Climate Change and The Specter of Statelessness

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ABSTRACT

What happens when climate change extinguishes entire nations? Neither international nor environmental law has provided a satisfactory answer to this weighty question. Climate change-induced flooding, storm surge, and sea level rise threaten the territorial integrity and habitability of several small island developing states, raising the specter of statelessness. We know that climate catastrophe is coming, but we have failed to take the necessary steps to safeguard several developing nations. This Article argues that innovative legal and policy solutions are needed today to prevent nation extinction tomorrow. I focus on two potential international governance solutions: the U.N. Framework Convention on Climate Change's loss and damage mechanism and the U.N. Security Council's capacity to address environmental threats to international peace and security.

This Article proceeds in four Parts. I first describe and analyze how climate change is threatening to destroy several island nations. Second, I analyze both the Framework Convention and Security Council's legal authorities and capacity to prevent and compensate nations for climate-driven habitability loss. Third, I argue that wealthier, developed nations—responsible for the bulk of current and historic greenhouse gas emissions—must take the lead in saving nations from extinction. I conclude by offering a "climate-security" roadmap. This encompasses funding and implementing a loss and damage mechanism to compensate nations for harm already done. This roadmap offers a bolder vision for a reimagined Security Council that takes proactive steps to confront climate change as a threat to international peace and security.

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INTRODUCTION

We are paying with our lives for the carbon someone else emitted.[1]

Is the international community prepared for climate-driven nation extinction? For several Pacific Small Island Developing States ("SIDS"), climate change-induced flooding, storm surge, and sea level rise have placed their homeland on a collision course with territorial loss and wholesale abandonment.[2] Yet to date, international law and its institutions have failed to address this "specter of statelessness." In turn, many Pacific islanders face existential climate-driven loss.[3] This Article argues that innovative legal and policy solutions are needed today to prevent climate catastrophe and nation extinction tomorrow.[4] In doing so, I focus on two possible international legal solutions to address this existential threat: implementing the U.N. Framework Convention on Climate Change's ("Framework Convention") loss and damage mechanism and reconceptualizing the U.N. Security Council ("Council") as an institution that confronts climate change as a threat to international peace and security.

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1. *Quotes–"Death Knell for Coal": Reactions to the U.N. Climate Report*, REUTERS, (Aug 9, 2021), https://perma.cc/28T4-2KQP (quoting Mohamed Nasheed, former president of Maldives, speaking after the issuance of the Intergovernmental Panel on Climate Change's "Code Red" report).

2. Curt D. Storlazzi et al., *Most Atolls Will be Uninhabitable by the Mid-21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding*, 4 SCI. ADVANCES 1, 4–5 (2018), https://perma.cc/E9U5-ZBUK. For a discussion of the numerous follow-on consequences of sea level rise on small island developing states, *see* Melissa Stewart, *Cascading Consequences for Sinking States,* 59 STAN. INT'L L. J __ (forthcoming 2023). Professor Stewart identifies four "sinking states," defined as a "discrete number of low-lying states at risk of the submergence of a significant portion or all of their territory due to sea level rise by the end of the century or early in the next." *See id.* These four states include Tuvalu, Kiribati, Maldives, and the Marshall Islands.

3. The "specter of statelessness" refers to the threat that several island nation states are facing from climate impacts, to include sea level *rise* and saltwater inundation into freshwater drinking supplies.

4. See Mark Nevitt, *Is Climate Change a Threat to International Peace and Security?,* 42 MICH. J. INT'L. L. 527 (2021) (arguing for an increased role for the Security Council to address the climate threat).

Further, this specter of statelessness has broader implications for international law and institutional governance.[5] The Framework Convention just approved a loss and damage mechanism at Sharm-el Sheikh Egypt—a critical first step in compensating poorer nations from climate harm inflicted by wealthier nations.[6] Recent loss and damage progress suggests that the Framework Convention and follow-on Conference of Parties can evolve to address critical issues as they arise. Relatedly, failure to protect nations from climate impacts could well delegitimize the U.N. Charter—a system that is predicated on the sovereign equality of all its Member States.[7] While far from perfect, since its inception the Charter has played a stabilizing role in upholding the sovereignty of all its Members through the prohibition on the use of force and the protection of territorial integrity.[8] Climate change is a unique threat no less dangerous than armed attacks and traditional use of force conceptions—witness the uptick in extreme weather and storm surge that eviscerate coastlines and damage freshwater drinking supplies.[9] Although international law recognizes that each nation possesses the inherent right of self-defense in the event of an *armed* attack, we lack a corresponding governance model and vernacular to address complex, diffuse *environmental* attacks.[10]

Advances in greenhouse gas ("GHG") reporting and modeling now shine light on the nations responsible for a disproportionate share of climate harm. This spotlight raises novel questions of climate justice and liability for damage already caused by the world's emitters.[11] Does the world have the tools to prevent or

5. For an outstanding discussion of the legal issues facing Tuvalu and Kiribati in the face of climate-driven statelessness, *see* Jane McAdam, *Disappearing States, Statelessness, and the Boundaries of International Law in* CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 105-130 (Jane McAdam ed., 2010).

6. U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries, (Nov. 26, 2022).

7. U.N. Charter art. 2 (1) "The Organization is based on the principle of the sovereign equality of all its Members." Professor Stewart astutely notes that despite this principle "the U.N. system is constitutionally unequal due to the inclusion of the veto power to the permanent members of the Security Council." Stewart, *supra* note 2, at 20.

8. U.N. Charter art. 2, ¶ 1, 4.

9. *See* Storlazzi et al., *supra* note 2. The Alliance of Small Island Developing States (AOSIS) was established in 1990 and includes 38 U.N. Member States located throughout the world. As a group, SIDS comprise twenty percent of all U.N. members. For a discussion of the history and politics of loss and damage *see* J. Taub, N. Nasir, M. Feisal Rahman & S. Huq, *From Paris to Marrakesh: Global Politics around Loss and Damage*' 72(4) India Quarterly 317, 322 (2016); E. Calliari, O. Serdeczny & L. Vanhala, *Making Sense of the Politics in the Climate Loss and Damage Debate*, 64 GLOB. ENVT'L. CHANGE 102133 (2020).

10. *But see* Craig Martin, *Atmospheric Intervention? The Climate Crisis and the Jus ad Bellum Regime*, 45 COLUM. J. ENVT'L. L. 321 (2020) (describing possible international legal solutions to address climate impacts). For an outstanding overview of the role the Security Council might play in addressing climate change, *see* CLIMATE CHANGE AND THE UN SECURITY COUNCIL (Shirley V. Scott & Charlotte Ku, eds., 2018).

11. At the time of this writing, the United States is the largest historical emitter of GHG emissions while China emits more GHG emissions on an annual basis than any Member nation. *See* Ctr. for Climate & Energy Sols., *Global Emissions*, C2ES (last visited Feb. 27, 2021), https://perma.cc/Z8FE-SWEX.

ameliorate climate-driven nation extinction? How can international law attempt to make nations whole? Where will the inevitable climate refugee influx reside, and how does the lack of physical territory inform traditional legal conceptions of statehood?[12] And who, exactly, should be held responsible for past and future climate harm?

This Article proceeds in four Parts. In Part I, I first describe and analyze how climate change is threatening to extinguish several island nations, creating what I label the specter of statelessness. In Part II, I analyze the Framework Convention's capacity to both prevent and compensate nations for climate-driven habitability loss via a loss and damage facility. In Part III, I analyze the Security Council's authorities and potential role in addressing climate change. I conclude in Part IV by proposing a new climate-security roadmap. This roadmap includes a funded loss and damage facility designed to compensate island nations and envisions an evolved role for the Council to address international threats to peace and security, broadly defined. I argue that wealthier, developed nations—responsible for the bulk of GHG emissions—must take transformational action today to avert climate catastrophe tomorrow.[13]

I. SMALL ISLAND DEVELOPING STATES: AT THE FRONTLINES OF THE CLIMATE CRISIS

Scientists predict that over 500,000 people residing in four SIDS — Tuvalu, Kiribati, Marshall Islands, and Maldives — face extreme climate risk.[14] These island nations are bound together by their physical remoteness, economic dependence on the natural environment, and their outsized exposure to climate impacts. They are poised to lose large swaths of territory due to climate change, threatening their physical integrity and habitability.[15] And when disaster strikes these nations' vulnerable populations, SIDS must rely on ad hoc requests for disaster aid—there is no formal, legal requirement for nations to assist.[16] Indeed, large portions of these nations will be uninhabitable by mid-century. This is due to climate change-driven sea level rise and flooding.[17] For some, it is already too late: several low-lying Pacific islands in the Solomon Islands and Micronesia have already been lost to the ocean, never to return.[18]

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12. The Montevideo Convention on the Rights and Duties of States includes "physical territory" as one of the requirements for state recognition under international law. *See discussion infra* Part II.A.

13. *United in Science 2022* (2022), WORLD METEOROLOGICAL ORG. (2022), https://perma.cc/NQZ5-C5JW [hereinafter UNITED 2021] (describing the need for transformational action to avert climate catastrophe).

14. *See* Storlazzi et al., *supra* note 2.

15. *See id.*

16. Maxine Burkett, *Loss and Damage*, 4 CLIMATE LAW 119, 123 (2014).

17. *Id.*

18. *See, e.g.,* Federated States of Micronesia, *Views on the Possible Security Implications of Climate Change to be included in the report of the Secretary-General to the 64th Session of the United Nations General Assembly*, at 6 https://perma.cc/9NY7-HM3E (last visited Jan. 29, 2023).

These low-lying islands struggle with coastal erosion and reduced freshwater quality and availability.[19] This is due to the saltwater inundation of freshwater aquifers—an existing environmental threat made worse by climate change.[20] Saltwater inundation harms drinking water supplies and the low-lying islands' capacity to grow crops.[21] This exacerbates food insecurity with devastating consequences for small nations that possess limited, arable farmland. Indeed, small island nations may run out of fresh water long before they run out of land.[22] The island nation of Tuvalu, for example, has served as a "climate canary in the coal mine" on such issues, suffering a water emergency in 2011 due to drinking water shortages.[23] As climate impacts rise, such water and food emergencies will become more commonplace.

In a tragic climate justice paradox, these four nations bear little responsibility for the underlying crisis and harm they are suffering.[24] They have emitted a minuscule share of GHG emissions but suffer disproportionate climate harm.[25] Unlike developed nations—whose carbon-intense economies grew from the Industrial Revolution to present day—developing nations are asked to reduce their GHG emissions, slowing their economic growth and progress.

It is increasingly clear that a massive uptick in adaptation funding and investment will not avert wholesale abandonment of large swaths of these islands; a point reinforced by several scientific papers and highlighted by Professor Maxine Burkett.[26] Although migration has long been a natural human adaptation strategy to environmental variability, climate change is putting a new adaptation strategy on the table: full-scale nation abandonment.[27] In extreme instances abandonment can be characterized as a rational human adaptation strategy. Nevertheless, abandonment has devastating consequences for many island nations.[28]

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19. C. Storlazzi, E. P.L. Elias & P. Berkowitz, *Many Atolls May be Uninhabitable Within Decades Due to Climate Change*, SCIENTIFIC REPORTS, Sept. 25, 2015, at 1, 6, https://perma.cc/LM69-S6QP.

20. Vlad Sokhin, *Sink or Swim: Can Island States Survive the Climate Crisis?*, U.N. NEWS (Jul. 31, 2021).

21. Storlazzi et al., *supra* note 19, at 1.

22. *See id*. at 6.

23. Tuvalu was aided by Australia and New Zealand, who provided water supplies, desalination plants, and technical expertise. Jane McAdam, *Disappearing States?,* BROOKINGS (Mar. 30, 2013), https://perma.cc/479H-52BV.

24. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, MITIGATION OF CLIMATE CHANGE 9 (2022).

25. *See* Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 HAW. L. REV. 633 (2013). For a critique of distributive and corrective justice in the context of climate change, *see* Eric Posner & Cass Sunstein, *Climate Change Justice*, 96 GEO. L.J. 165 (2008).

26. *See* Storlazzi et al., supra note 19; Burkett, *supra* note 25.

27. R. Bedford, *Environmentally-Induced Migration within the Context of Existing Migration Patterns in* CLIMATE CHANGE AND MIGRATION IN THE SOUTH PACIFIC REGION: POLICY PERSPECTIVES CONFERENCE, WELLINGTON, 9–10 (July 2009).

28. Abandonment is also a highly contentious and sensitive issue for SIDS. Many SIDS, such as Kiribati, have a "migration with dignity" strategy.

Representing just 1% of the world population, these island nations have routinely "punched above their weight" in international climate negotiations.[29] Indeed, SIDS have played an outsized role in the Framework Convention's annual Conference of Parties ("COP") meetings, pushing negotiators to fund adaptation measures through the creation of the Adaptation Fund and the Green Climate Fund.[30] Recently, SIDS played a critical role in mobilizing support for the Paris Climate Agreement's "Keep 1.5 Alive" effort, designed to keep global temperatures below 1.5 degree Celsius from pre-industrial norms.[31] Island nations have argued that exceeding 1.5 degrees Celsius will have devastating consequences for their homelands.[32] Climate consequences reveal deep inequities: these island nations stand to lose everything while others stand to lose little in comparison. Although the Paris Climate Agreement's goal of limiting warming to 1.5 degrees Celsius is still alive, "its pulse is weak."[33] That pulse is being kept on life support by island nations clamoring for transformational action. Today, island nations are a leading voice in urging other nations to increase their "mitigation ambition" and accelerate decarbonization efforts.[34] In doing so, they have served as the world's climate conscience, reminding wealthier nations of climate change's immediate, existential threat.[35]

Despite the Framework Convention and Paris Climate Agreement's near-universal acceptance and a growing acceptance that transformational action is required, international climate progress has been characterized by incrementalism,

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29. The Alliance of Small Island Developing States (AOSIS) was established in 1990 and includes 38 U.N. Member States located throughout the world. As a group, SIDS comprise twenty percent of all U.N. members. Press Release, Security Council, Addressing Security Council, Pacific Island President Calls Climate Change Defining Issue of Next Century, Calls for Special Representative on Issue, U.N. Press Release SC/13417 (Dec. 17, 2018), https://perma.cc/7E76-2WGW [hereinafter 2018 Council Debate].

30. *See, e.g.,* U.N. Framework Convention on Climate Change, *Climate Change: Small Island Developing States* (2005) (stating that Small Island Developing States have "been particularly active and vocal").

31. Press Release, Alliance of Small Island Developing States, SIDS Survival Means Keeping 1.5 Alive (Feb. 28, 2022).

32. Brad Plumer, David Gelles, & Lisa Friedman, *A Clash Over Degrees: How Hot Should Nations Allow the Earth to Get?,* N.Y. TIMES at A12 (Nov. 16, 2022).

33. James Salzman, et. al, INTERNATIONAL ENVIRONMENTAL LAW & POLICY 1 (6TH ED 2021) (quoting Alok Sharma, the UK president of COP26). Paris Agreement to the United Nations Framework Convention on Climate Change art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.

34. *See, e.g.,* Tina Gerhardt, *At COP 26, Island Nations Demand Action on Funding and Emissions*, THE NATION (Nov. 9, 2021); Mark Nevitt, *Key Takeaways from the Glasgow Climate Pact*, LAWFARE, (Nov. 17, 2021).

35. Famously, the Maldives held a Cabinet meeting underwater in scuba gear as a way to showcase the imminent climate harm that they are facing. *See* Maryam Omidi, *Maldives Sends Climate SOS with Undersea Cabinet*, REUTERS (Oct. 17, 2009).

not bold action.[36] The Maldives' representative to the Framework Convention highlighted the tension between incrementalism and the need for transformational action needed to protect her island when she exclaimed, "What is balanced and pragmatic to other parties will not help the Maldives adapt in time. It will be too late."[37]

II. INTERNATIONAL LAW & THE SPECTER OF CLIMATE-DRIVEN STATELESSNESS

A. EXISTING GAPS IN INTERNATIONAL GOVERNANCE

While there is no agreed upon definition to meet the statehood requirement under international law, the 1933 Montevideo Convention has proven to be highly influential for international lawyers making this analysis.[38] Under the Montevideo Convention on the Rights and Duties of States, a state must possess four characteristics to qualify as a sovereign, recognized state under international law: permanent population, defined territory, functioning government, and capacity to enter into foreign relations.[39] The Montevideo definition has proven to be instrumental in establishing a starting point for agreed-upon criteria for determining a state under international law.[40] It also establishes the strong presumption of a state's continued existence, although it remains unclear at what point, precisely, a state loses its status when one or more criteria is lost.[41]

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36. *See e.g.,* Jen Iris Allan, *Dangerous Incrementalism of the Paris Agreement,* 19 GLOBAL ENVIRONMENTAL POLITICS 1 (2019) (arguing the Paris Agreement "represent[s] continuity with existing climate policy, not a break from the past).

37. *See* Brad Plumer & Lisa Friedman, *Negotiators Strike a Climate Deal, but World Remains Far from Limiting Warming,* N. Y. TIMES, (Nov. 13, 2021), https://perma.cc/4DB3-MP7C, (quoting Shauna Aminath, environmental minister of the Maldives who stated that "[Glasgow] is not in line with the urgency and scale required."). To highlight the existential threat faced by climate change, Maldives held a recent cabinet meeting underwater.

38. Stewart, *supra* note 2, at 23–24.

39. Montevideo Convention on the Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 cmt. A (AM. LAW INST. 1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."). If a recognized state loses one of these characteristics, there is some disagreement under international law whether that state continues to exist. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 cmt. A (AM. LAW INST. 1987).

40. Professor Louis Henkin acknowledged the Montevideo criteria as reflective of international law, while simultaneously critiquing the Montevideo definition as "not requisite qualifications but descriptions of states as we know them." LOUIS HENKIN: INTERNATIONAL LAW: POLITICS AND VALUES 13 (1995).

41. *See, e.g.,* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 717 (2006); Antonio Joseph DelGrande, *Statelessness in the Context of Climate Change: The Applicability of the Montevideo Criteria to "Sinking States*," 5 N.Y.U. J. INT'L. L. & POL. 151, 155 (2021).

TABLE A:
CLIMATE CHANGE AND STATELESSNESS

Requirement	Climate Threat	Possible Remedy
Permanent Population	Environmental displacement caused by wave-driven flooding or loss of freshwater.	Permanent relocation funded by loss & damage mechanism.
Defined Territory	Sea level rise causing territorial loss and uninhabitability.	Set-aside of physical territory in neighboring nation funded by loss & damage.
Functioning Government	*En masse* displacement following extreme weather event.	Consent of host nation to function as government in exile.
Capacity for Diplomacy	Climate diaspora, loss of a functioning government.	Consent of host nation to conduct foreign relations & exercise sovereign powers within host nation's borders.

Of the four indicia of statehood, climate impacts as applied to island nations will likely first cause the loss of a permanent population on a nation's homeland. Though international law contemplates the loss of statehood due to absorption, merger, or dissolution of physical territory, climate change poses a novel threat to this statelessness calculus.[42] A nation's physical territory will be lost to environmental impacts, never to be assumed, merged, or dissolved into another nation. International law must take steps to accommodate this problem, balancing traditional notions of statehood with climate realities.[43] For example, the U.N. Convention of the Law of the Sea and customary international law governing territorial sea and maritime baselines does not take into account habitable lands lost to the ocean.[44] Would these nations lose their territorial sea or be classified as a rock or low-tide elevation?[45]

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42. Matthew C.R. Craven, *The Problem of State Succession and the Identity of States under International Law,* 9 EUR. J. INT'L L. 142, 145 (1998); Jeffrey L. Blackman, *State Succession and Statelessness: The Emerging Rights to an Effective Nationality Under International Law*, 19 MICH. J. INT'L L. 1441, 1444–1445, 1180–1181 (1998) (discussing state succession issues arising out of the dissolution of the former Soviet Union and Yugoslavia).

43. Professor McAdam has examined new legal models such as a government in exile, which allows a State to continue even when the territory is no longer habitable. Professor McAdam has examined new legal models such as a government in exile, which allows a State to continue even when the territory is no longer habitable. McAdam, *supra* note 6, at 106. *See also* Maxine Burkett*, The Nation Ex-Situ: On Climate Change, De-territorialized Nationhood and the Post-Climate Era,* 2 CLIMATE LAW 345, 359 (2011).

44. *See* Alan Boyle, *Law of the Sea Perspectives on Climate Change,* 27 THE INT'L J. OF MARINE & COASTAL L. 831, 831–838 (2012).

45. *Id.*

Further, the plight of island climate migrants underscores longstanding international governance gaps addressing refugees fleeing environmental disaster. The law of statelessness does not apply to climate refugees, or "environmentally displaced persons" in the terminology of the U.N. High Commission for Refugees.[46] The 1951 Convention Relating to the Status of Refugees and 1967 Refugee Protocol are also silent on migrants fleeing environmental disaster.[47] Under international law, protected refugee status may be granted for reasons of persecution (e.g. race, nationality, or membership of a particular social group).[48] Environmental migrants fleeing their homeland would not fall under this refugee conception.[49] In addition, the Framework Convention and follow-on accords do not provide legal protections for climate migrants fleeing environmental or imminent climate disaster.[50]

Although the U.N. General Assembly recently recognized the right to a healthy human environment in 2022, it remains to be seen how this new right is actualized.[51] In the interim, environmentally displaced persons lack clear, legally cognizable protections under international law.[52]

Relatedly, at the urging of the Republic of Vanautu (a small island nation in the Pacific) in March 2023 the U.N. General Assembly voted to request that the International Court of Justice (ICJ) issue an advisory opinion addressing the

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46. U.N. High Commission for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol to the Status of Refugees, at 9 (2011); Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Person in the Context of Disasters and Climate Change Volume I (2015); *see also* Stewart, *supra* note 2, at 32–33.

47. *See* Philip Dane Warren, Note, *Evaluating Climate Change Displacement,* 116 COLUM. L. REV. 2103, 2109–10 (2017); Amhimyanhu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory,* 50 STAN. J. INT'L L. 1 (2014) (arguing that the political realities of recognition will operate to ensure the continuing statehood of these small island nations).

48. Convention Relating to the Status of Refugees art. 1, ¶ (A)(2), Jul. 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

49. See Human Rights Committee, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016, at ¶ 2.8 (Sep. 23, 2020).

50. For a discussion of a possible role for the 1954 Convention Relating to the Status of Stateless Persons in providing a relevant legal framework for environmentally displaced persons, *see* Michel Rouleau-Dick, *Sea Level Rise and Climate Statelessness: From 'Too Little Too Late' to Context-Based Relevance,* 3 STATELESSNESS & CITIZENSHIP REV. 287, 289-92 (2021). In other contexts, the Security Council has acknowledged the role that refugees can play in a deteriorating security situation. *See* S. C. Res. 1199 (Sept. 23, 1998) (recognizing the massive flow of refugees contributed to a deteriorating security situation in Kosovo).

51. G.A. Res. 76/300 (Jul. 28, 2022) (recalling the Human Rights Council recognized the right to a clean, healthy, and sustainable environment as a human right).

52. There is an ongoing debate about the proper terminology to describe people displaced by climate change. Possibilities include environmental refugees, climate refugees, and climate migrants. I prefer "climate migrants" as it best captures the numerous climate-driven reasons people might flee their homeland.

obligation of states with respect to climate change.[53] Labeled by one lawyer as a "diplomatic feat of Herculean proportions," the General Assembly's vote showcased small island nations' critical role in demanding climate action from much wealthier and more powerful nations. It also reveals the employment of innovative legal strategies to highlight the plight of developing nations and small island nations. To be sure, it is too early to predict what the ICJ opinion will say and it remains to be seen how influential this opinion will be on the Framework Convention, Security Council, and domestic climate law. Still, the General Assembly's request for an advisory opinion makes it likely that a leading international tribunal will make a legal determination on loss and damage and related climate justice issues.

B. LOSS AND DAMAGE: PROMISING BEGINNINGS MARRED BY FAILED PROMISES

Our current pathway favors incremental adaptation and mitigation progress, an approach that will not suffice to save small island nations. As climate science has drawn closer linkages between GHG emissions and the impacts of climate change, climate negotiations have gone beyond mitigation and adaptation to address a third pillar: loss and damage. Loss and damage can be loosely defined as the adverse impacts of climate change that occur despite efforts to mitigate and adapt to climate change.[54] "Loss" encompasses the irrevocable loss of human lives, culture, and biodiversity. This can include both an economic and noneconomic component, such as the loss of cultural heritage. "Damage" refers to negative climate impacts where repair or restoration is still possible.[55]

Loss and damage begins where the limits to adaptation end. Adaptation is constrained by technological and resource limitations.[56] A new, legally-binding loss and damage regime would address harms that occur despite best efforts to reduce GHG emissions and adapt to climate change's effects. As Professor Maxine Burkett explains:

> [C]ivil-engineering plans typical of adaptation projects funded by the undercapitalized Adaptation and Green Climate Funds will not suffice. At some point, the sea walls of the Maldives and Tuvalu will fail so consistently and

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53. G.A. Res 12,497 U.N. GAOR, 77th Sess. (Mar. 29, 2023) ("Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change").

54. Thomas et al., *Climate Change and Small Island Developing States,* 45 ANN. REV. ENV'T. RES. 1, 16 (2020) (stating "climate-induced migration can be viewed as a response to loss and damage that would be incurred after limits to adaptation have been surpassed").

55. Maxine Burkett, *Loss and Damage*, 4 CLIMATE LAW 119, 120–21 (2014). Despite these definitions, there is still considerable disagreement on what loss and damage means when funding is operationalized. For a related solution to this problem, *see* Rosemary Lyster, *A Fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, 4 TRANSNAT'L ENV'T LAW 125 (2015). *See also* RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS AND DAMAGE (Meinhard Doelle & Sara L. Seck eds., 2021).

56. Maxine Burkett, *supra* note 55, at 122-23.

> completely that communities and countries will need compensation for rehabilitation from losses incurred.[57]

Indeed, the traditional climate adaptation tools—to include the Green Climate Fund and Adaptation Fund—lack both the mandate and resources to operationalize a loss and damage regime.[58]

Moreover, international adaptation financing continues to fall short. Wealthier, "Global North" nations once promised to fund $100 billion/year in adaptation funding to developing nations in the Global South.[59] By one estimate, just $79.8 billion has been provided to date, much of it in the form of loans.[60] The Glasgow Climate Pact laments this shortfall, "not[ing] with deep regret that the goal of developed country Parties to mobilize jointly USD 100 billion per year by 2020 . . . has not yet been met."[61] In response, island nations have seized on the gap between easy-to-make pledges and follow-on action.

In the face of funding shortfalls and adaptation challenges, island nations have sought a permanent loss and damage mechanism, consistently bringing their concerns to the Framework Convention COPs.[62] In a promising sign, the 2015 Paris Climate Agreement identified possible areas for cooperation on loss and damage.[63] This includes emergency preparedness, slow onset events, and community resilience. It states:

> Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.[64]

While adaptation funding has faltered, small island nations have pressed wealthier nations to fund a "loss and damage" *facility* that will compensate developing nations for harm suffered.[65] The loss and damage dream has run headfirst into political realities: wealthier nations are reluctant to admit past wrongdoing and fund anything that may be perceived as climate reparations.[66] Further, wealthy nations are reluctant to establish a precedent for accepting liability for past

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57. *Id.*

58. Jessica Omkuti et al., *The green climate fund and its shortcomings in local delivery of adaptation finance,* 22 CLIMATE POLICY 1225 (2022), available at https://perma.cc/WSR3-W3PH.

59. Nevitt, *supra* note 34.

60. Salzman, *supra* note 33, at 5.

61. Glasgow Climate Pact art. 26 (Nov. 13, 2021).

62. U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States (UN-OHRLLS), *Loss and Damage a Major Demand for Island Nations at COP26,* (Nov. 4, 2021), https://perma.cc/M8VJ-LML8.

63. Paris Agreement to the United Nations Framework Convention on Climate Change art. 8(1), Dec. 12, 2015, T.I.A.S. No. 16–1104.

64. *Id.*

65. *See, e.g.,* Nevitt, *supra* note 34.

66. For an outstanding discussion of climate reparations, *see* Maxine Burkett, *Climate Reparations*, 10 MELB. J. OF INT'L L. 509–542 (2009).

and future climate harm.[67] This reality was highlighted in the 2021 Glasgow Climate Pact, which failed to establish a funded loss and damage facility.[68] Developing nations sought the creation of a "facility" that would set in motion more concrete financial commitments to compensate for climate harm.[69] Instead, Glasgow created a mere "dialogue" between parties. This was designed to "minimize and address loss and damage associated with the adverse impacts of climate change."[70]

Following the lack of progress at Glasgow, SIDS labeled the absence of a funded loss and damage mechanism a "gaping hole" in the Framework Convention and international efforts to fully address climate impacts.[71] The Framework Convention is the proper legal forum to implement a lasting loss and damage mechanism. Why? First, the Framework Convention has near universal adoption, and its status as a treaty within the United States insures that the world's largest historical GHG emitter is included. Second, the Framework Convention possesses relevant expertise and the yearly Conference of Parties provide a regular forum to address climate matters and adjust as needed. Perhaps not surprisingly, SIDS have argued that loss and damage should be resourced, funded, and incorporated as a third pillar within the Framework Convention alongside mitigation and adaptation. SIDS continue to urge developed nations to show more ambition and commitment to tackling the climate crisis.[72] Small island nations have advocated for a U.N. resolution to establish a legal framework to protect the rights of people displaced by climate change.[73]

A breakthrough on loss and damage occurred at COP-27 in Sharm-el-Sheikh, Egypt in 2022. In a positive sign in the runup to the conference, U.S. climate envoy John Kerry committed the U.S. to participate in loss and damage conference discussions.[74] After weeks of intense climate negotiations, COP-27 established a dedicated loss and damage fund with the goal of compensating developing nations.

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67. *See, e.g.,* David Gelles, *After Decades of Resistance, Rich Countries Offer Direct Climate Aid,* N.Y. TIMES, at A9 (Nov. 9, 2022) (noting "wealthy nations . . . have avoided calls to help poor countries from climate disasters, fearing that doing so could open them to unlimited liability").

68. *See, e.g.*, Nevitt, *supra* note 34.

69. *See, e.g.*, Nevitt, *supra* note 34.

70. Glasgow Climate Pact, art. 58 (Nov. 13, 2021). For a discussion of this failed effort, *see* Michael Jacobs, *Reflections on COP26: International Diplomacy, Global Justice and the Greening of Capitalism,* 93 POL. Q. 270, 276 (2021).

71. Glasgow Climate Pact, art. 58 (quoting Submission of Nauru on behalf of The Alliance of Small Island States, *Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16*, Subsidiary Body on Implementation (Sept. 28, 2012) at 1).

72. Adelle Thomas et al., *Climate Change and Small Island Developing States,* 45 ANN. REV. ENV'T. RES. 1, 16 (2020).

73. SIDS have also requested the U.N. to appoint a "Special Rapporteur on Climate and Security" to help manage climate security risks and provide support to vulnerable countries to develop climate-security risk assessments. Int'l Inst. for Sustainable Development, *Coral Reefs: Strategies for Ecosystems on the Edge* (June 1, 2021).

74. Lindsay Maizland, *COP27 Climate Summit in Egypt: What to Expect,* COUNCIL ON FOREIGN RELATIONS, https://perma.cc/J54C-QMUM.

This goes far beyond the mere loss and damage "dialogue" put in place at Glasgow. While the precise arrangement of these funding requirements have not yet been established, a loss and damage "transitional committee" is working throughout the year in the run up to COP-28 in Dubai, United Arab Emirates. This committee's goal is to make specific recommendations on how to operationalize the loss and damage fund. Relatedly, climate negotiators in Egypt made further progress to operationalize the Santiago Network for Loss and Damage. This provides technical assistance to developing nations vulnerable to the climate effects.

Despite their promises to alleviate harm caused to the most vulnerable nations—and recent progress at Egypt—it remains to be seen when and to what extent the world's largest carbon emitters will fund loss and damage.[75] Still, the establishment of a loss and damage fund and the request for an ICJ opinion demonstrate recent progress on loss and damage, insuring that this will remain alive on the international climate agenda. And the Alliance of Small Island Developing States ("AOSIS") will continue to play a role as the conscience of climate negotiators. Weighty questions arise. What does climate justice mean for the billions in the Global South and the developing world? What is the role of international governance in this crisis? What is the responsibility of the developed world to the developing world?

III. ENVISIONING AN INCREASED ROLE FOR A "CLIMATE-SECURITY" COUNCIL

Climate change has been aptly described as a "super-wicked problem" and the "mother of all collective action problem[s]."[76] It will result in mass migration, starvation, pandemics, and cascading levels of armed conflict.[77] The resulting uptick in conflicts over natural resources and food will require increased Security Council engagement. As such, the Council should take proactive steps today to ameliorate future human suffering and conflict before it happens. It has the legal authority to do so, but political realities exacerbated by Russia's invasion of Ukraine have hampered Council action on climate.

A. LEGAL AUTHORITIES & RECENT ACTION ON CLIMATE

Beyond the questions swirling around loss and damage, the specter of statelessness strikes at the heart of the U.N. Charter's emphasis on sovereignty, inviting a greater role for Security Council engagement. After all, the Council plays a

75. *See* Michael Jacobs, *Reflections on COP26,* 93 POL. Q. at 276 (2021).

76. *See* Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009); Steven R. Brechin, *Climate Change Mitigation and the Collective Action Problem: Exploring Country Differences in Greenhouse Gas Contributions*, 31 SOCIO. F. 846, 846 (2016) (describing climate change as the collective action problem of our era). Daniel Bodansky, *Climate Change: Reversing the Past and Advancing the Future*, 115 AM. J. INT'L. L. UNBOUND 80 (2021).

77. For an overview of climate change's security implications, *see* CTR. FOR NAVAL ANALYSIS, NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE (2014).

critical, stabilizing role in upholding each nation's sovereignty and territorial integrity.[78] It also possesses the primary responsibility for the maintenance of international peace and acts on behalf of other Member States.[79] As climate impacts such as sea level rise, precipitation, and flooding threaten to swallow island nations whole, it will be increasingly difficult for the Council to ignore the resulting sovereignty costs.[80]

For the past seventy-five years, the U.N. Charter has ought to uphold the principle of sovereign equality of all its Member States.[81] This principle has played a key, stabilizing role in shaping the post-World War II order.[82] Under Article 24 of the U.N. Charter, the Council has "primary responsibility" for ensuring international peace and security.[83] This encompasses the authority and responsibility to take measures on behalf of other Member States to ensure international peace and security.[84]

The Council, acting on behalf of all other Member States, can tap into its broad enforcement authorities under Article 39 if it determines that a situation rises to a "threat to the peace, breach of the peace, or act of aggression."[85] Although the Council has broad discretion in making this legal determination—these terms are not defined—any such threat to the peace determination must conform with the U.N. Charter's governing Purposes and Principles.[86] The Council must muster the votes to make such a determination and later follow through with effective enforcement. A determination that climate change is a "threat to the peace" would serve as a key that unlocks the door to broad economic and military authorities under Chapter VII of the Charter.[87]

These Chapter VII "doors" may include economic sanctions against "climate rogue states," prohibition on the trade of pernicious climate goods, or even military operations.[88] In Brazil, for example, former President Bolsonaro has failed to protect the Amazon, a key carbon sink.[89] While President Bolsonaro lost the most recent election, the Council could feasibly use its powers to prohibit the export of

78. Nevitt, *supra* note 4, at 560.

79. U.N. Charter art. 24, ¶ 1.

80. *Id.* ("[I]ts Members confer on the Security Council the primary responsibility for the maintenance of international peace and security.").

81. U.N. Charter art. 2, ¶ 1. While it is beyond the scope of this article to critique the U.N.'s success in this regard, Russia's invasion of Ukraine in the absence of an international legal justification is the latest challenge to the U.N. rules–based order.

82. Nevitt, *supra* note 4, at 530.

83. U.N. Charter art. 24, ¶ 1.

84. U.N. Charter art. 39.

85. *Id.*

86. U.N. Charter art. 1.

87. U.N. Charter art. 40–42.

88. I borrow the term "climate rogue states" from Professor Craig Martin. *See* Martin, *supra* note 10, at 14.

89. *See, e.g.*, Franklin Foer, *The Amazon Fires are More Dangerous than WMDs,* THE ATLANTIC (Aug. 24, 2019), https://perma.cc/L8JK-7K8J.

goods from the Amazon. Alternatively, it could or ban the export of pernicious goods or chemicals that have debilitating climate impacts.

The Council also possesses awesome authorities that include taking military action "by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[90] Although it is difficult to foresee how this authority would be used to address climate impacts, one can potentially imagine a military operation that assists with the outflow of climate refugees in the aftermath of an extreme weather event or part of a broader managed migration effort.[91] This is somewhat akin to the role that the U.S. military plays in humanitarian assistance and disaster response at home and abroad.[92]

Since the end of the Cold War, the Council has gradually expanded its aperture for action under its existing authorities. This has included addressing a growing menu of nontraditional security threats.[93] This includes global health crises (Ebola and, belatedly, COVID-19), the spread of weapons of mass destruction, and the underlying causes of conflict and human suffering.[94] COVID-19's ongoing deadly global impact—the world lost more than 15 million people in 2020 and 2021 alone—highlights the need to reconceptualize and broaden traditional notions of threats to international peace and security.[95] By opening the aperture to address nontraditional threats, the Council has demonstrated a willingness and an emerging capacity to take on more complex and diffuse challenges.

Though developing nations have historically been skeptical of the Council's role in international security, climate change has started to shift that calculus.[96] Island states have implored greater Council engagement on climate change, with the President of Nauru stating that the Council should "review particularly sensitive issues such as the implications of the loss of land and resources and the displacement of people for sovereignty and international legal rights."[97] The President of Vanuatu exclaimed that if nations were submerged by climate-driven sea level rise, the United Nations would have "failed in their first and most basic

90. U.N. Charter art. 42.

91. *See infra* Part III.B.

92. *See* Mark Nevitt, *Climate-Security Insights from the COVID-19 Response*, 98 IND. L. J. 815, 840-845 (2023), https://perma.cc/F3GA-G2GY.

93. Nevitt, *supra* note 4, at 544–51.

94. *Id*. at 551.

95. Press Release, World Health Organization [WHO], 14.9 Million Excess Deaths Associated with the COVID-19 Pandemic in 2020 and 2021 (May 5, 2022), https://perma.cc/VYF8-4DLU; Craig Martin, *Climate Change and Global Security: Framing an Existential Threat*, 116 AM. J. INT'L. L. UNBOUND 248, 250 (2022); Oona Hathaway, *Covid-19 Shows How the U.S. Got National Security Wrong*, JUST SEC. (Apr. 7, 2020), https://perma.cc/TV9A-W4M3 (describing the need to broaden our collective aperture to address nontraditional security threats such as climate change). For a similar argument, *see* Mark Nevitt, *supra* note 92.

96. *See, e.g.,* Dane Warren, POSSIBLE ROLES FOR THE UN SECURITY COUNCIL IN ADDRESSING CLIMATE CHANGE, SABIN CTR. FOR CLIMATE CHANGE L., COLUM. L. 1–5 (July 2015).

97. U.N. GAOR, 63rd Sess., 8th plen. mtg. at 20, U.N. Doc. A/63/PV.8 (Sept. 24, 2008) (Mr. Marcus Stephen, President of the Republic of Nauru).

duty to a Member and its innocent people."[98] To be sure, with Russia and China as Permanent Five ("P5") Council members, future Council climate action remains uncertain. But island nations' have shown a steady determination to highlight the threat to their homeland posed by climate change and to keep climate change on the Council's agenda. In 2009, the U.N. General Assembly adopted a Resolution on Climate Change and its Possible Security Implications.[99] And leaders from the island of Tuvalu have drawn connections between climate impacts and traditional armed attacks, describing climate change as a "conflict . . . not being fought with guns and missiles but with weapons from everyday life—chimney stacks and exhaust pipes."[100] Vanautu's leadership on the most recent General Assembly request for an ICJ opinion is a continuation of earlier climate efforts that appear to be growing in strength.

Indeed, since 2007, at the urging of several island nations, the Council has sponsored several high-level forums addressing climate change's destabilizing effects on international peace and security.[101] In 2009, the U.N. General Assembly passed a Resolution that both reaffirmed the Framework Convention as the "key instrument for addressing climate change" while explicitly labeling climate change a "threat multiplier."[102] It further called on other U.N. organs to consider climate change's security implications, leaving the door open for future Council engagement.[103] As climate science continues to evolve, U.N. leadership has spoken out about the link between climate change and international peace and security.[104] Despite the lack of a cohesive position on Council climate action, the many small island states continue to keep climate change alive as a matter within the Council's ambit.

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98. U.N. GAOR, 63rd Sess., 11th plen. mtg. at 6, U.N. Doc. A/63/PV.11 (Sept. 26, 2008) (Mr. Kalkot Matas Kelekele, President of the Republic of Vanuatu). The President of Micronesia emphasized that climate change was impacting "our own security and territorial integrity, and on our very existence as inhabitants of very small and vulnerable island nations." U.N. GAOR, 63rd Sess., 10th plen. mtg. at 3, U.N. Doc. A/63/PV.10 (Sept. 25, 2008) (Mr. Emanuel Mori, President of the Federated States of Micronesia).

99. UNGA Res 63/281 (3 June 2009).

100. Ken Conca, *Is There a Role for the UN Security Council on Climate Change?,* Jan./Feb. 2019, 61 ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. at 9, https://perma.cc/WK2E-5FE9. In addition, Papua New Guinea, a Small Island Developing State, made a similar pronouncement, declaring that "the impact of climate change on small islands was no less threatening than the dangers guns and bombs posed to large nations." Press Release, Security Council, Security Council Holds First-ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers, U.N. Press Release SC/9000 (Apr. 17, 2007).

101. Nevitt, *supra* note 4, at 552–53 (discussing the Council engagement on climate-security matters).

102. U.N. Secretary-General, *Climate Change and Its Possible Security Implications,* ¶ 13, U.N. Doc. A/64/350 (Sept. 11, 2009).

103. *Id.*

104. U.N. Secretary-General, *Remarks to the Security Council on the Impacts of Climate Change on International Peace and Security* (Jul. 20, 2011), https://perma.cc/2TNV-85WV.

In 2017, the Council took the important and historic step of referencing climate change as a destabilizing security impact within the text of a Security Council resolution.[105] This was the first time that climate change was named in a Security Council resolution.[106] In addressing the deteriorating security situation in the Lake Chad region, the Council noted the "adverse effects of climate change and ecological change."[107] Since then, the Council has addressed climate change's role in other instances but has to make a Chapter VII "threat to the peace" determination.[108]

Despite these developments, each day of governance delay presents enormous climate opportunity costs that cannot be dismissed. After all, greenhouse gases emitted today stay in the atmosphere for years—even decades.[109] This climate opportunity cost will be felt by poorer island nations most vulnerable to climate impacts. Addressing climate change is consistent with earlier Council efforts to adopt a broad strategy for conflict prevention.[110] Further, implicit in the Council's mandate to maintain international peace and security is the responsibility to uphold the sovereign equality of all Member States from all threats, broadly defined.

B. CHALLENGES TO "CLIMATIZING" THE SECURITY COUNCIL

To be sure, Security Council action on climate will not be without controversy, particularly if the threat to the peace determination is followed up with positive enforcement via economic sanctions.[111] And any prospective Council climate action faces political headwinds from nations reluctant to expand the Council's climate mandate. The U.S. National Intelligence Estimate (NIE) has labeled Russia a "petrostate"—a nation whose economy is linked to fossil fuel extraction.[112] Petrostates are prone to resist international decarbonization efforts.[113] Perhaps not surprisingly, Russia is the P5 member most likely to halt efforts to

105. S.C. Res. 2349, ¶ 26 (Mar. 31, 2017).

106. In 1992 the Council acknowledged that "ecological sources" may act as a source of instability. U.N. SCOR, 3406th mtg., at 143, U.N. Doc. S/PV.3046 (Jan. 31, 1992) (stating that "the non-military sources of instability in the economic, social, humanitarian, and ecological fields have become threats to peace and security.").

107. S.C. Res. 2349, ¶ 26 (ar. 31, 2017).

108. Nevitt, *supra* note 4, at 556-57.

109. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5C°, at 64 (Valérie Masson-Delmotte et al. eds., 2018) (describing how GHG emissions stay in the atmosphere for decades) [hereinafter IPCC 1.5 REPORT].

110. *See, e.g.*, RICHARD GOWAN, THE SECURITY COUNCIL AND CONFLICT PREVENTION: ENTRY POINTS FOR DIPLOMATIC ACTION (2021).

111. For a discussion within the international relations literature of the Security Council's role in combatting climate change, *see* Ken Conca et al., *Climate Change and the UN Security Council: Bully Pulpit or Bull in a China Shop?*, GLOB. ENVT'L. POL'Y., May 2017, at 1, 2.

112. NAT'L INTEL. COUNCIL, CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO U.S. NATIONAL SECURITY THROUGH 2040 5, 7 (2021) https://perma.cc/74KX-XZ38.

113. *Id.*

"climatize" the Council.[114] To date, Russian climate intransigence has thwarted bolder Council action—any member of the P5 possesses veto power over any prospective Council action. Meanwhile, P5 membership (the United States, Russia, the United Kingdom, France, and China) remains frozen in time, despite calls for membership expansion to reflect economic and demographic realities.[115] For example, India is an economic superpower and the world's most populous nation, but it lacks a permanent seat on the Council.[116] The Security Council is also composed of ten elected non-permanent, rotating members that serve for a two-year period.[117] As nations seek election to the Council, their individual climate policies are under greater scrutiny.[118] Based upon the sheer size of the SIDS coalition, island nations will continue to have a continued influence on the Council as non-permanent members.[119]

Further complicating matters, the Council is composed of the world's worst climate offenders.[120] P5 nations emit an outsized proportion of GHG emissions. Indeed, the U.S. and Russia are two of the world's largest oil and gas producers.[121] China is the largest annual emitter while the U.S. is the largest historical emitter.[122] Countries that rely on fossil fuel exports to support their economies will continue to resist rapid decarbonization efforts because they fear the economic, political, and geopolitical costs of doing so.[123] This creates a mitigation-security paradox: the nations possessing the authorities under the U.N. Charter to address climate change's security impacts are themselves the greatest source of GHG emissions and climate harm. They may well be disincentivized from taking action to reduce their own emissions. After all, taking any climate action—whether it be through a funded loss and damage mechanism or related Council

114. Ken Conca, *Is There a Role for the UN Security Council on Climate Change?,* 61 ENV'T. SCI. & POL'Y FOR SUSTAINABLE DEV. at 9–10 (2019). China has been reluctant to use Security Council powers to address climate change, and the United States' record is uneven.

115. *See, e.g.*, Shamala Kandiah Thompson et al., *The United Nations in Hindsight: The Long and Winding Road to Security Council Reform*, JUST SECURITY (Sep. 30, 2022), https://perma.cc/H8JY-W6N8.

116. U.N. Charter art. 23, ¶ 1.

117. *Id. See also* U.N. SECURITY COUNCIL, Current Members, https://perma.cc/8HTP-J533 (last visited Jan. 31, 2023).

118. This impacted Canada and Norway's efforts to join the Council in 2020. *See* Megan Darby, *Greta Thunberg Looks to U.N. Security Council Election for Leverage on Climate*, CLIMATE HOME NEWS, (June 6, 2020), https://perma.cc/3Q8V-BKUC.

119. U.N. Charter art. 23, ¶ 1 (stating that "due regard" must be paid to Members contributing to the maintenance of international peace and security while striving to achieve an "equitable geographical distribution.").

120. The United States is the largest historical emitter of GHG emissions while China emits more GHG emissions on an annual basis than any Member nation. *See* Ctr. for Climate & Energy Sols., *Global Emissions*, C2ES (last visited Aug. 8, 2022), https://perma.cc/WS6B-VKQ2.

121. *See, id.* N.Y. TIMES, *Why Russian Oil and Gas Matter to the Global Economy,* (last updated Mar. 10, 2022), https://perma.cc/S7TC-K2C7.

122. *See* Ctr. for Climate & Energy Sols., *Global Emissions*, C2ES (last visited Feb. 27, 2021), https://perma.cc/Z8FE-SWEX.

123. NAT'L INTEL. COUNCIL, *supra* note 112, at 17.

action—would implicate the P5 and other wealthy nations' outsized role in the climate crisis.

Today, Russia's Council presence makes substantive Council progress on climate change unlikely soon. To this point: in December 2021, Russia vetoed a Joint Resolution sponsored by Nigeria and Ireland to declare climate change a "threat to the peace."[124] By defining climate change as a threat to the peace, the Council could have sent an important signal that climate change is squarely within its ambit while setting the stage for follow-on action.

Finally, any potential Security Council action must carefully walk a "legitimacy tightrope" that balances its inherent, delegated authority with its understood mandate.[125] Straying too far from its mandate could prove disastrous. Yet ignoring climate change's security costs and threats to an individual state's existence may come with its own legitimacy costs. What is the cost if the Council took no action to uphold international peace and security in the face of environmental destruction?

IV. RECOMMENDATIONS: A CLIMATE-SECURITY ROADMAP

In what follows, I propose a roadmap to address the gaps in international governance to address the specter of statelessness. This roadmap first emphasizes the need for greater mitigation, adaptation, and loss and damage ambition. Irrespective of how or when loss and damage is funded, developed nations must lead the way on climate progress. Second, the U.N. Security Council must play an increased role in addressing environmental threats to international peace and security. Though geopolitical realities make it unrealistic for P5 Members to tap into their Chapter VII authorities today to address the specter of statelessness, the Council must remain seized of the climate-security threat, keep climate-security matters on their formal agenda, collaborate with other U.N. entities, and begin to formulate solutions to address climate-driven nation extinction.

A. RESOURCE & FUND A LOSS AND DAMAGE MECHANISM

Small island nations are already planning for the inevitable. The United States, China, and other developed nations must take a leadership role in funding a loss and damage facility. This became a focus of climate negotiators at COP-27 in Sharm el-Sheikh, Egypt. Small island nations—disappointed in climate progress to date—dubbed COP-27 the "Loss and Damage Summit."[126]

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124. Mark Nevitt, *Is it Time to "Climatize" the Security Council?,* INTERNATIONAL MILITARY COUNCIL ON CLIMATE AND SECURITY, https://perma.cc/CJG2-TKW7.

125. For a discussion of the unique legitimacy challenges within international law, *see* Dan Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L. L. 596, 605 (1999). There is also a danger in normalizing climate loss, a point made by Professor Barnett, Jonathon Barnett. *The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries*, 58 ASIAN PACIFIC VIEWPOINT 3, 3 (2017).

126. Salzman, *supra* note 33, at 5.

Consider: climate realities have already forced island nations to purchase land outside their home.[127] Both the Maldives and Kiribati have purchased some land in the region, an escape hatch for the inevitable and imminent loss of their territorial integrity.[128] Five years ago, the Kiribati government purchased a block of land in Fiji for several million dollars to help address ongoing food security issues (Kiribati's geography is rocky, making it difficult to farm).[129] It could also serve as a refuge if Kiribati makes the decision to abandon its ancestral lands in whole or in part. These purchases have been self-funded with little to no help from wealthier nations.[130] Once again, weighty climate justice questions emerge. Why should Kiribati pay for a new homeland when it contributed so few GHG emissions? What nations should pay for Kiribati's new homeland? As part of the loss and damage funding process, Kiribati, Maldives, Tuvalu, and the Marshall Islands should insist that separate funds be set aside to fund land relocation in neighboring nations, paid for by the most egregious climate offenders.

Tragically, many island nations are deeply in debt to wealthier nations, thwarting their capacity to invest in adaptation measures.[131] The loss and damage mechanism should acknowledge this growing debt crisis and find innovative ways for island nations to adapt to climate change in an equitable manner. Although it is beyond the scope of this Article to formulate exactly how such an effort should unfold, any efforts to aid on climate progress must take into account the island nation's current debt burden and its realistic capacity to fund climate adaptation solutions.

Second, alongside these efforts to fund loss and damage, developed nations should proactively engage with island states to develop *ex ante* managed migration options prior to abandonment or disaster striking. Domestically, managed retreat is gaining traction as an appealing human adaptation tool.[132] Managed retreat—defined as the purposeful, coordinated movement of people and assets out of harm's way—can help provide population movement options within a nation's territory.[133] Similarly, as the specter of statelessness looms ever larger, island nations and wealthier, developed nations should work collaboratively on

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127. *See* Christopher Pala, *The Island Nation that Bought a Back-Up Property*, THE ATLANTIC (Aug. 21, 2014).

128. Kiribati is a Pacific Small Island Developing State that is already planning for a future outside its historic homeland. *See, e.g.,* Christopher Pala, *Kiribati and China to Develop Climate-refuge Land in Fiji,* THE GUARDIAN, (Feb. 23, 2021, 2:00 PM), https://perma.cc/B64J-C2L4.

129. *See* Christopher Pala, *The Island Nation that Bought a Back-Up Property*, THE ATLANTIC (Aug. 21, 2014).

130. *Id.*

131. According to the United Nations Conference on Trade and Development, external debt for SIDS more than doubled between 2008 and 2021. *The Barbados Rebellion: An Island Nation's Fight for Climate Justice,* N.Y. TIMES (Jul. 27, 2022), https://perma.cc/MFF6-Y5K7.

132. A.R. Siders, *Managed Retreat in the United States*, 1 ONE EARTH PERSP. 216, 216 (2019), (describing managed retreat as the purposeful, coordinat[ed] movement of people and assets out of harm's way).

133. *Id.*

managed *migration* options outside of a nation's territory. Such an approach should favor *ex ante,* voluntary, and thoughtful migration options for the affected population. These options should not be imposed from the top-down but surface organically from the bottom-up. In the absence of international refugee protections, the receiving nation could still provide specialized legal protections to climate migrants. This could come in the form of workers' visas, employment assistance, housing, and other legal protections. Many small island states suffer from overpopulation and resource constraints; thoughtful managed migration strategies can relieve resource constraint pressure while providing the advanced option to move outside the ancestral territory.[134]

Is this managed migration proposal ideal? Far from it, but such an approach would be a frank acknowledgement of climate change's stunning human costs. It should be seen as part of a broader climate risk diversification strategy that can take place in advance of slow onset flooding, sea level rise, or a major disaster striking.[135]

Third, international policymakers and climate negotiators must adopt a *human*-security approach to address the specter of statelessness, disfavoring a physical and territorial-security approach. After all, Kiribati and Tuvalu will lose a permanent human population long before their territory physically disappears.[136] This human-security approach should focus on human impacts—including multidimensional cultural impacts—over the loss of physical space.[137] The Framework Convention should invest additional resources to discuss the impacts of noneconomic loss to these island nations. One adaptation study by Dr. Koko Warner, for example, showcased that certain adaptation measures were inadequate and could even result in negative side effects.[138] For instance, Dr. Warner's study noted that large rocks from ancient ruins have been used to build seawalls, resulting in severe damage to the cultural heritage of the island, destroying one asset in an attempt to protect another.[139] Even promising adaptation solutions may present heartbreaking trade-offs for the most vulnerable nations.

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134. Jane McAdam, *Disappearing States?, supra* note 23.

135. *See generally* Etienne Piguet, *Climatic Statelessness: Risk Assessment and Policy Options*, 45 POPULATION & DEV. REV. 865 (2019) (assessing the causes, risks, and policy options in the face of climate change-induced statelessness).

136. McAdam, *supra* note 5, at 106.

137. For an argument that climate change is a human security issue, *see* Maryam Jamshidi, *The Climate Crisis is a Human Security, Not a National Security, Issue*, 93 S. CAL. L. REV. POSTSCRIPT 36 (2019).

138. Koko Warner et al., *Pushed to the Limit: Evidence of Climate Change-Related Loss and Damage When People Face Constraints and Limits to Adaptation*, U.N. UNIV. INST. FOR ENV'T AND SOC'Y REP. NO. 11 5, 69 (Nov. 2013), (citing Iris Monnereau and Simpson Abraham, *Limits to Autonomous Adaptation in Response to Coastal Erosion in Kosrae, Micronesia*, 5 INT. J. OF GLOBAL WARMING 416, 416–432 (2013)).

139. *Id.*

In light of climate inaction from developed nations, many island nations are growing (understandably) exasperated. They have shifted their climate diplomacy tactics, favoring a more litigious approach.[140] For example, following the Glasgow Climate Pact's failure to address loss and damage, Tuvalu and other nations were disappointed by the lack of progress on loss and damage.[141] They are now demanding compensation from developed nations for past, present, and future climate harm.[142] This unmistakable rise in climate litigation has resulted in some successes, with the added benefit of raising awareness of the island nations' plight in the public eye.[143] Still, adopting a proactive approach to loss and damage as outlined could open the door to more collaborative and inclusive climate solutions with developed nations.

At the most recent Conference of Parties held in Sharm el-Sheikh, Egypt climate negotiators agreed to create a separate fund for loss and damage.[144] Though this was an important step forward to help compensate nations for climate harm, it remains to be seen how loss and damage will be funded and how this will trickle down to small island nations. Still, the Chair of the Alliance of Small Island States noted that the creation of the loss and damage fund reflected a "win for our entire world" that "has restored faith" in the climate negotiation process.[145]

B. MOVING TOWARDS A "CLIMATE-SECURITY COUNCIL"

The Security Council has powerful, delegated authorities to restore peace and security on behalf of all other Member Nations.[146] As discussed earlier, climate change imposes a unique temporal cost as GHG emissions stay in the atmosphere long after they are introduced.[147] As the climate clock ticks, the Security Council can play a gap-filling role, plugging an ever-widening international governance hole. It also has the clear authority to take legally binding action.[148] Addressing problems that undermine international peace and security are the ultimate

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140. *See* Anthony Faiola, *Drowning Nations Disappointed with Outcome of U.N. Climate Summit May Have One Move Left: Lawsuits*, WASH. POST., (Nov. 17, 2021).

141. James Redmayne, *Sinking Tavalu laments watered down U.N. Glasgow climate pact,* REUTERS, (NOV 15, 2021), https://perma.cc/5GK9-Z6TB.

142. *See* Teitiota v. New Zealand, CCPR/C/127/D/2728/2016 (Jan. 7, 2020) (opening the door to future human rights actions following the request for a Kiribati resident to be identified as a climate change refugee).

143. *Id.*

144. *COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Nations*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, (Nov. 20, 2022), https://perma.cc/25GP-SCMK.

145. Fiona Harvey et. al, *COP27 agrees historic loss and damage fund for climate impact in developing countries*, THE GUARDIAN, (Nov. 20, 2022) https://perma.cc/6E8Y-Z83N.

146. U.N. Charter arts. 39–42.

147. IPCC 1.5 REPORT, *supra* note 109, at 64. *See* discussion, *supra* Part III.B.

148. U.N. Charter art. 24, ¶ 1 ("In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council *primary responsibility* for the maintenance of international

responsibility of the Security Council.[149] Oftentimes, international environmental laws are inadequate in substance (lacking a security mandate) and implementation (free-riding and enforcement of existing provisions).[150] The earth continues to warm despite international governance progress on climate change.

Of course, Russia's invasion of Ukraine is likely to thwart U.N. Security Council climate action in the near future. This new geopolitical reality makes it more important for other P5 nations to be joined by the developed world in making climate progress. Climate impacts are agnostic to geopolitical realities. In what follows, I offer several recommendations for realistic Council action that takes into account geopolitical realities.

First, the Council should remain engaged on climate-security matters to the maximum extent politically feasible. One incremental solution: the Council's work could be synchronized and aligned with the Framework Convention's annual Conference of Parties. To date, the Council's climate change work has taken place in an ad hoc, reactive manner as the COP meets every year in accordance with Article 7 of the Framework Convention.[151] Why not establish routinized, follow-on "Security COPs" that tap into the Council's expertise and authority?[152] These Security COPs could work in harmony with the Framework Convention, facilitating a consistent dialogue and information-sharing between the Framework Convention and Council.

Too often, international institutions fail to break free from their governance silos despite the clear need to collaborate across institutions and expertise.[153] This would also likely build trust across governance structures. Follow-on Security COPs can help inform the Council's follow-on actions, setting the stage for future potential enforcement measures while helping to dismantle traditional governance silos. For example, the Conference of Parties could raise climate-security issues directly to the Council following a COP, tapping into the Council's expertise and authority. Such a Security COP allows the Council to be better integrated and placed within the centralized international climate governance process that has been in place since 1994. It also could alleviate concerns that the Council is overstepping its authority and encroaching on the work of other U.N. organs. The security issues inextricably linked with nation extinction seem tailor-made for this collaboration.

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peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.") (emphasis added).

149. *Id.*

150. Nevitt, *supra* note 4, at 579.

151. FRAMEWORK CONVENTION, *supra* note 133.

152. *See also* Nevitt, *supra* note 4, at 568.

153. For a discussion how climate justice and the environment can be silo'd from "existing sociopolitical" systems *See* Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 480-81 (2018).

Second, the Council should take a leadership role in coordinating specific climate-security matters across relevant U.N. organs. This could potentially include the development of an early climate warning system.[154] Better yet, the Council could establish an early warning information-sharing "clearinghouse" system across U.N. organs or establish a more formal institutional home to assist the U.N. in responding to future climate crises. Either way, the Council must think proactively about where future climate disruption and conflict are likely to take place. Best to embrace a proactive, risk-based approach to climate today, rather than waiting for climate disruption, and natural disasters to strike. Council action should address the unique climate-security challenges outside of conflict zones and be upfront about the role that climate change plays in undermining international peace and scrutiny. This should encompass investment in better risk assessment tools, resources, information sharing, and strategies.

Third, the Council should continue to debate whether climate change is a threat to international peace and security within the meaning of Article 39.[155] Although such an effort failed in December 2021 when Nigeria and Ireland proposed it in a resolution, declaring non-traditional threats to be a threat to international peace and security is not without precedent.[156] Though a formal Article 39 determination appears to be a non-starter at this time in the face of the Russia-Ukraine conflict, the Irish and Nigerian resolution was supported by the overwhelming majority of permanent and non-permanent Security Council members. Within the P5, the U.S., U.K., and France supported the resolution while China abstained. Further, the proposal was put forth by a wealthy, developed nation (Ireland) and a developing nation in the Global South (Nigeria).[157] This suggests that Council action on climate action is endorsed by an increasingly diverse group of Member States, with small island developing states clamoring for international governance solutions.

The Council determined that a public health epidemic —the Ebola crisis — constituted a threat to international peace and security within the meaning of Article 39 of the U.N. Charter.[158] As a non-traditional threat demanding a collective response, the Ebola crisis shares characteristics with the climate crisis. The Council's action facilitated the flow of logistics and humanitarian assistance to Ebola-ravaged countries in Africa.[159] The Council could build upon its work in the Ebola response by calling on Member Nations to assist the most vulnerable

154. Under Article 8(4), the Paris Agreement identifies areas of cooperation to include emergency preparedness, early warning, risk management and slow onset events. Paris Agreement, *supra* note 57, at art. 8(4). Conca, *supra* note 100, at 11.

155. U.N. Charter art. 39.

156. S.C. Res. 2177, ¶ 6 (Sept. 18, 2014).

157. *See* Nevitt, *supra* note 124.

158. S.C. Res. 2177, ¶ 6, *supra* note 156. For a discussion of the global emergency powers implicated in the Ebola response, *see generally* J. Benton Heath, *Global Emergency Power in the Age of Ebola,* 57 HARV. INT'L L. J. 1 (2016).

159. Nevitt, *supra* note 4, at 548–49.

island nations in adapting to climate change. In doing so, the Council could call on Member Nations to offer aid and assistance, accept vulnerable populations into their own population, or even ask the most egregious climate offenders to carve out territory for the inflow of new climate migrants.[160]

If an Article 39 determination is ultimately made, the Council could mandate specific, legally–binding actions.[161] This could include the mandatory acceptance of climate migrants from island nations or the sanctioning of certain states engaging in dangerous climate conduct. For example, Brazil has refused to enforce environmental forest regulations, resulting in devastation to the Amazon rain forest—the "lungs of the planet."[162] In response to destructive domestic practices that have far-reaching impacts on peace and security, the Council could sanction Brazil or prohibit the export of lumber and goods harvested from the Amazon. In addition, the Council could stop the international trade of certain harmful climate substances. Consider nitrous oxide's climate impacts. It stays in the atmosphere for decades and is 300 times more potent than carbon dioxide.[163] Nitrous oxide is used in a variety of commercial medical products. The Council likely possesses the authority to circumscribe the export of nitrous oxide used in non-medical supplies—a potentially appealing option if climate progress stalls elsewhere.[164]

Alternatively, the Council could issue a broad climate-security resolution that falls just short of a formal Article 39 determination. This is similar to the Council's earlier efforts on other global health crises—including HIV/AIDS in 2000 and COVID-19 in 2020.[165] Although the Council has been criticized as slow in its COVID-19 response, it ultimately addressed the COVID-19 crisis through the passage of U.N. Security Council Resolution 2532.[166] The Resolution called for a global 90-day ceasefire and requested that the Secretary-General provide updates to the Council "on the U.N. efforts to address the COVID-19 pandemic in countries in situations of armed conflict or affected by humanitarian crisis."[167] An analogous climate-security resolution could adopt a similar approach, calling on nations to resource a loss and damage mechanism and assist

160. This idea was proposed by Professor Michael Gerrard of Columbia Law School's Sabin Climate Center. *See* Michael Gerrard, *America is the Worst Polluter in the History of the World. We Should Let Climate Change Refugees Resettle Here.*, WASH. POST (June 25, 2015), https://perma.cc/GVM7-529F.

161. U.N. Charter, art. 41 (stating that the "Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions . . . [t]hese may include complete or partial interruptions of economic relations . . . ").

162. Nevitt, *supra* note 4.

163. One ton of nitrous oxide is equivalent to nearly 300 tons of carbon dioxide, and it stays in the atmosphere for over 100 years. *See Overview of Greenhouse Gas Emissions: Nitrous Oxide*, ENV'T PROT. AGENCY, https://perma.cc/L7SW-9RWW.

164. U.N. Charter art. 41; Mark Nevitt, *supra* note 4.

165. S.C. Res. 1308 (July 17, 2000).

166. S.C. Res. 2532 (July 1, 2020).

167. *See id.*

island nations with debt reduction, adaptation funding, and technical assistance. The needs are many and varied. Either way, there is space and precedent for Council action to address climate change as a "non-traditional" security threat. Climate change offers an opportunity for the Council to both uphold the sovereignty of its Member States and showcase its capacity to evolve to address novel threats to peace and security. In Part II.A, I highlight how climate change impacts each qualification for statehood while proposing possible remedies that the Council could facilitate under international law.[168]

CONCLUSION

For several small island developing states, climate change poses an existential threat to their existence. The impacts of climate change are not theoretical: it dramatically exacerbates sea level rise, wave-driven flooding, and extreme weather. These impacts threaten the very survival of Kiribati, Maldives, the Republic of Marshall Islands, and Tuvalu.[169] In the face of international intransigence, we are on a calamitous glideslope to the unthinkable: environmental nation extinction. Will the international community respond?

Climate change's threat to international security—demonstrated by the specter of statelessness—demand bold and innovative legal solutions today. We will need to think broadly about all the legal, policy, and technological tools at our disposal to address climate change as both a threat multiplier and a catalyst for conflict. Due to geopolitical realities, the Security Council may not take immediate, legally binding action on climate change today, yet it has both the responsibility and authority to uphold peace and security. This is true regardless of the source of the underlying threat.[170] Climate science shows a clear, unmistakable linkage between human-caused climate change and threats to peace and security.[171] A logical first step is to acknowledge what the science demonstrates: climate change is a threat to international peace and security, similar to earlier pronouncements on terrorism, weapons of mass destruction, and health crises. In the interim, the Council's work should continue. So, too, should the Framework Convention's work, which must make progress to fund and operationalize a loss and damage facility that takes into account the island states' unique challenges.

As the Maldives' President astutely noted in 2009, "It is for the people to determine the destiny of the territory and not the territory the destiny of the people."[172]

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168. *See supra* Part II.A.

169. *See, e.g.* Storlazzi, *supra* note 2.

170. U.N. Charter art. 24, ¶ 1.

171. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], GLOBAL WARMING OF 1.5 CELSIUS, SUMMARY FOR POLICY MAKERS (2d ed. Jan. 2019), https://perma.cc/WH84-BX4C.

172. *See* Address by President Mohamed Nasheed (Maldives) to the United Nations General Assembly (UNGA) (21 September 2009), https://perma.cc/9985-Q95S.

More than a decade after this pronouncement, the island nations' story is not being written by its people. Maldives' destiny is in the hands of climate-driven extreme weather events and the actions of wealthier nations who have the necessary resources to address the specter of statelessness head-on. These wealthier nations also bear outsized responsibility for past, present, and future climate harm. Each day of inaction brings a further loss of agency for the Maldives and other SIDS over their future.