

*Refugees, Climate Litigation in the Global South and
Climate Change: Facing the Gap in the Protection
of Climate Refugees in International Law*

Refugiados, litigación climática en el sur
global y cambio climático: enfrentando
la brecha en la protección de refugiados
climáticos en el derecho internacional

Réfugiés, litiges climatiques dans les pays
du Sud et changement climatique: combler
les lacunes dans la protection des réfugiés
climatiques en droit international

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Abstract: Climate change, as the main catalyst for catastrophes in this century, is closely linked to large groups of human beings in forced displacement. This group, called climate migrants - people who, against their will, have to leave their places of origin due to climate phenomena. However, this group of human beings, which tends to expand expressively in the coming decades, reaching somewhere between 200 million to 1.2 billion people by 2050, still does not enjoy specific protection, for what they could be considered: refugees. Despite this, the recognition of this category of migrants as refugees is of immediate importance, due to the need for protection, which has not yet been reflected in international law. Thus, at the moment, what advances have been achieved regarding the protection of climate “refugees” and regarding the evolution of the use of the expression? The present work is developed through bibliographic and documentary research as a research technique, and the analytical-deductive method for analyzing information. In this context, climate strategic litigation, a mechanism through which climate

impacts on human rights can be claimed in international courts, could be a possible short-term solution to the legislative gap for refugee protection.

Keywords: migration, refugees, climate refugees, climate migrations, climate litigation, international law.

Resumo: As mudanças climáticas, enquanto principal catalisador de catástrofes neste século, estão intimamente ligadas a grandes fluxos de seres humanos em deslocamento forçado. A esse grupo, dá-se o nome de migrantes climáticos - pessoas que, sem qualquer traço de voluntariedade, têm de deixar seus lugares de origem em razão dos fenômenos do clima. No entanto, esse grupo de seres humanos, que tende a se ampliar vertiginosamente nas próximas décadas, atingindo algo entre 200 milhões a 1.2 bilhão de pessoas até 2050, ainda não goza de proteção específica, pelo que poderiam ser considerados: refugiados. A despeito disso, é de imediata importância o reconhecimento dessa categoria de migrantes como refugiados, em razão da necessidade de proteção, o que ainda não se refletiu no direito internacional. Assim, até o presente momento, quais os avanços conquistados quanto à proteção dos “refugiados” climáticos e quanto à evolução da utilização da expressão? O presente trabalho se desenvolve através da pesquisa bibliográfica e documental como técnica de pesquisa, e do método analítico-dedutivo para análise das informações. Nesse contexto, a litigância climática estratégica, mecanismo por meio do qual os impactos climáticos sobre os direitos humanos podem ser reivindicados em tribunais internacionais, pode ser uma possível solução de curto prazo para a lacuna legislativa para a proteção de refugiados.

Palavras-Chave: migração, refúgio, refugiados climáticos, migrações climáticas, litigância climática, direito internacional.

Résumé: Le changement climatique, en tant que principal catalyseur des catastrophes de ce siècle, est étroitement lié à de grands groupes d’êtres humains en déplacement forcé. Ce groupe, appelé migrants climatiques - des personnes qui, contre leur gré, doivent quitter leur lieu d’origine en raison de phénomènes climatiques. Cependant, ce groupe d’êtres humains, qui tend à s’étendre de manière expressive dans les décennies à venir, atteignant quelque part entre 200 millions et 1,2 milliard de personnes d’ici 2050, ne bénéficie toujours pas d’une protection spécifique, pour ce qu’ils pourraient être considérés: réfugiés. Malgré cela, la reconnaissance de cette catégorie de migrants en tant que réfugiés est d’une importance immédiate, en raison du besoin de protection, qui n’a pas encore été reflété dans le droit international. Ainsi, à l’heure actuelle, quelles avancées ont été réalisées concernant la protection des « réfugiés » climatiques et concernant l’évolution de l’usage de l’expression? Le présent travail est développé à travers la recherche bibliographique et documentaire comme technique de recherche, et la méthode analytique-déductive d’analyse de l’information. Dans ce contexte, le litige stratégique climatique, un mécanisme par lequel les impacts climatiques sur les droits de l’homme peuvent être revendiqués devant les tribunaux internationaux, pourrait être une solution possible à court terme au vide législatif en matière de protection des réfugiés.

Mots-clés: migration, réfugiés, réfugiés climatiques, migrations climatiques, contentieux climat, droit international.

Summary: I. Introduction. II. The evolution of the concept of “climate refugees”. III. Framing climate migration in international law. IV. Climate litigation and the legal gap on climate refugees: inspiration from the global south. V. Conclusions. VI. Bibliography.

I. Introduction

With the countless situations that can arise from climate change—from rising ocean levels and the melting of glaciers and ice caps to the complete disappearance of small island countries such as Tuvalu, Vanuatu, Nauru and Tonga, including the effects immediately perceptible as the increase in temperatures—short and long-term responses must be considered to mitigate the consequences in this century, caused by human actions on the climate.

Considering the most severe aspects on the population, which can lead to intense migration flows of people who cannot return to their countries of origin precisely because of the severity of climate catastrophes, reality confronts us with a gap in international legislation concerning the protection of the so-called *climate refugees*, an expression adopted by the specialized literature since the 1980s, but which still does not find scope in international law. Those who migrate for climate reasons are not yet considered *refugees*.

This is due to the specificity of the protection given by the status of refugee, designated for people fleeing persecution of civil and political nature, among which environmental changes are not found, for some reasons: the climate does not persecute, and also because there is an important difference in the individual legal nature of the refugee status and the trans-individual nature of the environment that renders them, at least at a first legal point of view, incompatible.

However, this lack of definition is set to expose from 200 million people, in the most optimistic estimates, to 1.2 billion people in the coming decades,¹ in the most worrying estimates—humans who will be forced to abandon their places of origin due to climate change,² and are at risk of not being covered with due international protection—an estimate that, howev-

¹ Institute for Economics and Peace. Over one billion people are at threat of being displaced by 2050 due to environmental change, conflict and civil unrest (2020), available at: <https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf> (last visited December 27, 2021)

² Koser, Khalid, “Why migration matters”, *Current History*, vol. 108, no. 717, April 2009, pp. 147-153.

er, does not fully reveal the complexity of the facts: the origin of the migration phenomena and the location and extent of the damage caused by climate change are uncertain, unpredictable and, as far as it can be currently stated, already irreversible.³

Such consequences can also occur in different ways, in the form of prolonged droughts, unusual amounts of rain, desertification, changes in plantations and harvests,⁴ exacerbating existing conflicts and creating new ones, in already very fragile regions, which does not mean, however, that only developing countries will be affected.

Each year, according to data from the United Nations High Commissioner for Refugees, it is estimated that more than 20 million people have to leave their homes annually due to climate disasters,⁵ which affects small economies, such as Bangladesh, and large economies, such as India, China and the United States.⁶

As climate change is becoming increasingly difficult to be denied, given the environmental catastrophes striking worldwide, it is of utmost importance to address the immediate consequences affecting humans, as the survival of the species is in debate. Still, there are aspects of the protection that remain outside of the legal framework, despite its growing importance, such as the need to encompass environmental migration in the definition of refugee.

As noted in this work, there is little interest/effort to produce legal instruments concerning climate refugees, which brings us to the need to seek other means to deliver the necessary results, as the human rights consequences of the absence of full non-refoulement protection in these situations —specially for Small Island States— can be irreversible. In this scenario, climate litigation, when major impact contexts can be taken to international courts, might arise as a possible short-term solution to the gap in the legislation —a strategic use of multilevel governance.

³ *Idem*.

⁴ United Nations High Commissioner for Refugees. Climate Change and Disaster Displacement (2020), available at: <https://www.unhcr.org/climate-change-and-disasters.html> (last visited December 27, 2021)

⁵ *Id*.

⁶ World Economic Forum. Climate Refugees - the World's Forgotten Victims (2021), available at: <https://www.weforum.org/agenda/2021/06/climate-refugees-the-world-s-forgotten-victims> (last visited December 27, 2021)

One possible suggestion for the future could be climate litigation along these lines, as the leading cases analysed here, about other human rights issues related to climate, reveal some interesting perspectives that could have reflections in refugee protection. In the present work, an epistemological option to look after jurisprudence from the Global South assumes an important role: this is the part of the planet most affected by climate change, due to its special economic, social and development conditions, which means that development coming from this portion of the planet on the subject is extremely relevant to the discussions on protection and displacement.

In this sense, how have the subject of climate migrants developed and what progress has been made so far, given the exclusive protection of refugees? From the methodological point of view, in order to proceed with the best approach to the issue, the option was made for the analytical-deductive research method, starting from bibliographic and documentary research as a research technique.

II. The Evolution of the Concept Of “Climate Refugees”

The refugee concept adopted until the present moment dates from 1951, and since then, few substantial changes have occurred regarding its informative core, with the most important one being in the text of the 1967 Protocol relating to the Status of Refugees, with the removal of the geographical and temporal limitation that guaranteed protection only to European refugees from the Second World War. But the central definition remained unchanged, considering that:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷

⁷ Article 1, A(2), Definition of the term “refugee”, *Convention relating to the Status of Refugees*, 1951, available at: <https://www.unhcr.org/ph/wp-content/uploads/sites/28/2017/03/3.3-1967-Protocol-relating-to-the-status-of-refugees.pdf>

From the Convention itself, it is noted that it is a legal institute shaped for individual protection, which means that its recognition, for all the cases mentioned in the text, is done on a case-by-case basis, individually. An asylum-seeker, among the countries that are members of the 1951 Convention relating to the Status of Refugees, must go to the competent immigration authority of the country where they intend to apply for refuge, and they will do so only in their own name.

Other members of their family, provided they also have a well-founded fear of persecution, may also be recognized with the same status, but only under these conditions: that they are also included in the modalities of recognition. If the individual victim of persecution is only one person among them, the right to family reunion can be claimed for the other members of the group, but the refugee status, specifically, will only be granted for those persecuted.

In addition to the hypotheses listed in the 1951 Convention, in the Inter-American context there are some additional possibilities for extending the status of refugee, according to the Cartagena Declaration of 1984—which finds similarity in another document from the African system of Human Rights, of 1969—including in the concept the possibility of granting refugee status due to “generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously disturbed public order”.⁸

These contexts listed in Cartagena have a slightly different characteristic from the individual persecution of the 1951 text, as they reveal situations that occur in collective contexts, such as domestic political instabilities, which could give rise to the collective protection of refugees in the Inter-American context, although it has not yet occurred, and the recognition is still individual, made person to person.

That said, there is still no collective recognition of refugees. And this is exactly the gap in relation to climate migrants that, for the time being, makes their inclusion in the recognition of refugee status unfeasible: climate change is collective and more, environmental law is trans-individual and diffuse, of indeterminate ownership, which would render its relationship with refugee status and its individual nature very difficult to assemble.

⁸ United Nations High Commissioner for Refugees. Declaração de Cartagena (1984), available at: https://www.acnur.org/fileadmin/Documentos/portugues/BD_Legal/Instrumentos_Internacionais/Declaracao_de_Cartagena.pdf (last visited December 25, 2021)

Furthermore, even if this were the hypothesis, of recognizing collective modalities of refugee status, the informative core, once again and still, are the persecutions, conflicts and serious violations of human rights. And the environment does not promote persecution, and it is not directly considered a human right, although it is an extension, in terms of human rights, of the right to life, the right to health, physical integrity and the dignity of the human person.⁹

The climate refugee status, or environmental refugee status, first appeared in a document of public circulation in a report developed by Essam El-Hinnawi, for the United Nations Environment Program, in 1985, but its origin and use may have happened earlier, since the 1970s.¹⁰ However, it is common among climate migration scholars to consider that El-Hinnawi was the first to conceptualize the expression, as he was the first to bring it into a text destined to public debate,¹¹ when defining that climate refugees are persons who were

forced to leave their original habitat (or having left voluntarily) to protect themselves from harm and/or to seek a better quality of life. However, for the purpose of this book, environmental refugees are defined as those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.¹²

El-Hinnawi, alongside other authors, especially Jodi Jacobson in 1988, helped popularize the expression, which began to be used in other documents in the area. Jacobson, specifically, would note “unnatural disasters” into the concept, those being the disasters in which normal effects are exacerbated

⁹ Doc. 9791, 16 April 2003, Environment and human rights. Report. Committee on the Environment, Agriculture and Local and Regional Affairs. Parliamentary Assembly of the Council of Europe (2003), available at: <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10145&lang=EN> (last visited December 16, 2021)

¹⁰ Miller, DeMond S, “Climate refugees and the human cost of global climate change”, *Environmental Justice*, vol. 10, no. 4, August 2017, pp. 89-92, <https://doi.org/10.1089/env.2017.29027.dm>

¹¹ *Idem*.

¹² El-Hinnawi, Essam E., *Environmental Refugees*, Nairobi, United Nations Environment Programme, 1985.

ed by anthropogenic processes, second only to environmental soil degradation in the reasons for climate refugee migration.¹³

Although the expression was not used in it, the Intergovernmental Panel on Climate Change (IPCC), in 1990, in its First Assessment Report, defined, in a similar way, that “the gravest effects of climate change may be those on human migration”, reinforcing the academy’s concern for the international community.¹⁴

It would, however, be in 1993 that the first alarming numerical estimate on climate migrations appeared, in an article by Norman Myers, stating that a world “affected by greenhouse gases” would know 150 million climate refugees in the 21st century —in “rough calculations”, with the data possible at the time, as the author himself defines in the text.¹⁵ Currently, estimates already fluctuate between 200 million¹⁶ to 1.2 billion by 2050.¹⁷

In 1995, Myers and Kent would bring the most complete definition to date (and perhaps to this day) for the definition of climate refugees, as being:

persons who can no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope. These factors include drought, desertification, deforestation, soil erosion and other forms of land degradation; resource deficits such as water shortages; decline of urban habitats through massive over-loading of city-systems; emergent problems such as climate change, especially global warming; and natural disasters such as cyclones, storm surges and floods, also earthquakes, with impacts aggravated by human mismanagement.¹⁸

The International Organization for Migration (IOM) was incorporated to the institutional umbrella of the United Nations in the year 2016, with the

¹³ Jacobson, Jodi L., “Environmental refugees: a yardstick of habitability”, *Bulletin of Science, Technology and Society*, vol. 8, no. 3, 1988.

¹⁴ Piguet, Etienne, “Climate Change and Forced Migration. New Issues in Refugee Research”, UNHCR, Research Paper no. 153, 2008.

¹⁵ Myers, Norman, “Environmental refugees in a globally warmed world”, *Bioscience*, vol. 43, no. 11, 1993, pp. 752-761.

¹⁶ Koser, Khalid, *op. cit.*

¹⁷ Institute for Economics and Peace (IEP). Over one billion people are at threat of being displaced by 2050 due to environmental change, conflict, and civil unrest (2020), available at: <https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf> (last visited December 27, 2021)

¹⁸ Myers, Norman and Kent, Jennifer, “Environmental Exodus: an Emergent Crisis in the Global Arena”, Washington D.C., Climate Institute, 1995, p. 18.

status of a UN-related organization,¹⁹ differently from the United Nations High Commissioner for Refugees (UNHCR) which, in addition to having always been part of the UN structure since its foundation, was created with the status of subsidiary body to the General Assembly at first, by Resolution 319 (IV) December 1949, with an initial term of only 3 years.²⁰ UNHCR was only converted into a permanent body at a later time, in December 1950.

IOM also brought to the UN system an institutional definition of climate migrants, without, however, calling them refugees, within the scope of the organization's institutional performance, in the following terms, as their working definition:

Environmental migrants are persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.²¹

Thus, it is important to note that, although climate insecurity is not the primary cause for the emergence of armed conflicts, it may be a secondary cause, due to the consequences caused by climate change, such as hunger, scarcity of resources, droughts and human displacement, especially in situations of sudden disasters: earthquakes and hurricanes (Haiti²² and the Philippines²³); floods (Myanmar²⁴ and Bangladesh²⁵); food insecurity (Eritrea,

¹⁹ International Organization for Migration. IOM becomes related Organization to the UN (2016), available at: <https://www.iom.int/news/iom-becomes-related-organization-un> (last visited December 26, 2021)

²⁰ UN General Assembly, *Refugees and stateless persons*, 3 December 1949, A/RES/319, available at: <https://www.refworld.org/docid/3b00f1ed34.html> (last visited December 26, 2021)

²¹ International Organization for Migration. Definitional Issues – Climate Migrants, available at: <https://www.iom.int/definitional-issues> (last visited December 18, 2021)

²² Cohen, Marc J. and Singh, Bhawan, *Climate change resilience: The case of Haiti*, Oxfam International, 2014.

²³ Yumul Jr, Graciano P. *et al.*, “Extreme weather events and related disasters in the Philippines, 2004–08: a sign of what climate change will mean?”, *Disasters*, vol. 35 no. 2, 2011, pp. 362-382.

²⁴ In addition to the climate situation, Myanmar is experiencing a context of political instability. See United Nations High Commissioner for Refugees. Rohingya Emergency, available at: <https://www.unhcr.org/rohingya-emergency.html> (last visited December 20, 2021)

²⁵ United Nations Children's Fund. Climate change threatens lives and futures of over 19

Ethiopia, Somalia, Sudan, Djibouti²⁶); sea level rise (small island States);²⁷ melting of glaciers and mountain ice (Pakistan and India, in the Himalayas).²⁸

Among those mentioned, Haiti and Myanmar are among the most affected by extreme weather events, in the period 1999 to 2018,²⁹ along with Puerto Rico, followed by the Philippines, Pakistan and Vietnam.

The Horn of Africa is invariably mentioned as an example of conflicts related to food insecurity (“*conflict resulting from political and cross-border competition over resources impacted by climate*”)³⁰ —and food insecurity, there, is related to drought, lack of water, desertification, which adds to weakened states,³¹ to serious public health issues such as HIV and malaria outbreaks (the latter caused by the protozoan *p.falciparum*³²), and a rural economy, of small family farmers, marginalized since the colonial period,³³ whose production is directly affected by climate change. The same occurs in the Lake Chad Basin (Chad,

million children in Bangladesh (2019), available at: <https://www.unicef.org/press-releases/climate-change-threatens-lives-and-futures-over-19-million-children-bangladesh> (last visited December 26, 2021)

²⁶ Oxfam International. Ethiopia and the Horn of Africa hunger crisis, available at: <https://www.oxfam.org.au/what-we-do/emergencies/learn-about-current-emergencies/horn-of-africa-drought-and-food-crisis> (last visited December 21, 2021)

²⁷ International Labour Organization. Climate Change and Migration Issues in the Pacific, available at: <https://www.ilo.org/dyn/migpractice/docs/261/Pacific.pdf> (last visited December 26, 2021)

²⁸ World Bank. Glaciers of the Himalayas - World Bank Report (2021), available at: <https://www.worldbank.org/en/news/press-release/2021/06/01/to-slow-himalayan-glacier-melt-curbing-air-pollution-is-key> (last visited December 20, 2021)

²⁹ Eckstein, David *et al.*, Global climate risk index 2020. Bonn, Germanwatch (2019), available at: https://germanwatch.org/sites/default/files/20-2-01e%20Global%20Climate%20Risk%20Index%202020_14.pdf (last visited December 26, 2021)

³⁰ World Food Program. Greater Horn of Africa Climate Risk and Food Security Atlas - Technical Summary, available at: <https://docs.wfp.org/api/documents/WFP-0000098939/download/> (last visited December 26, 2021)

³¹ Burgess, Stephen F., “Environment and human security in the Horn of Africa”, *Journal of Human Security*, vol. 4, núm. 2, 2008, pp. 37-61.

³² World Health Organization. World Malaria Report (2020), available at: https://www.who.int/docs/default-source/malaria/world-malaria-reports/9789240015791-double-page-view.pdf?sfvrsn=2c24349d_5 (last visited December 26, 2021)

³³ Thomas, Evan *et al.*, “Reducing drought emergencies in the Horn of Africa”, *Science of The Total Environment*, vol. 727, 2020, <https://doi.org/10.1016/j.scitotenv.2020.138772>

Cameroon, Niger and Nigeria), a lake that has lost 90% of its water capacity since 1960,³⁴ in a region dominated by Boko Haram.³⁵

In addition to food insecurity and armed conflicts, climate catastrophes of human origin generate migration flows, in a more visible and direct way, even if individuals do not cross borders, remaining internally displaced —such as the rupture of the Fundão (Mariana) and Córrego do Feijão (Brumadinho) dams, in Minas Gerais, Brazil.³⁶ There are, however, still individuals who will not have this option of remaining internally displaced —those from small island countries such as Tuvalu, Vanuatu and Tonga.

There are, therefore, numerous situations of climate insecurity that create flows of internally displaced persons or climate migrants, without them being satisfactorily included in international law, especially with regard to the growing expectation of expanding the concept of refuge to encompass them—which in no way means that there has been no progress in the legislation in the last 30 years, as the next chapter intends to demonstrate.

III. Framing Climate Migration in International Law

Regarding the progress of international legislation with regard to climate migration, although there is still no definition of who climate refugees are, despite the whole context of climate change, which could give rise to this new thematic construction, the last 30 years have presented substantial changes, in order to gradually include the subject on the agenda of international law.

Since the United Nations Framework Convention on Climate Change (UNFCCC), in 1992, the inclusion of concepts such as “dangerous anthropogenic interference with the climate system”, root of the current context

³⁴ United Nations. Drying Lake Chad Basin gives rise to crisis. Food insecurity, conflicts, terrorism, displacement and climate change effects compound challenges (2020), available at: <https://www.un.org/africarenewal/magazine/december-2019-march-2020/drying-lake-chad-basin-gives-rise-crisis> (last visited December 26, 2021)

³⁵ Médecins Sans Frontières. Lago Chade: populações fogem da violência do Boko Haram, available at: <https://www.msf.org.br/noticias/lago-chade-populacoes-fogem-da-violencia-do-boko-haram> (last visited December 26, 2021)

³⁶ Vedovato, Luis Renato, Franzolin, Cláudio José, and Roque, Luana Reis, “Deslocados ambientais: uma análise com base na dignidade da pessoa humana”, *Revista Direito e Práxis*, vol. 11, 2020, pp. 1654-1680.

of insecurity, allowing “ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner”, in connection with the recognition that “low-lying and other small island countries, countries with low-lying coastal, arid and semiarid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change”, and also recognizing that “the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions”.

However, it would only be at COP13,³⁷ in 2007 with the Bali Action Plan, that the issue of environmental displaced persons began to gain greater relevance, when in article 1(c), (III) of the Action Plan, the idea to create “disaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change” has first appeared as a strategic response.³⁸ The Bali Action Plan also explicitly describes the need for international cooperation by countries,

further taking into account the urgent and immediate needs of developing countries that are particularly vulnerable to the adverse effects of climate change, especially the least developed countries and small island developing States, and further taking into account the needs of countries in Africa affected by drought, desertification, and floods.³⁹

Even so, the COP16, in 2010, in which the adaptation of Cancun to the Framework Convention took place, was the first to consider the need for joint governance of the issue of climate migration, in what we now call mini-

³⁷ Warner, Koko, “Coordinated approaches to large-scale movements of people: Contributions of the Paris Agreement and the Global Compacts for migration and on refugees”, *Population and Environment*, vol. 39, no. 4, 2018, pp. 384-401.

³⁸ United Nations Office for Disaster Risk Reduction. Bali Action Plan (2007), available at: https://www.unisdr.org/files/5526_BaliActionPlanandDRR.pdf (last visited December 26, 2021)

³⁹ United Nations Office for Disaster Risk Reduction. Bali Action Plan (2007), available at: https://www.unisdr.org/files/5526_BaliActionPlanandDRR.pdf (last visited December 26, 2021).

mum standards of “safe migration”.⁴⁰ New strategies would be established at COP18 in Doha, at COP19 in Warsaw, without substantial changes taking place in terms of the definition of climate migration.

However, COP19 creates the Warsaw International Mechanism on Loss and Damage, and in 2015, already under the auspices of COP21, with the Paris Agreement, the big change occurs, precisely because it was included within the International Mechanism of Warsaw a *Task Force on Displacement*,⁴¹ within the obligation of article 8 of the Agreement, to avoid, minimize and address losses and damages associated with the negative effects of climate change, including extreme weather events and slowly evolving events, and the role of sustainable development in reducing the risk of losses and damage.⁴²

The task force⁴³ was initially divided into 4 central axes,⁴⁴ and this systematization of the elements was updated for the period 2019-2021, as a consequence of the progress of the objectives of the first work plan, involving, in the same way, United Nations bodies and groups of experts under the mandate of the United Nations Convention on Climate Change, as well as other

⁴⁰ (f) Measures to enhance understanding, coordination, and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels; See UN Framework Convention on Climate Change. Cancun Adaptation Framework. Draft Decision, CP.16. Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, available at: https://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf#page=3 (last visited December 20, 2021)

⁴¹ UN Framework Convention on Climate Change. Workplan of the Task Force on Displacement, 2017-2018, available at: https://unfccc.int/sites/default/files/tfd_workplan.pdf (last visited December 26, 2021)

⁴² UN Framework Convention on Climate Change. The Paris Agreement (2015) available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (last visited December 26, 2021)

⁴³ UN Framework Convention on Climate Change. Workplan of the Task Force on Displacement, 2017-2018, available at: https://unfccc.int/sites/default/files/tfd_workplan.pdf (last visited December 26, 2021)

⁴⁴ Policies/practices - national/subnational level; Policies – international/regional; Data and evaluation; Framing and linkages. See UN Framework Convention on Climate Change. Workplan of the Task Force on Displacement, 2017-2018, available at: https://unfccc.int/sites/default/files/tfd_workplan.pdf (last visited December 26, 2021)

organizations whose role is relevant to the topic and other specialized bodies, even if external to the UNFCCC.⁴⁵

All efforts to include climate migration in their texts aimed to try to reduce the harmful impacts of climate on forced human displacement, but the climax of this elaboration would occur in 2018, with two extremely important documents for the theme: the Global Compact on Safe, Orderly and Regular Migration⁴⁶ and the Global Compact on Refugees.

This expression, not without reason, was not well received by migration scholars, as the guarantee of protection of migrants only in these contexts - safe, orderly and regular migration - excludes situations of not orderly and irregular migration, truly the greatest element of discussion when it comes to of climate migrations, due to the unpredictability⁴⁷ of its effects, and also because the aspirations of the Compact are too broad and vague,⁴⁸ as shown in objective 7: “address and reduce vulnerabilities in migration”.

However, the Global Compact on Migration also made several important points about environmental displacement, including an entire topic in objective 2, about tackling “natural disasters, adverse effects of climate change and environmental degradation”,⁴⁹ mentioning solutions for human mobility and human safety, with a series of mapping measures, vulnerability analysis and creation of structures at regional and sub-regional levels, precisely to guarantee the safe, orderly and regular migration of all climate migrants.

The use of the term climate refugee has not yet occurred, and there was great expectation for the Global Compact on Refugees,⁵⁰ also from 2018, for the inclusion of the theme, which did not happen. There is only a brief men-

⁴⁵ UN Framework Convention on Climate Change. Task Force on Displacement - Constituted Bodies, available at: <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD#eq-5> (last visited December 26, 2021)

⁴⁶ Safe, orderly, and regular migration also appears in the 2030 Agenda of the sustainable development goals, in goal 10.7 of goal 10.

⁴⁷ Koser, Khalid, *op. cit.*

⁴⁸ Newland, Kathleen, “The global compact for safe, orderly and regular migration: An unlikely achievement”, *International Journal of Refugee Law*, vol. 30, no. 4, 2018, pp. 657-660.

⁴⁹ United Nations. Global Compact for Safe, Orderly and Regular Migration - Final Draft, 11 July 2018, available at: https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf (last visited December 26, 2021).

⁵⁰ United Nations High Commissioner for Refugees. Global Compact on Refugees (2018), available at: <https://www.unhcr.org/5c658aed4.pdf> (last visited December 26, 2021).

tion about the environment, when dealing with environmental impact assessment in host countries when there are large flows of migrants, in line with the need to strengthen national host capacity, but stating, however, that the climate interacts with the elements that cause refugee flows, although they are not the main motivator.

What can be seen is that there is no connecting element between the two realities in the practice of refugee protection, that of climate migration with protection covered by the principle of *non-refoulement* - *non-refoulement* or non-return, is the principle through which no refugee can be returned to the country where they are persecuted, or their life is at risk. Yet, to date, neither the Framework Convention nor refugee legislation has satisfactorily addressed the issue of climate refugees.⁵¹

And precisely because of their unclear status, climate refugees, as we call them, are the forgotten face of climate change, and it is estimated that, worldwide, more than 20 million people have to leave their homes by disaster each year, according to data from the United Nations High Commissioner for Refugees.⁵²

Many of these migrants, unlike what was initially estimated, come from major world economies, such as the United States, China, and India,⁵³ indicating the geographical unpredictability of the consequences of climate change, on a planet whose atmosphere does not know the political boundaries imposed on humans. Even so, the greatest impacts are in regions of the planet with less economic conditions to react to impacts, which makes the mitigation of consequences even more complex.⁵⁴

Therefore, there is an urgent need to incorporate the human dimension into climate protection, and an important milestone is the Malé Declaration

⁵¹ Nishimura, Lauren, “‘Climate change migrants’: Impediments to a protection framework and the need to incorporate migration into climate change adaptation strategies”, *International Journal of Refugee Law*, vol. 27, no. 1, 2015, pp. 107-134.

⁵² United Nations High Commissioner for Refugees. Climate Change and Disaster Displacement (2020), available at: <https://www.unhcr.org/climate-change-and-disasters.html> (last visited December 26, 2021)

⁵³ World Economic Forum. Climate Refugees - the World's Forgotten Victims (2021), available at: <https://www.weforum.org/agenda/2021/06/climate-refugees-the-world-s-forgotten-victims> (last visited December 27, 2021)

⁵⁴ Nishimura, Lauren, *op. cit.*

on the Human Dimension of Global Climate Change,⁵⁵ within the scope of the Framework Convention, which states that there are clear and immediate implications of climate effects to the enjoyment of human rights - rights as important as the right to life, the right to food and minimum standards of living.

But the great innovation of the Declaration is the inclusion of emphasis on small island countries, in a text subscribed by themselves, due to the fact that even small climate changes are catastrophic for them, and whose destruction not only of ecosystems, but of their whole territory, may, in the less optimistic perspectives, cause its total disappearance, due to the rise in sea level.

Among the signatories of Malé, in addition to the Maldives, the country of which Malé is the capital, are Tuvalu, Vanuatu, Kiribati and Tonga, and other countries, all members of a group of small developing countries, all with the same characteristic: being islands or coastal areas, the SIDS (Small Island Developing States) .⁵⁶

For the populations of these countries, statelessness is not an estimate, it is a realization of the uncertain future that awaits them, as it is not a situation of simple forced displacement, it is the total disappearance of countries altogether, which should inspire, in the coming decades, impact mitigation mechanisms, especially for these populations – and one of the possible instruments to broaden the scope of current legislation to frame climate refugees, apparently, might be climate litigation.

IV. Climate Litigation and the Legal Gap on Climate Refugees: Inspiration from the Global South

As we have seen, despite the expressive amount of international documents referring to climate change and international environmental law as a whole, there is still a worrying gap regarding climate refugees, and it is not possible to apply the principle of *non-refoulement* while they are considered migrants,

⁵⁵ Center for Environmental Law. Malé Declaration on the Human Dimension of Global Climate Change (2007), available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (last visited December 27, 2021)

⁵⁶ United Nations. Sustainable Development Goals: Knowledge - Small Insular Developing States (SIDS), available at: <https://sustainabledevelopment.un.org/topics/sids/list> (last visited December 29, 2021)

in a generic way, which leaves them in a condition of deep vulnerability, especially those originating from small island States, tending to disappear.

Precisely because of the potential of imminent damage to communities made vulnerable by climate change, it is necessary to think of a way through which this specific group of migrants—who cannot or do not want to return to their places of origin due to severe climate conditions—can reaffirm their human rights, while broadening the *non-refoulement* protection to their contexts. As shown, legislation is making considerable progress, but this is still an unreached topic, and one of very important proportion, given the rate in which climate change is modifying landscapes.

A possible proposal for the future, in this sense, could be climate litigation, as some leading cases have already been developed around other human rights issues related to climate, although not necessarily for refugees. As an advance in the climate jurisprudence from the Global South can be observed—here, in an epistemological option for analyzing decisions referring to this portion of the planet, the most affected by climate change and, constantly, the most forgotten with regard to intellectual production in this sense—the trend of cooperation between States and organizations of the Global South for the development of the subject grows.⁵⁷

The option to analyze cases from the Global South is also due to the fact that cases from the Global North, instead of being mainly directed to human rights issues, often turn to the need for stricter climate control—a reflection of their own economies and development perspectives. Thus, in the Global North, the severity of climate change itself, as a climate phenomenon, is analyzed in the leading cases, rather than the means of mitigating its consequences on humans, which is more visible in the leading cases from the Global South.⁵⁸

The first case analyzed here will be the *Carbon Majors Petition* from the Philippines, before the country's Human Rights Commission—a paradigmatic case of climate litigation, linking human rights to the damage caused by climate change, a kind of gap filler for issues in which there is still no legal

⁵⁷ Peel, Jacqueline, and Lin, Jolene, “Transnational climate litigation: The contribution of the global south”, *American Journal of International Law*, vol. 113, no. 4, 2019, pp. 679-726.

⁵⁸ Yoshida, Keina and Setzer, Joana, “The trends and challenges of climate change litigation and human rights”, *European Human Rights Law Review*, 2020, pp. 140-152.

coverage.⁵⁹ Even though human rights are not formally associated with environmental law directly, but as a reflection, the consequences of prolonged droughts, above-average floods and other unexpected events can indeed generate serious human rights violations, which can be imputed to polluting States and other actors.

In this case of litigation in the Philippines, in particular, after a series of typhoons in 2016, numerous civil society organizations and a group of Filipino citizens came together to petition against 47 organizations (among them ExxonMobil, Chevron, Shell and BP), on the grounds that they had contributed significantly to climate change with their actions, causing immense damage to the population of the Philippines⁶⁰ —attracting international attention to their demand, with the Philippines being the scenario of an average of 20 typhoons per year, a reality likely to get worsened by climate change. The case was held by the Commission on Human Rights, which is not just a symbolic act, but a potential form, to be developed, of punishing future polluters.

The case of the Philippines is important for us to observe that, many times, populations in territories far away from the headquarters of the main polluters will be indiscriminately and unintentionally affected by these actions, and that a collective response needs to emerge. In this sense, it is noted that, although still incipient, the recognition of the relationship between human rights violations and the damage caused by anthropogenic climate change in the world has been affirmed by the United Nations Human Rights Council⁶¹, including conflicts over climate change and, specially, climate migration, when there are no longer conditions to inhabit a certain territory.

Despite the difficulty that can be argued in linking the responsibility of major polluters —whether companies or States— to human rights violations

⁵⁹ Savaresi, Annalisa and Hartmann, Jacques, “Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry”, in Lin, Jolene and Kysar, Douglas (eds.), *Climate Change Litigation in the Asia Pacific*, Cambridge, Cambridge University Press, 2020, pp. 63-93.

⁶⁰ Savaresi, Annalisa *et al.*, “Why the world is looking to the Philippines for climate justice”, *The Conversation*, February 17, 2018, available at: <https://theconversation.com/why-the-world-is-looking-to-the-philippines-for-climate-justice-91792> (last visited January 25, 2022)

⁶¹ UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, 15 January 2009, A/HRC/10/61, available at: <https://www.refworld.org/docid/498811532.html> (last visited January 17, 2022)

caused by climate change, it must be considered that the United Nations Human Rights Council itself, numerous times, affirms in its resolutions that it is possible to carry out this type of connection,⁶² including with “procedural obligations” on the part of States, due to their affiliation to international environmental law documents that guarantee it, as in paragraph 20 of A/HRC/31/52 of 2016, which mentions the duty “to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm”.⁶³

This resolution is important for the study of the issue of climate refugees because it also entails, as can be seen, the obligation to ensure the means to remedy damages as a reflection of civil and political rights obligations inside the treaties scope – a possibility of enlargement of conceptual standards, vital for immediate action. In this same direction, UN High Commissioner for Human Rights, Michelle Bachelet has recently hailed a landmark recognition of the right to a healthy environment as a human right, in resolution 48/13 of HRC,⁶⁴ to which a special rapporteur has been defined. This could mark the beginning of the legal breach to propose actions in favor of the enlargement of the concept of refugee protection.

Another case that is also interesting for the brief analysis proposed here is the Colombian Youths that, although it was a case seen by the Supreme Court of Colombia, and only against the State of Colombia, 25 children were the petitioners of an action in which they sought to hold accountable the government for the deforestation of the Amazon, which directly affects their rights to a future in which there are enough natural resources to guarantee their survival and long-term well-being.

As the observatory of the Sabin Center for Climate Change Law at Columbia University, according to a report by Professor Jose Felix Pinto Bazurco notes, 6 main measures were required in the children’s petition: a Govern-

⁶² Savaresi, Annalisa *et al.*, *op. cit.*

⁶³ Office of the UN High Commissioner for Human Rights. ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2016) UN Doc, A/HRC/31/52.

⁶⁴ Office of the UN High Commissioner for Human Rights. Bachelet hails landmark recognition that having a healthy environment is a human right (2021), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27635&LangID=E> (last visited January 18, 2022)

ment Action Plan to Reduce Deforestation, an Intergenerational Agreement, Updates to Municipal Land Management Plans, a Moratorium on the Drivers of Deforestation, an investigation into Illicit Drivers of Deforestation, and a National Parks Budget Review.⁶⁵

Thus, it can be seen that there is an interesting diversity of cases, especially among the main countries interested in mitigating the damages of climate change (notably, those that suffer the most), which can serve as a substrate and inspiration for other potential actions to expand the protection of refugees through strategic litigation in the courts – since there is already an obligation for States to protect and accommodate refugees, in the standard definition of the 1951 Convention and its 1967 Protocol.

Furthermore, especially in Latin America, it is legally possible to relate cases of refugees to the climate through a legal mechanism that can serve as an example for other countries in the world: the Cartagena Declaration of 1984. In its text, there is a conceptual expansion of the protection of refugee status in cases of serious and massive violations of human rights, something that, by reflex, can be caused by climate change in cases in which, as we have seen from the cases analyzed, States (or large corporations located in them) fail to provide their populations or populations of other affected States with mechanisms to prevent the advance of disasters or to mitigate their most serious consequences, as famine, livelihood security after droughts, and other circumstances.

In other words, if a State fails to punish those responsible for major environmental damage and prevent it from occurring, and this damage causes substantial changes in the local climate (and global, unfortunately), to the point of making subsistence, livelihoods, housing and food difficult for people, it is indeed possible to link refugee protection to climate protection, without prejudice to any of the legal concepts exposed.

And, finally, perhaps the most emblematic case of climate migration in tribunals and courts from the Global South is case *Ioane Teitiota vs The Chief Executive of the Ministry of Business, Innovation and Employment of New Zealand*. Teitiota, a national of Kiribati sought asylum under refugee status

⁶⁵ Columbia Climate School. Colombian Youth sue for Recognition of the Rights of Future Generations. Sabin Center for Climate Change Law, available at: <https://news.climate.columbia.edu/2018/03/21/colombian-youth-lawsuit-climate-rainforest> (last visited January 18, 2022)

⁶⁶ *Ioane Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016,

for himself and his family in New Zealand when his request was denied and they were deported back to Kiribati. He then filed a complaint to the UN ICCPR⁶⁷ Committee on Human Rights against the deportation, as such move from the government of New Zealand meant a threat to his right to life.

Kiribati, as argued by Mr. Teitiota, and as one of the small island states threatened by the rise in sea level, is directly affected by climate change, which renders life for its inhabitants very complex, due to the environmental conditions, making it impossible to maintain their livelihoods, farming, and access to clean, salt-free water.⁶⁸ An individual complaint, but with landmark perspectives.

As a result, the Committee, though not admitting that refugee status could be sought in such cases, as it did not identify the direct link between the threat to the right to life in this context, as the time span in which Kiribati is going to become inhabitable is that of 10 to 15 years—a considerable time to promote other measures—, meaning it was not an immediate risk, but it did recognize that, with the growing concern around climate change and the possibility that cases as Mr. Teitiota's would become more frequent, this position could suffer further reviews in the future, thereupon.⁶⁹

V. Conclusions

The fact that climate refugees are not yet under the protection of specific legislation, under the status of refugees, which renders them invisible to most specialized agencies and other forms of enforcing the protection under the *non-refoulement* principle—except for the IOM, but with a broad mandate, for all migrants, not just climate migrants, despite their specificity—, is still a challenge for researchers and practitioners on migration.

UN Human Rights Committee (HRC), 7 January 2020, available at: <https://www.refworld.org/cases,HRC,5e26f7134.html> (last visited January 22, 2022)

⁶⁷ International Covenant on Civil and Political Rights - ICCPR.

⁶⁸ Office of the UN High Commissioner for Human Rights. Historic UN Human Rights case opens door to climate change asylum claims, available at: <https://www.ohchr.org/EN/News-Events/Pages/DisplayNews.aspx?NewsID=25482> (last visited January 22, 2022)

⁶⁹ Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, available at: <https://www.refworld.org/cases,HRC,5e26f7134.html> (last visited January 22, 2022)

It also sheds light on the need for efficient governance to deal with the human consequences of advancing climate change, putting climate refugees at the center of the century's main concern: the advance of environmental catastrophes.

The use of the expression “environmental refugee” is recent and dates back to the 1980s, which means that its fresh academic construction has not yet found strength in the international political environment to change the protection legislation in a way of amplifying rights, which is still hampered by the apparent incompatibility between individual refugee status and the collective protection of the environment – something that cannot and should not be the center of the debates.

So far, there are no hypotheses for granting collective refugee status in international legislation, and even under the aegis of the Cartagena Declaration of 1984, in the context of the Inter-American System of Human Rights, it is possible only in very specific context, such as massive and generalized violations of human rights. For most of the recognition processes, it remains on a case-by-case basis, individually, depending on the eligibility analysis by the competent authorities of each nation.

This means that, in a century in which the most optimistic forecast estimates that ¼ of a billion human beings will have to move from their places of origin in the midst of environmental catastrophes —among those, countries that could completely vanish— there is still no protection that links the human rights of these populations to the refugee status, which would guarantee them with the right of not being returned to a place in which their lives could be in danger. And for some populations, this is not even an option. It is a necessity, in the face of the destruction of all places they know and love. In which they have developed their livelihoods. In which they have raised their children. In the land in which they expect to finally rest, when the time comes.

Though not all of the case law attempts until the very moment have been successful to promote further protection for climate refugees, it is visible that development on the matter is not only possible, but already happening. In this sense, climate litigation plays a vital role in opening doors to the debate, prompting political and judicial actors to review their positions as the world gradually faces the increasing consequences of climate change.

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