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## CLIMATE REFUGEES, HUMAN RIGHTS AND THE PRINCIPLE OF NON-REFOULEMENT

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I. INTRODUCTION – II. LACK OF A CONCEPT IN INTERNATIONAL LAW – III. CLIMATE CHANGE AS A CAUSE OF MIGRATION FLOWS – IV. PROPOSED LEGAL RESPONSES TO CLIMATE-RELATED FORCED DISPLACEMENT – V. CLIMATE MIGRATION AND HUMAN RIGHTS. THE TEITIOTA CASE BEFORE THE HUMAN RIGHTS COMMITTEE – VI. CONCLUSIONS

**ABSTRACT:** Climate change caused by human action and its development model is one of the greatest challenges that the international community has to tackle in the 21st century. One of the consequences is the increase in migratory flows as a consequence of the degradation of ecosystems and loss of territory. Climate migrants lack recognition of protection rights under existing international law. However, in our opinion, their fundamental rights are clearly affected, starting with the fundamental right to life. In the absence of normative developments, court proceedings and case-law - as the Teitiotia case- can serve as an instrument for the recognition of their fundamental rights and a redefinition of the principle of non-refoulement.

**KEYWORDS:** Climate change, fundamental rights, forced migration, climate refugees, *non-refoulement*.

**REFUGIADOS CLIMÁTICOS, DERECHOS HUMANOS Y EL PRINCIPIO DE *NON-REFOULEMENT***

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**RESUMEN:** El fenómeno del cambio climático causado por la acción del hombre y su modelo de desarrollo es uno de los mayores retos de la comunidad internacional en el siglo XXI. Una de las consecuencias es el incremento de los flujos migratorios como consecuencia de la degradación de los ecosistemas y pérdida de territorio. Los migrantes climáticos carecen en el derecho internacional vigente de un reconocimiento de derechos de protección. No obstante, en nuestra opinión, es clara la afectación a sus derechos fundamentales, empezando por el fundamental derecho a la vida. A falta de desarrollos normativos, la vía jurisprudencial –como el caso Teitiotia- puede ir sirviendo como un instrumento para un reconocimiento de sus derechos fundamentales y una reconsideración del principio de no devolución.

**KEYWORDS:** cambio climático, derechos fundamentales, migraciones forzadas, refugiados climáticos, *non-refoulement*.

## **LES RÉFUGIÉS CLIMATIQUES, DROITS DE L'HOMME ET LE PRINCIPE DE NON-REFOULEMENT**

**RESUME :** Le phénomène du changement climatique causé par l'action humaine et son modèle de développement constituent l'un des plus grands défis auxquels la communauté internationale est confrontée au XXI<sup>e</sup> siècle. L'une des conséquences est l'augmentation des flux migratoires en raison de la dégradation des écosystèmes et de la perte de territoire. Les droits de protection des migrants climatiques ne sont pas reconnus par le droit international en vigueur. Cependant, à notre avis, il est clair que leurs droits fondamentaux sont affectés, à commencer par le droit fondamental à la vie. En l'absence de développements normatifs, la jurisprudence peut servir d'instrument pour la reconnaissance de leurs droits fondamentaux et une reformulation du principe de non-refoulement.

**MOTS-CLES:** Changement climatique, droits fondamentaux, migration forcée, réfugiés climatiques, *non-refoulement*.

## **I. INTRODUCTION**

In this paper, we will attempt to provide some reflections on a difficult concept without clear definition, the climate refugee, which, strictly speaking, does not exist in current international law. Consequently, we must begin by acknowledging that the title of this paper may be formally incorrect as a starting point given the non-existence of this concept in the international legal system. Nevertheless, we have decided to use this expression with a certain provocative intention, but admitting that it is already present in doctrine<sup>2</sup>, *soft law*<sup>3</sup> texts and is common among civil society and commonly cited in the media. However, we reiterate from the beginning of this paper that it does not

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<sup>2</sup> Particularly interesting is the work of SCIACCALUGA, G., *International Law and the Protection of "climate Refugees"*, Palgrave Macmillan, London, 2020.

<sup>3</sup> In this respect, for example the Nansen Initiative, a state-led consultative process to build consensus on a protection agenda addressing the needs of people displaced across borders in the context of disasters and the effects of climate change.

currently have any legal recognition as it is not included in any international law instrument, except exceptionally, as we have indicated, in some *soft law* texts. Nor is it easy to offer a precise definition, since a good number of legal, social, political and environmental circumstances are intertwined around this concept, which makes it difficult to approach it conceptually. What is certain is that the effects of the climate change process are increasingly severe, altering the living conditions and environment of a large number of our planet's inhabitants to the point that a significant number of people are forced to leave their original territories of residence. In some cases, the action of climate change is clear and manifest. For instance, the disappearance of islands due to rising sea levels. In other cases, it is interrelated with other pre-existing environmental and social problems, such as difficulties of access to drinking water, loss of arable land due to increased desertification, progressive deterioration of traditional agricultural techniques in the face of rising temperatures, pressures and hostilities from hostile groups, ethnic groups or populations in the struggle for increasingly scarce resources, etc. Evidently, these complex circumstances do not at all facilitate even a non-legal approach to the concept of climate refugee or climate migrant, whatever the most precise denomination may be.

Moreover, as we will see in the following pages, there is no clear consensus on the very concept of climate refugees or migrants. Other terms are also used (climate displaced persons, climate migrants, environmentally displaced persons, etc.), all of which are useful depending on the perspective and approach provided, but which generate a conceptual distortion and debate around this concept.

What is indisputable is the significant increase in recent years of migratory flows, both in internal and external displacements, directly or indirectly related to the effects of climate change to the point of being considered a more important migration factor than the traditional economic and political factors in the countries of origin<sup>4</sup>. Furthermore, a large number of reports and technical studies agree that these flows will multiply exponentially in the future.

It would therefore seem necessary for all the members of the international community to foresee some kind of legal response to these situations and not leave it to the individual responses of each state. Especially if the environmental

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<sup>4</sup> See *infra*, note 26 of this paper.

deterioration caused by climate change as a trigger for migration affects the exercise of the fundamental rights of this disputed category of people who, even if we assume the legal incorrectness, we can call *climate refugees*.

Finally, we also want to highlight in this article the fact that, if to a large extent potential rights-holders recognized in international law encounter enormous difficulties in asserting their rights in practice at the final stage of their difficult migratory route, potential refugees who do not yet have a recognized framework that guarantees effective protection of their rights will suffer enormously and to a greater extent in their need to find the necessary international protection.

In this paper, we will start with the lack of an adequate legal concept for the category of people who have been forced to leave their habitat as a result of climate change. Secondly, we will stress that these circumstances will lead to a very significant increase in migratory flows, which will highlight the need to seek legal solutions. Thirdly, we will set out the possible legal responses that have been put forward. We will end with a case before the Human Rights Committee, the Teitiotia case, which has made it possible to link the impact of human rights and the phenomenon of climate change and which identifies the possible application of the principle of *non-refoulement* to this emerging category of climate refugees.

## **II. ABSENCE OF A CONCEPT IN INTERNATIONAL LAW**

As is well known, the definition of a refugee in international law is found in Article 1A. 2) of the Convention relating to the Status of Refugees<sup>5</sup>, and refers to any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of

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5 Other definitions exist in regional instruments, such as the Bangkok Principles Relating to the Status and Treatment of Refugees adopted in 1966, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees.

his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it<sup>6</sup>.

It has been abundantly pointed out in doctrine and ratified in practice that climate refugees do not fit within the literal wording of a rule drafted in a very specific context and a precise and limited category, refugee, that responds to specific needs and circumstances<sup>7</sup>.

Consequently, most people who might fall into the category of climate refugee are considered, in light of a strict and literal interpretation of current international law, to be economic migrants and thus lacking an international protection framework. The term environmental migrant in general, or climate migrant in particular, might seem less problematic in legal terms, providing a nuance that is in principle irrelevant to migrant status and without legal consequences, but it certainly does not adequately reflect the complex nature of the problem. For the International Organization for Migration, an environmental migrant is defined as a person or group of persons who, because of unavoidable, sudden or progressive environmental changes that adversely affect their lives or living conditions, are forced to leave their habitual homes, or choose to do so voluntarily. Displacement may be temporary or permanent, within their own country or abroad<sup>8</sup>. However, the use of the term migrant or refugee for people who leave their territories due to environmental disruptions is not a neutral choice. The choice of term, beyond formal legal correctness, involves a choice about the rights that could affect this category of people. Behind each term there is a choice about different legal regimes with very different levels of protection of the rights of the persons concerned.

The unique characteristics of these people, migrants or potential refugees, allow us to identify both on a theoretical level in the doctrine and in the international practice of states and International Organizations an evolution

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<sup>6</sup> The Instrument of Accession of Spain to the Convention relating to the Status of Refugees can be consulted in BOE no. 252 of 21 October 1978.

<sup>7</sup> On the concept of refugee, international law and its evolution, FERNÁNDEZ LIESA, C. R., “Evolución jurídica internacional del derecho internacional de los refugiados”, *Tiempo de paz*, n° 119, 2015, pp. 11 - 18. HATHAWAY, J. C. *The rights of refugees under international law*. Cambridge University Press, 2021. GOODWIN-GILL, G. S.; MCADAM, J., *The refugee in international law*. Oxford University Press, 2007.

<sup>8</sup> IOM, “Note for Discussion: Migration and the Environment”, Ninety-fourth Session of the Council, MC/INF/288, 2007, pp. 1-2.

and development generating a progressive trend of recognition of certain rights towards these people.

The first thing we should try to find is a definition as precise as possible for this category of people whom we have incorrectly categorized in the title of this paper as climate refugees. In our opinion, this category should not necessarily coincide with the broader category of environmental refugee<sup>9</sup>, which has been consolidated in different scientific and international forums for some time now<sup>10</sup>. According to the well-known definition of El-Hinnawi, former director of the United Nations Environment Programme, environmental refugees are those individuals who have been forced to leave their traditional habitat, temporarily or permanently, due to a marked environmental disruption, either because of natural hazards and/or caused by human activity, such as industrial accidents or which have led to their permanent displacement by large economic development projects, or who have been forced to migrate because of poor processing and deposition of toxic waste, endangering their existence and/or seriously affecting their quality of life<sup>11</sup>. Ultimately, the most important element is the environmental disruption of their habitat whatever the causes<sup>12</sup>. However, this conceptualization is not unanimously accepted either in practice

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<sup>9</sup> On environmental refugees, BORRÁS PERNINAT, S., “Refugiados ambientales: el nuevo desafío del derecho internacional del medio ambiente”, *Revista de Derecho*, Vol. XIX - Nº 2 - December 2006, pp. 85-108. FLINTAN, F., “Environmental refugees-a misnomer or a reality”, Report of the Wilton Park Conference on Environmental Security and Conflict Prevention. 2001. p. 1-3. BLACK, R., Environmental refugees: myth or reality?, 2001. BERCHIN, I. I., “Climate change and forced migrations: An effort towards recognizing climate refugees”, *Geoforum*, 2017, vol. 84, pp. 147-150. BELL, D. R., “Environmental refugees: what rights? Which duties?”, *Res Publica*, 2004, vol. 10, no 2, pp. 135-152. DEL ÁLAMO MARCHENA, E., “Migration and Human Displacement in the Context of Climate change: Reflections on the Category of Climate Refugees”, *Peace & Security-Paix et Sécurité Internationales*, nº 9, 2021.

<sup>10</sup> EGEA JIMÉNEZ, C., and SOLEDAD SUESCÚN, J. I., “Los desplazados ambientales, más allá del cambio climático. Un debate abierto”, *Cuadernos Geográficos*, 2011, Vo. 49, no 2, pp. 201-215. KEANE, D., “The environmental causes and consequences of migration: a search for the meaning of environmental refugees”, *Georgetown International Environmental Law Review*. RAMLOGAN, R., “Environmental refugees: a review”, *Environmental Conservation*, 1996, pp. 81-88.

<sup>11</sup> EL-HINNAWI, E., *Environmental Refugees*, United Nations Environment Program, Nairobi, Kenya, 1985.

<sup>12</sup> ESPÓSITO, C., and TORRES CAMPRUBÍ, A., “Cambio climático y derechos humanos: el desafío de los nuevos refugiados”, *Relaciones Internacionales*, no 17, June 2011, pp. 67-86.



or in doctrine as it lacks an adequate scientific framework and does not clearly address some fundamental issues<sup>13</sup>. In any case, what is relevant is that this concept has not generated a legal framework for international protection.

When we refer to climate refugees, we are referring to the fact that the disruption of their habitat is caused, directly or indirectly, by the phenomenon of climate change. That is the main reason for leaving the territory. That is, there is a link between being forced to leave one's habitat and the phenomenon of climate change. As we have repeatedly mentioned above, this concept does not exist in international law and is called into question. Indeed, the United Nations High Commissioner for Refugees (UNHCR) expressly does not endorse this concept and maintains that it is more accurate to refer to "persons displaced in the context of disasters and climate change", as climate change primarily generates internal displacement and affects people within their own countries<sup>14</sup>. On the other hand, the use of the term refugee is also questioned insofar as it seems to incorporate legal consequences, which have not existed to date, and also has a strong emotional content in relation to people whose lives are endangered by environmental and climatic disruptions<sup>15</sup>.

In any case, this term reflects the reality of a group of people who are forced to leave their place of residence due to climate change. As Czesch points out, in view of the fact of forced abandonment, they should be considered as victims without the capacity to act and therefore deserving of international protection by states<sup>16</sup>. Economic migration is to some extent, and with many nuances, a freely made choice; nevertheless, leaving a territory when it becomes uninhabitable as a result of climate change is not a choice. Consequently, the international response must be different.

<sup>13</sup> Critical about the El-Hinnawi's definition, KIBREAB, G., "Environmental Causes and Impact of Refugee Movements: a Critique of the Current Debate", in *Disasters*, 1997, vol. 21, no. 1, pp. 20-38. MCGREGOR, J., "Do Environmental Refugees Exist?", in *RPN Refugee Participation Network*, 1995, no. 18, Refugee Studies Programme (University of Oxford) and HEGOA (University of the Basque Country), Oxford-Bilbao, pp. 7-8.

<sup>14</sup> For internally displaced people (IDP) figures, see UNHCR report: <https://www.unhcr.org/596f25467.pdf>.

<sup>15</sup> GORLICK, B., *Environmentally displaced persons: a UNHCR perspective. Environmental Refugees: The Forgotten Migrants Meeting*, accessed at: [http://www.ony.unu.edu/seminars/2007/16May2007/presentation\\_gorlick.ppt](http://www.ony.unu.edu/seminars/2007/16May2007/presentation_gorlick.ppt).

<sup>16</sup> CZESH, S., "A human rights-based redefinition of forced migration", *Migration and Development*, 2008, no. 10, pp. 97-126.



The fact is that the number of people who have had to leave their homes in relation to climate change, unable to act, with no choice, has multiplied in recent years. As early as 1993, Myers warned that deforestation, desertification, problems in access to food and agriculture, unemployment, poverty, population growth and climate change would result in forced migration due to environmental causes and predicted that there would be 150 million environmental refugees by 2050.<sup>17</sup>

It seems obvious that it is very difficult to know the exact numbers of climate refugees at present, as displacement caused by environmental factors also has complex economic, social and political causes, and there are no effective identification procedures in international practice. Nevertheless, the numbers of forced migrations are enormous and easy to find in numerous reports and increasingly alarming news reports<sup>18</sup>. A 2018 report by the World Bank Group concludes that by 2050 the increasing impacts of climate change in three densely populated regions of the world could result in the displacement of more than 140 million people (close to the number predicted by Myers almost thirty years earlier) within their respective countries, bringing with it an imminent humanitarian crisis and threatening the development process<sup>19</sup>. A recent report by the UN's Intergovernmental Panel on Climate Change warns that if global warming is not contained, there will be one billion climate refugees by 2050<sup>20</sup>. The vast majority of published reports agree on important figures. The Internal Displacement Monitoring Centre, which is part of the *Norwegian Refugee Council*, reports that environmental catastrophes caused 30.7 million forced migrations in 149 countries and territories<sup>21</sup>. It is true that not all environmental disasters are related to climate change, but the figure<sup>1</sup>, taken from the report, is highly illustrative of the high percentage of forced displacement caused by climate change

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<sup>17</sup> MYERS, N., *Ultimate Security: The Environmental Basis of Political Stability*, Norton Company, 1993.

<sup>18</sup> See “New record number of climate refugees”, SER, 21 October 2018, [https://cadenaser.com/ser/2018/10/19/ciencia/1539945890\\_540616.html](https://cadenaser.com/ser/2018/10/19/ciencia/1539945890_540616.html).

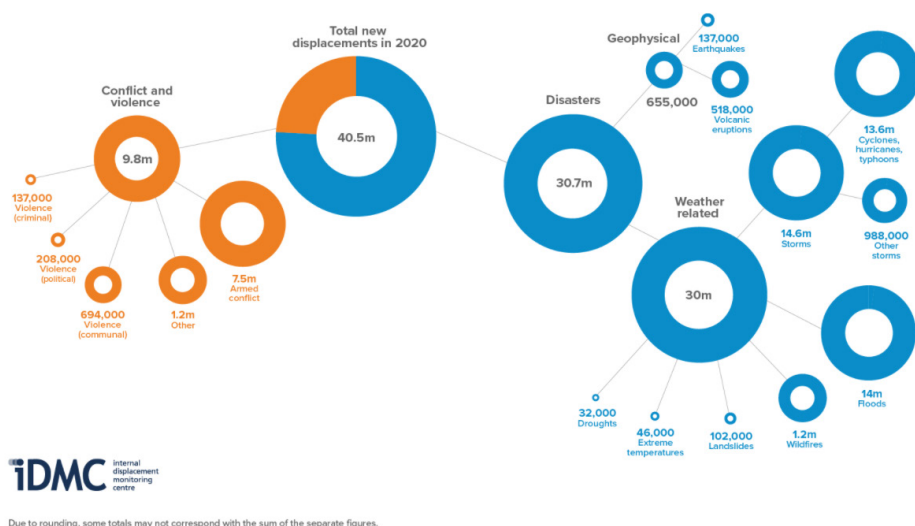
<sup>19</sup> WORLD BANK, *Groundswell: Preparing for Internal Climate Migration*, 2018.

<sup>20</sup> IPCC, *Global Warming of 1.5th Report*, 2018. Retrieved from: <https://www.ipcc.ch/sr15/>.

<sup>21</sup> IDMC, *Global Report on Internal Displacements 2021*. Retrieved from <https://www.internal-displacement.org/global-report/grid2021/>.

Figure 1. Causes of Forced Displacement in 2020: Internal Displacement Monitoring Centre.

### New displacements in 2020: breakdown for conflict and disasters



Source: IDMC, *Global Report on Internal Displacements 2021*, available at: <https://www.internal-displacement.org/global-report/grid2021/>.

Ultimately, the exponential growth of forced migration flows as a consequence of the effects of climate change will undoubtedly be one of the biggest crises that the international community will have to face in the coming years.

### III. CLIMATE CHANGE AS A CAUSE OF FORCED MIGRATION FLOWS

Having identified the effects of a human-induced change in climate patterns on the planet many, many years ago, and having reached a broad scientific consensus, the international community's reaction to address this phenomenon has been absolutely late and ineffective<sup>22</sup>. As a result, the

<sup>22</sup> In 1938, Guy Callendar linked increases in carbon dioxide in the earth's atmosphere to global warming. In 1956, Gilbert Plass linked human emissions of carbon dioxide to climate

effects of climate change are becoming increasingly visible and devastating. In fact, almost every inhabitant of our planet has experienced first-hand some significant or anomalous climate change-related weather phenomenon in their immediate environment over the last year. Reading the scientific reports, especially those of the Intergovernmental Panel on Climate Change<sup>23</sup>, are sufficiently illustrative of the seriousness of the situation and certainly frightening for the conditions of life on earth for the near future and, above all, for the next generations<sup>24</sup>. Thus, the need for effective commitments in the development and implementation of the framework of existing international instruments, especially the Paris Agreement<sup>25</sup>, are of paramount importance.

As is well known and sufficiently confirmed by numerous scientific reports, the effects of climate change are manifold and are not limited exclusively to a generalized increase in temperatures, or global warming, but are manifested through the multiplication of extreme weather phenomena, changes in rainfall patterns that simultaneously cause prolonged droughts and heavy flooding. What is certain is that these consequences in turn interrelate with each other, exacerbating their severity, such as the melting of polar ice caps and glaciers, rising sea levels, salinization of drinking water reserves, loss of fertile soil and desertification, etc. The result is the sudden impossibility for entire communities to occupy the territory they inhabit and the creation of

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change.

<sup>23</sup> The Intergovernmental Panel on Climate Change (IPCC) was established in 1988 to provide comprehensive assessments of the state of scientific, technical and socio-economic knowledge on climate change, its causes, potential impacts and response strategies. Since the start of its work in 1988, the IPCC has produced five assessment reports in several volumes. These can be found in the *Reports* section. It is now in its sixth assessment cycle. The reports are available at: <https://www.ipcc.ch/about/preparingreports/>.

<sup>24</sup> MITCHELL, J. F. B., et al., “Equilibrium climate change and its implications for the future”, *Climate change: The IPCC scientific assessment*, 1990, vol. 131, p. 172. BELLARD, C., et al., “Impacts of climate change on the future of biodiversity”, *Ecology letters*, 2012, vol. 15, no 4, p. 365-377. FLANNERY, T., *The Threat of Climate Change: History and Future*, Taurus, 2006.

<sup>25</sup> Regarding the abundant bibliography on the Paris Agreement, see BORRAS PERTINAT, S. and VILLAVICENCIO CALZADILLA, P. M., (eds.), *El Acuerdo de París sobre el cambio climático: ¿un acuerdo histórico o una oportunidad perdida? análisis jurídico y perspectivas futuras*, Aranzadi, 2018. FAJARDO DEL CASTILLO, T., “El acuerdo de París sobre el cambio climático: sus aportaciones al desarrollo progresivo del Derecho internacional y las consecuencias de la retirada de los Estados Unidos”, *Revista española de derecho internacional*, Vol. 70, no 1, 2018, pp. 23-51.

significant flows of forced migration. These people whose decision to migrate is imposed by the environmental degradation caused by the effects of climate change fall into the generic category of climate migrants.

In fact, as Prof. Wesselbaum argues, climate change is nowadays more important for migration than traditional economic and political factors in countries of origin<sup>26</sup>. In recent years, the effect of climate catastrophes in countries of origin is considered to be one of the main drivers of migration, especially due to the impact that climate change can have on living conditions in vulnerable territories. Ultimately, climate change will make some areas of our planet simply unsustainable.

The UN High Commissioner for Refugees has identified the Sahel area in the report *Global Trends, Forced Displacements in 2020* as particularly affected by the impact of climate change where it interacts with other conflicts and complex causes of violence (especially Mali and Niger, but also including Nigeria and the Central African Republic)<sup>27</sup>.

In Central America, El Salvador, Honduras and Guatemala are examples of states with significant increases in climate change-induced forced displacement. In 2021, we witnessed the beginning of what may be one of the most straightforward examples of climate-induced migration in Central America. Around 10,000 people have already attempted to migrate northward after two devastating storms hit, and many more are planning to leave soon<sup>28</sup>.

The phenomenon of forced displacement is particularly visible in coastal and island territories affected by rising sea levels<sup>29</sup>. The average rise in sea level has been estimated at 3.2 mm per year since 1993, as reported in the Fifth Assessment Report of the Intergovernmental Panel on Climate Change<sup>30</sup>. This increase is driven by two factors. Firstly, water from melting glaciers and ice

<sup>26</sup> WESSELBAUM, D. ABURN, A., “Gone with the wind: International migration”, *Global and Planetary Change*, Volume 178, 2019, pp. 96-109.

<sup>27</sup> UNHCR, *Global Trends, Forced Displacements in 2020*, p. 24.

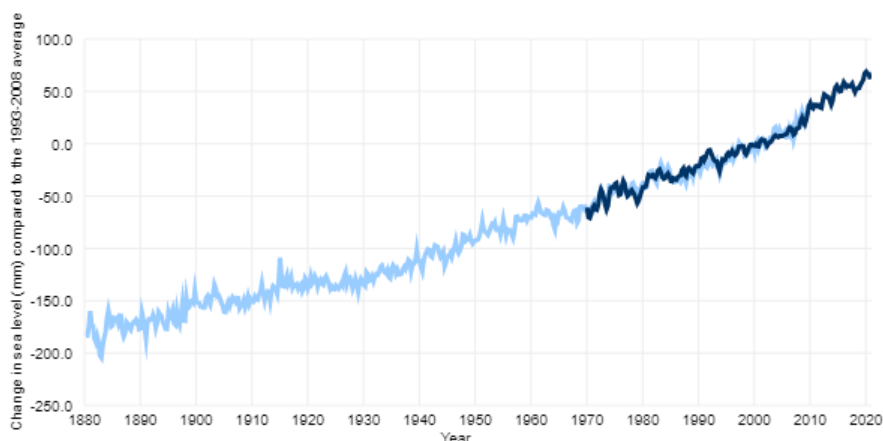
<sup>28</sup> Regarding environmental migrants in Central America: <https://www.cbsnews.com/news/climate-change-migration-central-america/>.

<sup>29</sup> WILLIAMS, A., “Turning the tide: recognising climate change refugees in international law”, *Law Policy*, 2008, no. 30, pp. 502- 503.529.

<sup>30</sup> IPCC, available at [https://archive.ipcc.ch/home\\_languages\\_main\\_spanish.shtml](https://archive.ipcc.ch/home_languages_main_spanish.shtml).

Figure 2. Sea level rise.

### Sea level since 1880



Source: Rebecca Lindsey at <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level>.

caps, and secondly, the thermal expansion of seawater as it warms<sup>31</sup>. Science communicator Rebecca Lindsey of the US *National Oceanic and Atmospheric Administration* states that global sea level has risen by about 21-24 centimetres since 1880, of which one third has risen in the last two and a half decades, illustrated by this figure<sup>32</sup>:

As a consequence of this sea level rise, some 745 million people living in coastal areas and islands will be exposed to increasingly frequent and devastating floods, storm surges and other extreme events for human life and the environment in the coming decades, as the IPCC warned in a special report on oceans and the cryosphere at the end of 2019<sup>33</sup>.

However, the effects of climate change are already being felt in island territories mainly in the Caribbean and the Pacific Ocean, posing a real existential

<sup>31</sup> See the report *Is Sea level Rising?* by the US Department of Commerce's National Ocean Service. Available at: <https://oceanservice.noaa.gov/facts/sealevel.html>.

<sup>32</sup> LINDSEY, R., "Climate Change. Global Sea Level", January 21, 2021, <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level>.

<sup>33</sup> [https://www.ipcc.ch/site/assets/uploads/sites/3/2020/07/SROCC\\_SPM\\_es.pdf](https://www.ipcc.ch/site/assets/uploads/sites/3/2020/07/SROCC_SPM_es.pdf).

threat to small island states as sea<sup>34</sup> level rise severely impacts on their territory. Particularly affected are the Marshall Islands, Tuvalu and Kiribati, which are experiencing increasingly severe flooding from the sea, causing the destruction of the coastline, the salinization of water resources and the degradation or disappearance of agricultural land with direct impacts on the health and food security of the population, problems that have been identified for some time and which are worsening at an accelerated rate<sup>35</sup>. Unlike other Pacific islands of volcanic origin, coral islands and atolls are particularly vulnerable to sea level rise, having already suffered significant forced population movements<sup>36</sup>.

Of course, these small island states have played a very active role in global climate negotiations insofar as rising sea levels threaten an essential element of the state, its territory, forcing the migration of a significant number of its inhabitants<sup>37</sup>. In fact, they constitute an important group in the negotiating framework of the fight against climate change. Defending the interests of these states falls within the competence of the United Nations High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States<sup>38</sup>.

Probably one of the iconic images to be remembered from the Glasgow Climate Summit (COP 26) in November 2021 will be the intervention from Tuvalu, an archipelagic state located in the Pacific Ocean and particularly threatened by rising sea levels, of its Foreign Minister at a conference addressed to the summit knee-deep in seawater, on coastal land that until very

<sup>34</sup> WYETH, G., "For Pacific Island States, Climate Change is an Existential Threat", *The Diplomat*, 2017, <https://thediplomat.com/2017/06/for-pacific-island-states-climate-change-is-an-existential-threat>.

<sup>35</sup> FAO, *Climate Change and Food security in Pacific Island Countries*, Rome, 2008.

<sup>36</sup> SALEM, S., "Climate Change and the Sinking Island States in the Pacific", E - International Relations, 9 January 2020.

<sup>37</sup> HOAD, D., "The 2015 Paris Climate Agreement: outcomes and their impacts on small island states", *Island Studies Journal*, 2016, vol. 11, no 1.; FRY, I., "The Paris Agreement: an insider's perspective-the role of Small Island Developing States", *Environmental Policy and Law*, 2016, vol. 46, no 2, p. 105. CARTER, G., "Pacific island states and 30 years of global climate change negotiations", *Coalitions in the Climate Negotiations*. Abingdon: Routledge, 2020.

<sup>38</sup> To address the challenges of climate change, see the UN Programmes of Action in support of Small Island Developing States, the Barbados Programme of Action (1994), the Mauritius Strategy (2005) and the Samoa Pathway of 2014 at <https://www.un.org/ohrrls/content/samoa-pathway>.

recently was dry land, stating that climate change and sea level rise are lethal and fundamental threats to Tuvalu and other countries at sea level, “*we are sinking, but so is the rest of the world*” and warning that Tuvalu **is** preparing for a “*worst case scenario*” in which its entire island territory disappears and its 12,000 or so people are forced to migrate<sup>39</sup>.

#### **IV. PROPOSED LEGAL RESPONSES TO CLIMATE-RELATED FORCED DISPLACEMENT**

Faced with this complex reality, where multiple factors are interrelated in the increase in migratory flows linked to climate change, there are various approaches in both doctrine and practice aimed at trying to provide international legal coverage that can offer a protection scheme for this category of climate refugees, which is very difficult to conceptualize. In fact, as we have mentioned, climate change is a factor in forced displacement, but except in certain cases where it can be clearly identified, such as in the case of disappearance of island territories, on a large number of occasions it interacts with the dynamics of poverty, food insecurity and pre-existing conflicts, exacerbating the vulnerability of populations who are forced to move<sup>40</sup>. As a result, the identification of environmental refugees is complex and, consequently, it is not easy to provide legal answers. As we have been saying, it seems clear that it does not fit the traditional conception of refugee in the terms of current international law. As Professor Ochoa Ruiz points out, there is no normative instrument of universal scope with treaty status that regulates migration for climate-related reasons<sup>41</sup>.

Faced with this regulatory vacuum and the need to provide a response to these situations, in a synthetic way, and without going into the complex pros and cons of each option, we can identify the following existing approaches in the doctrine to seek an adequate response to the need to provide international protection mechanisms to this special category of forced migrants, climate

<sup>39</sup> His statement can be found at <https://www.rtve.es/noticias/20211109/agua-rodillas-tuvalu-emergencia-climatica/2220120.shtml>.

<sup>40</sup> UNHCR, *Global Trends, Forced Displacements in 2020*, p. 8.

<sup>41</sup> OCHOA RUIZ, N., “Estados que se hunden: ¿Qué soluciones ofrece el derecho internacional a los migrantes climáticos que abandonan los territorios afectados por la elevación del nivel del mar?”, *Revista Española de Derecho Internacional*, vol. 73, no 2, 2021, pp. 389-397.



refugees, many of whom do not even have a territory suitable for life in which to return:

- Firstly, we highlight the existence of proposals for an expansive modification of the definition of refugee contained in the 1951 Convention relating to the Status of Refugees to include environmental degradation caused by climate change as one of the causes of departure from the country of origin<sup>42</sup>. Undoubtedly, the enormous current difficulties derived from the application of the provisions of the statute to existing situations anticipate the enormous problems that could arise from a reform proposal, which, in addition to the technical-legal problems, could be counterproductive by diluting the concept of the international protection obligation.
- Secondly, the possibility of approving a new specific international agreement on this issue that includes a precise definition of climate refugees, determines and identifies the international protection obligations of states and the rights recognized for climate refugees has been advocated<sup>43</sup>. This is possibly the best option from a theoretical perspective, but the one that would be most politically difficult to put into practice.
- Thirdly, some authors have argued for a possible solution through the use of commitments derived from the international framework for combating climate change, such as a Protocol to the Framework Convention on Climate Change<sup>44</sup>. The approach is based on the fact that if states have an international obligation to combat climate change, they must therefore respond to climate change-induced forced migration<sup>45</sup>. However, the enormous difficulties in implementing an international

<sup>42</sup> MARSHALL, L. W., “Toward a new definition of ‘refugee’: is the 1951 convention out of date?”, *European Journal of Trauma and Emergency Surgery*, 2011, vol. 37, no 1, p. 61-66. BERCHIN, I. I. I., et al. “Climate change and forced migrations: An effort towards recognizing climate refugees”, *Geoforum*, 2017, vol. 84, pp. 147-150.

<sup>43</sup> HODGKINSON, D., “Towards a Convention for Person Displaced by Climate Change: Key issues and preliminary responses”, *IOP Conference Series Earth and Environmental Science*, Vol. 6 no 56, February, 2009.

<sup>44</sup> BIERMANN, F., and BOAS, I., “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees”, *Global Environmental Politics*, 2010, Vol. 10, no 1, pp. 60-88.

<sup>45</sup> SCIACCALUGA, G., International Law and the Protection of” climate Refugees”... *cit.*, p. 97.

framework for combating climate change, as highlighted at the Sharm El-Sheij climate summit in November 2022, show us the enormous difficulties of this proposal.

– Finally, and fourthly, without the need for new normative developments, there is an opportunity to provide a response to this category of forced migrants by linking the concept of climatic refugee to the need for human rights protection through an extensive interpretation of the various international instruments already in force<sup>46</sup>.

It is not at all easy to decide on one of the above approaches as the most appropriate to provide a response to this reality of forced migration which, as we have mentioned, according to various reports, will multiply in the coming years as the foreseeable effects of climate change become more acute. All the options outlined above have certain advantages, but none of them are without drawbacks. All these aspects have been widely highlighted in the literature and debated in recent years. However, what is certain is that the direct linking of situations of forced migration caused by climate change with the violation of fundamental rights, such as the right to life and health, can be done without the need for specific normative development and, therefore, can currently be a practical and useful way to respond to specific situations in the search for international protection mechanisms.

## **V. CLIMATE MIGRATION AND HUMAN RIGHTS. THE TEITIOTA CASE BEFORE THE HUMAN RIGHTS COMMITTEE**

The Teitiota case before the Human Rights Committee, concluded by a ruling in October 2019, is particularly significant and may be a reference in linking the protection of human rights and forced migration related to climate change<sup>47</sup>. The ruling marks the first decision by a UN human rights treaty body on a complaint by an individual seeking asylum protection from the effects of climate change. Although its final interpretation and scope is

<sup>46</sup> HUMPHREYS, S., *Human Rights and Climate Change*, Cambridge, 2010. MAYER, B., “Critical Perspective on The Identification of “Environmental Refugees” As A Category of Human Rights Concerns”, *Climate Change, Migration and Human Rights: Law and Policy Perspectives*, 2017, p. 28-42.

<sup>47</sup> Human Rights Committee, Views adopted by the Committee under article 5, paragraph 4, of the Optional Protocol in respect of communication 2728/2016 of 23 September 2020. UN Doc CCPR/C/127/D/2728/2016.

being debated by the doctrine with different assessments, the truth is that this case has had an enormous resonance, cited as a landmark ruling of historical importance. The United Nations High Commissioner for Refugees, Filippo Grandi, has publicly acknowledged that after this resolution, “if there is an immediate threat to the life of a refugee due to climate change, due to climate emergency, and if he or she crosses the border and goes to another country, he or she should not be sent back, as his/her life would be at risk, as in a war or in a situation of persecution”<sup>48</sup>. There is no doubt that this is a highly significant statement in that it identifies situations of forced migration induced by climate change with the traditional assumptions that fall into the category of refugee under the terms of the 1951 Convention. The news was published on the High Commissioner’s website under a highly significant headline: *Historic UN Human Rights case opens door to climate change asylum claims* with great repercussion and impact in the media worldwide<sup>49</sup>.

A first interpretation seems to conclude that, for the first time, an international body in charge of the protection of human rights declares that states cannot expel individuals who have left their country due to changes in the territory induced by climate change, as this could potentially constitute a violation of fundamental rights, especially the right to life.

However, the fact remains that the Human Rights Committee did not consider that Mr Teitiota’s rights had been violated by New Zealand, which agreed, after a lengthy judicial process, not to grant him refugee status and, consequently, to return him to his country of origin, Kiribati, an island state severely affected by climate change and rising sea levels<sup>50</sup>. A certain amount

<sup>48</sup> Statements collected and consulted at: <https://www.dw.com/es/la-onu-alerta-en-davos-sobre-una-pr%C3%B3xima-avalancha-de-refugiados-clim%C3%A1ticos/a-52109930>.

<sup>49</sup> <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E>.

<sup>50</sup> Mr Teitiota’s statement is particularly interesting: ‘Forgive my ignorance, but to be frank, I’m quite disappointed with the outcome of my case which has been recently released from the UN... It’s still the same as before — I’m still worried about my family [because of] climate change ... the sea level rise, the drinking water is not good ... [and] I’m still yet to find a job until now. Personally, I think big countries like NZ should accept us and not ignore our plight because our islands are very low-lying and we are vulnerable even to the slightest bad weather or storm surge. I want to ask these big countries to please take our case seriously because we need their help... The notable difference is that my children are more vulnerable here to the spread of diseases such as a virus infection like a flu or diarrhea’. Retrieved from BEHRMAN, S. and KENT, A., “[Human Rights Committee’s Decision on the Case Ieoane Teitiota v New](#)

of caution is therefore necessary before reaching definitive and conclusive conclusions<sup>51</sup>.

Indeed, in the factual analysis scenario, the above-mentioned decision sets an excessively high threshold in relation to the severity of the effects of climate change in order to establish the existence of a certain risk to the life of an individual applicant<sup>52</sup>. However, in our opinion, what is particularly relevant in this case, more than the specific case and the circumstances of Mr. Teitiota and the specific case of Kiribati, is the clear and precise link between climate change and the impact on human rights and, in turn, the need to review the criteria for applying the principle of *non-refoulement*, a key principle in the international protection of refugees.

Professors Susana Borràs and Paola Villavicencio-Calzadilla have identified in the Human Rights Committee's Opinion in the Teitiota case the following determining questions for the necessary reconceptualisation of the principle of *non-refoulement*:

- The general legal obligation imposed on States parties to the International Covenant on Civil and Political Rights to protect and not to extradite, deport or expel a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant, due to climate change.

- The risk must be personal, which cannot be derived simply from general conditions in the receiving state, except in the most extreme cases.

- The obligation not to extradite, deport or otherwise transfer under Art. 6 of the Covenant may be broader and may require the protection of aliens who are not entitled to refugee status.

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[Zealand: Landmark or Will-o'-the-wisp for Climate Refugees?](#), *Questions of International Law*, 75, 2020, pp. 25–39.

<sup>51</sup> On this case, BEHRMAN, S. and KENT, A., “The Teitiota Case and the limitations of the human rights framework”, *Questions of International Law*, 2020, vol. 75, pp. 25–39.

<sup>52</sup> MANEGGIA, A., “Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The Teitiota Case Before the Human Rights Committee”, *Diritti umani e diritto internazionale*, 2020, no 2, pp. 635–643.

–The obligation for states to allow all asylum seekers who claim a real risk of violation of their right to life in the country of origin to access refugee status determination procedures<sup>53</sup>.

–The truth is that, as we have mentioned, in the specific case we are dealing with, the Committee established an extraordinarily high threshold, not perceiving a real impact on the life of the claimant, but beyond the specific and determined particularities of the Teitiota case, the importance of this resolution is that it may contain the criteria and thresholds on which an emerging right of refuge for climate migrants can be built in the future through a reformulation of the principle of *non-refoulement*, establishing parameters that can be used as a guide before national administrations and courts.

–We have no doubt that legal actions will multiply all over the planet following the indications contained in the Teitiota case when the competent administrations agree to return people who, having left their territories of origin as a consequence of climate change, allege that the environmental disruption caused by climate change has affected their fundamental rights. That is, the protection of the human rights is placed in the center of the debate. In this sense, confirming this approach, we would finally like to mention the ground-breaking decision of the UN Human Rights Committee of September 2022 that has found that Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home<sup>54</sup>.

## VI. CONCLUSIONS

It is clear from the latest scientific reports that climate change, with its devastating effects on practically the entire planet, is one of the greatest challenges the international community has to face. With multiple impacts,

<sup>53</sup> BORRÁS, S. and VILLAVENCIO-CALZADILLA, P., “El principio de no devolución en tiempos de emergencia climática: una revisión necesaria para la protección del refugio y asilo climático”, *Revista Española de Derecho Internacional*, vol. 73, no 2, 2021, pp. 399 -407.

<sup>54</sup> About this decision of the UN Human Rights Committee see <https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family>.

the significant increase in migratory flows resulting directly or indirectly from climate disruptions affecting, degrading or destroying natural habitats will be one of the major future challenges requiring an international legal response.

To date, climate refugee is a figure without legal categorization that appears only in *soft law* texts and does not generate rights in the field of international protection. Various options have been put forward in different forums aimed at configuring a protection status for these people who, strictly speaking, are not rigorously economic migrants and who, in many cases, have not even had the option of leaving their territories, but have been forced to do so. However, there is not a clear choice. All the alternatives that exist to date to provide an adequate international legal response present enormous political and legal problems and unknowns regarding their actual implementation.

For all these reasons, the Teitiota case before the UN Human Rights Committee, despite not giving a satisfactory response to the plaintiff, is of huge interest. The case illustrates a possible alternative option of international protection through the recognition via case-law of a right of *non-refoulement* linked to the obligation to protect fundamental rights already recognized in international law, especially the right to life, potentially affected by the severe disruptions caused by climate change in the environment.

This resolution can be an extraordinarily useful reference for initiating legal proceedings around the world to try to guarantee an international protection status for those people who have been forced to leave their places of origin due to climate change and who, at the beginning of this paper, we indicated that we were going to classify as climate refugees.

In short, the Teitiota case places the protection of human rights at the center of the debate in relation to forced displacement caused by climate change. It can illustrate how, without the need for any legal change, the so-called climate refugees whose human rights protected by international law have been affected by the effects of climate change in their homelands are entitled to claim international protection in different domestic or international jurisdictions.

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