



SIMÃO RIBEIRO PÓVOA

**Migrating to Effective Protection: A New International Legal  
Framework to Strengthen the Rights of Climate  
Refugees and Internally Displaced Persons**

Dissertation to obtain a Master's Degree in  
Law, in the speciality of International and  
European Law

Supervisors:

Dr. Veronica Corcodel, PhD, Professor of the NOVA School of Law

Dr. Ana Soares Pinto, PhD, Professor of the University of Lisbon, Faculty of Law

5<sup>th</sup> September 2023



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Simão Ribeiro Póvoa

Brussels, 5<sup>th</sup> September 2023

*To **Ari**, the reason for all this and the person I love most in the world. I hope you are proud of the brother you have because I could never ask for any other than you. I miss you so much. See you soon, “Cara de Urso”.*

*To my **Family**, the best I have in life.*

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### **Citation Style**

Throughout this dissertation, bibliographical references will be presented according to “*Normas Portuguesas n.ºs 405-1 e 405-4 do Instituto Português da Qualidade*”.

## **Abstract**

This research explores the issue of climate refugees and internally displaced persons (IDPs) and the need for an international legal framework to enhance their rights and protection.

Title 2 provides a historical overview of human movement and defines key terms such as *migrant*, *refugee*, and *IDP*. It examines the doctrinal divergence surrounding the concept of *climate refugee*, the principle of non-refoulement, and the worsening situation of minors. Thus, it proposes broadening the definition of refugee for climate-induced displacement, defending a distinct legal status.

Title 3 studies the legal frameworks that may or may not be applied to climate refugees and IDPs. It also discusses the *Teitiota v Chief Executive Ministry of Business, Innovation and Employment case* to clarify climate refugees' challenges in obtaining adequate protection. It shows that existing legal frameworks and case law are insufficient to address the protection of climate refugees and IDPs, supporting the need to establish more precise legal provisions.

Title 4 focuses on the consequences of sea level rise in climate-induced displacement, addressing challenges regarding State status and international legal personality in case of total territory loss or permanent uninhabitability. It studies the *Sydney Declaration of Principles for the Protection of Displaced Persons in the Context of Sea Level Rise* and its principles. The argument is that sea level rise will increasingly serve as a cause for involuntary displacement, leading to uninhabitability and loss of territory, proving that climate-induced displacement will, obligatory, not be only within borders, creating new challenges.

Finally, Title 5 highlights the need and the implementation challenges of a specific international legal instrument, the *International Convention on the Protection of Climate Refugees and IDPs*, explaining its central concepts, principles, covered situations, and provided rights, along with its binding nature to protect these groups effectively. It also proposes the creation of the *Climate Refugees and IDPs Fund*, the *International Agency for Climate Refugees and IDPs*, and the *Intergovernmental Panel on Climate-Induced Displacement*.

**Keywords:** Climate Refugee; Climate Internally Displaced Person; International Law; International Refugee Law; Human Rights; Climate Change; Forced Displacement; Migration.

## **Resumo**

Esta dissertação explora a questão dos refugiados e dos deslocados internos climáticos e a necessidade de um quadro jurídico internacional para reforçar a sua proteção.

O Título 2 apresenta um resumo da história do deslocamento humano e define *migrante*, *refugiado* e *deslocado interno*, analisando a divergência doutrinária sobre *refugiado climático*, e ainda o princípio do *non-refoulement* e a situação agravada dos menores. Propõe-se o alargamento da definição de *refugiado* ao deslocamento transfronteiriço induzido pelas alterações climáticas, defendendo um estatuto jurídico distinto.

O Título 3 estuda a legislação que pode ou não ser aplicada a refugiados e deslocados internos climáticos e aborda o caso *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* para elucidar sobre os desafios dos refugiados climáticos na obtenção de proteção adequada. Defende-se que a legislação e a jurisprudência permanecem insuficientes para abordar adequadamente a proteção dos refugiados e dos deslocados internos climáticos, urgindo a necessidade de estabelecer quadros legais mais específicos.

O Título 4 centra-se nas consequências da subida do nível do mar na deslocação induzida pelas alterações climáticas, abordando os desafios relativos ao estatuto dos Estados e à personalidade jurídica internacional em caso de perda total do território ou de inabitabilidade permanente. Estuda ainda a *Sydney Declaration of Principles for the Protection of Displaced Persons in the Context of Sea Level Rise* e os seus princípios. Defende-se que a subida do nível do mar será cada vez mais uma causa de deslocamento involuntário, levando à inabitabilidade permanente e à perda de territórios, provando-se que o êxodo derivado às alterações climáticas transcenderá obrigatoriamente fronteiras, criando novos desafios.

O Título 5 destaca a necessidade e os desafios da implementação de um instrumento jurídico internacional, a *Convenção Internacional sobre a Proteção dos Refugiados e dos Deslocados Internos (DI) Climáticos*, explicando os conceitos, princípios, situações e direitos previstos, e a sua natureza vinculativa para uma proteção eficaz. Propõe ainda a criação do *Fundo para os Refugiados e DI Climáticos*, da *Agência Internacional para os Refugiados e DI Climáticos* e do *Painel Intergovernamental sobre Deslocamentos Induzidos pelas Alterações Climáticas*.

**Palavras-chave:** Refugiado Climático; Deslocado Interno Climático; Direito Internacional; Direito Internacional dos Refugiados; Direitos Humanos; Alterações Climáticas; Deslocamento Forçado; Migração.

## **Glossary**

<b>1951 Convention</b>	United Nations Convention relating to the Status of Refugees
<b>1954 Convention</b>	United Nations Convention relating to the Status of Stateless Persons
<b>AI</b>	Amnesty International
<b>CESCR</b>	United Nations Committee on Economic, Social and Cultural Rights
<b>C-IDP</b>	Climate-Induced Displaced Person
<b>CMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
<b>CRC</b>	Committee on the Rights of the Child
<b>CRIDP</b>	International Convention on the Protection of Climate Refugees and Internally Displaced Persons
<b>CRIF</b>	Climate Refugees and Internally Displaced Persons Fund
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>ECHR</b>	European Court of Human Rights
<b>EEZ</b>	Exclusive Economic Zone
<b>EU</b>	European Union
<b>GCM</b>	Global Compact for Safe, Orderly and Regular Migration
<b>Guiding Principles</b>	Guiding Principles for Children on the Move in the Context of Climate Change
<b>HRC</b>	United Nations Human Rights Committee
<b>HRW</b>	Human Rights Watch
<b>IACRI</b>	International Agency for Climate Refugees and Internally Displaced Persons
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IDP</b>	Internally Displaced Person
<b>ILA</b>	International Law Association
<b>IOM</b>	International Organisation for Migration
<b>IPCC</b>	Intergovernmental Panel on Climate Change
<b>IPCID</b>	Intergovernmental Panel on Climate-Induced Displacement

<b>Kampala Convention</b>	African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa
<b>NGO</b>	Non-Governmental Organisation
<b>NYD</b>	New York Declaration for Refugees and Migrants
<b>OAU Convention</b>	Organisation of African Unity Convention
<b>OHCHR</b>	United Nations High Commissioner for Human Rights
<b>StC</b>	Save the Children
<b>Sydney Declaration</b>	Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNCCD</b>	United Nations Convention to Combat Desertification
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations Children's Fund
<b>VCLT</b>	Vienna Convention on the Law of Treaties

### **Number of Characters**

The body of this dissertation, including spaces, footnotes and the abstract, but excluding this declaration, the bibliography, the index, the citation style information and dedications, accounts for **199.931 characters**, respecting Article 21(4) of the 2<sup>nd</sup> Cycle Regulations of the NOVA School of Law (Regulation 495/2022).

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## **1. Introduction**

### **1.1. Contextualisation of Theme**

*Climate change*. This combination of words insists on hanging over our heads – still, perhaps not enough, or not captivating sufficient attention, namely from political decision-makers or the agents who contribute most to this phenomenon. Hence, the innumerable legal gaps on climate change and its influence on human movement, along with a doctrinal and jurisprudential component still under development.

Climate change, corresponding to long-term changes in our planet's climate conditions, is due, as most of the scientific community argues – and with which this thesis agrees – to the human *hand* in the form of deforestation and the burning of fossil fuels, among others. The result is an increase in the average global temperature<sup>1</sup> or even in the levels of carbon dioxide, melting ice, and sea level rise<sup>2</sup>, or even other increasingly severe and recurrent natural disasters, such as droughts, floods, storms, and hurricanes [Intergovernmental Panel on Climate Change (IPCC), 2021, pp. 7-8]. Therefore, regardless of a State's location or development, this is a universal problem, and committed, synchronised action is needed to address it.

This phenomenon already affects millions of people worldwide. Millions are being forced to leave behind their homes and dear ones due to the consequences of climate change. They move only by searching for a safe place to continue their lives because such situations have destroyed their homes, put their survival at risk, or made their land infertile. These are the ones usually called *climate migrants*, *climate displaced persons* and/or *climate refugees* – concepts that do not meet academic, legal, and scientific consensus and that will be examined. Therefore, this research will study which concept shall be chosen to describe these citizens, initiating by using *climate-induced displaced persons* (C-IDPs) for internal and cross-border movements.

The International Organisation for Migration [(IOM), 2018, p. 5] estimates that by 2050, 200 million citizens will be forced to relocate from their places of origin motivated by extreme weather events. The World Bank (2018, p. 19) predicts, in the same period, 143 million climate IDPs in Latin America, sub-Saharan Africa and South Asia. Currently, countries such as Papua New Guinea, Tuvalu, Kiribati, Maldives (Heilprin, 2008) and Bangladesh (Wax, 2007) are

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<sup>1</sup> About 1.1°C since the end of the 19<sup>th</sup> century.

<sup>2</sup> About 20 centimetres since the century above.

already affected by this problem – in a non-exhaustive list. Still, information is scarce, and the work is done on a forecast basis, so it is estimated that the number may increase.

Other developing countries that will receive these groups will face increased challenges since they will start from an assumption of poverty and social precariousness, leading to increased responsibility of nations with higher levels of prosperity. Moreover, host States, their Governments, international organisations and other civil society sectors will face a significant challenge in protecting and assisting these populations – while political radicalism may intensify. Whether regarding access to basic needs, such as water or food, or in situations of homelessness or Human Rights violations, people from developing countries will suffer most of their fragile resources, services, and infrastructure.

Finally, we should not forget children since climate change significantly harms them given their physical, mental, and emotional development stage, having fewer resources and capacities to adapt to adverse realities than adults have. Insect-borne diseases, such as malaria or dengue, whose incidence may increase due to climate change, are proof of this danger [Save the Children (StC), 2021a, p. 10]. Other problems relate to the precarious access to basic health, education, and legal and social protection, especially regarding their families, and situations of child exploitation for labour or sexual purposes. Extreme weather can also increase the risk of child mental health problems such as anxiety, depression, or post-traumatic stress (Berry *et al.*, 2010, pp. 123-132). Environmental degradation and biodiversity loss may affect, among other things, food, especially for children who depend on natural resources (UNICEF, 2021b). In fact, the United Nations Children’s Fund [(UNICEF), 2021a] points out that “*one billion children [are] at ‘extremely high risk’ of the impacts of the climate crisis*” and that (2021b) “*559 million children currently exposed to high heatwave frequency, rising to all 2.02 billion children globally by 2050*”.

## **1.2. Justification of the Choice of Topic**

Countless people remain left behind, and many eyes persist closed to their marginalisation. The international community has a crucial role in addressing this future – *current* – climate-induced displacement crisis. Thus, it is urgent to analyse the role of International Law, Human Rights Law, and Refugee Law in protecting these populations. However, their ineffectiveness and gaps justify this research subject. It is urgent to ensure the permanent application of international legal instruments and understand whether they are adequate and up-to-date with

the current panorama, especially considering that the context of climate-induced displacement still needs to be more specific and recognised.

Thus, it is to ensure a better future for the millions already taking a step backwards because of external constraints that this research emerges. The aim is to fill these gaps and protect citizens from the tragic consequences of climate change, guaranteeing respect for their rights and well-being, namely when they flee and search for a safe place to live. For a bright horizon for these, this research stands here with the motivation to help change the world, nonetheless with the pragmatism and critical, scientific spirit to seek solutions to ensure their protection.

### **1.3. Research Objectives**

The **problem** to study is the need for international legal protection for C-IDPs. For its part, the **justification of the issue** equally relates to the need to guarantee adequate legal protection for C-IDPs, and this scientific contribution may help to find the *way*. While it is true that there are international conventions protecting Human Rights and the rights of refugees, there is no specific legislation for C-IDPs – nor is there doctrinal and jurisprudential consensus on their qualification. This research intends to address the result of this insufficient international legal framework, seeking viable solutions to the lack of obligation of States to grant protection to these citizens.

Therefore, an essential **question** emerges, subdivided into two:

*Is the current International Human Rights and Refugee legal framework sufficient for addressing the phenomenon of climate-induced displacement? Moreover, is creating an innovative international legal instrument the solution to protect the rights of climate-induced displaced persons?*

By posing this crucial question, it becomes possible to study the need to address a potential gap in the current international legal framework in protecting C-IDPs' rights, well-being, and dignity, not adequately covering their unique circumstances and challenges. Besides, it can contribute to developing a comprehensive legal framework that addresses these groups' specific needs by adding valuable insights and expanding the knowledge by including additional elements. This enhances the comprehensiveness of this dissertation but also complements the efforts of other researchers and scholars who may be interested in this specific aspect. By delving deeper into the topic and

considering various perspectives, this research can enrich the existing body of literature and comprehensively analyse the legal protection of C-IDPs.

As regards the **objectives**, the main one is to understand the need and feasibility of creating this instrument. However, several specific goals will emerge throughout the research. Among these, the following must be highlighted:

- To define who could be considered climate refugees and IDPs;
- To elucidate the legal obligations of States in the protection of C-IDPs;
- To promote international and intersectoral collaboration and sharing of legal and educational policies and best practices;
- To establish an international support system for countries with fewer resources and capacities, guaranteeing financing mechanisms and technical support;
- To raise public awareness of the problem and these groups' respect and inclusion, guaranteeing them a future and enabling them to contribute to the community.
- To recognise and tackle barriers climate refugees and IDPs face – including linguistic and cultural ones.

#### **1.4. Adopted Methodology and Research Strategies**

Finally, the adopted methodology is multi-dimensional<sup>3</sup>. Firstly, it adopts a **critical perspective** to the system of legal norms that protect C-IDPs, addressing their limits, as well as the mechanisms to improve and make it more effective, exposing inequalities and social injustices. Likewise, a **Legal Sociology** perspective is used to understand the relationship between International Law and its impact on society, namely on the groups this research studies. Finally, **Economic considerations** also receive attention since reference will have to be made to the implications of creating policies for the protection and inclusion of C-IDPs on the economy of States, as these will lead to the use of financial resources, showing interstate inequalities.

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<sup>3</sup> According to the methods explained by Solum (1985).

## **2. The Forgotten Reality of Climate Refugees and Internally Displaced Persons**

Climate change and its consequences will increase. While the number of C-IDPs is already growing, in a trend that is expected to worsen, we are confronted with the insufficiency of adequate legal protection for them. Although there is an ongoing debate on how to approach the safety of this group's rights, what is decided will have global implications.

### **2.1. Brief Historical Evolution of Human Displacement**

*Movement* is synonymous with *being human*. According to Bernard Wood (2005, pp. 71-115), 1.8 million years ago, our ancestors decided to look for new places and resources, with *Homo erectus* leaving the borders of Africa for Asia, later evolving into *Homo habilis* and *Homo floresiensis*. As early as 60.000 years ago, *Homo sapiens* left the African continent and spread to Eurasia and America. Later, the expansion of the Roman Empire, at the time of the mass flow of millions of citizens through the Mediterranean area, ended up having other impacts, such as the diffusion of Latin (Woolf, 1998, pp. 72-73).

This would prove that the search for food or other natural resources was no longer the only motivation for human movement, later already related to better living conditions, safety, refuge or work (Gatrell, 2015, pp. 1-18). Examples since the beginning of the 20<sup>th</sup> century are the persons fleeing World War I and II, the Cold War or the Bosnian War, the displacements in search of employment from Europe to the United States of America – in the 1950s and 1960s – or the refugee crises from Yugoslavia – at the end of the 20<sup>th</sup> century – or Syria – in the 21<sup>st</sup> century. We can also add the displacement consequences of the conflict in Ukraine. This impact can even be seen in other parts of life, like in higher education, with over 5 million international students spread across the globe in 2020 [United Nations Educational, Scientific and Cultural Organisation (UNESCO) Institute for Statistics, 2020].

### **2.2. Definition of *Migrant* and *Refugee***

A *migrant* – though there is no standard definition – can correspond to “*all cases where the decision to migrate was taken freely*<sup>4</sup> *by the individual concerned for reasons of 'personal*

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<sup>4</sup> Nonetheless, it is a controversial definition, given that there is literature on *forced migration*. The European Commission defines *forced migration* as a situation when there is “*a person subject to a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes*” (European Commission, n.d.). The distinction between voluntary and forced migration could be simplified by grouping individuals between migrants and refugees. Firstly, by categorising all displaced people

*convenience' and without the intervention of an external compelling factor”*, applying to “*people, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family*” (IOM, 2009, p. 43). As the IOM (2009, pp. 40-45) explains, human movement can be internal – within a State’s borders – or external/international – across State borders. Further, it can be temporary or permanent. We can also assess migration based on its motivation, which can be, for example, for economic purposes, labour purposes or family purposes. Migration can have significant impacts on societies of origin and destination. In the first ones, it can result in the loss of skilled labour and the receipt of remittances that benefit the local economy. In the second case, migration can contribute to economic growth, cultural diversity, innovation and the exchange of cultures, languages and traditions, affecting social and cultural aspects in both societies. Nonetheless, it can create challenges related to integration, competition for resources, security and the development of extremist ideas.

On the other hand, the definition of *refugee* has been developing or changing over time. It first emerged in Europe after World War I, with the League of Nations and signing of several treaties with the defeated States to protect minorities in those territories (Rehman, 2021, pp. 37-45). Then, as Hathaway (2012, pp. 177-204) explains, it continued to change: it legally characterised stateless people, then moved to a more socially oriented understanding of those who were denied their right to nationality by the Nazi regime during World War II and, finally, in a broader conception, it began to be applied to those who did not see certain rights respected in their country of origin.

However, Article 1(a)(2) of the **UN Convention relating to the Status of Refugees (1951 Convention)** enlightens us on the definition of a *refugee*. This status, under this convention, corresponds to any person who has a “(...) *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is*

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as refugees, regardless of the cause of displacement, everyone would have access to the rights and protections established by International Refugee Law. Even if some adjustments were necessary, this would eliminate the need to determine the causes of displacement in each case. Likewise, the distinction between voluntary and forced migration can lead to stigmatisation based on misperceptions about their motivations. Moreover, simplified categorisation as a refugee would allow for a more effective humanitarian response, as displaced people would automatically receive assistance and protection, regardless of the cause of displacement. Similarly, the distinction can be ambiguous and complex, resulting in varying interpretations in different jurisdictions, so classifying everyone as a refugee would create a more solid and cohesive legal basis. Finally, it could simplify administrative and bureaucratic procedures, making granting status and providing assistance more efficient.

*outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*". Thus, the criterion focuses on the fact that the citizen has left *their*<sup>5</sup> State of origin for fear of persecution for one of the five factors listed.

The concept of *persecution* is one of the central points for assessing this normative provision. Initially, this was understood from a literal point of view, that is, of someone being watched or pursued by State authorities, for example, recurrently or violently. However, for Hathaway *et al.* (2014, p. 105), the concept of *persecution* should be understood more sensitively and comprehensively in harmony with respect to the rights set out in the Universal Declaration of Human Rights (UDHR). Thus, the provision for *persecution* can be verified whenever there is "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group". Nonetheless, "[o]ther serious violations of human rights – for the same reasons – would also constitute persecution" (UNHCR, 2019, p. 21). Still, the persecution must be intentional, severe, and discriminatory (Gil, 2018, pp. 253-297). Therefore, climate refugees can not be considered refugees via this convention. The intentional or discriminatory aspect is not fulfilled since the consequences of climate change are not decided or carried out by an *aggressive* agent. This *fear* factor must be objectively founded – such persecution must be considered plausible, proven, and current<sup>6</sup>.

Similarly, this research argues that climate refugees should be included in the subsidiary protection. Subsidiary protection in EU law, for example, is a form of international protection granted to people who do not qualify as refugees under the 1951 Convention and its Additional Protocol but who still face serious risks if returned to their country of origin due to threats to life, liberty or personal integrity. *Directive 2011/95/EU of the European Council* establishes the rules and criteria for granting subsidiary protection in the EU and guidelines for procedures

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<sup>5</sup> In this research, the terms *he* or *she* and *him* or *her* were replaced by the terms *their* and *them*, respectively, given gender-inclusive language.

<sup>6</sup> See the Judgment of the Portuguese South Administrative Central Court (2018) of 6<sup>th</sup> September, which defines that the "fear of persecution, given the legal requirement of [its] reasonableness, implies that it should not be reduced to a mere [subjective] condition (the appellant's state of mind), but should rather be based on a situation or factual reality of [an objective] nature, normally (in terms of the average person) generating such fear (...)".

South Central Administrative Court of Portugal, Judgment of 6<sup>th</sup> September 2018 [case no. 707/18.6BELSB]. Retrieved from: <https://inclusivecourts.pt/en/tribunal-central-administrativo-sul-proc-707-18-6belsb-06-09-2018/>. Accessed on: 17<sup>th</sup> May 2023.

for recognising subsidiary protection, rights and benefits granted to beneficiaries and other issues related to international protection. Nonetheless, other problems arise: it appears to be a stopgap solution, poorly thought out and rushed, and it could create inequality factors among climate refugees, as will be studied further in **Chapter 5.1**.

However, the 1951 Convention is not static, as he may not refuse new understandings on who may be a refugee. Proof of this is the fact that, for example, the EU considers that gender identity and sexual orientation may justify a citizen to be considered persecuted and belonging to a social group<sup>7</sup> in the refugee qualification scope, demonstrating evolution in this legal field. The *UNHCR Guidelines on International Protection regarding Gender-Related Persecution* also recognised that persecution related to sexual orientation and gender identity can include threats to life and liberty and other types of violence, discrimination, stigmatisation and social exclusion<sup>8</sup>. Similarly, the *UNHCR Guidelines on International Protection No. 9* provides guidelines on determining a person's eligibility for refugee status based on sexual orientation and gender identity, broadening the concept of persecution<sup>9</sup>. Finally, the *UNHCR's Views on Asylum Claims based on Sexual Orientation and Gender Identity* emphasise the need to assess the context in which an LGBTQ+ person lives, including culture, laws and social attitudes of the country of origin, to determine whether there is a real and serious threat to their life, liberty or personal integrity, in order to guarantee the right to asylum. This opens the door to new approaches to qualifying people as refugees.

## **2.3. Definition of Climate Refugee**

### 2.3.1. Importance of Consensus

Sea level rise will cause a displacement of 5.5 million citizens in Southeast Asia, and in Bangladesh, 10% of the territory will be submerged (Pellegrino, 2019, pp. 193-209). By 2050,

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<sup>7</sup> In Recital 30 and Article 10(1)(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13<sup>th</sup> December 2011.

<sup>8</sup> The *UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* also emphasise that persecution does not have to be only physical, but can be psychological, social and emotional, and can occur in different contexts, such as family, community and Government.

<sup>9</sup> The *Guidelines on the Recognition of Refugee Status on the Basis of Sexual Orientation and/or Gender Identity in the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* include acts of sexual violence, cruel and degrading treatment, stigmatisation, criminalisation and systematic discrimination. They also recognise that persecution can be both direct – such as physical attacks – and indirect – such as discriminatory laws or social practices.

parts of Vietnam, where about 20 million people live, and Thailand, with 10 million, will be underwater. Several cities, such as New Orleans, Shanghai, Mumbai, and Alexandria, will suffer the same fate, with many climate refugees expected worldwide by the same year (Kulp *et al.*, 2019, p. 10).

It is urgent to reach a consensus on differentiating *climate migrant* and *climate refugee* since the respective qualifications may influence the existing degree of legal protection – as the status of refugee grants greater legal safeguards. Moreover, the choice of policies and norms to deal with climate-induced displacement and the dynamics of their implementation and financing depend on this. McAdam (2012, pp. 50-51 and 96-97) notes that this conceptual uncertainty may lead to International Law violations as climate change affects Human Rights and current international policy or normative frameworks do not adequately recognise and protect these groups. Robinson (2008, pp. 3-4) points out that people already vulnerable will be disproportionately affected and that climate change reveals numerous weaknesses in our current institutional architecture, urging information gathering and collective decision-making to Law enforcement and resource allocation, recalling Article 28 of the UDHR<sup>10</sup>.

In 2018, the UN General Assembly, in the *Global Compact for Safe, Orderly and Regular Migration* (GCM)<sup>11</sup>, has set itself the goal of strengthening analysis and information sharing among States to “*better map, understand, predict and address [displacement], such as those that may result from sudden-onset and slowonset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations, while ensuring the effective respect, protection and fulfilment of the human rights of all migrants*”. In achieving these goals, it is urgent to start by outlining who will be under them. Amnesty International [(AI), 2020] recalls the obligation of States to protect these citizens against the effects of climate change, as does Human Rights Watch [(HRW), 2020], advocating changes in the definition of *refugee*, assessing climate change as “*an existential threat to humanity*”.

The very definition of *climate refugee*, its application and its respective legal effects have been addressed by UNHCR (2020a, p. 3), which warns of the importance of legal international protection in the context of forced displacement derived from climate change. However, this study highlights a point of uncertainty when the UNHCR acknowledges that not all C-IDPs

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<sup>10</sup> Which states: “*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised*”.

<sup>11</sup> This, however, is not formally binding under International Law, as it is only a politically binding commitment (UN, n.d.).

will meet the refugee criteria. The definition of *climate migrant* or *refugee* is exceptionally significant because it is directly linked to the defence of their rights in the name of the desired social and climate justice. The problem is aggravated insofar as the risk of lack of legal protection raises even more alarm bells when we remember that those most affected by climate change are mostly those in the most precarious socio-economic conditions – the *double disadvantage*<sup>12</sup>. Finally, a concrete definition is urgently needed to avoid blockages or extreme bureaucracy in legalisation processes in host countries to prevent these people from being placed in danger.

### 2.3.2. Doctrinal Divergence

We can categorise several perspectives based on classifying displaced individuals due to climate change. The term *climate refugee* is not a legal category under International Law and has no specific legal status. Likewise, it does not integrate the concept of a traditional refugee under the 1951 Convention, as it does not materialise the respective normative provision of Article 1 on the topic of persecution or its motivation<sup>13</sup>. However, considering *migrant* seems too light, seeing the absence of voluntariness. Moreover, **the use of the term *refugee* does not seem to be barred to the scope of the 1951 Convention** (Claro, 2016, pp. 67-68), given that its Article 1 states that “*under this Convention (...) is considered a refugee*”. Therefore, the path begins with the doctrinal divergence between **minimalists** and **maximalists**. **Minimalists** argue that climate change cannot be considered a reason for human displacement, while **maximalists** say it is a direct cause (Jolly *et al.*, 2015, pp. 216-224).

For **minimalists** like Warner (2010, pp. 402-413), International Law does not consider the term *climate refugee*, and climate-induced displacement is not always permanent and interstate<sup>14</sup>. The UNHCR, in the voice of Black (2001, p. 1), argues that climate change cannot

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<sup>12</sup> According to a study by StC (2021a, p. 49), in Mali, “*drought-affected communities can lack the resources to move*”, and in Mozambique, “*many children are trapped in high-risk locations because they are caring for elderly or sick parents, or lack the money, education or skills to pursue new livelihood options*”.

<sup>13</sup> Nonetheless, an individual could meet the 1951 Convention’s provision if a persecuting agent capitalises on environmental impacts for its benefit and as a means of persecution (Jubilut, 2010, pp. 275-294), or in a situation of extreme weather phenomena in which the State adopts measures that end up intentionally harming *them*, such as the construction of a dam without duly granting the right to relocate.

<sup>14</sup> Nonetheless, there are many examples of cross-border movements – especially in the future cases of the disappearance of States due to sea level rise.

be considered a reason for displacement, justifying it with other reasons<sup>15</sup>, and that the concept of *climate refugee* will be practically impossible to achieve.

On the other hand, **maximalists** present definitions for the concept and interpret *refugee* in a broader sense, along with concern about climate change (Bates, 2002, pp. 465-477). The expression *climate migrant* may be, for these, a frivolous and generic way of mentioning the reasons and nature of these movements, as well as legally unsatisfactory<sup>16</sup>. Jolly *et al.* (2015, pp. 216-224) present a definition of *climate refugee*:

*“People who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disturbance (natural and/or human-induced) which has jeopardised their existence and/or seriously affected the quality of their lives. Environmental disturbance means any physical, chemical and/or biological change in the ecosystem (or resource base) that makes it temporarily or permanently unsuitable to support human life (...).”*

For Myers *et al.* (1995, p. 25), this concept may be seen as someone who can no longer live in their place of origin due to harmful environmental events such as drought, soil erosion, desertification or deforestation, and issues associated with population pressures and deep poverty. Park (2008) presents a similar explanation but adds the aspect of “*threatened or damaged*” areas. Jacobson (1988, pp. 37-38) gives this definition positively:

*“[P]erson temporarily displaced because of local environmental disturbances, such as an avalanche or an earthquake; [those] who migrate because environmental degradation has damaged their livelihoods or poses unacceptable health risks; and [those] who resettle because land degradation has resulted in desertification or because of other permanent habitat changes.”*

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<sup>15</sup> UNHCR (2023) points out: the lack of natural resources, such as clean drinking water; the difficulties of agriculture and livestock in surviving in conditions that are too hot and dry or too cold and wet, threatening livelihoods; or the possibility of climate change acting as a threat multiplier, exacerbating existing tensions and the potential for conflict.

<sup>16</sup> The IOM (2007, pp. 1-2) defines *environmental migrants* as “*persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad*”. The expression “*or choose to do so*” wrongly accepts using *environmental migrant* for all situations of displacement due to climate change, including for those of an *a priori* forced character.

### 2.3.3. Adopted Position

Admittedly, the 1951 Convention has a too restrictive definition of *refugee*, and the concept of *climate migrant*, given its character of voluntariness, must be used so lightly to define this reality. The severity of the impact of climate change does not let a person decide, voluntarily, for *their* displacement or not. We can then suggest the concept of *climate refugee* as follows:

*A person who, although not falling within the normative provision of the concept of “refugee” in Article 1 of the 1951 Convention, is forced to leave their place of origin and seek a place of refuge in another State because of serious climatic or environmental disasters or environmental degradation in their area of origin<sup>17</sup> or residence, in the short, medium, or long term, making it impossible for them to continue their life there in safety and with respect for their rights.*

It is necessary to legally stipulate this phenomenon and recognise the associated complexity and transversality, demonstrating the direct connection with climate change. Climate refugees’ movement is not voluntary but rather an obligation for survival, as it is a serious and dangerous situation for guaranteeing rights. The *secret* can lie in this very **gravity** factor. According to Carens (2015, pp. 202-211), the threat’s gravity must be valued rather than the reason why there is a threat to Human Rights – namely, the five listed in the 1951 Convention. Therefore, the attribution of legal protection should not depend primarily on the origins of the threat, as suggested by the legislation above, but rather on its severity.

### 2.3.4. The Principle of Non-Refoulement

Considering a C-IDP as a migrant can be challenging since the voluntary decision factor is not verified, as their stay in the territories at risk does not guarantee safety for their rights. By this logic, the principle of non-refoulement, which is “*the principle of international law according to which those who seek asylum for fear of persecution, torture, inhuman treatment or any other violation of human rights because of their race, religion, nationality, social group or political opinion are prohibited from returning to their country of origin*”<sup>18</sup>, cannot be

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<sup>17</sup> As mentioned, this dissertation accepts the maximalist position, based on evidence. One might be an assessment of the impact of climate change on human displacement, commissioned by the UK Government, which states that “*the clearest evidence of the links between climate change and mobility relates to climate shock phenomena – floods, storms and short-term fluctuations in temperature and precipitation fluctuations*” (Selby *et al.*, 2021, p. 57).

<sup>18</sup> According to the definition on the *website* of the Electronic Official Gazette. Retrieved from: <https://dre.pt/dre/lexionario/termo/non-refoulement>. Accessed on: 1<sup>st</sup> July 2023.

applied. Article 33 of the 1951 Convention points to the prohibition of returning refugees to situations of danger only to refugees provided for in this same legislation. However, it is dubious to say that this principle could not apply to climate refugees, who should have the right to receive international protection. This argument, as explained by Keshen *et al.* (2021), is proven by the jurisprudence of the case *Teitiota v. Chief Executive Ministry of Business, Innovation and Employment*, which will be studied in section 2.5.3 of this research and indicates that a specific combination of environmental conditions may justify the activation of the principle of non-refoulement in the case of climate refugees. Also, in 2020, the Bordeaux Court of Appeal<sup>19</sup> prevented the deportation of a Bangladeshi citizen suffering from a respiratory disease because this State had the highest levels of air pollution in the world, defending that the same deportation would result in his death – showing the possibility of application of this principle to climate refugees.

Equally, for some authors, the principle of non-refoulement can be considered *jus cogens* (Allain, 2001, pp. 533-558), «*a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*»<sup>20</sup>. The 2022 *International Law Commission's Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)* open the door to considering the principle of non-refoulement as *jus cogens*. To be considered a *jus cogens* norm, the principle of non-refoulement must meet two main criteria, as mentioned in Conclusion 4 of the draft conclusions: it must be a norm of general international law, and it must be accepted and recognized by the international community as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general International Law with the same character.

The principle is widely accepted in the international community as an imperative norm of International Refugee Law, as it is enshrined in main instruments like the 1951 Convention. The principle is also considered a fundamental norm for protecting refugee's Human Rights. Indeed, this principle is not included in the annexe to these Conclusions listing the norms of *jus cogens*. However, this list is purely non-exhaustive, as indicated in Conclusion 23. Thus,

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<sup>19</sup> Bordeaux Administrative Court of Appeal (2020, 18 December). Decisions Nos. 20BX02193, 20BX02195. Retrieved from: <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042737615>. Accessed on: 12<sup>th</sup> May 2023.

<sup>20</sup> Article 53 of the Vienna Convention on the Law of Treaties (CVLT).

although these conclusions demonstrate that the UN does not see this principle as *jus cogens*, the opposite can be argued.

Therefore, its application could be seen as applicable to include their protection from return to territories at climate and environmental risk<sup>21</sup>, accepting a *climate refugee* legal status<sup>22</sup>. First, applying this principle to climate refugees is justified by the need to protect fundamental Human Rights, as climate refugees often face threats to their lives and well-being, and denying them protection under the principle of non-refoulement could be interpreted as a violation of the rights to life, liberty and personal security. In addition, the evolution of International Law must be considered since climate change is creating a global crisis that forces people to leave their homes due to unbearable and dangerous conditions. As such, emerging norms should encompass the protection of climate refugees as a reflection of the global consensus on the urgency of the climate crisis and the need for a humanitarian response. Finally, international ethics and solidarity also back the application of this principle to climate refugees, with the global community having the responsibility to protect those forced to relocate due to extreme weather events, many of which are exacerbated by human activities.

#### **2.4. Definition of *Climate Internally Displaced Person***

According to the UN University – Institute for Environment and Human Security, *climate displacement* refers to people who must leave their homes due to climatic factors (Integral Human Development, n.d.). However, the term is often used broadly to refer to citizens who move within their own country and those who move to other States. In other words, *climate refugees* and *IDPs* are concepts used interchangeably in many contexts.

However, this research proposes changing the nomenclature of *climate-induced displaced person* to *climate internally displaced person* (IDP) to differentiate them from *climate refugee*.

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<sup>21</sup> It is hard to argue that this principle can not apply to climate refugees. Would anyone argue that a citizen of a State which, because of sea level rise, is uninhabitable and underwater, should have to return there?

<sup>22</sup> It is difficult to consider these individuals as migrants, as they have no choice: it is *flee or flee*. StC (2021a, p. 42), in a set of interviews conducted with children affected by climate change, provides an important passage in this discussion:

*“Many of the children (...) interviewed described their decision to migrate as a matter of survival, rather than a choice, reinforcing that climate change is a key driver of [displacement] and not just a risk multiplier. For example, in Mozambique, many children said that they had to move to help their family, to look for work or to build a better house, because of flood or cyclone damage. In Fiji, loss of crops following a cyclone – which led to food insecurity – was a strong push factor for children to migrate, with a long-term goal of supporting families left behind. (...)”*

According to this proposal, *climate IDPs* should be a nomenclature reserved for individuals involuntarily displaced within their country because of climate change<sup>23</sup> – more specifically:

*A person who is forced to leave their place of origin and seek a place of refuge in the same State because of serious climatic or environmental disasters or environmental degradation in their area of origin or residence in the short, medium, or long term, making it impossible for them to continue their life there in safety and with respect for their rights.*

It is also proposed that *climate refugee* should be used to describe individuals involuntarily displaced to territories outside their country because of climate change. The use of the term *refugee* is not barred to cases under the 1951 Convention, so it will be possible to present a set of requirements for obtaining refugee status for climate refugees under another international legal instrument.

This distinction is helpful in identifying the different needs and challenges these populations face. For example, climate IDPs may have access to more resources and support from their national Government. In contrast, climate refugees may face additional challenges, such as obtaining asylum or refugee status or linking to language barriers. The term *climate refugee* could also draw attention to the need for greater legal protection and assistance for these people.

## **2.5. The Worsening Situation of Minor Climate Refugees and Internally Displaced Persons**

### 2.5.1. Background

Although there are no exact figures regarding minors in this situation, the UN has pointed out in 2020, close to 10 million displaced children due to climate phenomena. Moreover, half of the world's young population – around 1 billion – lives in regions at high risk of climate change impact (Hall, 2022). Some examples can be Bangladesh – with hundreds of thousands of citizens, many of them minors, forced to *flee* the floods (International Federation of the Red Cross, 2022) –, West Africa – with the strengthening of terrorist groups by desertification,

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<sup>23</sup> This definition would correspond to a branch of the category of IDPs, which are “[p]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border” (International Federation of the Red Cross, 2021, p. 5).

causing another flight of millions (Kamal, 2018) – or sea level rise in the Pacific and Oceania (Black, 2018). In this case, take the example of Tuvalu, a *drowning*<sup>24</sup> State where we see numerous health problems relating to minors’ precarious and unsafe access to water and food.

There are several problems that climate change causes to children, often resulting in their displacement and not always accompanied by their families. As StC (2021a, p. 42) notes, “[i]n Mozambique and Mali, the majority of children made the decision to move by themselves, working en route to their destination to pay for their journey”. The same pattern of *loneliness* appears to hold in Iraq and Fiji. This NGO research also shows that the number of minors moving alone has been increasing: in 2017, there were about 300.000, five times the 2012 figure, and the number is now even higher. In Fiji, 58.000 children had to *flee* due to cyclones and floods since 2008, being aware that extreme climatic phenomena lead to involuntary displacement<sup>25</sup> (StC, 2021a, p. 37). It was mainly girls who justified their displacement by needing a place that guaranteed access to educational opportunities, in an alarming sign of gender inequality.

#### 2.5.2. Added Disadvantages Associated with Childhood Facing Climate Threat<sup>26</sup>

As stated by StC (2021b), **children are most at risk physically and psychologically**, usually separated from their families, increasing susceptibility to violence, abuse, and exploitation. It indicates that minors born in 2020 would suffer 6.8 times more heat waves, 2.8 times more floods and 2.6 times more droughts than their grandparents. Sub-Saharan Africa, which has the youngest population in the world and where the proportion of younger age groups on the continent is projected to continue to increase until 2060, can have 85 million climate refugees

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<sup>24</sup> It is estimated that, by 2050, Tuvalu will no longer have territory above the sea (Humanium, 2020).

<sup>25</sup> According to the study, “in Mozambique, children highlighted that weather-related events had undermined their and their family’s ability to grow food and earn a living, which influenced their decision to move. Similarly, in Mali, food insecurity resulting from rainfall variability and drought was the most commonly cited driver of migration [displacement]. In Peru, children noted that the loss of crops due to heavy rain, flooding, drought, and frost had caused them to leave their communities to find work” (StC, 2021a, p. 39).

<sup>26</sup> However, it is essential to remember that, in the context of displacement, “youth (aged 15–24) often face many of the same challenges as children, particularly older adolescents (aged 15–19)” (UNICEF, 2022a, p. 16). The problem is that “youth aged over 18 are regarded as adults, [and therefore] they lack some of the protections extended to children”, including those in the UNCRC. Young people often lose their social support networks and move independently. Another problem for young people is that their education may also be interrupted – the UNCRC, in Article 28, obliges that secondary and higher education is available and accessible to all. As UNICEF also says, “[y]outh may lack life and work-related skills and experience that leave them susceptible to exploitation or abuse”.

and IDPs by 2050 (World Bank, 2018). Finally, according to the World Health Organisation, environmental factors are responsible for a quarter of deaths in the adult population. However, the situation worsens in under-14s, taking responsibility for a third of deaths (Prüs-Üstün *et al.*, 2006, p. 6).

According to StC (2021a, p. 28), children living in high-risk settings report that climate change is already affecting their lives. Take, for example, the heavy rains that disrupt school attendance and affect food security in Iraq because of their impact on agriculture. Also, note the case of Mali, where variable rainfall patterns cause dramatic fluctuations between extreme wet and dry conditions, while in Peru, cold fronts have intensified, resulting in an oscillation between increased flooding and prolonged drought. Thus, children are disproportionately affected by the climate crisis, a situation made worse by the sparse database, making it impossible to understand this reality better.

As Watts (2021, pp. 129-170) explains, there are anatomical, cognitive, immunological, physical, and psychological differences between children and adults, with greater vulnerability in the former, which makes them, for example, more sensitive to situations of malnutrition, often originating from the consequences of climate change (Mitchell *et al.*, 2014), but also to diseases and infections. Proofs of this are seen in Costa Rica – with children more vulnerable to water contamination because of sea level rise, storms, and floods –, Iraq – with numerous water-borne diseases due to low rainfall and water scarcity – and Peru – with effects of extreme climate events on their physical development (StC, 2021a, p. 29).

Regarding children's **ability and method of adaptation and reaction**, social, economic, political, and cultural factors also influence access and understanding of information (Brown *et al.*, 2020, p. 15). Conflict situations usually go *hand in hand* with climate change, with one-sixth of the world's children – 420 million – living in conflict zones. Moreover, as resources become increasingly scarce, the social order destabilises (StC, 2021b)<sup>27</sup>. Children are also especially at risk or as targets of exploitation and child trafficking (Verdasco, 2013, p. 30).

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<sup>27</sup> In Mali, for example, “*the impact of climate change, which has undermined traditional livelihoods, combined with a fragile security state has resulted in a large number of children adopting perilous coping strategies, including joining armed militia*” (StC, 2021b).

### 2.5.3. General Comment No. 26 on Children’s Rights and the Environment, with a Special Focus on Climate Change

The 2023 *UN Committee on the Rights of the Child’s (CRC) General Comment No. 26*<sup>28</sup> highlights the urgent and systemic threat posed to children’s rights globally by the triple planetary crisis, which includes the climate emergency, biodiversity collapse, and pervasive pollution. It states that, in applying a child rights-based approach to the environment, it is crucial to consider all children’s rights under the UNCRC and its Optional Protocols<sup>29</sup>. This dissertation truly values the recognition that children have the right to be protected from environmental harm that affects their rights and be seen as active participants in climate matters – with special attention given to disadvantaged children’s barriers.

A clean, healthy, and sustainable environment is a Human Right, essential for fully enjoying various children’s rights. According to this General Comment, the components of this right encompass vital elements for children’s well-being, including clean air, a stable climate, robust ecosystems, biodiversity, safe water, healthy food, and non-toxic environments. Conversely, environmental degradation harms these rights, especially for children in disadvantaged situations or highly climate-exposed regions. Moreover, children’s exercise of their rights to expression, assembly, information, education, and participation can lead to more ambitious and effective environmental policies, creating a positive cycle between children’s rights and ecological protection while addressing future environmental threats resulting from their actions or omissions.

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<sup>28</sup> General Comments issued by UN committees are interpretative documents that clarify the application and implementation of their respective conventions. These comments are not binding in themselves, i.e. they do not have the force of an international treaty, but they have significant legal value and are widely recognised as sources of guidance in the legal interpretation. They mainly clarify how rights should be understood and implemented in the light of existing provisions in specific conventions.

The authority and weight of the General Comments can be explained as follows: they provide detailed guidance on how some rights can be understood and applied in different contexts; they can be used as sources of reference in national and international litigation related to certain rights; monitoring bodies often rely on these Comments to assess States’ compliance with their obligations in their periodic reports; and they contribute to the development of International Law by promoting a uniform and advanced interpretation of certain rights throughout the world.

<sup>29</sup> This General Comment delves into a comprehensive array of fundamental children’s rights within the framework of environmental conservation. It proves this dissertation’s view of valuing a group of children’s rights that must be protected regarding climate change. These rights encompass: non-discrimination (Article 2 of the UNCRC); best interests of the child (3); life, survival, and development; right to be heard (12); freedom of expression, association, and peaceful assembly (13 and 15); information (13 and 17); freedom from all forms of violence (19); highest attainable standard of health (24); social security and adequate standard of living (26 and 27); education [arts. 28 and 29(1)(e)], and rest, play, leisure, and recreation (31). The rights of Indigenous children and children belonging to minority groups, predicted in Article 30 of the UNHCR, are equally not forgotten.

Therefore, the Committee recommends that States undertake immediate actions, including enhancing air quality to prevent child mortality, ensuring access to safe water and sanitation to combat waterborne illnesses, transitioning towards sustainable food production to address malnutrition and promote children's growth, and phasing out the use of fossil fuels in favour of renewable energy sources to combat the climate crisis. Conserving, protecting, and restoring biodiversity, preventing marine pollution, and regulating and eliminating toxic substances with adverse health effects on children are also highlighted.

Furthermore, procedural aspects, such as granting children access to information, involving them in decision-making processes, and providing child-friendly admission to justice with effective remedies, are crucial for empowering children to become active agents in shaping their futures. States are also encouraged to incorporate the right to a clean, healthy, and sustainable environment into their national legislation and implement the necessary measures to ensure accountability. This right should be integrated across all decisions and measures affecting children, including education, recreation, access to green spaces, child protection, children's health, migration, and national frameworks for Convention implementation.

Therefore, this General Comment is positive when it elucidates that States, in cooperation, must ensure a clean, healthy, and sustainable environment to protect children's rights, avoiding ecological harm, protecting children from hazards, and prioritising their well-being while transitioning to clean energy. In addition, this dissertation highlights that child rights impact assessments in environmental decisions should consider direct and indirect effects, transboundary and cumulative impacts, and children's vulnerabilities, involving children and experts and sharing findings in child-friendly language. Equally constructive is the indication that businesses must respect children's environmental rights. Accessible remedies for children in environmental matters, including complaint mechanisms, which should be inclusive and provide free legal aid, innovative remedies, and support for children affected by violations, are also crucial, and this General Comment points out reasonably.

Therefore, urgent collective action is needed, while inadequate progress in meeting global warming commitments poses increasing risks to children. Developed nations should support developing countries in implementing child-focused mitigation measures, and climate change's intensifying impact on children's rights calls for urgent, child-sensitive adaptation measures. Therefore, this August's general comment is of paramount importance, ensuring that issues related to climate change and its impacts on children are addressed comprehensively, in detail, and in global coordination for present and future generations.

### **3. The (Deficit of) Legal Framework for Climate Refugees and Internally Displaced Persons**

#### **3.1. International Law**

Several sources in International Law spell out legal obligations for States. Firstly, they are legally bound by the Human Rights conventions they have ratified and must act in good faith<sup>30</sup> since they are not free to choose whether to fulfil their obligations under International Human Rights treaties. States must avoid violating these rights, protect people against violations by third parties and take measures to ensure that everyone in their territory effectively enjoys these rights. Therefore, national Laws can only justify non-compliance with these obligations if they have made specific reservations to the treaties that allow such conflicts.

Moreover, the 1966 **International Covenant on Economic, Social and Cultural Rights (ICESCR)** establishes economic, social, and cultural rights at a universal level. Regarding climate refugees and IDPs, it may be relevant, although in a limited and complex way, due to the absence of specific references to the group studied and the need for interpretation. This convention has particularly relevant norms, such as the rights of access to housing (Article 11), health (Article 12), education (Article 13) or culture (Article 15). Similarly, there are CESCR General Comments which indicate what the signatory States should do to implement, in good faith, the ICESCR in the field of migrants, refugees and IDPs, giving us an understanding of its provisions, even if not expressly, concerning climate refugees. General Comment No. 7 condemns the practice of forced evictions that seriously affect refugees, including forced population transfers. General Comments Nos. 12 and 14 indicate that States are responsible for cooperating in providing disaster relief and humanitarian assistance, including to refugees<sup>31</sup>. By Article 2 of the ICESCR, States must take steps, individually but through international cooperation, to achieve the full realisation, without discrimination, of Human Rights. These steps must be taken progressively, and measures, including legislative ones, must be adopted<sup>32</sup>.

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<sup>30</sup> Article 26 of the VCLT, adopted in 1969, entered into force in 1989.

<sup>31</sup> Other crucial points are derived from CESCR General Comments No. 13 – which highlights the need to promote technical and vocational education for disadvantaged groups, including children of migrant workers and refugees – and No. 10 – which insists on the importance of fair treatment and trial for all children suspected or accused of having infringed Criminal Law, including refugee and asylum-seeking children.

<sup>32</sup> However, these measures, which can be of administrative, financial, social, educational, or other nature, must be assessed according to the criterion of reasonableness (decisions must be reasonable and non-arbitrary, assessing the proportionality and adequacy of State actions or omissions to achieve a given objective), in harmony with Article 8(4) of the ICESCR. The obligations of the States Parties about the rights foreseen in the ICESCR are of

Furthermore, the **International Covenant on Civil and Political Rights (ICCPR)**, focusing on civil rights such as the right to life (Article 6) and the prohibition of inhuman and degrading treatment (Article 7), holds particular relevance in this discourse, also establishing important rights like freedom of movement (Article 12) and fair trial (Article 14). It represents another international set of norms that does not directly address climate refugees or IDPs, yet presenting crucial issues that may emerge during displacement processes. The protection of the life and safety of these (Article 6) and the prohibition of torture or cruel, inhuman, or degrading treatment (Article 7) represent some of its valuable predictions. McAdam (2011a, pp. 18-36) even mentions that the ICCPR could be applied to climate refugees, although without express reference in its legal text.

Nonetheless, it would be another job of interpretation. The reliance on interpretive efforts to extend the application of the ICCPR to climate refugees introduces a complex challenge. While the *Teitiota case* indirectly offers a promising precedent (as shown in **Chapter 3.3.**), the necessity for interpretive measures underscores the nuanced nature of this application. The difficulty lies in the fact that relying solely on interpretation introduces uncertainty and may not provide the robust and unequivocal legal protection that climate refugees urgently require. Indeed, applying international Human Rights instruments, such as the ICCPR, to address the rights of climate refugees presents a complex challenge that largely relies on interpretative efforts. First, the ICCPR primarily focuses on civil and political rights and does not explicitly address climate refugees' unique challenges. Therefore, applying ICCPR protections requires broadening the interpretation of existing rights to encompass climate refugees' specific needs and vulnerabilities<sup>33</sup>. Another problem is determining the extraterritorial application of the ICCPR. Climate refugees cross international borders, and their rights may be impacted in their home country and the country they seek refuge in. Clarifying States' obligations regarding extraterritorial Human Rights responsibilities is a complex legal issue. In addition, interpreting the ICCPR requires balancing the rights of climate refugees with States' obligations – while these must protect Human Rights, they also have security and sovereignty concerns. Thus, striking the right balance in interpreting and applying the ICCPR is delicate.

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*progressive realisation*, that is, countries commit themselves to work towards the full realisation of these rights, yet, as resources allow – however, they also have certain immediate obligations, such as the guarantee of non-discrimination in the exercise of these rights.

<sup>33</sup> Nevertheless, interpreting the 1966 ICCPR would reflect a growing awareness of the interconnectedness of Human Rights and environmental issues and the idea that certain environmental and social conditions can directly affect the enjoyment of civil and political rights.

Therefore, interpreting the ICCPR to accommodate the specific circumstances of climate-induced displacement creates room for varying perspectives, leading to inconsistencies. As a result, the comprehensive protection of climate refugees' rights may not be as assured as it could be under a dedicated legal framework specifically tailored to their situation. The principle of legal certainty, a cornerstone of International Law, dictates that individuals should have access to clear and unambiguous legal norms that ensure their rights are protected predictably (Council of Europe, n.d.). Therefore, relying on interpretive measures needs to be revised to guarantee security and legal protection for climate refugees.

Moreover, applying the ICCPR to climate refugees could result in obligations for States, but it would also have significant limitations. States would be obligated not to discriminate [Article 2(1)], to protect life and physical integrity (Articles 6 and 7), provide access to basic resources (Article 1) and protect their families and children (Articles 23 and 24). Nonetheless, it would not directly address the complexities of climate-induced displacement situations. Worse, there is no solid legal basis for recognising them as refugees, and it would require comprehensive responses that go beyond States' obligations by the ICCPR.

Moreover, it is usual to verify discrimination towards migrants, refugees, and IDPs in accessing these rights due to closed borders policies. Nonetheless, General Comment No. 31 of the CESCR, for example, points out that Article 2(1) of the ICCPR imposes on the signatory States the obligation to respect and guarantee the rights provided for all those who, regardless of nationality or statelessness<sup>34</sup>, stand under the power or effective control of a State, including refugees, migrant workers and IDPs. For its part, General Comment No. 32 points out that Article 14 of the ICCPR guarantees the right of access to the courts and equality before the Law to all individuals regardless of their nationality or statelessness, including refugees, migrant workers, and unaccompanied children.

Social and economic rights, on the other hand, often entail comparatively weaker obligations. However, these considerations acquire heightened significance when their impact rises to a level where they breach fundamental rights enshrined within the ICCPR. The ICCPR's emphasis on civil and political rights reinforces their foundational status within the international legal framework. Thus, it is essential to approach socio-economic considerations seriously, particularly when they reach a threshold of gravity that engenders violations of core

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<sup>34</sup> One problem that can arise is that these rights are only guaranteed to those under the jurisdiction of a State, but if such individuals are not considered refugees, they can be refused entry.

principles such as the right to life and the prohibition of inhuman and degrading treatment – which, however, are not economic, social and cultural rights.

In light of the *Teitiota case* (as seen in **Chapter 3.3.**), it becomes apparent that the ICCPR’s right to life has already been employed to address climate-induced displacement, indicating that the principles within the ICCPR are adaptable to such scenarios. However, the challenge lies in consistently and systematically applying this interpretation to all instances of climate-induced displacement, ensuring that the right to life is seen as a fundamental protection for these. The *Teitiota case* underscores the adaptability of the ICCPR but also highlights the importance of a coherent and standardised approach to interpretation. The right to life was interpreted as encompassing immediate threats to life and broader challenges arising from climate changes, and the Court recognised that the gradual impact of environmental degradation and loss of habitable land could violate the right to life. This broader interpretation of the right to life in the context of climate-induced displacement highlights the potential applicability of Human Rights provisions to such situations. Nonetheless, the complexity lies not in the absence of specific terminology but in the interpretation and consistent application of existing legal provisions, indicating the need for further legal measures to address International Law’s unique challenges these vulnerable populations face, in particular, knowing that the decisions of the multiple courts in the *Teitiota case* have indeed shown that International Law is not yet fully prepared to ensure adequate protection for climate refugees.

Regarding the legislation on migrants, refugees, and stateless persons, the **1951 Convention** is the main instrument for the international protection of refugees. However, as seen in the **Chapters above**, more is needed to effectively protect climate refugees and IDPs.

The **UN Convention relating to the Status of Stateless Persons (1954 Convention)** sets out the rights and obligations of stateless persons, i.e. “*a person who is not considered as a national by any State under the operation of its law*” (Article 1). It establishes the obligation of protection and assistance by States to stateless persons in their territory (Article 2), as well as the attribution of nationality by the same States to individuals who, if this does not happen, will be stateless (Article 3). It could be argued that a similar situation should occur in the case of someone who lost *their* nationality due to climate change, a situation that the UNHCR (2009, pp. 2-3) has already mentioned. The scenario of someone losing nationality due to climate change could occur in situations where the effects of climate change, such as sea level rise or environmental degradation, lead to the submergence or uninhabitability of a territory. As a result, the individuals residing in those areas might find themselves in a situation where their

home country is no longer viable or habitable. As it will be studied in **Title 4**, this could manifest as territorial loss, with the complete submergence of a nation's territory due to sea level rise, with States disappearing. As the land vanishes, the sovereignty and existence of that nation could be compromised, leaving its citizens without a recognised nation and nationality, much like stateless individuals. This is where the 1954 Convention could potentially come into play. However, adapting this to protect climate refugees requires an extensive and innovative interpretation of its provisions. Moreover, the problem lies in the fact that this convention was designed with the protection of stateless people in mind due to historical or political factors, which requires an extensive interpretation if we want to consider protecting climate refugees under its umbrella.

Likewise, there is the 1990 **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)**. Once again, this convention also lacks references to climate refugees and IDPs. However, several norms in its text could be analogously understood as applicable to those. For example, Article 7 establishes the principle of equal treatment between migrant workers and nationals in the States. This could be interpreted broadly to ensure that climate refugees and IDPs are entitled to equal treatment with locals, including access to basic services and social protection. Article 8 establishes the right to equal protection under the Law for migrant workers, which could guarantee C-IDPs their legal rights and protection against discrimination. Applying Article 12 would reinforce the same non-discrimination, and Article 16 would guarantee special protection in situations of vulnerability. Finally, Article 43 would guarantee access to social services on equal terms with nationals. Nevertheless, a broad interpretation of the norms would be necessary, which would not guarantee the desired legal certainty to protect C-IDPs.

In the insufficiency of legal protection expressed by the previous international conventions focused on migrants, refugees, or stateless persons, legal provisions regarding climate change must be studied. The 1994 **UN Convention to Combat Desertification (UNCCD)**, aimed to promote the recovery of degraded areas, references climate-induced displacement and recognises that desertification can lead to forced displacement. The UNCCD Recital identifies that desertification can lead to forced displacement, emphasising the need to address this challenge under International Human Rights Law and standards. Article 2(d) of its Annex III highlights the interconnection between desertification, drought and displacement. Article 3(e) also states the importance of considering the social, economic, cultural, and environmental dimensions of desertification and associated displacement. Finally, Article 11(f) states that

forced displacement caused by desertification is often a cross-border problem that requires coordinated action between states.

Likewise, the 1992 **UN Framework Convention on Climate Change (UNFCCC)** aims at stabilising the concentration of greenhouse gases in the atmosphere at levels that do not dangerously interfere with the planet's climate. Although not referring to climate refugees or IDPs, Article 4 establishes responsibilities for the signatory States to combat and control the effects of climate change at the social level. However, it does it precariously and suffers the same deficit of provisions on C-IDPs as the UNCCD<sup>35</sup>. One of the main challenges is the need for clearer definitions for climate refugees and IDPs in relevant legal instruments. Then, although the UNCCD and the UNFCCC recognise the relationship between desertification, climate change and displacement, they address these issues in a fragmented way and do not provide an explicit, comprehensive legal framework for protecting climate refugees and IDPs. These instruments also establish goals but do not impose specific legally binding obligations concerning protecting C-IDPs' rights, leaving room for discretion. Finally, including specific provisions for these in existing instruments faces complex political and legal challenges, including some States' resistance to accepting new legal obligations. Therefore, we do not find adequate international legal protection for climate refugees and IDPs in the legal fields of human displacement and environment.

On the other hand, the 1965 **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)** aims to eliminate ethnic discrimination, including access to nationality for refugees and stateless persons. This prohibition of discrimination, although not intended directly for climate refugees and IDPs, can be significant since these commonly suffer from prejudice, inequality, or social exclusion in the territories to which they flee.

Still, it is crucial to refer to two regional legal instruments that are some of the few examples of Hard Law regarding climate refugees and IDPs. First, the 2009 **African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)** presents progress by recognising that climate change and natural disasters can lead to internal displacement and establishing principles and guidelines to deal with them. This convention emphasises that all IDPs have the right to equal treatment and protection, recognises the importance of preventing internal displacement, and urges States to take measures to avoid displacement wherever possible while establishing the obligation to protect

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<sup>35</sup> Nevertheless, the UNFCCC gave rise to the Paris Agreement, as studied in **Chapter 3.2**.

and assist IDPs by ensuring their access to adequate living conditions, including shelter, food, health care and education. It also has specific guidelines for dealing with internal displacement resulting from natural disasters, including measures to reduce risks, planning for resettlement and humanitarian assistance, and drafting policies and risk management strategies. This convention even designates principles and procedures for IDPs' voluntary and dignified resettlement. Finally, it recognises the need for special protection for vulnerable groups such as women, children, the elderly and people with disabilities. However, it does not specify climate refugees.

As for the **African, Caribbean and Pacific Group of States-EU Partnership Agreement (Cotonou Agreement)**, Article 13 establishes the need for cooperation among the signatory parties on mobility issues. While it does not explicitly refer to climate displacement, this cooperation can be interpreted to include protecting and assisting C-IDPs. The agreement recognises the importance of adequately managing migration flows and addressing issues like irregular migration, human trafficking, and repatriation, which can be relevant when dealing with climate displacement. Article 13 also emphasises the importance of promoting legal and safe migration, which can be relevant for climate refugees seeking safety due to environmental disasters. Additionally, the agreement provides technical and financial assistance to support the implementation of migration-related provisions, which can be used to aid in protecting C-IDPs. However, it does not explicitly mention refugees and climate displacement, creating legal uncertainty and, once again, the need to resort to interpretation.

Similarly, there is the 1969 **Organisation of African Unity Convention (OAU Convention)** on the specific problems of African refugees, such as those fleeing conflicts in the context of decolonisation. The OAU Convention extends protection to all those fleeing any danger in a portion of the territory of the State of origin (Hathaway, 2012, p. 180). Several countries show practices stemming from this document<sup>36</sup>. Nonetheless, the document does not clarify whether displaced persons from natural disasters are considered refugees (Okello, 2015, p. 25).

Finally, the 2015 **Paris Agreement**, under the UNFCCC, aims to keep the increase in global warming to 2°C, striving for a maximum value of 1,5°C. It recalls the importance of protecting Human Rights regarding climate change, particularly regarding human displacement and supporting the most affected States. Article 11(1) even points out that it aims to strengthen “*the*

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<sup>36</sup> Ethiopia received 450.000 refugees between 2009 and 2014 on a policy that they could live outside refugee camps if they could support themselves autonomously. Likewise, Uganda had a similar policy and offered land for cultivation to those received into the country.

*capacity and capability [of] countries with the least capacity, such as least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing states, to act effectively on climate change*". However, it does not explicitly apply to climate refugees.

Therefore, International Conventional Law has left climate refugees and IDPs in the lurch. Outside the scope of protection of the 1951 Convention and without express references in the main international Human Rights legal instruments, C-IDPs remain stagnant in an insufficient legal framework of non-existent distinct *status*.

### **3.2. Soft Law**

Although it is often a definition that does not gather consensus and opens room for discussion, we can characterise Soft Law as non-binding, informal commitments between States (Kdhir, 1997) or rules whose normative value is limited, not creating positive Law obligations or creating obligations with little possibility of sanction (Salmon, 2001). Snyder (1994, p. 2) seems to enunciate the most generalised definition: "*rules of conduct which, in principle, have no legal force, but which may nevertheless have practical effects*". Teixeira de Sousa (2013, p. 104) sees Soft Law as a non-sanctioning Law with diminished imperativeness. This can be observed as declarations, guidelines, recommendations, or other documents that emanate non-legally binding principles or standards, several of which exist in the field of climate refugees and IDPs. While Soft Law is not binding, it can help establish important standards and principles for future action, as well as public awareness and pressure to policy-makers.

The **UDHR**, adopted by the UN General Assembly in 1948, has several references to issues relating to climate refugees and IDPs. Article 14 states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution" – however, the spectre of persecution looms, and it is challenging to apply it to climate refugees due to the difficulty in justifying this requirement. Nevertheless, Article 25 states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control", which are crucial rights for C-IDPs who need assistance to rebuild their lives where they settle. Yet, the UDHR is not legally binding due to its nature as a declaration of the Un General Assembly. However, many of its provisions are considered part of International Customary Law, so they are recognised and accepted by the international

community as legal norms that States must respect. Therefore, although the UDHR is not a legally binding treaty, its provisions influence and inform the creation of Human Rights laws and treaties and are considered global Human Rights standards – its provisions have even been enshrined and developed in binding conventions, such as the ICCPR and the ICESCR.

There is also the 1984 **Cartagena Declaration on Refugees**, a non-binding regional legal instrument stemming from the conclusions and recommendations of the Cartagena Colloquium, organised by the UNHCR and approved in 1985 by the General Assembly of the Organisation of American States. Its Chapter 3(1) extends the definition of *refugee*: “(...) *in addition to containing the elements of the 1951 Convention and the 1967 Protocol, [it] includes (...) persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*”. This declaration is living proof that the definition of *refugee* may not have to follow the procedures of the 1951 Convention<sup>37</sup>.

The 2015 **United Nations 2030 Sustainable Development Agenda** sets out 17 Sustainable Development Goals to be achieved by the beginning of the next decade in a coordinated action by Governments, the private sector and civil society and with the motto: “*Leave no one behind*”. However, there is no reference to climate refugees, more so when an entire goal – No. 13 – is dedicated to climate action. Nevertheless, some important goals for this group are valued, albeit tacitly, such as access to education for the most vulnerable, recognition of the contribution of IDPs and refugees to inclusive and sustainable growth and a commitment to international cooperation to ensure safe, orderly, and regular human movements and respect for Human Rights (Goal No. 10). It is undeniable that these goals are important for realising C-IDPs’ Human Rights, even if not expressly mentioned, regarding preserving their dignity and creating opportunities for personal, social, and professional development.

The 2016 **New York Declaration for Refugees and Migrants (NYD)** has commitments to fully protect all refugees’ and migrants’ Human Rights, regardless of their status, and to design responses to large movements in harmony with International Law. From the NYD emerged the 2018 **GCM**, which presents a set of international principles aimed at protecting these groups and dividing responsibilities among 193 States with a view to this mission, supporting them.

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<sup>37</sup> International Law can perfectly well include the group studied by this research in this definition of people who have fled their places of origin “*because their lives, safety or freedom have been threatened by (...) other circumstances which have seriously disturbed public order*”.

This State distribution of burdens is one of the demarcation points of this pact concerning the 1951 Convention, as the latter does not address this issue. Another novelty is the express reference to climate and environmental degradation, as well as natural disasters – however, being directly characterised as not being causes of human displacement (UN, 2018).

Finally, the 2015 **Sendai Framework for Disaster Risk Reduction** establishes principles and measures to reduce disaster risk and strengthen the resilience of vulnerable communities, including those affected by climate change. Similarly, the **IOM’s Institutional Strategy on Migration, Environment and Climate Change 2021-2030** describes how this organisation will support States in assisting and protecting *migrants* and IDPs affected by climate change, environmental degradation and calamities resulting from natural disasters.

Still, the two common problems to all these documents are the **need for an express reference to climate refugees and IDPs** and their **non-binding nature** for signatory States<sup>38</sup>. Thus, C-IDPs’ protection remains limited, dependent on States’ goodwill, and legally uncertain.

### ***3.3. Teitiota v Chief Executive Ministry of Business, Innovation and Employment Case***

The insufficient international Human Rights framework regarding climate refugees and IDPs is not confined to the legislative side. As this is a relatively new issue, no extensive case law exists. Often, the courts’ focus turns to the obligations of States to combat climate change or mitigate its consequences, yet the focus on climate refugees needs to be more present.

However, the *Teitiota v Chief Executive Ministry of Business, Innovation and Employment case* – the *Teitiota Case* – [United Nations Human Rights Committee (HRC), 2020] presents an essential milestone in the discussion on the legal protection of this group. This HRC decision is by many considered a breakthrough on climate refugees. The summary of the step forward taken with this decision can be understood according to the words of the UN High Commissioner for Refugees, Filippo Grandi (Baker, 2020):

*“If you have an immediate threat to your life due to climate change, due to the climate emergency, and if you cross the border and go to another country, you*

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<sup>38</sup> There is also the 2015 **Nansen Initiative Protection Agenda – Disaster Displacement**, by Norway and Switzerland, adopted by 109 States, which, although not representing Soft Law, ended up emanating principles that broadly describe a framework with the actors responsible for policymaking on natural disaster-induced displacement, being an important step towards putting the topic on the table in legal and international discussions.

*should not be sent back because you would be at risk of your life, just like in a war or in a situation of persecution.”*

Nevertheless, this decision does not represent something entirely positive when it is noted that the request for protection in question was not acceded to.

### 3.3.1. Contextualisation

For part of the 2000s, Ioane Teitiota and his wife struggled to make ends meet in Tarawa, on the island State of Kiribati, due to uncultivable land caused by high tides and flooding. For this reason, in 2007, they decided to move to New Zealand, where they found employment. Several years – and three children – later, with their lives already settled in their new country, the problems returned: their work visas expired, and so the Teitiota family lost their legal status in New Zealand, being deported to Kiribati.

The family, therefore, applied for asylum<sup>39</sup>, seeking to remain on New Zealand territory either as refugees under the 1951 Convention or through complementary protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR due to the effects of climate change on their region of origin. The New Zealand Immigration Court (the *Court*), but also the HRC itself, found the evidence presented by the Teitiota representation to be precedent, namely about issues such as loss of land, coastal erosion, increased number and intensity of storms and floods, water contamination, and the related spread of diseases among the population – especially children. These bodies accepted that these circumstances made living conditions on the island unworkable. However, they both ruled against Teitiota.

### 3.3.2. New Zealand Courts

Although Teitiota’s representative called for considering the family as refugees, he needed to remember the necessary differentiation between the term's sociological and legal concept. While it is true that, as explained above, this dissertation agrees with the argument used by counsel that the term *refugee* is not confined to the legal meaning of the 1951 Convention, in a trial, it is the legal argumentation that counts, as the Court explained.

Likewise, the Court did not accept the claim that Teitiota could fall within the group of victims of *persecution*. However, as Grahl-Madsen (1972, p. 193) explains, while it is true that

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<sup>39</sup> Under Section 198 of New Zealand’s Immigration Act 2009.

this term is not legally defined, we can understand that “*this was probably deliberate*” because it was intended to “*introduce a flexible concept which might be applied to circumstances as they might arise*”. Only that the Court, like the New Zealand Supreme Court (the *Supreme Court*)<sup>40</sup>, understood *persecution* in the light used by Hathaway *et al.* (2014, p. 101) and required the verification of a “*sustained or systemic violation of basic human rights demonstrative of a failure of state protection*”<sup>41</sup>, involving direct human action. Teitiota’s lawyer still claimed an “*indirect but global human action*” at the origin of the harmful effects of climate change, but the judge declined, and refugee status under the 1951 Convention was not accepted, nor was protection status granted under the ICCPR. This was always the problem: the absence of a persecuting agent, and after successive appeals, the author’s appeal was refused. However, the door was not completely closed for the future since, as the Supreme Court’s judges said:

*“Both the Court and the Supreme Court emphasised that their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway to the Refugee Convention or protected persons jurisdiction. Our decision in this case should not be taken as excluding that possibility in an appropriate case.”*

However, the Supreme Court eventually implied that it takes the classic minimalist position of not considering climate change a cause of displacement but rather a factor that may lead to the origin of real causes of such flows, for instance, armed conflict or economic reasons. Furthermore, if, in this case, both the Court and the Supreme Court were to accept the requirement for asylum under the 1951 Convention, then there are reasons to alarm since these institutions place possible climate refugees in a situation of two *bad* hypotheses: either the request is considered unfounded since there is no sufficient reason under the 1951 Convention or the request can be accepted, but, to do so, there must be a situation of violence or violation of Human Rights as provided for in the same document. Therefore, in addition to being threatened by climate change, according to the Court and the Supreme Court, the family would have to experience a truly hostile situation in terms of violating their rights to benefit from the

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<sup>40</sup> Supreme Court of New Zealand. (2021). *Teitiota v Chief Executive Ministry of Business, Innovation and Employment*. Retrieved from: [https://www.refworld.org/cases,NZL\\_SC,55c8675d4.html](https://www.refworld.org/cases,NZL_SC,55c8675d4.html). Accessed on: 23<sup>rd</sup> April 2023.

<sup>41</sup> Nonetheless, it is verifiable *in casu* since the effects of climate change are systemic and have negative implications on Human Rights, individually and collectively.

legal protection status they sought<sup>42</sup>. The fact is that, for the Supreme Court, climate change has no directly and intentionally responsible agent<sup>43</sup>, and it does not resemble the classic grounds for refugee status, namely serious breakdowns in public order and security, but it has a long-term effect. The Supreme Court rejected Teitiota's appeal, forcing him and his family to return to the territory from which they had fled.

After deportation, Teitiota filed a complaint with the HRC. Since the institution only has jurisdiction over alleged violations of the ICCPR and not about claims for refugee status under the 1951 Convention, the plaintiff converted it to portray a claim concerning an alleged violation of the right to life (Article 6 of the ICCPR) by the New Zealand State, based on violation of the principle of non-refoulement.

### 3.3.3. Human Rights Committee

The HRC accepted the case with the same claims of proof used in the New Zealand courts – only with the addition that one of the children allegedly ended up ill due to consuming contaminated water in Kiribati. However, again, the appeal failed, with the HRC arguing in its decision that the estimated period for the threat – that is, between 10 to 15 years – still allows the Government of Kiribati, with assistance from the international community, to take steps to protect and, where necessary, relocate its population.

However, many praise the HRC decision for advancing the discussion on the topic of climate refugees, as the same decision also states that “*the effects of climate change on states may expose individuals to a violation of their rights (...) and thus triggering the obligation of non-refoulement*”. As Courtoy (2020) adds:

*“[U]ntil recently, the idea that the principle of non-refoulement could apply to persons who have fled the effects of climate change might still seem far-fetched. With this new decision, States must now duly motivate their refusal in the light of the actual situation suffered by the applicant for international protection, bearing in mind that they may have an obligation to receive him or her if what has been*

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<sup>42</sup> A strange decision as it requires that a citizen must reach too deep a level of absence of access to *their* rights to receive the proper protection. The *path* should be the prevention against situations of danger for people and not of *reception* only in situations with a level of seriousness that is already much more advanced and elevated.

<sup>43</sup> Or indeed, it has a collective agent, which is all of us as a human population, and is the result not of one intention but of a long chronology of neglect.

*done to reduce the effects of climate change and help those already suffering the full consequences of it is not sufficient.”*

In other words, the bottom line is that a State will violate its obligations under International Law if, disregarding someone’s Human Rights, it forces that same person to return to *their* place of origin in a situation where climate change puts *their* life at risk, being a “*global precedent*” (AI, 2020) and an affirmation of the principle of non-refoulement (Cullen, 2020). AI further reinforces that the HRC supports that efforts should be made, not only when concerned States in each situation are submerged but also when life becomes so difficult to sustain that it causes people to suffer or lose their dignity. Finally, even the UNHCR, which, *a priori*, seemed to have a dubious position on categorising someone under climate refugee status, praised the decision (International Journal of Refugee Law, 2021, pp. 151-165):

*“People seeking international protection in the context of the adverse effects of climate change or disasters may have valid claims for refugee status. They may have a well-founded fear of persecution under Article 1A(2) of the 1951 Convention, or be compelled to seek protection outside their own country owing to events seriously disturbing public order under Article I(2) of the 1969 OAU Convention and Conclusion III(3) of the 1984 Cartagena Declaration.”*

#### 3.3.4. Justifications for Decision

The HRC, though, did not give reason to Teitiota, firstly, as it claimed that the danger was not specific to the plaintiff’s family but common to all inhabitants of Kiribati, arguing that claims that are based on general conditions will only be accepted in the most extreme case and that there is a high threshold for providing substantial reasons to establish that there is a real risk of irreparable harm. In other words, one of the reasons why Teitiota has not been able to obtain a ruling in its favour is that he has been able to demonstrate that the living conditions on its island are not good, yet he has not done so by showing that the family’s particular reality was worse than that of the other inhabitants. This is a seriously problematic barrier for those wishing to apply for international protection due to climate change, as it does not affect individuals specifically but the community at large<sup>44</sup>. An interesting description was given by

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<sup>44</sup> Although this research may argue that if there is a certain degree of discrimination against part of the population, affecting them in a specific way, the 1951 Convention may be evoked. Moreover, if there is an impoverished reality derived from climate change only in part of the population, this hypothesis could raise further

one of the HRC's expert dissenters, Duncan Laki Muhumuza<sup>45</sup>, who noted that “*New Zealand's action is more like forcing a person to drown on a sinking ship, with the 'justification' that, after all, there are other travellers on board*”. Indeed, more HRC *dissidents*, such as Vasilka Sancin, have questioned how far conditions in Kiribati must go to be considered an extreme situation, given that there are already cases of lack of water – and spread of disease among children due to water contamination –, food, flooding, destruction of land and houses, and inability to grow crops.

The other reason evoked by the HRC for its decision was the timeframe, arguing that for Kiribati to become uninhabitable was 10 to 15 years, which it considered *weak* to present as an imminent threat to the family's life. However, Weiss (2015), in his report, pointed out that the then President of Kiribati, Anote Tong, explained that the Government had climate change adaptation plans, such as building sea defences, but that this would be ineffective, being more realistic to purchase land elsewhere for a future evacuation. Worse, the HRC used these Government plans as evidence that a 10-to-15-year timeframe would make it possible for Teitiota and their *countryperson* not to suffer a threat to their lives at present. It seems that the message the HRC wants to send is that threatened States wishing to *pave the way* for their citizens to seek a place where they will get proper protection should remain inert in combating, mitigating, and adapting to climate change. Alternatively, perhaps, it is again the aim to let the situation reach such a level that, when there is already a state of absolute scarcity of potable drinking water, arable land, safe food, among others, with conditions created to cause conflicts and acts of violence, then finally it will be enough to activate international protection mechanisms for climate refugees.

### 3.3.5. Conclusion

The truth is that this *semi-victory* is a sign that International Law still does not defend climate refugees effectively, resulting in conditions of insecurity and deterioration in what can be seen as a real *prison*. However, the problem is even more severe, as can be understood from the article in *Público* (Guimarães, 2020), which echoes an AI member, Kate Schuetze, pointing out “*about a dozen [similar] cases in the New Zealand justice system, mostly in Kiribati and Tuvalu*”, also leaving the message that “*the Pacific islands are the first warning*”. Lastly, in

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discussions on applying this convention. However, such issues are irrelevant in Kiribati, where the entire territory is in danger, as is its population.

<sup>45</sup> As per Paragraph 6 of Annex 2 to the HRC decision.

the same article, McAdam is quoted as congratulating the HRC for having recognised “*that without robust [action], at some point the governments may, under International Humanitarian Law, be prohibited from sending people to places where their lives are at risk or where they may face inhuman or undignified treatment*”, ending by pointing out that the decision nevertheless leaves open “*what is the tipping point at which there is a sufficiently serious threat to make it mandatory*” to grant legal protection.

### **3.4. The (Equally Deficient) Legal Framework for Minor Climate Refugees and Internally Displaced Persons**

No International Conventional or Soft Law currently focuses on C-IDPs’ rights and needs, particularly children. Although there are conventions and agreements on climate change, disaster management or Human Rights, there are no legal provisions to overcome the gap in framing this group within a specific set of norms. This situation complicates the work of national Governments in implementing policies on this issue.

Although limited and not very noticeable, there are already promising practices at the regional level. Even though there are obstacles to implementation, examples are: the **Comprehensive Regional Protection and Solutions Framework** – a concrete application of the GCM in Latin America and the Caribbean; the **Pacific Resilient Development Framework** – with commitments on climate change and displacement, and standards on the inclusion of high-risk groups, including children; or, again, the **Kampala Convention** – which broadens the status of refugee to indirectly include people who are displaced by climate phenomena, explicitly pointing out their protection and assistance needs.

Finally, at the national level, few countries have a comprehensive framework for protecting, namely, minor climate refugees and IDPs (StC, 2021a, pp. 65-66). StC highlights: the 2018 **Vanuatu’s National Policy on Climate Change and Disaster-Induced Displacement** – which includes provisions on physical and mental health, nutrition, food security and livelihoods, highlighting the inclusion of vulnerable populations; the 2016 **Philippines’ Emergency Relief and Protection for Children Act** – which promotes child-centred actions to prevent displacement and protect children; and the 2018 **Fiji Planned Displacement Guidelines** – which promotes a consultative process, with specific mention of vulnerable groups, including children, to ensure the sustainability, protection, access to services and well-being of communities affected by climate change, including strong foresight on gender and social inclusion issues.

### 3.4.1. International Law

As seen in **Chapter 3.1.**, although some important norms in International Law can protect these minors' rights, they are either silent or insufficient regarding these.

The **UNCRC**, adopted by the UN General Assembly in 1989, is an international treaty that establishes the rights of children and young people under the age of 18, including, if we resort to a work of interpretation, displacement due to climate change and natural disasters. The UNCRC is relevant to protecting children affected by climate displacement and applies in several ways. Firstly, it recognises every child's right to life, survival and development. Climate displacement can threaten children's lives and development (Article 6), making these rights fundamental. In addition, the principle of the best interests of the child (Article 3), which must be a primary consideration in all actions and decisions that affect children, can be applied to measures related to climate displacement and the protection of children in this situation. The UNCRC also prohibits discrimination against children (Article 2), including, it is assumed, the prohibition of discrimination based on climate refugee or IDP status. The convention also recognises the child's right to be heard and to have their considerations and opinions on issues affecting them taken into account (Article 12). Finally, the UNCRC protects children against exploitation (Article 19), including abuse and neglect, which is vital since minor C-IDPs may be at greater risk and, needing special protection. Mentions must also be given to the normative provisions regarding children's rights to an adequate standard of living (Article 27), health (Article 24), and education (Article 28). Therefore, although the UNCRC does not explicitly mention climate displacement, its principles and provisions provide a basis for protecting children affected by this phenomenon. This is valuable because the practical application of the UNCRC requires States parties to take concrete measures to ensure that children's rights are protected in all circumstances, including those related to climate displacement. Also noteworthy is the 2013 **CRC's General Comment No. 15** on the right of the child to participate in matters relating to the environment, since the right of access to justice in environmental matters is relevant, recognising that children are especially vulnerable to climate change and climate-induced displacement. In addition, 2017 **General Comment No. 23** on the child's rights in humanitarian disaster situations provides further guidance on protecting children affected by natural disasters, which may include climate change-related events. Finally, there is again the **General Comment No. 26**, studied in subchapter 2.5.3. These CRC general comments emphasise the importance of considering children's rights in climate-induced displacement and guide their protection and empowerment in these circumstances. Therefore,

although it does not explicitly mention minor climate refugees or IDPs, the standards and principles contained in its convention are relevant to protect their rights.

Concerning C-IDPs, documents such as the **1951** and the **1954 Conventions**, or the **CMW**, were not designed to specifically protect this group and, thus, require a broad, controversial, and practically impossible interpretation to be applied to this group. Other pieces of legislation could arise, such as the **UNCCD** or the **UNFCCC**, with some relevance to the issue of these groups. However, they are also considered inadequate regarding the adequate legal protection of these minors. Nevertheless, the latter prepares the ground for better treatment of climate C-IDPs, calling on States to develop their policies for managing and receiving human movements.

Consequently, although these instruments are important for protection, there are no direct references or legal provisions for minor climate refugees and IDPs, who have similar levels of rights protection to other children in vulnerable situations provided by the **ICCPR**, the **ICESCR** or the **UNCRC**, among others. This forces too extensive and debatable interpretation exercises, which do not guarantee the legal safety required for these children (McAdam, 2012, pp. 50-51 and 96-97). Therefore, the international community needs more effective action to protect these children and young people, especially given that many States fail to meet their obligations towards these, lacking the creation and implementation of measures, policies, and legal framework to change this panorama.

#### 3.4.2. Guiding Principles for Children on the Move in the Context of Climate Change

*“The state of the planet is broken”*. These are the words of the current UN Secretary-General, António Guterres (UNICEF, 2022b), portrayed in an article where this entity points out that *“climate-related events have already contributed to over 50 million children being forced from their homes, migrating across borders or being displaced within their own countries”*, while these *“(...) have been almost entirely overlooked in the emerging debate, research and policies on climate-related migration and displacement (...)”*.

Thus, in November 2020, UNICEF and the IOM organised a virtual colloquium to address the impact of climate-induced displacement on children and youth and raise visibility on the issue, featuring experts and representatives of various organisations worldwide, including

young activists<sup>46</sup> for climate and regarding displacement<sup>47</sup>. Discussions on the rights and needs, as well as the protection of children under climate change, led participants to the conclusion that there is an absence of a global legal and policy framework to address the needs and rights of these children (StC, 2021a, pp. 26, 35, 43, 52, 62, 69 and 80), and that environmental and climate factors are not addressed by this framework today (UNICEF, 2020b). Accordingly, they recommended the development of the *Guiding Principles for Children on the Move in the Context of Climate Change (Guiding Principles)*<sup>4849</sup> to be used by Governments, organisations, and civil society groups to safeguard the rights and well-being of children on the move in the context of climate change. The nine principles are based on<sup>50</sup>: a rights-based approach; the best interests of the child; accountability; awareness and participation in decision-making for children<sup>51</sup>; family unity; safety and security; access to education, health care and social services; non-discrimination; and nationality.

As UNICEF (2022a) explains, these principles apply to all children on the move in the context of climate change, whether within their country of origin or to international destinations, temporarily or permanently, alone or with their families, and through regular or irregular channels. They also apply to children who cannot or choose not to move, including children *left behind* by displaced parents and whose enjoyment of rights may be adversely affected by climate change. However, these principles “do not create new international legal obligations” UNICEF (2022a).

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<sup>46</sup> It is positive that the *little ones* have come to the table. In the words of the late former UN Secretary-General Kofi Annan, the UN, about children and young people, should discuss a “*future that we are preparing with them and not for them*” (Hall, 2022).

<sup>47</sup> UNICEF (2022b) opened the possibility that 18 months after this date, a consultation could be organised to solicit comments and input on these Guiding Principles, consider their usefulness, and revise the principles in light of such comments.

<sup>48</sup> UNICEF invited “*all stakeholders to review this project and share their views*” by June 10<sup>th</sup>, 2022.

<sup>49</sup> Only applicable to citizens up to 18 years of age.

<sup>50</sup> They derive from instruments such as the UNCRC, ICESCR, and ICCPR – virtually all the international legal instruments referred to in this research.

<sup>51</sup> According to UNICEF (2022b), a version of the Guiding Principles adapted and accessible to children is available.

### 3.4.3. Case Law

Relevant jurisprudence on minor C-IDPs regarding effectively protecting their rights is not abundant. The closest are a few regional or national court decisions.

The **Inter-American Court of Human Rights**, in its **advisory opinion OC-21/14**<sup>52</sup>, assumes that minors can be displaced “*due to different reasons, such as (...) environmental degradation*”. Moreover, it points out that they may move due to “*gradual or sudden changes in the environment that adversely affect their life and living conditions*”.

In addition, the **New Zealand Immigration and Protection Tribunal**, mentioned above concerning the *Teitiota Case*, presents ambiguities<sup>53</sup>. Now in another case, dated **2013**<sup>54</sup>, the following is stated:

*“The Tribunal notes the fear of the wife in particular that the young children could be drowned in a tidal event or storm surge. No evidence has been provided to establish that deaths from these events are occurring with such regularity as to raise the prospect of death occurring to the appellant or his family member to a level which rises beyond conjecture and surmise at all, let alone a risk which can be characterised as an arbitrary deprivation of life in the sense outlined above. (...) For these reasons, there are no substantial grounds for believing that the appellant (or any of his family members for that matter) will be in danger of being subjected to arbitrary deprivation of life.”*

However, in **2014**<sup>55</sup>, this court appeared to reveal progress in protecting children at risk from extreme weather events by noting that young age makes them “*inherently more vulnerable to*

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<sup>52</sup> Inter-American Court of Human Rights. (2014, 19 August). *Advisory Opinion OC-21/14, Rights and guarantees of children in the context of migration and/or the need for international protection*. Retrieved from: <https://www.refworld.org/cases,IACRTHR,54129c854.html>. Accessed on: 22<sup>nd</sup> May 2023.

<sup>53</sup> Which had already been perceived in this very case. The court, in arguing that conditions in Kiribati, although adverse due to climate change, allegedly did not verified the level of persecution necessary to grant refugee status, opening the door to the forced return of the Teitiota family to their country of origin. One of the children reportedly ended up ill due to consuming contaminated water in Kiribati.

<sup>54</sup> Immigration and Protection Tribunal of New Zealand. (2013, 25 June). *AF (Kiribati) [2013] NZIPT 800413* [AF (Kiribati) [2013] NZIPT 800413]. Retrieved from: <https://www.refworld.org/cases,NZ IPT,5dad6b754.html>. Accessed on: 22<sup>nd</sup> May 2023.

<sup>55</sup> Immigration and Protection Tribunal of New Zealand. (2014, 4 June). *AD (Tuvalu) [AD (Tuvalu)], [2014] NZIPT 501370-371*. Retrieved from: <https://www.refworld.org/cases,NZ IPT,585152d14.html>. Accessed on: 22<sup>nd</sup> May 2023.

*natural disasters and the adverse impact of climate change as noted above*". Furthermore, by acknowledging that determining the legal standing of children in New Zealand inherently involves conducting a best interest assessment as outlined in Article 3 of the UNCRC, this decision strengthens the doctrinal arguments regarding the substantial influence of this convention in safeguarding children from being relocated to countries where they could face significant harm.

Other interesting cases may be the following, regarding the situation in Afghanistan, decided by the **Asylum and Immigration Tribunal of the United Kingdom**:

**21<sup>st</sup> November 2002**<sup>56</sup>: addressing the difficulty of access to water in Kabul, the capital of Afghanistan, due to four years of drought, affecting children;

**19<sup>th</sup> October 2009**<sup>57</sup>: indicating that climatic disasters and poor food production have a more significant impact on mortality, particularly infant mortality, compared to the civil conflict itself lived in that country;

**21<sup>st</sup> October 2010**<sup>58</sup>: explaining that drought contributes to food insecurity, forcing families to send their children into the street to beg for food and money;

**18 May 2012**<sup>59</sup>: pointing to floods and natural disasters as factors contributing to the difficulties IDPs face, notably children.

These court rulings had several implications and consequences. The Inter-American Court of Human Rights decision can be interpreted as recognising the importance of protecting children's rights affected by climate displacement in the Americas. New Zealand case law highlights ambiguities and developments in protecting children's rights in climate-related displacement, yet with the positive factor of recognising the inherent

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<sup>56</sup> Asylum and Immigration Tribunal of the United Kingdom (High Court). (2002, 21 November). *No. 14 v. Home Secretary*. Retrieved from: [https://www.refworld.org/cases,GBR\\_AIT,46836ace0.html](https://www.refworld.org/cases,GBR_AIT,46836ace0.html). Accessed on: 22<sup>nd</sup> May 2023.

<sup>57</sup> Asylum and Immigration Tribunal of the United Kingdom (High Court). (2009, 19 October). *GS v. Secretary of State for the Home Department*. Retrieved from: [https://www.refworld.org/cases,GBR\\_AIT,4adf2def2.html](https://www.refworld.org/cases,GBR_AIT,4adf2def2.html). Accessed on: 22<sup>nd</sup> May 2023.

<sup>58</sup> Asylum and Immigration Tribunal of the United Kingdom (High Court). (2010, 21 October). *HK and others v. Secretary of State for the Home Department*. Retrieved from: [https://www.refworld.org/cases,GBR\\_UTIAC,4ced11642.html](https://www.refworld.org/cases,GBR_UTIAC,4ced11642.html). Accessed on: 22<sup>nd</sup> May 2023.

<sup>59</sup> Asylum and Immigration Tribunal of the United Kingdom (High Court). (2012, 18 May). *AK v. Secretary of State for the Home Department*. Retrieved from: [https://www.refworld.org/cases,GBR\\_UTIAC,4fba408b2.html](https://www.refworld.org/cases,GBR_UTIAC,4fba408b2.html). Accessed on: 22<sup>nd</sup> May 2023.

vulnerability of children to natural disasters and climate change, and valuing the best interests of the child. Finally, British jurisprudence has recognised that climate change can exacerbate children's vulnerability to conflict and displacement. Thus, although these decisions show a slow-growing recognition of the importance of protecting children's rights through climate displacement, relevant case law on climate refugees and IDPs is scarce.

## **4. The Consequences of Sea Level Rise for Climate Refugees and Internally Displaced Persons**

### **4.1. Background**

According to Público (Guimarães, 2020), McAdam puts forward “*the hypothesis that the inhabitants of Kiribati or Tuvalu will, in practice, be stateless because their countries, a few metres above sea level, could literally disappear*”. Thus, the **2018 Sydney Conference on International Law and Sea Level Rise**, organised by the International Law Association [(ILA), 2018], must be studied since it has addressed critical issues related to sea level rise and their impact on low-lying island nations such as Kiribati and Tuvalu. The fact that sea level rise is a more permanent phenomenon compared to other climate events makes it essential to understand the legal implications and challenges these nations and their inhabitants face, including the possibility of becoming stateless due to losing their territories.

Before, the Committee on International Law and Rising Sea Level (the *Committee*)<sup>60</sup> began by stating that “[i]f current predictions of sea level rise are realized, some States will become completely submerged” (ILA, 2012, p. 30). It then pointed out that, while in the 20<sup>th</sup> century, annual sea level rise was 1,7 millimetres per year, between 1993 and 2010, this figure was already 3,2 millimetres per year, and future projections are even less encouraging: between 26 and 98 centimetres of rise, with these changes having “*a strong regional pattern*”.

Finally, the report pointed to uncertainty about the effects of this phenomenon, particularly about the degree of impact and the timeframe. Given the legal implications of sea level rise, it may shake up International Law, leading to a redefinition of its procedures. For this set of reasons, the three main focuses of this committee are: the Law of the Sea; displacement and Human Rights; and issues of statehood and international security.

### **4.2. Challenges of Sea Level Rise for International Law: State Status and International Legal Personality in the Event of Total Loss of Territory or Permanent Uninhabitability**

Sea level rise will affect the coastal areas of the States, as well as their infrastructure and populations. However, before discussing the impacts on inhabitants, it is urgent to point out

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<sup>60</sup> This committee aims to study the impacts of this rise and, under International Law, of the partial and complete flooding of State territories or their depopulation, particularly of small island and low-lying nations, and to work on proposals for the progressive development of this branch of Law on the loss of all or parts of State territory for the same reason, including the impacts on statehood, nationality, and Human Rights.

that this may affect the claims of the spatial extension of maritime jurisdiction of several countries (Bird *et al.*, 1989, pp. 177-196)<sup>61</sup>. The situation worsens when it comes to island States.

Another discussion of the Committee, perhaps the most important on the topic of climate-induced displacement, focused on the following topic: if the complete and permanent flooding of territories caused by sea level rise forced a population to move elsewhere, this would affect the maintenance and dynamics of their right to jurisdiction, as well as their very existence. While the members of the Committee considered in the 2018 report that International Law's rules on the acquisition and loss of territory are clear and well established<sup>62</sup>, and that there have already been several situations in which Governments have continued to exist without physical control of their respective territories – as in the case of Governments in exile –, the truth is that those members also did not hide the absence of precedent concerning the situation that a small number of island States could face problems if sea level rise reached existential proportions for them. It was also pointed out that the challenges presented by this situation are unequal and

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<sup>61</sup> According to Article 5, the UN Convention on the Law of the Sea states that, unless otherwise specified, “*the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State*”. By using this line, States can also measure their contiguous zone (Article 3), Exclusive Economic Zone (EEZ) (Article 57) and continental shelf [Article 76(1)]. Thus, if the normal baseline moves closer to the land territory because of sea level rise, these areas will shrink, and waters that were previously under the national jurisdiction of a State may become part of the high seas or the territorial sea – in the case of the EEZ. This situation, understandably, may cause international disputes. Similarly, as the sea level rises, several small islands and other geographical formations may be submerged, affecting the extent of the above-mentioned maritime jurisdiction areas.

However, the situation worsens when it comes to island States. As the 2018 ILA report notes, Article 47 of the LOSC “*lays down strict criteria for the drawing of archipelagic baselines and the loss of key basepoints may mean that the remaining basepoints are further apart than the Convention permits or the resulting water-to-land ratio no longer meets the necessary requirements.*”<sup>67</sup> Such changes would affect maritime zone claims but might also even compromise the State's ability to maintain its claim to archipelagic status. Although it is generally accepted that coastal States may undertake physical measures to maintain their existing baselines, it was recognised that for many coastal States this would not be a feasible option due to the costs involved”.

For these reasons, the **Baselines Committee Sofia Report** (ILA, 2012, p. 31) points out that “[t]he existing law of the normal baseline does not offer an adequate solution to this potentially serious problem”, and the Committee has recommended that pending a different solution agreed upon in a globally applicable international convention (ILA, 2018, p. 19):

*“The Committee therefore recommends that a proposal be put together in a Resolution of the International Law Association proposing that States should accept that, once the baselines and the outer limits of the maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the detailed requirements of the 1982 Law of the Sea Convention, that also reflect customary international law, these baselines and limits should not be required to be readjusted should sea level change affect the geographical reality of the coastline.”*

<sup>62</sup> International Law traditionally recognises five methods of acquiring territory ownership: occupation, prescription, conquest, cession, and avulsion (Jennings, 1965).

driven by natural reasons rather than political or warlike issues. The Committee thus noted that “*as guidance and as a starting point, there should be a presumption of continuing statehood in cases where land territory was lost*”. However, it recalled that “*the exact modalities for the continuation of statehood, or perhaps some other form of international legal personality, as well as other solutions for this problem (e.g., merger with another State), were questions of great sensitivity that the Committee should approach with considerable caution*” (ILA, 2018, p. 25), and therefore deferred this discussion to posterity.

### **4.3. Sydney Declaration of Principles for the Protection of Displaced Persons in the Context of Sea Level Rise**

The Committee decided to point its focus to victims of sea level rise and the depopulation of States, namely, small and low-lying ones, speaking broadly of “*human mobility*” in the context of Human Rights (ILA, 2018, p. 26). Thus, in 2017, in Croatia, and in 2018, in Singapore, the Committee discussed a set of principles regarding international norms focused – even if not using such nomenclature – on C-IDPs, emerging the **Sydney Declaration**. This international effort, spearheaded by the Committee, reflects a comprehensive approach to safeguarding the rights and well-being of C-IDPs, mainly due to sea level rise.

Knowing that this declaration “*applies to all forms of human mobility arising in the context of sea level rise*”<sup>63</sup>, it underscores, in its Principle 1, the primary **duty of States to protect and assist individuals** who are habitually residing in areas under their jurisdiction and are impacted by sea level rise<sup>64</sup>. Principle 2 indicates that “*States of origin, transit, and destination have a duty to respect on a non-discriminatory basis the human rights of persons under their jurisdiction who move in the context of sea level rise, including (...)*”, which covers the rights to freedom of movement, residence, to leave and return to their country, to be protected from deportation to their country of origin, and consultation and participation in decisions that affect them<sup>65</sup> – recalling the report that the impacts of sea level rise are likely to disproportionately

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<sup>63</sup> The scope of the Sydney Declaration.

<sup>64</sup> This reflects the principle of sovereignty enshrined in Principle 2(7) of the UN Charter and Principle 3 of the Guiding Principles on Internal Displacement.

<sup>65</sup> This principle highlights only some rights that experience indicates are particularly relevant to those displaced by sea level rise. However, its impacts will also affect many other ones, such as private and family life, property, housing, means of subsistence, freedom of movement, not to be subjected to severe risks to life or cruel, inhuman or degrading treatment, and to dispose freely of natural resources.

affect vulnerable groups, including indigenous peoples, women, children, older people, persons with disabilities, and people with low incomes.

In turn, Principle 3 emanates that **States must take positive action to protect the lives and safety of individuals** residing in low-lying areas at risk of sea level rise. This duty encompasses prevention, protection, and assistance regarding displacement<sup>66</sup>. While rooted in International Human Rights standards, this derives from International Law and the emerging jurisprudence of the European Court of Human Rights (ECHR) and the UN treaty bodies<sup>6768</sup>. The Declaration's emphasis on the primary duty of States to protect and assist affected persons resonates with the urgency of providing immediate relief and support to those confronted with the impacts of sea level rise. Principle 3(1) represents a significant advancement in recognizing the inherent right to life and safety of individuals residing in areas vulnerable to sea level rise. However, operationalising these measures requires robust institutional frameworks, resources, and coordination, besides carefully considering the complexities involved in securing the rights and well-being of C-IDPs.

Principle 4(1) emphasises how crucial international cooperation is to address the multifaceted challenges arising from sea level rise, particularly the implications for the most vulnerable States. As the declaration explains, while sea level rise is a challenge for all, the poorest States will be disproportionately affected, with their capacity to respond hampered by shortfalls in resources, technical support, and institutional capacity and by pressure related to population growth, scarce education opportunities and weak Human Rights protection – with small island developing States being particularly harmed.

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<sup>66</sup> However, the Sydney Declaration points out that “*an impossible or disproportionate burden must not be imposed on the authorities*” and that “*States retain some margin of appreciation, dependent in part on the resources at their disposal, with regard to operational choices*” (ILA, 2018, p. 31).

<sup>67</sup> States must respect but also protect and fulfil certain Human Rights concerning disaster response, and several authors argue that victims of humanitarian disasters may claim humanitarian assistance (Kälin, 2015). Moreover, the ECHR adds that this duty to protect applies when a natural hazard is imminent and identifiable, especially “*when it is a recurring disaster affecting a distinct area developed for human habitation or use*” – European Court of Human Rights. (2018). *Budayeva and Others v. Russia* [Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02]. Retrieved from: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%5C%22001-85436%22%5D%7D>. Accessed on: 21<sup>st</sup> May 2023.

<sup>68</sup> Another interesting issue is the right which explicitly obliges States to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including natural disasters, referred to in Article 11 of the CRPD,

While Principle 6(1) – on the topic of **planned relocations of those affected** – emphasizes that such actions should only take place with the informed consent of affected persons and communities, ensuring their agency in decisions about their displacement<sup>69</sup>, Principle 7 acknowledges the role of **migration** as a strategy to mitigate the negative impacts of sea level rise, advocating for a rights-based approach to migration governance.

Principles 8<sup>70</sup> and 9, specifically tailored to **climate refugees** and **IDPs**, underscore the importance of their adequate protection and assistance. Principle 9 calls on States to admit individuals displaced across borders in the context of disasters linked to sea level rise, mainly when the State of origin cannot offer protection due to the disaster’s effects. This aligns with the principle of non-refoulement and emphasizes the need to avoid returning individuals to situations of grave risk or harm. However, while these principles aspire to bridge the protection gap for climate refugees and IDPs, their effectiveness hinges on the willingness of States to admit and provide support to those in need, even in the absence of a strict legal obligation.

The Sydney Declaration offers a significant stride in addressing the complex challenges posed by climate-induced displacement, specifically about climate refugees and IDPs. While the Declaration presents principles aimed at safeguarding the rights and well-being of these vulnerable groups, its efficacy warrants a nuanced evaluation. It is crucial to recognize its positive intent in providing a platform for international cooperation and protecting climate refugees and IDPs. However, the gap between principle and practice underscores the need for a binding international convention specifically tailored to climate-induced displacement. Such a convention would provide a clear legal framework and set of obligations that States must uphold, ensuring the consistent and comprehensive protection of the rights and well-being of C-IDPs as they grapple with the profound challenges presented by sea level rise and other climate-related threats. Therefore, the Sydney Declaration lays a foundation for addressing the plight of climate refugees and IDPs in the context of sea level rise. However, it also underscores the imperative for further concerted efforts, namely creating a binding international instrument to address the unique challenges and vulnerabilities of C-IDPs effectively.

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<sup>69</sup> The absence of such consent means that planned displacements may be carried out as a last resort to safeguard the lives and safety of affected citizens based on national Law and in harmony with International Law.

<sup>70</sup> It says that “*States will protect and assist persons displaced within their territory in the context of sea level rise and associated risks and establish conditions and means to enable internally displaced persons to find durable solutions in accordance with the UN Guiding Principles on Internal Displacement*”.

These principles could be a cornerstone in building adequate protection and guaranteeing the Human Rights of C-IDPs. Nonetheless, they are not because, in the Commentary to Principle 9, the ILA writes that “[p]ersons displaced across borders in the context of disasters linked to sea level rise do not qualify as refugees per se”, justifying that allegedly, in Refugee Law, although the underlying disaster or climate change process does not constitute persecution *per se*, they can provide a context in which forms of harm that implicate existing international protection regimes can arise<sup>71</sup>. Therefore, we are back to the idea that International Law seems to require this group to reach such a serious point of their rights and dignity for a sufficient cause to apply for refugee status rather than simply anticipating and speeding up the process of granting the same qualification.

Consequently, the Sydney Declaration draws attention and presents very positive and timely ideas for this international discussion about sea level rise<sup>72</sup>. However, it has the old problem of not wanting to accept that climate change is a direct cause for forced displacement, denying C-IDPs their qualification and strengthened rights. Thus, the Sydney Declaration is yet another reminder of the need for a truly binding international convention on C-IDPs, where the main point would be the effective creation and granting of this status to those who meet the respective requirements.

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<sup>71</sup> For example, when a disaster causes a breakdown in Law and order or is used by a Government as a pretext for acts of persecution against certain parts of the population.

<sup>72</sup> Also mentioned in CRC’s General Comment No. 26.

## **5. The Urgent Need in Creating a New International Legal Instrument to Protect Climate Refugees and Internally Displaced Persons**

### **5.1. Context**

Given the legal gaps previously verified about the protection of climate refugees, but also somewhat regarding climate IDPs, a change in this paradigm is urgently needed. Even if some authors argue that the current instruments of International Law related to refugees or Human Rights may be sufficient (Betts, 2017, p. 181), broadening their scope to encompass these two groups seems unrealistic.

As Betts (2017, p. 181) explains, one view is that the scope of the 1951 Convention could be extended to include climate refugees<sup>73</sup>, by having climate change in the group of circumstances incorporated in the *persecution* factor of Article 1 of the 1951 Convention (Biermann *et al.*, 2008, pp. 8-17). However, doubts would remain. Firstly, it is unlikely that this will happen, and secondly, it is not a solution free of insufficiencies and gaps in protecting these groups. It seems a rushed proposal that does not reveal this topic's importance in a poorly structured fallback solution. Jolly (2020, pp. 125-156) even mentions that this inadequate solution could bring problems at the level of the protection of the *classic* refugees foreseen by this instrument, with these being reduced due to the inclusion of a new faction of the population in the normative forecast of the document. It seems dangerous insofar as all the protection for *classic* refugees is already complex, given their large number. Moreover, this could overburden the UNHCR in terms of workload since the current number of people under its responsibility is already relatively high.

Instead, other authors, such as Gil (2018, p. 288)<sup>74</sup>, studied the possible application of the subsidiary protection status of the same 1951 Convention for climate refugees, as done, for example, by Directive 2011/95/EU at a European level – this is the case of what is already happening in Finland and Sweden (Pelegrine, 2022, p. 127)<sup>75</sup>. Still, it presents two problems.

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<sup>73</sup> This proposal was presented in 2006 in the Maldives at a meeting between UN agencies, Governments, and civil society organisations.

<sup>74</sup> However, this author defends, similarly to this research, a new international legal instrument directly focused on climate refugees and IDPs.

<sup>75</sup> These two States integrate into their national Law normative provisions regarding the extension of the EU's subsidiary protection concerning refugees, adding disasters and other events related to the environment as possible factors for requesting asylum.

First, it seems a fallback solution, poorly planned. The 1951 Convention was originally developed to protect people fleeing political persecution. Applying this convention to C-IDPs may be inappropriate since their reasons and characteristics differ from those of political persecution. This raises questions about whether subsidiary protection status is adequate to address the specific needs of people displaced by climate change. Applying this subsidiary status to climate refugees may need an adequate and specific protection framework, resulting in gaps in assistance since existing protection systems may not be designed to deal with the unique challenges of climate displacement. Equally, adapting this status can be a complex and time-consuming legal process, subject to varying interpretations as described before, creating uncertainty about the scope and effectiveness of this protection, leaving displaced people in a state of legal *limbo*.

Similarly, it creates the undesirable possibility of giving too much discretion to States to legislate in this field, creating inequalities in protecting the rights of climate refugees and IDPs between countries and regions, dependent on the degree of social and economic development of each host nation. This would also create a situation of aggravated inequality for these migrant populations since, depending on the physical and socio-economic capacities of everyone in this situation, they could access different treatments in a similar situation<sup>76</sup>, violating the principle of equality<sup>77</sup>. The same could happen if they were accompanied by citizens who are more fragile from a physical or health point of view – as is the case of children, older people, and citizens with disabilities – which, being an added difficulty to move to a State with more significant guarantees of protection of Human Rights, would either lead to the group having to

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<sup>76</sup> The question that arises in this situation is whether it would be fair for one climate refugee to have access to a higher degree of protection than another person in a similar situation merely because *they* can travel by *their* means or by transport to a State to which the other climate refugee could not travel, merely because *they* cannot afford an airline ticket, does not have as many contacts, or does not have the same physical capacity to stay as long and travel as far as the first citizen.

<sup>77</sup> As Alexy (1986) described, the principle of equality posits that all individuals should be treated equally under the Law without arbitrary distinctions or discrimination. It emphasises that individuals should be treated with equal respect and dignity, regardless of their characteristics or circumstances.

According to Alexy, the principle of equality involves two aspects: formal equality and material equality. Formal equality means that individuals in similar situations should be treated equally. This aspect focuses on treating like cases alike and not making arbitrary distinctions between individuals. On the other hand, material equality suggests that individuals in different situations should be treated differently based on relevant differences between them. This aspect acknowledges that treating everyone equally may not lead to fairness if significant differences exist in people's circumstances or needs.

In summary, the principle of equality, as Alexy outlines, calls for treating similar cases alike and different cases differently based on relevant differences. It aims to ensure fairness and non-discrimination in legal and social contexts.

submit to a more meagre treatment in a closer country to which they could move or it would lead to the case of abandonment of the most fragile people for the sake of their survival. It seems that this solution conflicts with the principle of equality in that, because of one citizen's physical, psychological, social, or financial characteristics, *they* might not be able to access as high a degree of protection as another. Therefore, this proposal also falls.

Jolly (2020, p. 147) explains that changing policies and instruments of a regional nature could also be an option. Even so, if this regionalism points to the possibility of adapting protection instruments to the specific needs of each area of the globe, it needs improvement. First, it incurs the error of the above solution of regimes' adaptation at the national level since it could contribute to unequal treatment of citizens in the same condition. However, it adds the notion that such a solution would end up creating an overload of work and resources for certain regions compared to others, depending on the degree of affectation by climate change of each one. As exemplified by Pelegrine (2022, p. 127), this overload could particularly affect the Pacific area as it is primarily composed of island States increasingly threatened by extreme weather phenomena or sea level rise, endangering their very survival – again, a situation that creates unjustified unequal treatment for a population experiencing a parallel reality, while it could equally affect certain areas of the globe more severely than others<sup>78</sup>.

Nevertheless, another argument that could be put forward against the *national* solution or *regional* solution could be the opposite. Allowing a lack of harmony and cooperation on the protection of C-IDPs at the international level could, in fact, even contribute to the possibility of States and regions refraining from submitting *work* on these issues and creating procedures that are too complex, bureaucratic and with requirements that are difficult for citizens seeking legal protection to comply with<sup>79</sup>.

Finally, a suggestion could be the adaptation of international legal instruments concerning protecting IDPs, extending their scope to protecting climate refugees. This proposal ends up underlining an idea that has been trying to be proved throughout this research: that although climate IDPs still lack adequate international protection regarding their status and rights, the situation experienced by climate refugees is even more severe, with much greater difficulty in

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<sup>78</sup> In fairness, one could also point this argument to the previous solution concerning States' discretion in choosing how to treat C-IDPs.

<sup>79</sup> Or, at an extreme level, States could simply not work on this topic at all, putting the effort for the respect of Human Rights on the back burner. Given the current international landscape, this dystopic vision cannot be considered misplaced or excessively dystopian.

accessing appropriate guarantees of their interests and freedoms. An example could be the adaptation of the Kampala Convention (Cournil *et al.*, 2019, p. 218), which already provides for this protection of climate IDPs. However, it seems, once again, a fallback solution, with unnecessary or even complex adaptations and amendments from a legal point of view, and the delay and inertia in creating a specific and comprehensive international legal instrument for all climate refugees and IDPs is still not justified. Therefore, like all the other suggestions, this one equally falls flat.

In summary, some authors argue that, with a view to greater celerity and speed in creating this instrument, it should be created in a Protocol under the UNFCCC. Biermann *et al.* (2008, pp. 8-17) are examples of this position, with their proposal including the provision for the creation of a specific and independent monetary fund for climate refugees and IDPs – the “*Climate Refugee Protection and Resettlement Fund*”. The authors also foresee some basic principles for this new instrument, such as equal treatment between climate refugees and immigrants, support for their States of origin and the acceptance that this scourge is a problem of the international community as a whole and not merely of one State or a group of them.

On the other hand, the doctrine that argues this instrument should be a separate convention, not limited to the scope of International Environmental Law – as in the UNFCCC – but also to Human Rights norms, has emerged. Examples of this position are Docherty *et al.* (2009, p. 368), who criticise the proposal of Biermann *et al.* (2008) for two reasons: first, because they do not distinguish between climate refugees and IDPs; second, because they present a list of factors that would lead to the attribution of the status by the Protocol (Pelegrine, 2022, pp. 132-133), such as the rise in sea level, drought or water shortage. This list should not be exhaustive but exemplary because over time, new factors may emerge, and the convention must be able to adapt to future challenges. Thus, Docherty *et al.* (2009, pp. 369-370) present a proposal that merely focuses on climate refugees, not limiting the effects of climate change that could lead to obtaining this status, allowing for an opening in the list of factors, which could, in the future, be extended given new scientific and doctrinal advances. The proposal also includes some basic principles, such as covering temporary or permanent displacement, these being involuntary and cross-border movements, the sharing of responsibilities at the interstate level<sup>80</sup>, support for host

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<sup>80</sup> And the same notion as in the previous proposal, i.e., that this is a scourge of the international community.

States, the creation of a fund, and an independent administrative body, to manage issues relating to the application of this new convention.

## **5.2. Challenges to the Creation of a New International Legal Instrument**

Notwithstanding all the above, McAdam (2011b, pp. 2-27) presents problems in creating a new international legal instrument for protecting C-IDPs. The author addresses the first point that it is generally pointed out that these flows are of an internal rather than cross-border nature. However, this statement can be refuted by considering that climate disasters do not respect national borders and can easily lead to the displacement of affected populations across borders. Moreover, when a country's natural resources are depleted due to a climate crisis – often the only food source for the population –, the inhabitants may be forced to seek refuge in another country. We must also consider that with globalisation and increased mobility, people's movements have become more fluid and complex, increasing cross-border flows. In addition, it is essential to remember the significant impact of sea level rise, especially on small island States. The reality is that this rise is already leading to the vanishing of habitable land and, in the future, to the complete disappearance of States. In this sense, such populations will have no choice but to move across borders, as their nations will literally cease to exist. This palpable reality underlines the need to consider C-IDPs movements as a phenomenon that transcends national borders and requires a coordinated international response. Then, arguing that climate-induced displacement is strictly a phenomenon related to IDPs, forgetting about refugees, oversimplifies a complex and multifaceted problem and does not correspond to reality.

Likewise, the author states that there needs to be more political interest from States in creating a binding international legal instrument on this topic. However, it is important to note that this perception may be more a reflection of the complexity of the problem than a genuine lack of interest. Effectively addressing the issue of climate refugees requires a deep understanding of the interactions between climate, politics, economics, and human displacement – a tangle of variables that make it challenging to design clear and effective legislation. Moreover, there needs to be a delicate balance between the sovereignty of States and the need for collective action to address a global challenge. This is not necessarily a sign of disinterest but rather a reflection of the difficulties inherent in dealing with a problem that is so complex and global. Furthermore, as studied, there have been efforts to create policies and international agreements to address this issue, showing at least some political interest in this topic.

McAdam (2011b, pp. 12-13) adds the abovementioned argument that climate change would be just one of many main displacement factors in these regions. Instead, it would be the precarious socio-economic conditions, even if indirectly motivated by environmental factors. Nevertheless, it is crucial to recognise that climate change has direct and immediate impacts. Phenomena such as sea level rise, intensifying storms or changes in rainfall patterns can make certain places uninhabitable, forcing people to migrate. While socio-economic problems can indeed exacerbate these situations, the main driving force behind this displacement is primarily climatic<sup>81</sup>.

Moreover, unlike issues of a socio-economic nature that may be localised and vary from place to place, climate change is a global problem, meaning that its impact on climate refugees' and IDPs' displacement will further possess a notably larger scale. However, it must be recognised that even though this type of forced displacement may be primarily driven by climate change, a more holistic approach to solving this problem should consider other social, economic, humanitarian, and political factors. Thus, the solution will require the provision of protective status for those directly harmed by climate change, but without closing the door to protection for those affected by other factors that indirectly derive from this environmental phenomenon – for example, through an equivalent of subsidiary protection.

### **5.3. Soft Law as a (Non-) Solution**

An idea that also appears on the table is that presented by Cournil *et al.* (2019, p. 222) through legislation in the form of Soft Law since it could be, as the authors argue, more readily accepted by States, given its non-binding nature. Likewise, as Abbott *et al.* (2000, pp. 434) point out, it would be a less costly way to achieve an international legal document regarding refugees and climate IDPs in that fewer human and financial resources would be required to achieve the goal since the bureaucratic process would be less costly at the legal and scientific research level.

However, while Cournil *et al.* (2019) and Abbott *et al.* (2000) present arguments in favour of Soft Law, there is a valid counterargument based on this legislation's non-binding and perceived weak nature. Soft Law can sometimes be seen as a more fragile and less effective legal instrument than Hard Law because, although States may more easily accept it due to its non-binding nature, this characteristic may limit its effectiveness. The lack of enforcement

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<sup>81</sup> History gives us examples of massive human movements caused by climatic events, such as the Great Dust Bowl Migration in the United States in the 1930s, motivated by severe droughts and dust storms (Gregory, 1989).

mechanisms may lead to less rigorous compliance with the principles and norms established, especially in situations where the interests of States may be contrary to the objectives of the legislation. Furthermore, Soft Law may need to offer more protection for climate refugees and IDPs. States may ignore or minimise their efforts to assist those affected by climate-induced displacement without a legal obligation to comply with established provisions. Finally, while Soft Law may be less costly regarding human and financial resources, these savings may be offset by the need for additional efforts to persuade or pressure States to comply with established standards. Thus, despite the potential benefits of Soft Law in terms of acceptance by States and resource savings, its limitations in terms of effectiveness and adequate protection for those affected by climate-induced displacement should be considered.

Nevertheless, an intermediate position also emerges about Soft Law. Hurwitz (2012, pp. 430-433) proposes an international legal instrument of Soft Law serving as a bridge, or middle and transitional position, towards a final Hard Law document. This could be justified because it seems more accessible and palatable for States to accept rather than more demanding obligations through Hard Law.

Although interesting, this suggestion presents challenges that may compromise its effectiveness. First, the idea that Soft Law instruments may serve as a basis for the transition to Hard Law is an optimistic perspective that only sometimes materialises in practice. States may accommodate Soft Law's flexibility and lack of bindingness, making the transition to Hard Law less likely. This can lead to urgent issues, such as climate refugees, not addressed effectively and promptly. Secondly, it is essential to note that even though Soft Law may appear more attractive to States, the non-binding nature of this form of Law may limit the protection offered to climate refugees and IDPs. States may neglect their obligations under Soft Law without facing significant consequences due to the lack of an effective enforcement mechanism. Moreover, adopting a Soft Law instrument may divert the attention and resources needed to create an effective Hard Law. This may prolong legal uncertainty and insufficient protection of C-IDPs. Therefore, while the proposal may seem useful at first glance, the practical difficulties associated with the transition from Soft Law to Hard Law, as well as the potential lack of adequate protection for climate refugees and IDPs, suggest that this may not be the most effective approach to address this complex and urgent problem.

#### **5.4. Adopted Position**

Given the factors of inequality, lack of protection and disinterest of States, nationally or regionally, to institute legislation and mechanisms to defend climate refugees and IDPs (Khan, 2019, pp. 513-524), and the inadequacy and insufficiency of current international legal instruments with the same objective in mind, it seems that the best solution would be the creation of a universal, binding device, now directly focused on the two population groups under study. Thus, climate-induced displacement governance is a possible solution to the insufficient protection of climate refugees. As Gil (2018, p. 295) described, such a strategy seeks to manage human movements centrally and supranationally, basing itself on solidarity and burden sharing. This concept can be compared to the EU's approach to the refugee crisis of 2015, with the introduction of the relocation mechanism<sup>82</sup>. Later, in 2017, the EU introduced the resettlement mechanism, which aims to protect refugees before they arrive in the country of refuge, guaranteeing rights from transit to reception. However, these procedures must be comprehensive and specifically address C-IDPs. Therefore, a global protection system could effectively protect them<sup>83</sup>.

This exercise should be done even knowing that there are no *perfect* Laws, that other gaps would arise and would have to be adapted over time, and that conceptualisation would be problematic since the definition as a criterion for obtaining climate refugee or IDP status sometimes becomes a complex exercise, given a wide range of other factors, of a social, economic and humanitarian nature, that could be observed simultaneously in each case. Moreover, as Khan (2019, pp. 513-524) reminds, an international convention is only binding for the States that ratify it, while at the same time, they may not be interested in having a more significant number of legal obligations, as well as in submitting the authority for monitoring the application of that instrument to a supranational authority (Abbott *et al.*, 2000, p. 437),

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<sup>82</sup> As Pelegrine (2022, p. 137) explains, Article 67(2) of the Treaty on the Functioning of the EU allowed for the creation of this instrument by providing that: "*The Union shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, which is based on solidarity between Member States and which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals*". In this same sense of allowing the creation of relocation, Article 80 asserts that: "*The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle*".

<sup>83</sup> However, this resettlement mechanism has been used before and demonstrates flaws, such as people who have spent years in refugee camps waiting for this mechanism to work, which shows that it holds countless Human Rights violations.

losing part of their sovereignty within their territory. However, this is a critical path to first overcome much of the immensity of gaps in the protection of refugees and climate IDPs, even if, usually, the tendency of host States may be contrary solutions like restrictive displacement and closed-door policies.

Two other situations that will require work are related to the need to create a specific financial fund for this new international legal instrument (Environmental Justice Foundation, 2022, p. 24), as well as the use of human and financial resources during the negotiation process (Abbott *et al.*, 2000), which is naturally going to be lengthy, complex, bureaucratic, and technically and scientifically demanding.

A new binding legal instrument based on Human Rights is urgently needed. Global protection would require the participation of all States, especially those more developed. Although complex, the urgency and the need for practical actions apply to all States regarding climate change, even those that may feel far from displacement crises due to climatic and geographic factors. In this view, the argument defending the sovereignty of States does not meet with this research. Firstly, participation in this international convention project depends on the free will of States. Secondly, it would be achieved through a global consensus, i.e., in harmony with each party's demands. Moreover, it may seem utopian to appeal to the *ethical responsibility* of nations. However, given the universal and transboundary component of climate change and its effects on our planet and people, finding a solution that effectively combats this problem without international consent seems complicated. The impacts of this scourge go beyond the degree of gravity of political and cultural differences, so a consensus is urgently needed to defend Human Rights effectively.

As Pelegrine (2022, p. 141) explains, the UNHRC's decision in the *Teitiota case* opened the door to developing legal protection for these two groups. First, with its statement that climate events “*can propel cross-border movement of individuals seeking protection from climate change-related harm*”, recalling the importance of the collective work of the international community in protecting citizens affected by this scourge. Moreover, it recognised that “*given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realised*”. However, as noted above, emphasis goes to Paragraph 9.12, in the context of development regarding the need for legal protection of climate refugees and IDPs by International Law, when it states that:

*“In the present case, the Committee accepts the author’s claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population (...).”*

Although this research disagrees with the deadline presented by the UNHRC, this committee assumes that Kiribati will become uninhabitable. Moreover, it underlines that sea level rise will be the primary cause of this State’s uninhabitability – and, consequently, of others – so it becomes an effective alert for creating policies and legislation concerning those affected by this reality.

The normative basis for the creation of this new international legal instrument can be found in Article 6(1) of the ICCPR – binding on ratifying States:

*“Every human being has the inherent right to life. This right shall be protected by Law. No one shall be arbitrarily deprived of his life.”*

Further, UNHRC General Comment No. 36 (2020) on this article is also essential to reinforce this dissertation’s position on the need for guaranteed Human Rights safeguards for climate refugees and IDPs. In Paragraph 26, it points out that:

*“The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include (...) degradation of the environment (...).”*

Further, Paragraph 62 is of equal importance:

*“Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. 249 The obligations of States parties under international environmental Law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental Law. 250 Implementation of the obligation to respect and ensure the right to life, particularly life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution*

*and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.”*

Given these transcripts, this dissertation reinforces that climate change is already seen as undermining the rights of climate refugees and IDPs.

### ***5.5. International Convention on the Protection of Climate Refugees and Internally Displaced Persons***

Given the above, it seems that the best solution is based on creating a new international convention, independent from others: the ***“International Convention on the Protection of Climate Refugees and Internally Displaced Persons (CRIDP)”***. This mechanism is intended to fulfil the various purposes for which it is needed, namely: to recognise and guarantee the rights and duties of climate refugees and IDPs; to recognise and guarantee the rights and duties of States – namely, host ones; and to recognise and guarantee the necessary preventive actions with a view to better managing this human displacement, as well as the respective protection and social integration of these citizens, a multisectoral mission including Governments, UN agencies, NGOs, civil society, among others. Moreover, this mechanism should also be multidisciplinary, encompassing branches of Law such as International Human Rights Law, International Refugee Law, International Humanitarian Law, and International Environmental Law.

This instrument should encompass Human Rights norms, considering the intersection between climate change. Docherty’s *et al.* proposal is attractive in that it criticises the limitation of factors leading to the attribution of climate refugee status in Biermann’s *et al.* (2008) proposal, presenting a more open perspective. Their suggestion is flexible and adaptable to scientific and doctrinal developments related to climate change. Still, Docherty’s *et al.* (2009) proposal focuses exclusively on climate refugees, neglecting climate IDPs, a gap that needs to be addressed. On this point, this research finds value in the approach of Biermann *et al.* (2008), who propose protection for climate IDPs despite their limitations. This inclusion is crucial, as

this group, despite its evident specificities, faces similar challenges to climate refugees and equally needs protection and assistance. Thus, a new instrument should be created, flexible enough to accommodate a non-restrictive list of factors that could lead to climate refugee or IDP status, thus allowing for the inclusion of new factors as science and doctrine advance.

Furthermore, this research agrees with the principles put forward in both proposals, such as sharing responsibilities at the interstate level and creating a separate fund and an independent administrative entity for managing issues relating to the application of this new instrument and support for host States. Ultimately, this study believes that creating this legal framework is essential to ensure adequate and effective protection for C-IDPs, recognising that this is the international community's responsibility.

#### 5.5.1. Main Concepts

In the context of this convention, the following definitions are proposed:

*A **Climate Refugee** is a person who, although not falling within the normative provision of the concept of "refugee" in Article 1 of the 1951 Convention, is forced to leave their place of origin and seek a place of refuge in another State because of serious climatic or environmental disasters or environmental degradation in their area of origin or residence, in the short, medium, or long term, making it impossible for them to continue their life there in safety and with respect for their rights.*

*A **Climate Internally Displaced Person** is a person who is forced to leave their place of origin and seek a place of refuge in the same State because of serious climatic or environmental disasters or environmental degradation in their area of origin or residence, in the short, medium, or long term, making it impossible for them to continue their life there in safety and with respect for their rights.*

#### 5.5.2. Covered Situations

This convention should be *activated* in scenarios where individuals are compelled to move, internally or across national borders, temporarily or permanently, by climate or environmental events that result directly or progressively from climate change. Still, to make this instrument more precise and not overly broad, it is necessary to restrict the environmental occurrences of the requirement to those connected to climate change – its extension would imply an increase

in the number of climate refugees and IDPs as a result of environmental disasters or events of entirely natural origin, making ratification by States more complex<sup>84</sup>. Thus, we could highlight the following situations: sea level rise; droughts; floods; extreme heat and cold waves; severe storms; forest fires; melting ice and snow; among others. However, it is essential to establish an efficient set of parameters that allow us to discern whether a case is motivated by climate change, even if in a very indirect way, given that the primary purpose is to safeguard Human Rights.

Furthermore, this restriction presupposes a duty of the international community in the face of the repercussions of human activities and emissions that intensified these events, thus justifying the obligation to compensate the victims who did not participate significantly in these actions. Although this method may be considered complex and time-consuming by some, it ultimately represents an opportunity to assist affected populations in *restarting* their lives, preventing them from being forgotten or neglected.

### 5.5.3. Fundamental Principles

As Terada (2019, pp. 88-90) irrepressibly enumerates, on the basis of this new international convention on the protection of climate refugees and IDPs, the following principles cannot be forgotten:

- **Common but Differentiated Responsibility:** States would have different responsibilities concerning climate change. Consequently, their obligations to host victims and fund relief efforts would be proportionate to those responsibilities. The responsibility for climate refugees should be shared between the State of origin, the host State, and the international community. The State of origin must implement preventive and corrective measures to minimise the effects on the population to avoid the need for its citizens to flee through human movements. On the other hand, the host State must ensure the fundamental rights of climate refugees. Finally, the international community should provide financial assistance commensurate with its capacities and responsibilities in climate change – the latter encompasses the resource needs related to protecting the rights of climate IDPs and not just the respective refugees.

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<sup>84</sup> This delimitation is appropriate to ensure the instrument's effectiveness since there is a global consensus that responsibility for human actions, which have exacerbated climate change, belongs to all, especially developed countries. Thus, the international community is more likely to aid the victims of extreme weather phenomena than to those of other factors.

- **Physical and Cultural (Voluntary) Proximity:** climate refugees and IDPs would preferably be resettled in places close and culturally like their regions of origin, thus minimising the impact of adaptation. However, it is crucial to underline the voluntary nature of this principle. The right to self-determination of displaced individuals would be respected by allowing them to resettle in regions that are not necessarily close or culturally similar.
- **Solidarity:** signatory States would be responsible for doing their utmost to receive these displaced citizens and to participate financially in implementing the necessary support and protection measures.
- **Effective Protection:** countries would develop and implement policies that ensure the protection, respect, and enjoyment of climate refugees and IDPs' rights.
- **Non-Discrimination:** all rights recognised by the convention would be guaranteed without any distinction, whether related to sex, gender, sexual orientation, ethnicity, language, religion, political or other opinions, national or social origin, socio-economic conditions, presence of disability, or age – in a non-exhaustive list.
- **Maintaining Cultural Identity:** climate refugees' and IDPs' intangible cultural heritage would be protected by preserving their cultural identity in the host signatory State.
- **Non-Refoulement and Non-Expulsion:** victims of climate change could not be returned to places where their lives are at risk due to that same environmental variation. Likewise, it would prohibit signatory States from expelling individuals with climate refugee or IDP status. However, the 1951 Convention also provides exceptions in some instances, which must be included in this new instrument. These are detailed in its Article 33: if there are serious security reasons for considering that the refugee poses a threat to the security of the host country; if the refugee, having been convicted of a grave crime, poses a threat to the community of the host country; or if the refugee, having been convicted of a crime, poses a danger to the community of the host country because of his dishonest behaviour.

#### 5.5.4. Rights Provided for Climate Refugees and Internally Displaced Persons

The new international convention would recognise climate refugees and IDPs with a broad – and non-exhaustive – set of Human Rights<sup>85</sup> when threatened concerning climate change and its consequences, such as<sup>86</sup>:

- **Access to Water and Food:** based on Article 11 of the ICESCR, climate refugees and IDPs would be guaranteed access to food and water resources sufficient for survival and proper health.
- **Welfare Benefits:** based on Article 9 of the ICESCR, it indicates that climate refugees and IDPs would have the right to receive social assistance and benefits to ensure their survival and well-being.
- **Provision of Basic Subsistence Needs:** like the right to access to water and food, this is also underpinned by Article 11 of the ICESCR, extending to other basic needs, including shelter, clothing, and health care.
- **Medical Care:** underpinned by Article 12 of the ICESCR, which establishes the right to health. Climate refugees and IDPs would have access to necessary health care.
- **Housing:** equally underpinned by Article 11 of the ICESCR, it is through this that climate refugees and IDPs would have the right to access adequate housing.
- **Recognition of Legal Personality:** based on Article 16 of the ICCPR, it would become clear that individuals covered by this new convention should be entitled to recognition of their legal personality in the country where they are located.
- **Respect for Family Unity:** although not directly defined in the ICCPR or ICESCR, it is a fundamental principle of International Refugee Law, finding its legal provision in Article 16(3) of the UDHR. In this way, families would see their unity protected, not be separated during the displacement process, and, finally, be provided for family reunification in the event of such separation. The UNHCR (2001) recognises that *«family reunification for*

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<sup>85</sup> Also inspired by the provisions of the 1951 Convention.

<sup>86</sup> The **obligation to respect animals** should also be safeguarded. Although not provided for in the ICCPR or the ICESCR, it is an important consideration for climate refugees and IDPs. Not just from an Animal Rights perspective, but also from a Human Rights one, C-IDPs would have the right to assistance in transporting the animals they live with. In connection with the right of return, States would also have an obligation to ensure, as far as possible, the equal return of these animals to their place of origin.

*refugees and other persons in need of international protection has special significance because of the fact that they are not able to return to their country of origin».*

- **Wage (and other Dignified Working Conditions):** guaranteed by Article 7 of the ICESCR, which affirms freedom to enjoy just and favourable working conditions, namely regarding the right to salary.
- **Education:** climate refugees and IDPs face many challenges, not least of which is access to education, a fundamental Human Right guaranteed by Articles 13 of the ICESCR, 22 of the 1951 Convention and 28 and 29 of the UNCRC. This article indicates that everyone would have the right to education, regardless of their circumstances or geographical location. However, social, cultural, administrative, and language barriers often make it impossible for climate refugees and IDPs to enjoy this right. Moreover, the precarious situation in which they find themselves can hinder their access to educational infrastructure and the necessary resources for learning. Nonetheless, education plays a crucial role in integrating these individuals into new communities, providing them with the necessary tools for self-sustenance and building a better future. Therefore, States must work together to ensure that the right to education is effectively applied, namely, regarding mitigating possible barriers<sup>87</sup>.
- **Cultural Identity:** although not directly addressed in the ICCPR or ICESCR, it is an essential principle in International Refugee Law. Thus, refugees and climate IDPs would have the right to maintain, practice and develop their culture and traditions.
- **Return:** also not directly mentioned in the ICCPR or the ICESCR, it is a fundamental principle of International Refugee Law. If the situation that led to displacement is solved, climate refugees and IDPs would have the right to return to their origin<sup>88</sup>.
- **Information and Participation:** not explicitly mentioned in the ICCPR or the ICESCR, it represents an important component of the human movement process. These citizens should always be informed about their situations, rights, options, and all relevant measures the host State takes. Moreover, they should be able to participate in these processes actively<sup>89</sup>.

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<sup>87</sup> A support structure is needed to overcome language barriers. The existence of interpreters for C-IDPs' native languages and the receiving State's languages is one of the primary needs to be met.

<sup>88</sup> This, however, seems difficult – or impossible – in the context of climate change.

<sup>89</sup> This right will also be important from a pre-displacement perspective. People threatened with displacement due to climate change must have access to transparent, accurate information about their risks and available

- **Collective Rights:** especially concerning minority rights, but not only, this principle would include the right to form and participate in community organisations, freedom of association and representation, among others.
- **Nationality:** in harmony with Article 24 of the ICCPR, C-IDPs would have the right to keep their nationality. Nonetheless, if they wish to adopt the nationality of the host State, the process would be facilitated without discrimination or excessive bureaucracy.

#### 5.5.5. Climate Refugees and Internally Displaced Persons Fund

Creating the *Climate Refugees and IDPs Fund (CRIF)* is vital. This fund would be financed by mandatory contributions from developed or highly polluting countries, according to criteria defined *a posteriori*<sup>90</sup> – with the principle of common but differentiated responsibilities at the base. Developing countries, NGOs and companies could also contribute – but voluntarily. The idea in creating this fund is to guarantee sustainable financial resources to deal with the challenges brought about by climate change, especially those about human displacement. This fund would have three main pillars of action: prevention; adaptation; and resettlement.

At the prevention level, the fund would contribute to financing prevention projects to minimise the risks of climate displacement. This could include investments in climate-resilient infrastructure, as well as developing and implementing sustainable technologies or educational projects promoting environmental awareness and adaptation to climate change.

As for adaptation, this would constitute a crucial element in dealing with climate refugees and IDPs, as it would be based on helping communities to adapt to climate change. The fund could finance the transfer and implementation of climate-resilient technologies and practices and the training of professionals to manage such resources. The aim would be to strengthen the communities' resilience in extreme weather events.

Finally, at the resettlement level – where displacement is unavoidable –, the fund would be used to finance safe and dignified resettlement. This could include building new housing in secure locations, supporting the integration of victims into their new communities, ensuring access to basic services, and promoting employment opportunities for these citizens.

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mitigation measures. Further, climate refugees and IDPs should have the opportunity to participate in formulating policies and programmes to prevent or mitigate the effects of climate change. This relates to Article 25 of the ICCPR, which establishes the right to participate in the conduct of public affairs.

<sup>90</sup> Recognising that this will make it more difficult for developed and polluting States to get involved.

Therefore, this fund would constitute an essential tool for an effective response to the challenge of C-IDPs, always with a targeted focus on protecting the rights and welfare of the affected people.

#### 5.5.6. International Agency for Climate Refugees and Internally Displaced Persons

Creating a specialised agency, the *International Agency for Climate Refugees and Internally Displaced Persons (IACRI)*, would be central to effectively implementing a new protection instrument. It would have as a mandate the promotion and supervision of compliance with protection, prevention, displacement, and resettlement measures.

Firstly, at the level of policy evaluation, the agency would carry out a comprehensive and continuous assessment of environmental and climate policies. This would involve analysing the effectiveness and impact of these policies and recommending adjustments and improvements. In addition, it should consider how existing policies may lead to further climate displacement, seeking solutions to mitigate such effects.

Regarding resource mobilisation, the agency could mobilise resources from a human, technical and financial perspective to reduce the vulnerability of at-risk populations. This may include raising resources for programme implementation, building climate-resilient infrastructure, and developing disaster prevention strategies.

This entity would work in collaboration with States, International Organisations, NGOs, and other interested parties to organise a coordinated response to manage climate displacement, namely, regarding the coordination of humanitarian aid efforts, the promotion of safe removal, and the creation of resettlement programmes for those who cannot return. Further, the agency would assess the effectiveness of programmes implemented to prevent climate displacement, including through audits to ensure that resources are being used efficiently and effectively.

In cases where displacement is the only viable option, the agency could assist climate refugees and IDPs at the time of displacement, either by facilitating safe and orderly movement or by helping to ensure access to fundamental rights and services. It would also play an active role in organising the reception of these citizens through structured coordination with host States to ensure the protection of these groups' rights and reintegration programmes for those who may return to their places of origin in the future. While it may be challenging, it is essential to make a collective effort to address the issue of climate change and displacement.

Finally, there remains room for an important role in advocacy and awareness-raising on climate refugees' and IDPs' rights. The agency would actively advocate for these, working to raise awareness globally, but also action itself on this issue. **IACRI** would operate similarly to the UNHCR, considering its function of protecting and guaranteeing Human Rights and humanitarian aid, but with a specific focus on climate refugees and IDPs. This would ensure that signatory States were aware of and complied with their obligations.

Indeed, several international agencies and organisations deal with refugees and displaced persons. However, a specialised agency would focus exclusively on the specific issues of C-IDPs. This would allow for deeper specialisation and expertise in these areas. Moreover, climate displacement is a complex challenge that encompasses a variety of issues, and this would bring more effective coordination of global efforts, but also better promotion of preventative measures to avoid climate displacement wherever possible – such as actions to mitigate the impacts of climate change and strengthen the resilience of vulnerable communities. Likewise, the agency could supervise the fulfilment of protection and prevention measures, ensuring that the rights of those affected are respected.

#### 5.5.7. Intergovernmental Panel on Climate-Induced Displacement

Creating a body of scientific experts dedicated to studying this reality would be essential to the success of any convention on climate refugees and IDPs. This could be done through a structure like the IPCC but focused on these population groups: the ***Intergovernmental Panel on Climate-Induced Displacement (IPCID)***. The IPCID would act as a subsidiary advisory body, providing scientific advice to support the implementation of the convention, holding several responsibilities and being essential in providing the knowledge needed for the development of effective policies and the execution of practical measures to mitigate the impact of climate change on communities.

At the scientific advice level, it would evaluate existing preventive and protective measures, and others designed for the future, based on scientific and technological advances. Therefore, its assessment would help guide climate change adaptation policies and practices.

From a research and innovation point of view, the IPCID would find itself at the forefront of research and development of new technologies that could be used to aid efforts to prevent, protect and resettle climate refugees and IDPs.

Regarding climate event identification, the IPCID would play a crucial role in classifying specific events caused by climate change and assessing how human activities contribute to these events. This would be a critical aspect in determining claims for protection under the convention, but also of high interest in understanding the human impact on the conditions of our planet and its effects on certain populations, as well as States' obligations towards victims.

Finally, it would be crucial to legitimise the protection of climate refugees and IDPs. Studies, reports and other documents produced by the IPCID would serve as robust and incontrovertible scientific evidence that could be used to prove the legitimacy of protection claims from climate change victims.

#### 5.5.8. Binding Nature

Although there is an intense debate in academia on the adherence to a legally binding system for this Convention – mainly due to the fear that such rigour may dissuade countries from ratifying it –, the need for a compulsory commitment is unquestionable. Hard Law has specific characteristics that elevate it in terms of bindingness and enforcement. These instruments go through a meticulous and systematic process of formalisation, during which their terms, guidelines and provisions are established. This process not only defines the instrument's scope but also ensures that all parties involved are fully aware of and agree with the obligations they assume. Furthermore, Hard Law is characterised by its binding power, which means that signatories are legally bound to comply with the rules and regulations that the Law stipulates. This gives the instrument a level of authority that is much more difficult to challenge than more flexible laws. Finally, penalties for non-compliance are also crucial, reinforcing the Law's enforceability, acting as a deterrent to violations and ensuring a cost associated with non-compliance.

Equally, resistance to change is another characteristic, with its stability and permanence lending additional weight to its authority. Therefore, adopting a legally binding system for the Convention is a strategic choice as, despite its potentially more complex and lengthy ratification process, it offers a more robust and reliable legal framework to address the issue of climate displacement.

Adopting a binding legal system may introduce additional complexity and prolong the approval and ratification process because such systems require a greater consensus among participating States, which can be a considerable challenge on global issues such as climate change, where interests and capacities vary widely. However, the severity of the situation of

climate-displaced people requires adopting such a binding, coordinated system since it cannot be solved with non-binding commitments or piecemeal actions. Leaving such critical matters to the discretion of States or relying solely on their goodwill to act could lead to inconsistent, inadequate, or even absent responses, aggravating the situation of climate refugees and IDPs. Without a solid, binding legal mechanism to protect their rights and provide adequate assistance, they will remain vulnerable to risks. Consequently, despite the difficulties inherent in establishing a binding legal system, it is a necessary step to ensure their protection due to collective responsibility and climate justice.

Another important point relates to the 1951 Convention, with legally binding precepts and clearly defined implementation measures. In contrast, the UNFCCC, while important, is more generic and deals with climate change mitigation broadly without focusing specifically on the issue of climate refugees and IDPs. Thus, drawing more inspiration from the 1951 Convention would be prudent when developing this new instrument. The main reason is the similarity of the legal object in question – the protection of vulnerable groups who have been forced to leave their places of origin due to circumstances beyond their control – in the case of the 1951 Convention, related to conflict and persecution, and in the case of the CRIDP, related to extreme weather events and environmental change. Both situations require strong legal responses to ensure the rights and well-being of these groups, and the 1951 Convention has already established a successful precedent for such responses, with clearly defined systems of protection and assistance and binding legal obligations for signatory States. These features would be beneficial if incorporated into the CRIDP, ensuring a robust, coherent approach.

Finally, while Soft Law can serve as a flexible and diplomatic way of advancing complex issues, the problem lies in its need for legal enforceability. Climate refugees and IDPs cannot be left to the mercy of non-binding norms, given the urgency and scale of the problem. Climate change is notably accelerating, as are extreme weather phenomena, increasingly resulting in human movements. The adoption of a malleable instrument without sanctions for acts of non-compliance will thus place these victims in a position of extreme vulnerability and insecurity. In addition, States may ignore, minimise, or postpone the necessary action to prevent and respond to this reality without the protection of binding legal obligations. Therefore, clear and binding Hard Law rules and obligations are crucial and will provide protection and security for C-IDPs, ensuring that they are not neglected or forgotten, and the enforceability of such standards will guarantee States' accountability, assuring the implementation of adequate measures for the prevention, mitigation, and response to climate displacement.

## **Conclusion**

This research has provided substantial evidence and arguments supporting the urgent need for a new international legal framework to strengthen the rights of climate refugees and IDPs. Its findings have shed light on critical aspects that demand attention and action from the international community, offering substantial evidence and arguments answering to the initial question: in fact, **the current International Human Rights and Refugee legal framework is not sufficient for addressing the phenomenon of climate-induced displacement**, and it really seems that **creating an innovative international legal instrument may be the solution to protect the rights of C-IDPs**, since this dissertation's findings highlight the urgent need for new a legal framework to address the unique vulnerabilities and specific rights of climate refugees and IDPs.

One of the main contributions of this research is establishing the terminology used to describe these individuals. The definition and choice of the expressions of *climate refugee* and *IDP*, instead of *migrant* or others, have been thoroughly explored and justified. This consensus is crucial in recognising the specific vulnerabilities and rights that climate-induced displacement entails.

Moreover, it has highlighted the disproportionately severe impact of climate change on minors, particularly those already marginalised due to factors like age, gender or disabilities. Their specific needs, rights, and protection must be addressed and ensured comprehensively in a legal framework.

This research has also revealed significant gaps and insufficiencies in protecting the rights of climate refugees and IDPs. The *Teitiota case* is a poignant example, illustrating both the potential for granting enhanced protection to those and the challenges and shortcomings in securing their fundamental Human Rights, with much still to be done.

Similarly, the evidence of sea level rise and the consequent displacement of populations is undeniable proof that climate-induced displacement is not and will not be limited to internal movements. This context underscores the necessity for recognising and legally protecting climate refugees in the International Law framework. With projections indicating a substantial increase in climate refugees and IDPs, it is imperative to establish legal mechanisms that effectively address their rights and ensure their dignified treatment.

Accordingly, the proposed CRIDP is paramount. This would encompass crucial elements, including defining main concepts such as *climate refugee* and *IDP*, and outline covered

situations, fundamental principles, and the rights and entitlements granted. It would also have provisions for establishing CRIF, IACRI, and IPCID. Finally, it would be binding to ensure compliance and accountability among States.

While acknowledging the challenges associated with garnering State willingness to ratify such an instrument, rejecting alternative approaches such as Soft Law instruments or reliance on national and regional methods is imperative. The climate crisis is too severe, and its impact on vulnerable populations necessitates global cooperation.

Furthermore, it is essential to recognise that the burden of climate change disproportionately falls upon less advantaged countries. Adequate support and assistance should be provided to these countries to help them mitigate the effects of this environmental challenge and manage the difficulties posed by climate-induced displacement.

There is a critical need for an international legal framework that comprehensively addresses the rights and protection of climate refugees and IDPs. By prioritising the rights and needs of the most vulnerable, particularly children, and supporting countries affected by climate change, we can navigate this imminent challenge and build a more just and sustainable future for all.

Therefore, with the unwavering belief that *“the dream commands life”*, echoing the words of António Gedeão, this research ends with the fervent aspiration of contributing to creating a better world for those affected by climate change – all of us. Each written page was driven by the singular purpose of offering protection and ensuring the rights of those displaced by the overwhelming forces of our changing climate. In this pursuit, the solution never lies in closing doors but in forging bridges of solidarity and cooperation. May this work serve as a clarion call, awakening consciousness and galvanising collective efforts towards a future where all can live with dignity, security, and justice. Together, let us transform dreams into reality and pave the way for a more compassionate and sustainable world.

***“You may say I’m a dreamer, but I’m not the only one.”***

– John Lennon.

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## **International Conventional Law and Soft Law**

- i.** Cartagena Declaration on Refugees
- ii.** Committee on Economic, Social and Cultural Rights' General Comment No. 7: Article 11, paragraph 1 (the right to adequate housing: forced evictions)
- iii.** Committee on Economic, Social and Cultural Rights' General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights
- iv.** Committee on Economic, Social and Cultural Rights' General Comment No. 12: Article 11 (the right to adequate food)
- v.** Committee on Economic, Social and Cultural Rights' General Comment No. 13: Article 13 (the right to education)
- vi.** Committee on Economic, Social and Cultural Rights' General Comment No. 14: Article 12 (the right to the highest attainable standard of health)
- vii.** Committee on the Elimination of Discrimination against Women's General Recommendation No. 35 on gender-based violence against women of the Committee on the Elimination of all forms of discrimination against women
- viii.** Committee on the Rights of Persons with Disabilities' General Comment No. 4 on the right to inclusive education
- ix.** Committee on the Rights of the Child's General Comment No. 1: The aims of education
- x.** Committee on the Rights of the Child's General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change
- xi.** Committee on the Rights of the Child's General Comment No. 3: HIV/AIDS and the Rights of the Child
- xii.** Comprehensive Regional Protection and Solutions Framework
- xiii.** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- xiv.** Convention on the Elimination of All Forms of Discrimination against Women
- xv.** Convention on the Rights of Persons with Disabilities
- xvi.** Convention on the Rights of the Child
- xvii.** Cotonou Agreement – ACP-EU Partnership Agreement

- xviii.** Directive 2011/95/EU of the European Parliament and of the Council of 13<sup>th</sup> December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) Emergency Relief and Protection of Children Act of the Philippines
- xix.** European Convention on the Exercise of Children's Rights
- xx.** Fiji Planned Relocation Guidelines
- xxi.** Framework for Resilient Development in the Pacific 2017-2030
- xxii.** Global Compact for Safe, Orderly and Regular Migration
- xxiii.** Guiding Principles for Children on the Move in the Context of Climate Change
- xxiv.** Guiding Principles on Internally Displaced Persons
- xxv.** Institutional Strategy on Migration, Environment and Climate Change 2021-2030
- xxvi.** International Convention on the Elimination of All Forms of Racial Discrimination
- xxvii.** International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- xxviii.** International Covenant on Civil and Political Rights
- xxix.** International Covenant on Economic, Social and Cultural Rights
- xxx.** Kampala Convention – African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa
- xxxi.** Nansen Initiative Protection Agenda – Disaster Displacement
- xxxii.** New York Declaration for Refugees and Migrants
- xxxiii.** Organisation of African Unity Convention
- xxxiv.** Paris Agreement on Climate Change
- xxxv.** Rome Statute of the International Criminal Court
- xxxvi.** Sendai Framework for Disaster Risk Reduction
- xxxvii.** Sydney Declaration of Principles on the Protection of Displaced Persons in the context of Sea Level Rise

- xxxviii.** The Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- xxxix.** United Nations Charter
  - xl.** United Nations Children’s Fund’s Guiding principles for children on the move in the context of climate change
  - xli.** United Nations Convention on the Law of the Sea
  - xlii.** United Nations Convention relating to the Status of Refugees
  - xliii.** United Nations Convention relating to the Status of Stateless Persons
  - xliv.** United Nations Convention to Combat Desertification
  - xlv.** United Nations Declaration on Human Rights Education and Training
  - xlvi.** United Nations Framework Convention on Climate Change
  - xlvii.** United Nations High Commissioner for Refugees’ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees
  - xlviii.** United Nations High Commissioner for Refugees’ Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity
  - xliv.** United Nations High Commissioner for Refugees’ Views on Asylum Claims based on Sexual Orientation and Gender Identity
    - i.** United Nations Human Rights Committee’s General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant
    - ii.** United Nations Human Rights Committee’s General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial
    - iii.** Vanuatu’s National Policy on Climate Change and Disaster-induced Displacement
    - liii.** Vienna Convention on the Law of Treaties

### Case Law

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