Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2026, n. 1

EDITORIALE SCIENTIFICA

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies" www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

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2026, n. 1

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Vulnerabilità legate al genere: nuove sfide per la tutela di migranti e richiedenti asilo

Il focus *raccoglie i contributi selezionati a seguito di* call for papers *promossa dal Gruppo di interesse "Diritto internazionale ed europeo delle migrazioni e dell'asilo (DIEMA)" della Società italiana di Diritto internazionale e di Diritto dell'Unione europea (SIDI).*

(IM)MOBILITY IN THE CONTEXT OF CLIMATE CHANGE: BETWEEN LEGAL CHALLENGES AND LEGAL EXPERIMENTS

Marie Courtoy*, Francesco Luigi Gatta**

1. Introduction

Humans moving to adapt to their environment is a reality that has always existed. The qualification of migration in relation to the environmental factor is much more recent, though: it can be traced back to Lester Brown, environmental activist and founder of the Worldwatch Institute, who coined the term "environmental migrant" in the 1970s to refer

Double-blind peer reviewed article.

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This work was supported by the Italian Ministry of University and Research (MUR) under the PRIN 2022 project "Legal Pathways for Refugees in the Euro-Mediterranean Context: The Feasibility of Processing Asylum Claims outside the EU" - EUROPATHWAYS (Project code: 2022NKEY7J; CUP: J53D23005740006).

to "people choosing or forced to migrate due to environmental factors"[1]. It was taken up and popularized by Essam El-Hinnawi of the United Nations Environmental Programme in 1985, who preferred the term "environmental refugee", thus limiting the definition to persons forced to move[2]. The issue only gained further momentum when the existence of climate change was acknowledged. In its 1990 First Assessment Report, the International Panel on Climate Change (IPCC) warned that "the gravest effects of climate change may be those on human migration"[3]. Interestingly, then, the concept did not come from migration experts. It was rather highlighted by environmental scholars wishing to sound the alarm about environmental degradation and the need for action to combat it[4]. The ball, nevertheless, had been thrown into the fields of migration and refugee studies[5].

While migration experts emphasised the multi-causality of migrations and warned against oversimplifications[6], legal scholars attempted to find solutions based on existing instruments or by creating new ones. This led to numerous discussions and controversies about the definition of this newly identified category, to the point of questioning its very existence[7]. Today, a consensus seems to be emerging around the term of "(im)mobility"[8]

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[1] H. AYAZI, E. ELSHEIKH, *Climate Refugees: The Climate Crisis and Rights Denied*, in *UC Berkeley's Othering & Belonging Institute*, 2019, n. 21, available at <https://belonging.berkeley.edu/climaterefugees>. See also J. MORRISSEY, *Rethinking the "debate on environmental refugees": From "maximilists and minimalists" to "proponents and critics*", in *Journal of Political Ecology*, 2012, n. 1, p. 36.

[2] He used the term to describe "...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 affect the quality of their life. By 'environmental disruption' in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or the resource base) that render it temporarily or permanently, unsuitable to support human life." (E. EL-HINNAWI, *Environmental Refugees*, UN Environment Programme, 1985).

[3] IPCC, *First Assessment Report* (IPCC 1990), pt 5.0.10.

[4] C. A. VLASSOPOULOS, *Des migrants environnementaux aux migrants climatiques : un enjeu définitionnel complexe*, in *Cultures & Conflits*, 88/7, 2012, p. 9, available at <https://journals.openedition.org/conflits/18563>.

[5] M. J. FERNÀNDEZ, *Refugees, climate change and international law*, in *Forced Migration Review*, n. 49, 2015, p. 42.

[6] F. GEMENNE, *How They Became the Human Face of Climate Change. Research and Policy Interactions in the Birth of the 'Environmental Migration' Concept*, in E. PIGUET, A. PÉCOUD, P. DE GUCHTENEIRE (eds.), *Migration and Climate Change*, Cambridge, 2011, pp. 225-259.

[7] The International Organisation for Migration (IOM) indeed noticed in a 2009 report that there was "little consensus over the years among researchers about whether or not environmental migration is a distinct form of migration worthy a special study" (IOM, *Migration, Environment and Climate Change: Assessing the Evidence* (IOM 2009), p. 14, available at https://publications.iom.int/system/files/pdf/migration_and_environment.pdf. See also Richard Black who considers it a myth (R. BLACK, *Environmental Refugees: Myth or Reality?*, UNHCR Working Papers No. 34, 2001, pp. 1-19) or Stéphane Doumbé-Billé, who questions the fact that such migrants have their own reality behind such a problematic qualification (S. DOUMBÉ-BILLÉ, *Les déplacés environnementaux : la fuite devant l'environnement*, in *Revue juridique de l'environnement,* 2016, n. 41/3, p. 478). See also C.T.M. NICHOLSON, *'Climate-induced migration': ways forward in the face of an intrinsically equivocal concept*, in B. MAYER ET F. CRÉPEAU (eds.), *Research Handbook on Climate Change, Migration and the Law*, Cheltenham, 2017, pp. 49-66.

[8] The term encompasses the different forms that movements can take, thus reflecting the constantly changing nature of one movement to another, from mobility to immobility. It also has the advantage of not having the connotations associated with the term migration, allowing for reasoned, fact-based thinking about the best way to frame human (im)mobility. See I. BOAS, *From Climate Migration to Climate*

in the context of climate change. The Cancún Agreements in their para 14(f) refer to three forms of mobility: displacement, migration and planned relocation. Displacement is generally considered to be forced, whereas migration is said to be voluntary. However, the difference between the two is often blurred in practice. Moreover, it is now acknowledged that immobility, whether voluntary or involuntary, should be added to these three forms of mobility[9]. These different forms of (im)mobility call for varied and complementary solutions in law.

The purpose of this article is to assess the capacity of existing legal tools to provide protection and assistance to individuals affected by adverse climate-change related events. An answer will be explored by examining different, relevant legal frameworks.

Firstly, the EU legal order will be considered to highlight how EU policy and legislation on migration and environment lack a structured and protection-oriented approach (para. 2). Despite the recognition of the climate change-migration nexus by the institutions, indeed, legislative interventions so far have not addressed the protection of climate migrants nor solutions for safe and organized pathways, including via recent, important reform packages such as the so-called Green Deal and the Pact on Migration and Asylum.

Secondly, and given the unsatisfactory scenario in the EU legal order, the international protection regime will be considered to examine *to what extent* it is capable of providing some degree of *protection* for those escaping the impact of climate change (para. 3)[10]. Both refugee law and human rights law are indeed relevant for some of the affected individuals, even though international protection alone will not be sufficient to cover all mobility needs in a changing climate. The analysis, thus, will be complemented by looking at soft law instruments of international policymaking and standard-setting that contributed to put the issue of climate change-related migration on the global agenda (para. 4). In this context, indeed, a core idea of a safe, legal and organised *management* of migratory flows has emerged, building on multi-actor consultative processes aimed, *inter alia*, at identifying effective State practices for pre-emptive strategies, as planned relocation, special mobility pathways for particular groups affected by climate change.

Thirdly, the article will zoom in on concrete solutions and *ad hoc* instruments that have been recently implemented to manage climate change-related mobility (para. 5). Attention will be devoted to the legal and policy initiatives put in place in Oceania: a significant legal and judicial laboratory, where the issue of climate change mobility, especially with regard to inhabitants of Pacific States islands, has perhaps shown its

Mobilities, in *MPC Blog*, 9 December 2020, available at https://blogs.eui.eu/migrationpolicycentre/from-climate-migration-to-climate-mobilities/.

[9] K. VAN DER GEEST, A. DE SHERBININ, F. GEMENNE, K. WARNER, *Editorial: Climate Migration Research and Policy Connections: Progress since the Foresight Report*, in *Frontiers in Climate*, vol. 5, 23 juin 2023, pp. 1-4.

[10] M. MOREL, *Human rights law, refugee and migration law, and environmental law: exploring their contributions in the context of "environmental migration"*, in P. MARTIN, L. ZHIPING, Q. TIANBAO, A. DU PLESSIS, Y. LE BOUTHILLIER (eds.), *Environmental governance and sustainability*, Cheltenham, 2012, pp. 248-265.

outmost urgency and need for intervention. This scenario, indeed, has generated important developments, prompted by a certain legal creativity, leading to innovative solutions for assistance and protection of populations affected by climate change, in particular via special pathways of controlled and organised mobility.

Finally, the article will offer some overall concluding remarks, in order to assess the actual suitability of the existing legal frameworks to assist and manage individuals affected by climate change-related adverse effects (para. 6).

2. Situating the EU in the Global Debate on the Climate Change and Mobility Nexus

When discussing climate change and environmental disasters one could be tempted not to immediately think of Europe as the epicentre of such phenomena. Other zones or regions – for example, some coastal areas in the African Continent or some archipelagos of islands in Oceania – would more naturally come to mind. Yet, Europe is no stranger to risks and damages of climate change. It is a fact, indeed, that European populations themselves are subjects to the adverse effects of climate change. To mention a few examples, the climate change litigation pursued before the European Court of Human Rights (ECtHR) concerned issues such as heatwaves and wildfires, allegedly caused by the respondent States' greenhouse gas emissions[11]. More recently, according to the EU's Copernicus monitoring service – a service implemented by the European Environment Agency – in the Summer 2025, so-called Cyclone Daniel dumped more than a year's worth of rain on central Greece in just hours, so that some 750 km^2 (equivalent to the area of New York City) of the Thessalian plain were inundated, impacting, *inter alia*, on 25% of Greece's agricultural production[12]. Similarly, in January 2026, Cyclone Harry moved across the Mediterranean, bringing extreme weather to several coastal regions, including Sicily and Malta[13]. Climate change, therefore, is no longer an "exotic" or remote phenomenon that is not of Europe's direct concern. It is actually happening "at home" within its territory, where climate displacement is starting to occur internally. The initial responsibility for protection therefore lies primarily with Member States towards their own citizens, as indicated by natural disaster law[14] and the case law of the European Court of Human Rights, including through evacuations if necessary.

At the same time, climate change hitting neighbouring regions is likely to add much bigger and complex issues for the EU and its Member States. Indeed, as global warming

[11] See, in particular, ECtHR (Grand Chamber), judgment of 9 April 2024, App. no. 53600/20, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, and ECtHR (Grand Chamber), judgment of 9 April 2024, App. no. 39371/20, *Duarte Agostinho and Others v. Portugal and 32 Others*.
[12] N. STAMOULI, *Europe's climate refugees: The Greek communities wiped off the map*, in *Politico*, 20 September 2025.
[13] E. BORG, *Storm Harry moves to Sicily, leaving parts of eastern coast 'unrecognisable'*, in *Times of Malta*, 22 January 2026.
[14] International Law Commission, Draft articles on the protection of persons in the event of disasters, 2016, Article 10.

accelerates, intertwined and complex phenomena – such as access to food, water, and basic livelihoods, soil degradation – risk generating massive migratory movements in the near future, making the EU as an even bigger pole of attraction for displaced people from abroad. In particular, given the critical significance of the Mediterranean Sea as a human migration route, the EU would need to undertake bold initiatives that will allow a humane and orderly response to an impending humanitarian crisis resulting from sudden massive displacement of people from regions stricken by brutal climate disasters[15].

The EU is aware of the climate change-migration nexus and has expressed growing concern for the possible developments in this respect, thereby aligning itself with relevant international soft-law instruments[16]. Climate change, indeed, has been acknowledged several times by both the European Commission and the European Parliament as a significant, potential driver for displacement. To mention a few, recent examples, the former institution has addressed the issue of migration as related to and provoked or increased by disasters, climate change and environmental degradation[17]. The latter, on the one hand, has promoted studies and research on the matter[18]; on the other hand, has raised awareness of the human lives lost and the humanitarian crisis caused by climate change[19]. Similar actions and considerations, moreover, may be found within the institutions of the Council of Europe[20].

Yet, despite the acknowledgment of the urgency of the climate crisis, as well as, of its connections with human mobility, the EU's action has so far had a limited impact. The complexity of the matter is such that it does not allow for a "magic formula" to be implemented rapidly. Climate mobility requires, on the contrary, proactive and forward-looking strategies, policy coherence and strong institutional coordination which, however, do not come naturally to many political institutions, which may be preoccupied with advancing their policy agendas through short legislative cycles, gaining electoral support, or obtaining favourable outcomes in reform negotiations. In particular, the current, dominant crisis-oriented narratives around "mass migration" in Europe is a

[15] C. SCISSA, *Human mobility in the context of disasters, climate change and environmental degradation in the Euro-mediterranean region: Challenges and Insights*, in *EuroMed Rights*, February 2024.
[16] See below, at para. 4. On EU policy and law in relation to international soft law on the matter, see F. GAUDIOSI, *Environmental Migrants: UN Recent and « Soft » Sensitivity v. EU Deafening Silence in the New European Pact on Migration and Asylum*, in this *Journal*, 2021, n. 2, p. 150 et seq.
[17] Commission staff working document, *Addressing displacement and migration related to disasters, climate change and environmental degradation*, July 2022. See also the study, European Commission, Joint Research Centre, *International migration drivers – A quantitative assessment of the structural factors shaping migration*, Luxembourg, 2018.
[18] See, for example, A. KRALER, C. KATSIAFICAS, M. WAGNER, *Climate Change and Migration: Legal and policy challenges and responses to environmentally induced migration*, European Parliament, European Parliament Research Service, 2020; European Parliament, *The Future of Climate Migration*, European Parliament Research Service, 2022.
[19] European Parliament, *resolution of 15 June 2023 on the implementation and delivery of the Sustainable Development Goals*, (2023/2010(INI)), paras. 43, 48.
[20] See, for example, Parliamentary Assembly of the Council of Europe, *Resolution 2401 (2021) on climate and migration*, 29 September 2021, para. 1. The Resolution was supported by a report on climate change and migration. See, Parliamentary Assembly of the Council of Europe, *Climate Change and Migration: Report*, Doc. 15348, 23 August 2021.

relevant factor, which impacts the EU's capacity to effectively tackle the issue of climate change-related mobility, provide tangible protection to those affected by adverse environmental phenomena, and, ultimately, to promote its credibility to deliver, also and especially in the eyes of impacted third countries[21].

Results appear particularly poor when it comes to the protection of "climate refugees" on the one hand, and to the creation of a system of legal and safe mobility for nationals from climate change-affected third countries on the other. As it will be seen in the following paragraph, such an unsatisfactory outcome depends on several causes, one of which clearly appears to be the lack of political will to pave the way for normative instruments for protection and safe and legal mobility. In the recent period, indeed, the EU has had multiple opportunities to reform its legislation – both in the area of environment and migration law – so as to fill the existing protection gaps. All these opportunities, however, have been intentionally missed.

2.1. Attempts to Address the Issue of Protection of "Climate Refugees" in the EU

Under EU law there is not an explicit recognition of a status for the protection of individuals affected by climate change-related effects[22]. What is more, despite the acknowledgement of the connection between the two areas, EU law presents a stark separation between environmental and migration policies[23]. This might be questionable if one considers the relevant EU primary law provisions devoted to those areas. As for asylum and migration, indeed, Article 78, para. 1, TFEU establishes that the EU "shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to *any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement*"[24]. As it will be seen[25], authoritative international bodies have made it clear that there might be a link between climate change and refoulement obligations, which can trigger responsibility for States to provide protection. As for the EU environment policy, on the other hand, Article 11 TFEU establishes that "Environmental protection requirements must be *integrated into the definition and implementation of the Union's policies and activities*"[26], thereby framing environment as a cross-cutting sector, which could and should be interconnected

[21] On this topic, see, most recently, J. DREWORTH, *Climate Displacement and the European Refugee 'Crisis' Narrative*, in *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique*, Vol. 39, 2026, n. 3, pp. 963-987.
[22] On this matter, see G. MORGESE, *Environmental Migrants and the EU Immigration and Asylum Law: Is there any Chance for Protection?*, in G.C. BRUNO, F.M. PALOMBINO, V. ROSSI (eds.), *Migration and the Environment. Some Reflections on Current Legal Issues and Possible Ways Forward*, Roma, 2017, p. 47 et seq.
[23] C. SCISSA, *Climate Change and Migration: Implementing EU Commitments through Policy Synergies*, in ActionAid International, *Climate Change Knows no Borders*, April 2024, p. 20. On the matter see also H. HANN, M. FESSLER, *The EU's Approach to Climate Mobility: Which Way Forward?,* EPC – European Policy Centre, European Investment Bank, Discussion Paper, 26 October 2023.
[24] Emphasis added.
[25] See below, at para. 3.
[26] Emphasis added.

also with migration. Synergies between environmental and migration policies, thus, exist and should be endorsed for the EU's overall climate actions to be truly comprehensive, inclusive, and effective. A clear-cut division between the areas, on the contrary, risks undermining the achievement of significant results.

When it comes to the issue of international protection, in particular, although many developing countries have urged the EU to afford climate migrants the status of refugees, individual EU Member States have clearly not supported the idea. As it will be explained more in detail, there are legal criticalities in linking the status of refugee with climate change[27]. According to international and EU asylum law, indeed, refugees must have a well-founded (individual) fear of persecution on account of given reasons, among which environmental reasons *per se* can hardly amount to "persecution".

Nonetheless, some attempts to identify options for protection have been explored under EU secondary law, namely within the body of directives composing the Common European Asylum System (CEAS), based on the consideration that the relevant directives would demonstrate how protection from environmental causes is implicit in EU law[28]. In this respect, the 2001 temporary protection directive has been explored as a tool to cover individuals displaced because of environmental disasters, who may qualify as beneficiaries[29]. Similar reflections have been made with regard to the qualification directive, based on the consideration that a person who does not qualify as a refugee may nonetheless be eligible for subsidiary protection when there are substantial grounds for believing that, upon removal, they would face a real risk of suffering serious harm[30]. Finally, the return directive has equally come into account as an expansive interpretation of the exceptions to removal provided therein might include environmental considerations, which would also be consistent with the views adopted by the UN Human Rights Committee concerning climate change and refoulement obligations[31].

Besides the mentioned EU secondary law, the lack of a status for "climate refugee" could have been addressed by the EU legislator with two recent reforms, i.e., the so-called Green Deal and the New Pact on Migration of Asylum, neither of which, however, eventually proved suitable to fill the gap.

As for the 2019 European Green Deal, the European Commission recognised climate change as a trigger of migration, along with other factors of instability such as conflicts,

[27] See below, at para 3.

[28] C. SCISSA, *The Climate Changes, Should EU Migration Law Change as Well? Insights from Italy*, in *European Journal of Legal Studies*, Vol. 14, 2022, n. 1, p. 8. See also V. KOLMANNSKOG, F. MYRSTAD, *Environmental Displacement in European Asylum Law*, in *European Journal of Migration and Law*, Vol. 11, 2009, n. 4, pp. 313-326.

[29] See G. SCIACCALUGA, *Sudden-Onset Disasters, Human Displacement, and the Temporary Protection Directive: Space for a Promising Relationship?*, in G.C. BRUNO, F.M. PALOMBINO, V. ROSSI (eds.), *Migration and the Environment. Some Reflections on Current Legal Issues and Possible Ways Forward*, Roma, 2017, p. 75 et seq.

[30] C. SCISSA, *The Climate Changes, Should EU Migration Law Change as Well? Insights from Italy*, *op. cit.*, pp. 4-5.

[31] Mostly based on the findings of the case *Teitiota v. New Zealand*, which will be discussed more in detail below, at para. 3.

food insecurity and population displacement[32]. However, the Green Deal's engagement in addressing the relevant connection between climate change and mobility remains scarce. As a matter of fact, it essentially only covers cooperation with partners in order to prevent environmental and climate challenges, which would ideally prevent consequences such as displacement and forced migration from already vulnerable regions[33]. It has been highlighted, indeed, that such an approach is not accompanied by the opening of dedicated legal migration channels and that, in many cases, these policies "merely result in a rebranding of existing projects, or in the diversion of funding from other projects equally beneficial to the Global South"[34]. The idea, in other words, is to focus primarily on tackling the "root causes" of climate change, but migrants *per se* are not really part of the picture. And this includes those already present in the EU, who are at a greater risk of being socio-economically disadvantaged and exposed to environmental stressors. Consequently, it has been noted that leaving them out of the umbrella of the Green Deal implies disregarding their position and relevance within the host society, neglecting their agency, and failing to prioritise the representation of their interests[35].

In the area of migration and asylum, the 2020 Pact on migration and asylum, despite fostering a significant and comprehensive reform of the EU legislation in the area[36], did not properly address climate change as a crucial factor for international protection and as a reason for organised and safe mobility[37]. The Pact limited itself to mention climate change among the major global challenges impacting on migration dynamics, without putting forward any tangible commitment from the EU in terms of action on the climate change-migration nexus[38]. Even more emblematic is the silence of the Commission's recommendation on legal migration, which, despite having a soft law nature, did not even mention climate change, disasters, and environmental degradation[39].

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[32] European Commission, *The European Green Deal*, COM(2019)640, 11 December 2019.

[33] IOM, *Inclusion of Migration and Migrants in Climate-Resilient Development Pathways in the Context of the European Green Deal*, IOM, Geneva, 2023

[34] S. NASH, *The View from the Fortress: European Governance Perspectives on Climate Change and Migration*, in C. NICHOLSON, B. MAYER (eds.), *Climate Migration. Critical Perspectives for Law, Policy and Research*, Oxford, 2023, p. 148.

[35] C. SCISSA, *Climate Change and Migration: Implementing EU Commitments through Policy Synergies*, *op. cit.*, p. 24.

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *a New Pact on Migration and Asylum*, of 23 September 2020, COM(2020)609. For an overview of the significance of the reform and its main legal features, see F. SPITALERI, *La grande riforma del diritto dell'immigrazione e dell'asilo dell'Unione europea : un'analisi d'insieme nella prospettiva dei rapporti tra ordinamenti,* in *Eurojus*, 2025, n. 1, pp. 255-277.

[37] On the scarce impact of the Pact on climate migration, see F. PERRINI, *Il Nuovo Patto sulla migrazione e l'asilo ed i migranti ambientali: una categoria "dimenticata"?,* in this *Journal*, 2021, n. 2, p. 245 et seq.; M. FERRARI, *Il cambiamento climatico quale causa delle migrazioni forzate: un fenomeno ancora troppo trascurato*, in *Quaderni AISDUE*, 2024, n. 1, notably pp. 5-9.

[38] European Commission, *a New Pact on Migration and Asylum*, *op. cit.*, p. 1.

[39] Commission Recommendation (EU) 2020/1364, *on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways*, of 23 September 2020, C/2020/6467. On the topic of legal avenues of migration within the Pact, see M. BORRACCETTI, *Le vie legali di accesso all'Unione nel nuovo Patto su asilo e migrazione della Commissione europea*, in *I Post di AISDUE*, II, 2020, Focus "La proposta di Patto su immigrazione e asilo", 5 October 2020, pp. 97-118;

2.2. Gaps and Limits in the EU Approach to Climate Change Migration

As briefly outlined above, EU law provides neither a legal status, nor legal mobility solutions, for third country nationals affected by climate change. The EU's answer, or, rather, the dominant approach, appears to be essentially based on its external action. The climate change-migration nexus, in other words, is dealt with as a matter falling within the umbrella of cooperation and development policies, involving areas of external action such as so-called green diplomacy, trade, humanitarian aid and development. Such a toolbox of legal and diplomatic components aims primarily at the prevention of and the protection from migration originating from third countries. The main philosophy here, thus, is to intervene *in loco* vis-à-vis local populations, through financial and technical assistance, so as to prevent and contain outward mobility. For this reason, it has been criticised in so far as it distorts the use of cooperative and financial mechanisms, which are instrumentalized to implement externalisation policies[40].

Such an approach appears to be aligned with, and as an external projection of, the predominant security-driven dynamics characterizing current migration governance in the EU internally. The prevalence of such overall approach ends up impacting on bi-regional dialogues and approaches regarding protection and safe mobility pathways for people displaced by disasters, climate change, and environmental degradation[41]. This scenario ultimately determines gaps and delays in the EU's action as compared to other regional contexts and international organizations[42].

A more advanced scenario might be found in the EU but at domestic level, i.e., with regard to single, specific national experiences[43]. Some Member States, indeed, have put in place solutions for protection of migrants impacted by climate change. This is true

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C. FRATEA, *Accesso alle procedure di protezione internazionale e tutela delle esigenze umanitarie: la discrezionalità in capo agli Stati membri non viene intaccata dal Nuovo Patto sulla migrazione e l'asilo*, in this *Journal*, 2021, n. 2, notably p. 125 et seq.

[40] See, for example, M. SCOTT, *Adapting to Climate-Related Human Mobility into Europe: Between the Protection Agenda and the Deterrence Paradigm, or Beyond?*, in *European Journal of Migration and Law*, Vol. 25, 2023, n. 1, p. 65; T. SPIJKERBOER, *Migration management clientelism: Europe's migration funds as a global political project*, in *Journal of Ethnic and Migration Studies*, Vol. 48, 2022, n. 12, pp. 2892-2907.

[41] For an overview of the cooperation between the EU and the African Union, including on climate change and migration issues, see F.L. GATTA, *Bi-regional cooperation between the African Union and the European Union: legal-institutional settings, challenges and way ahead*, in *Ordine Internazionale e Diritti Umani*, 2022, n. 5, pp. 1220-1241.

[42] For an account of the different approaches taken in contexts other than the European one, see, with particular regard to the African, South-American and Arab Regions, M.V. ZECCA, *The Protection of "Environmental Refugees" in Regional Contexts*, in G.C. BRUNO, F.M. PALOMBINO, V. ROSSI (eds.), *Migration and the Environment. Some Reflections on Current Legal Issues and Possible Ways Forward*, Roma, 2017, p. 101 et seq.

[43] For an overview of the different approaches taken at EU and national levels, see A. BRAMBILLA, *Migrazioni indotte da cause ambientali: quale tutela nell'ambito dell'ordinamento giuridico europeo e nazionale?*, in *Diritto, Immigrazione e Cittadinanza*, n. 2, 2017, p. 1 et seq.; S. BORRÀS-PENTINAT, A. COSSIRI, *La protezione giuridica dei migranti forzati per causa climatica all'incrocio degli ordinamenti giuridici*, in *Diritto, Immigrazione e Cittadinanza*, 2024, n. 3, p. 1 et seq.; G. SCIACCALUGA, *La Corte Distrettuale dell'Aja e la lotta ai cambiamenti climatici: valori e limiti della politica climatica dell'Unione europea*, in *Eurojus*, 7 October 2015.

especially at judicial level, where various national courts – e.g., *inter alia*, in Austria, Germany or Italy[44] – have started to deliver decisions granting protection due to climate change-related and environmental adverse events, thereby setting precedents that could be replicated elsewhere[45].

Ultimately, therefore, in the EU, protection of migrants from such environmental causes appears to be mostly anchored in national practices. This marks, on the one hand, a certain positive dynamism, which might pave the way for future developments and dissemination of best judicial and legislative practices. On the other hand, however, it also means that protection is fragmented and suffers from significant variation across the EU. In conclusion, while the EU lacks a legal system of protection of climate refugees, as well as a structured toolbox of regular and safe access for individuals facing climate change, something more promising might be detected at the international level. As the next paragraphs will illustrate, indeed, the debate around protection and regular mobility of climate migrants is very active, with different solutions and experiments being discussed and tested. It might be especially fruitful and important for the EU, thus, to pay attention to the evolution unfolding beyond its borders, so as to re-orient its policies and actions, and build on existing regional practices for protection, admission and stay of climate refugees and migrants.

3. Looking Beyond Europe: International Protection in a Changing Climate

Although not climate change-specific, and despite being conceived in a different and apparently remote era, the 1951 Geneva Convention relating to the status of Refugees (hereinafter: the Refugee Convention) is relevant for the protection of some of the individuals affected by climate change who (otherwise) meet the conditions for obtaining refugee status. Recent developments in case law also seem to indicate that the principle of *non-refoulement* derived from human rights could intervene in favour of those who suffer a sufficiently high threshold – to be determined – of harm from the consequences of climate change. While these achievements are significant, international protection remains limited to a small fraction of individuals who are displaced by climate change and is proving inadequate for other forms of mobility that are also necessary in a changing climate.

[44] For the case of Austria, see M. MAYRHOFER, M. AMMER, *Climate mobility to Europe: The case of disaster migration in Austrian asylum procedures*, in *Frontiers*, Vol. 4, 2022; M. AMMER, M. MAYRHOFER, M. SCOTT, *Disaster-related migration into Europe: Judicial practice in Austria and Sweden*, in *ClimMobil Report*, 2022. For Italy, see M. DI FILIPPO, *La protezione dei migranti ambientali nel dialogo tra diritto internazionale e ordinamento italiano*, in *Diritti umani e diritto internazionale*, 2023, n. 2, pp. 329-334; C. SCISSA, *The Climate Changes. Should EU Migration Law Change As Well? Insights from Italy*, in *European Journal of Legal Studies*, Vol. 14, 2022, n. 1. For Germany, see C. SCHLOSS, *The Role of Environmental Disasters in Asylum Cases: Do German Courts Take Disasters into Account?*, in S. BEHRMAN, A. KENT (eds.), *Climate Refugees. Global, Local and Critical Approaches*, Cambridge, 2022.

[45] On such a judicial dynamism, see C. SCISSA, *Migrazioni ambientali tra immobilismo normativo e dinamismo giurisprudenziale: Un'analisi di tre recenti pronunce*, in *Questione giustizia*, 17 May 2021.

3.1. Refugee Law: No "Climate Refugees" but Standard Application of the Refugee Convention

From the outset and for a long time, the United Nations High Commissioner for Refugees (UNHCR) contested the appellation of "environmental or climate refugee", considering that it lacked a basis in international refugee law and that it risked undermining this legal regime[46]. This response was motivated by fear both of diluting the distinctiveness of refugee status in the face of already reluctant States, and of overburdening the already limited capacity of the UNHCR[47]. The debate has long been to determine whether "climate refugees" fall within the definition established by Article 1 of the Refugee Convention[48]. Today, the question is rather framed as follows: in what circumstances can a person fleeing the effects of climate change or a disaster be granted refugee status? In this more constructive approach, the UNHCR itself has developed guidelines[49], reinforced by insights from several research groups[50].

Three arguments have been put forward to justify the non-application of the Refugee Convention in the event of disasters or climate change. Firstly, it has been said that no agent of *persecution* could be identified and that, if one were to be identified, it would be the States to which individuals are fleeing to seek refuge, which would result in a "a reversal of the traditional refugee paradigm"[51]. The notion of persecution is not defined by the Refugee Convention, nor has it been subsequently defined by the UNHCR[52]. The drafters recognized the need for flexibility[53]. By reviewing the drafting history, though,

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[46] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Handbook)*, UN doc HCR/IP/4/ENG/REV.4 (1979, reissued 2019) para. 39; W. KÄLIN, N SCHREPFER, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR, 2012; A GUTERRES, *Climate Change, Natural Disasters, and Human Displacement: A UNHCR Perspective*, UNHCR, 23 October 2009.

[47] M. SCOTT, *Climate refugees and the 1951 Convention*, in S. SINGH JUSS (ed.), *Research Handbook on International Refugee Law*, Cheltenham, 2019, p. 350.

[48] A. WILLIAMS, *Achieving Justice within the International Legal System: Prospects for Climate Refugees*, in B. J. RICHARDSON (ed.), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Community*, Cheltenham, 2009, p. 3.

[49] UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, UNHCR, 2020; UNHCR, *Climate change impacts and cross-border displacement: International refugee law and UNHCR's mandate*, UNHCR, 2023.

[50] K. JASTRAM, *International Protection for People Displaced across Borders in the context of Climate Change and Disasters: A Practical Toolkit*, in *International Journal of Refugee Law*, 2025; D. CANTOR, *International Protection, Disasters and Climate Change*, in *International Journal of Refugee Law*, 2024, p. 12.

[51] J. MCADAM, *Climate Change, Forced Migration, and International Law*, Oxford, 2012, p. 45. On the matter, see also M. CASTIGLIONE, *Oltre l'*hazard paradigm*: la Convenzione di Ginevra sullo status dei rifugiati e il fondato timore di essere perseguitato a seguito dei cambiamenti climatici, disastri naturali e degradazione ambientale*, in *Diritto, Immigrazione e Cittadinanza*, 2023, n. 1, p. 74 et seq.

[52] UNHCR, *Handbook*, *op. cit*., para. 51.

[53] As Grahl-Madsen emphasized, "[i]t seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men", see A. GRAHL-MADSEN, *The status of refugees in international law*, Sijthoff, 1966, p. 193.

Hathaway and Foster identified two basic premises[54]: an inclusive approach to the type of harm – including socio-economic harms[55] –, and a restriction to the harms that the State is unwilling or unable to protect[56]. Such a 'bifurcated approach', thus, requires serious harm and a failure of state protection[57]. The source of harm is therefore irrelevant[58]. When it comes to individuals in situations of environmental disaster displacement, it can hardly be contested that they may suffer serious harm, given the impacts of climate change on human rights[59]. The failure of State protection, on the other hand, needs to be measured. The principle of due diligence has often been used. However, it has often been interpreted as the state "making efforts" to protect individuals[60], which is meaningless when it comes

[54] J. HATHAWAY, M. FOSTER, *The law of refugee status,* Cambridge, 2014, pp. 183-186.

[55] Hathaway and Foster refer to an exchange between Mr Stolz (the representative of the American Federation of Labour) and Mr Rain (the French delegate) during the drafting of the Convention. When the first "recalled that people sometimes left their countries for social or economic reasons, an eventuality which was not specifically mentioned", the second replied that he "thought that the nature of the persecution should be described in very broad terms. In actual practice he felt sure that the people referred to by the representative would be recognized as refugees" (UN Doc E/AC.32/SR.17, 31 January 1950, 3-4; cited in Hathaway and Foster, op. cit., 183, n11).

[56] Hathaway and Foster refer to the British draft which provided for the Convention to apply to "unprotected persons" (UN Doc E/AC.32/L.2, 17 January 1950, 1) and to the French draft which mentioned persons who were "unwilling or unable to claim the protection of [their] country" (UN Doc E/AC.32/L.3, 17 January 1950, 3). See J. HATHAWAY, M. FOSTER, *op. cit*., 184, n. 13. See also Shacknove's explanation: "[i]t is the absence of state protection which constitutes the full and complete negation of society and the basis of refugeehood". Cfr. A. SHACKNOVE, *Who Is a Refugee*?, in *Ethics*, 1985, n. 95, p. 277.

[57] *R v Immigration Appeal Tribunal and Another; ex parte Shah* [1999] 2 AC 629 (UKHL, 25 March 1999) 653 (Lord Hoffman). In addition to Hathaway and Foster, see G. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, 3rd ed., Oxford, 2007, p. 92.

[58] See Hathaway and Foster's discussion on the 'accountability theory' that requires the State to be responsible in some way for the persecution according to the rules governing state responsibility in international law. Given the strong criticisms due to its practical limitations and its inconsistency with the rules of interpretation of the Vienna Convention as well as the object and purpose of the Refugee Convention, it is now largely obsolete and has given way to the 'protection approach' (J. HATHAWAY, M. FOSTER, *op. cit*., 303-307). On the protection approach, see C.S. Canada, *Ward* (1993).

[59] See the multiple reports on the subject by the United Nations High Commissioner for Human Rights, OHCHR, *OHCHR and climate change*, https://www.ohchr.org/en/climate-change. The relevance of refugee law because of the impact of climate change on the enjoyment of human rights is also highlighted by the International Law Commission (ILC, *Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries* (2016) ILC Commentary to Article 5 at para 8, www.refworld.org/ docid/5f 64dc3c4.html. See the European Court of Human Rights' caselaw on environment (ECHR, *Environment and the European Convention on Human Rights* (March 2020), https://www.echr.coe.int/Documents /FS_Environment_ ENG.pdf. Interestingly, even natural disasters unrelated to human activities have already led to reports of violations of the right to life (ECHR, judgement of 20 March 2008, App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, *Budayeva and Others v. Russia*; ECHR, judgement of 17 November 2015, App Nos 14350/05, 15245/05 and 16051/05, *Özel and Others v. Turkey*. See the Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights (IACHR, *Advisory Opinion OC-23/17 on the Environment and Human Rights* (15 November 2017), http://www.corteidh.or.cr/sitios/libros/todos/docs/infografia-eng.pdf. Also noteworthy is the consideration of socio-economic rights by the United Nations Human Rights Committee under the cover of the examination of the right to life in the *Teitiota* case concerning the application of the principle of *non-refoulement* when the risk of serious harm concerns the effects of climate change. See UNHRC, Communication No. 2728/2016, of 24 October 2019, *Ioane Teitiota v. New Zealand*, esp. paras 9.8 and 9.9.

[60] See for example *Teitiota* (26 November 2013) NZSC 3125, para 12: "there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can".

to the dichotomy between inability versus *unwillingness* to ensure protection and prevention[61]. Due diligence also serves to assess the responsibility of the State rather than the protection of the individual[62]. These shortcomings have led to another, returnability test: instead of assessing whether the State is exercising a certain level of protection, the focus switches on whether the person will not be persecuted in case of removal[63].

Secondly, the strongest obstacle is the identification of one of the *Convention grounds*, given the alleged indiscriminate nature of the effects of climate change[64]. But, as Scott argues, this reveals a lack of understanding of what a disaster is[65]. Indeed, "disasters require the interaction of a natural hazard event or process with vulnerable social conditions"[66]. In the context of refugee law, this "invites a more context-specific examination of *individual* claims for international protection"[67], leading to the necessity of an examination of the question of whether a state of vulnerability is the product of discriminations for one of the Convention grounds[68]. This also aligns with the long-standing observation by migration experts that mobility is caused by a complex and interrelated set of factors[69]. This is still more the case with climate change, which often exacerbates existing socio-economic and environmental vulnerabilities[70], acting as a "threat multiplier"[71].

The doctrine initially sought to protect all so-called "climate migrants or refugees" by identifying a common Convention ground applicable to them. 'Membership of a particular social group' is the ground that has been most discussed in this regard[72]. The UNHCR state that "persecutory action toward a group may be a relevant factor in

[61] J. HATHAWAY, M. FOSTER, *op. cit*., pp. 308-313.
[62] *Ibidem*, pp. 314-315.
[63] See abundant examples of case law from UK, Canada, Australia, Austria, Belgium or Switzerland in Hathaway and Foster's manual, J. HATHAWAY, M. FOSTER, *op. cit.*, pp. 315-319; W. KÄLIN, *Conceptualising Climate-Induced Displacement*, in J. MCADAM (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford, 2010, p. 98.
[64] This was noted by the Immigration and Protection Tribunal of New Zealand in the case of Ioane Teitiota, stating that "[t]he sad reality is that the environmental degradation caused by slow and sudden-onset disasters is one which is faced by the Kiribati population generally" (*AF (Kiribati)* (25 June 2013) NZIPT 800413, para 75).
[65] M. SCOTT, *Climate Change, Disasters, and the Refugee Convention*, Cambridge, 2020. Also supported by Sanjula Weerasinghe. See S. WEERASINGHE, *Refugee Law in a Time of Climate Change, Disaster and Conflict*, UNHCR, 2020, pp. 90-96.
[66] M. SCOTT, *Climate refugees and the 1951 Convention*, cit., p. 355.
[67] M. SCOTT, *Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change*, in *Refugee Survey Quarterly*, 2016, n. 35/4, p. 27.
[68] This refers to the 'predicament approach' that will be studied in the next section.
[69] E. PIGUET, A. PÉCOUD, P. DE GUCHTENEIRE, *Migration and Climate Change: An Overview*, in *Refugee Survey Quarterly*, n. 33/3, 2011, p. 13.
[70] I. BERCHIN, I. BLASI VALDUGA, J. GARCIA, J. B. S. O DE ANDRADE GUERRA, *Climate change and forced migrations: An effort towards recognizing climate refugees*, in *Geoforum*, n. 84, 2017, p. 148.
[71] J MCADAM, *Building international approaches to climate change, disasters, and displacement*, in *Windsor Yearbook of Access to Justice*, 2016, n. 33/2, p. 3.
[72] UNHCR, 'Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' UN doc HCR/GIP/02/02 (7 May 2002) para 2; G. GOODWIN-GILL, J. MCADAM, *op. cit*., 79-80; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J).

determining the visibility of a group in a society"[73]. According to such a "social perception" approach, a group becomes a social group when it is perceived as such by society[74]. Therefore, it has been argued that even if potential "climate refugees" often do not share a common socio-economic condition[75], they could qualify as a social group under the "social perception" approach: factors such as lower incomes lead to fewer means to develop resilience to climate change, as well as a weaker voice at the political level[76], resulting in a form of marginalization that often characterizes certain social groups. Today, we tend to look at whether there are grounds for discrimination beyond environmental harm against certain individuals or groups of individuals that could make them eligible for refugee status. The UNHCR thus gives the example of people who take a political stance in defending the environment or belong to a marginalised or vulnerable group[77]. The idea is the same, but it is applied more specifically to individuals or groups of individuals in order to take risks into account in a systemic manner and in light of particular vulnerabilities and capacities.

Thirdly and finally, asylum seekers must prove that there is *nexus between the persecution and a given Convention ground*. Leading scholars in refugee law agree that if intention is a sufficient condition, it is not necessary[78]. This is justified both because it does not take into account the broader social context in which a fear develops, but also because of evidentiary issues[79]. Today, the tendency is rather to focus on the reason for exposure to the risk, in what is known as the 'predicament approach'[80]. As the Refugee Status Appeals Authority of New Zealand clearly explained: "The Convention defines refugee status not on the basis of a risk 'of persecution' but rather 'of being persecuted'… The focus is on the reasons for the claimant's predicament rather than on the mindset of

[73] UNHCR, 'Guidelines on International Protection No. 2', op. cit., para. 14.
[74] *Ibid*., para 7.
[75] Which is sometimes contested, see Duong about the Tuvalians: "If Tuvalu were not a small island in the Pacific Ocean in between Australia and Hawaii, it would not be in danger of its government being unable to stop the ocean from rising too high. Its people would not fear increasing carbon emissions from around the globe ending their very way of life. They have a well-founded fear of persecution precisely because of their membership in the social group of Tuvaluans – a group of small island dwellers whose homes are in peril due to the rise in sea levels." See T. DUONG, *When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law,* in *University of Pennsylvania Journal of International Law*, 2014, n. 31/4, p. 1265.
[76] F. QUILLERÉ-MAJZOUB, *Le droit international des réfugiés et les changements climatiques: vers une acceptation de l'"ecoprofugus"?*, in *Revue de Droit International et de Droit Comparé*, 2009, n. 9, p. 635.
[77] UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, UNHCR, 2020; UNHCR, *Climate change impacts and cross-border displacement: International refugee law and UNHCR's mandate*, UNHCR, 2023.
[78] J. HATHAWAY, M. FOSTER, *op. cit.*, p. 368; A ZIMMERMANN, C MAHLER, '*Article 1A, para 2'* in A. ZIMMERMANN (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford, 2011, p. 373; G. GOODWIN-GILL, J. MCADAM, *op. cit.*, p. 101.
[79] M. SCOTT, *Climate Change, Disasters, and the Refugee Convention*, Cambridge, 2020, p. 39.
[80] Endorsed by courts (UK House of Lords (Lord Hoffman), Islam (1999); Federal Court of Australia (Madgwick J), NACM (2003)); by the UNHCR (UNHCR, 'Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions' (2 December 2016) HCR/GIP/16/12 [32] <http://www.refworld.org/docid/583595ff4.html>) and by legal scholars (S. WEERASINGHE, *op. cit*., pp. 87-90); J. HATHAWAY, M. FOSTER, *op. cit*., p. 378).

the persecutor"[81]. This approach is particularly helpful in investigating possible discrimination (on a Convention ground) underlying the vulnerability that caused an environmental event to become a disaster[82].

3.2. Human Rights Law: Environmental Harm Potentially Sufficient to Trigger Non-Refoulement Obligations

The subsidiary protection offered by the principle of *non-refoulement* prevents any State from returning an individual to a country where their human rights would be violated[83]. Unlike the Refugee Convention, it does not require a connection to any specific ground. The threshold of severity of the harm is, however, very high. Yet, since the *Teitiota* communication issued by the UN Human Rights Committee[84], it has been recognised that "[w]ithout robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states" (para 9.11). In this particular case, however, the Committee considers that "the timeframe 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" (para 9.12). It therefore concludes that it is not in a position to find a violation of the right to life.

It is therefore still unclear what threshold is required for the principle of non-refoulement to apply[85], with Mr Teitiota's case already appearing particularly egregious: coastal erosion making flooding more frequent, saltwater infiltration reducing drinking water resources and destroying crops, even though agriculture is one of the island's main

[81] Refugee Status Appeals Authority of New Zealand, Refugee Appeal No. 72635/01 (2002), para. 168.

[82] M. FOSTER, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge, 2007, p. 283, who observes "cases in which decision-makers focus on the factors that led to or contributed to the person's vulnerability to the relevant harm feared, concluding that if those factors can be related to a Convention ground (most commonly membership of a particular social group) then nexus is established. In such cases […], the focus is not on the intention of the persecutor or even of the state (although the state protection issue is relevant); rather the decision-maker simply asks, 'why is the person in this predicament?'

[83] For a discussion on the relevance of human rights law for the protection of individuals affected by environmental adverse phenomena, see S. VILLANI, *Reflections on human rights law as suitable instrument of complementary protection applicable to environmental migration*, in *Diritto, Immigrazione e Cittadinanza*, 2021, n. 3, p. 1 et seq.

[84] UN Human Rights Committee, *Teitiota v. New Zealand*, UN Doc CCPR/C/127/D/2728/2017, 24 October 2019. For an analysis of the decision, see J. MCADAM, *Protecting People Displaced by the Impacts of Climate Change : The UN Human Rights Committee and the Principle of Non-Refoulement*, in *Australian Journal of International Law*, n. 114, 2020, p. 708; M. COURTOY, *Le Comité des droits de l'homme des Nations Unies face à l'homme qui voulait être le premier réfugié climatique : une avancée mesurée mais bienvenue. (obs. sous Com. dr. h., constatations Ioane Teitiota c. Nouvelle-Zélande, 24 octobre 2019)*, in *Revue trimestrielle des droits de l'Homme*, vol. 124, 2020, n. 4, pp. 941-968.

[85] For an overview of the relevant legal framework in different regional contexts, see C. SCISSA, *The principle of non-refoulement and environmental migration: a legal analysis of regional protection instruments*, in *Diritto, Immigrazione e Cittadinanza*, 2022, n. 3, p. 1 et seq.

sources of employment, erosion of inhabitable areas creating a housing crisis and causing social tensions that sometimes lead to violent disputes. In his dissenting opinion, Committee member Duncan Laki Muhumuza recalls that "[i]t would indeed be counter-intuitive to the protection of life to wait for deaths to be very frequent and considerable in number in order to consider the threshold of risk as met" (pt 5) and that "[t]he action taken by New Zealand is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all, there are other passengers on board" (pt 6).

The International Court of Justice and the Inter-American Court of Human Rights in their advisory opinions on climate change have both referred to this case law with regard to the principle of non-refoulement, without providing further guidance on the required threshold[86]. Even if the threshold were to be made more concrete by being reached in cases, we can expect a restrictive interpretation and therefore a fairly limited application of the protection afforded by this route[87].

3.3. International Protection: Part of the Solution(s) to Climate Threats

International protection for victims of disasters and climate change must be encouraged and strengthened. However, it is not the ultimate answer: not only will it not benefit all those on the move due to climate change, but it is also ill suited in certain respects.

The first and perhaps most critical deficiency is the one of *space*, concerning more specifically, internal movements, as only those who cross an international border can benefit from international protection[88]. This is crucial, considering that the former category of migrants will represent most of the victims pushed to move because of environmental disasters[89].

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[86] International Court of Justice, Advisory Opinion of 23 July 2025, *Obligations of States with regard to climate change*, para 378; IACHR, Advisory Opinion 32/25 of 29 May 2025, Climate emergency and human rights, para 433.

[87] Unprecedented numbers frighten States, leading to unproductive security discourse. Migrants end up being blamed while polluting States impose their concerns. See L. NISHIMURA, *"Climate Change Migrants": Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, in *International Journal of Refugee Law*, vol. 27, 2015, n. 1, p. 107 and p. 120, and the complexity of the situation is denied, see J-M LAVIEILLE, J BÉTAILLE, M PRIEUR, *Les catastrophes écologiques et le droit : échecs du droit, appels au droit*, Bruxelles, 2012, p. 527; C. FARBOTKO, H. LAZRUS, *The first climate refugees? Contesting global narratives of climate change in Tuvalu*, in *Global Environmental Change*, 2012, n. 22, p. 384. In the end, the reaction that is most reasonable to expect from States would be to choose a minimum definition that protects only a fraction of the people concerned. See B. MAYER, *The Concept of Climate Migration. Advocacy and its Prospects*, Elgar Studies in Climate Law, 2016, pp. 179-180.

[88] See Article 1A(2) of the Refugee Convention.

[89] See the World Bank report which justifies its choice to focus on internal migration in relation to climate change: "Internal, rather than cross-border, migration is the report's central focus for good reasons. There is growing recognition among researchers that more people will move within national borders to escape the effects of slow-onset climate change, such as droughts, crop failure, and rising seas." See K. K. RIGAUD, A DE SHERBININ, B JONES, J BERGMANN, V CLEMENT, K OBER, J SCHEWE, S ADAMO, B MCCUSKER, S HEUSER, A MIDGLEY, *Groundswell: Preparing for Internal Climate Migration*, World Bank, 2018.

The second issue is that of *time.* International protection requires that the movement be forced, however, migration related to slow-moving climate events may be considered as "voluntary" migration when the movement anticipates evil[90]. Even if it is the severity and not the timing of the harm that determines the need for protection, the two will often be linked[91]. Nevertheless, certain developments deserve to be pointed out. The Federal Court of Australia highlighted the need "to consider […] the applicant's fear of being persecuted in the more distant future"[92]. In New Zealand, the Immigration and Protection Tribunal also recognized that "[j]ust as in the refugee context past persecution can be a powerful indicator of the risk of future persecution, so too can the existence of a historical failure to discharge positive duties to protect against known environmental hazards be a similar indicator in the protected person jurisdiction"[93].

The UN Human Rights Committee, in *Teitiota*, did not apply the standard of imminence, but of foreseeability[94]. Even though the risk was not recognized as sufficiently foreseeable in the case at hand, this finding does not preclude that future cases could succeed as long as there is enough scientific evidence to demonstrate that the risk will occur[95].

The third, relevant aspect is *group protection.* Indeed, rather than implying cases of isolated individuals who request a case-by-case examination of their situation, displacements in the context of climate change, as indicated by the UNHCR, would entail the application of the Refugee Convention "to situations of large-scale arrivals of refugees"[96]. Even though the refugee system is often said to be individual, there is no exclusion of group situations in the *travaux préparatoires* of the Refugee Convention[97]. However, the refugee system is not ideally suited to this challenge. As Chemillier-Gendreau emphasizes, "the right of asylum itself has been the object of a legal

[90] See the decision of the Immigration and Protection Tribunal of New Zealand in the Teitiota case, which described the movement of the applicant for international protection as "voluntary adaptive migration – that is, to adapt to changes in the environment" and found that "[w]hile there is some degree of compulsion in his decision to migrate, his migration cannot be considered 'forced'" (*AF (Kiribati)* (25 June 2013) NZIPT 800413, para 49).

[91] J. MCADAM, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, in *International Journal of Refugee Law*, 2011, n. 23/1, p. 10. See also the useful distinction made by Jean-Yves Carlier and Sylvie Sarolea between the elements of "persecution" and "fear" (or "risk"): once persecution is established, what needs to be assessed is whether there is a risk that it will actually occur in the future in case of removal – bearing in mind that the more serious the harm, the less certain the possibility of it occurring should be, in line with the holistic approach of the refugee definition See J-Y. CARLIER, S. SAROLEA, *Droit des étrangers*, Bruxelles, 2016, pp. 410-443.

[92] FCA, *NAGT of 2002 v Minister for Immigration and Multicultural and Indigenous Affaires* (2002), para 22.

[93] NZIPT, *AC* (2014), para 69.

[94] *Ioane Teitiota v. New Zealand* (24 October 2019) UNHRC 2728/2016, esp. paras 9.4, 9.7, 9.8 and 9.9.

[95] B. CALI, C. COSTELLO, S. CUNNINGHAM, *Hard protection through soft courts: Non-refoulement before the united nations treaty bodies,* in *German Law Journal,* Vol. 21, 2020, n. 3, p. 355.

[96] UNHCR, 'Guidelines on international protection No. 11: Prima Facie Recognition of Refugee Status' UN doc HCR/GIP/15/11 (24 June 2015) para 9. See also the mention of "goup-based approaches to refugee status determination" in the 2020 guidelines on the subject (UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters* (UNHCR 2020) para 4).

[97] I.C. JACKSON, *The Refugee Concept in Group Situations*, The Hague, 1999, pp. 464-465.

construction in which individualism triumphs"[98] and that does not correspond to climate disasters' reality whereby entire populations are seeking refuge elsewhere[99]. As we will see below, moreover, victims of climate change, especially those living on Pacific islands, have a strong sense of community and often fear losing their identity, if considered "climate refugees" and relocated in a different society[100].

Finally, *the role of countries of origin* is and should be different. Generally speaking, indeed, international protection is only granted once the dangers have become sufficiently concrete, whereas questions of (im)mobility in the context of climate change require taking into account movements that *anticipate* extreme situations[101]. This is particularly relevant in a context where, thanks to scientific evidence, impacts or climate change can be predicted to a certain extent, with the consequence that human displacements too can to some extent be planned[102]. These circumstances make it possible to plan solutions in cooperation with the concerned countries of origin, i.e. those affected by climate change, and other countries that are less affected (but often more responsible) for greenhouse gas emissions. In this vein, thus, the regulation of (im)mobility in the context of climate change could be conceived as "an act of international population management in a context of localized shortages of living space"[103].

All things considered, international protection is not designed to deal with the complexity of the phenomenon of how climate change influences human mobilities. McAdam observes that one of the major disadvantages in academic work on the subject is the "tendency to treat climate-related movement as a single phenomenon that can be discussed in a general way"[104]. It is the same essential obstacle[105] that has confronted the attempts by some authors[106] to create a new protection regime exclusively dedicated to

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[98] M. CHEMILLIER-GENDREAU, *Faut-il un statut international du réfugié écologique?*, in *Revue européenne de droit de l'environnement*, 2006, n. 4, pp. 446, 449 (free translation). In this respect, she refers to François Crépeau's thesis. See F. CRÉPEAU, *Droit d'asile. De l'hospitalité aux contrôles migratoires*, Bruxelles, 1995, p. 57 et seq.

[99] B. MAYER, *The Concept of Climate Migration*, *op. cit.*, p. 164.

[100] B. MAYER, *Pour en finir avec la notion de "réfugiés environnementaux": Critique d'une approche individualiste et universaliste des déplacements causés par des changements environnementaux*, in *Revue internationale de droit et politique du développement durable*, n. 7/1, 2011, p. 55.

[101] J. MCADAM, *Climate Change, Displacement and the Role of International Law and Policy*, in *International Dialogue on Migration 2011: The Future of Migration: Building Capacities for Change: Intersessional Workshop on Climate Change, Environmental Degradation and Migration* (International Organization for Migration, 29-30 mars 2011) p. 3.

[102] L. NISHIMURA, "*Climate Change Migrants": Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies'*, in *International Journal of Refugee Law*, n. 27/1, 2015, p. 126.

[103] L. LEGOUX, *Les migrants climatiques et l'accueil des réfugiés en France et en Europe*, in *Revue Tiers Monde*, 2010, n. 204, p. 67 (free translation).

[104] J. MCADAM, *Climate Change, Displacement and the Role of International Law and Policy*, *op. cit.*, p. 4.

[105] N. HÖING, J. RAZZAQUE, *Unknowledged and unwanted? "Environmental refugees" in search of a legal status'*, in *Journal of Global Ethics*, n. 8/1, 2012, p. 21.

[106] See for example: International Centre for Comparative Environmental Law, *Draft Convention on the Status of Environmentally Displaced Persons* (Limoges, Fourth version of April 2018); D. HODGKINSON, L YOUNG, *'In the face of looming catastrophe': A convention for climate changes,* in M B GERRARD, G E WANNIER (eds.), *Threatened Island Nations*, Cambridge, 2013, pp. 299-336; B. DOCHERTY, T. GIANNINI,

climate (or environmental) migrants, *i.e*. the identification of persons falling into this category[107]. Behind the notion of climate migration, on the contrary, lies an immense variety of scenarios, both in terms of the event that drives individuals to move and in terms of the form that the movement takes[108]. Responses, thus, must be differentiated, so as to take into account the specific needs of each population affected[109]. In light of this, the next paragraphs illustrate attempts to envisage solutions for protection and assistance of individuals displaced by climate change both more generally and at global level (para. 3) and more specifically via *ad hoc* solutions conceived and implemented at local-regional level (para. 4).

4. (Im)mobility in the Global Policy Making and International (Soft) Law

(Im)mobility in the context of climate change is a complex problem that cannot be addressed by international protection alone. International protection requires that the risk be current while (im)mobility in the context of climate change is also about anticipating, organising, especially when it comes to slow environmental degradation[110]. Individual proactive or preventive mobility or planned relocation can be vital for the population affected[111].

It has, thus, brought to light the need to develop a global framework for migration[112]. Such considerations, which Warren summarized referring to the core of the problem of

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'*Confronting a rising tide: a proposal for a convention on climate change refugees*, in *Harvard Environmental Law Review*, n. 33, 2009, p. 372; F. BIERMANN, I. BOAS, *'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in *Global Environmental Politics*, n.10, 2010, pp. 60-88.

[107] S. MARTIN, K. WARNER, *Climate Change, Migration, and Development*, in I. OMELANIUK (ed.), *Global Perspectives on Migration and Development*, Berlin, 2012, p. 169.

[108] M. WALDINGER, *The effects of climate change on internal and international migration: implications for developing countries* (Grantham Research Institute, 2015) 2.

[109] Walter Kälin set up into a typology. See W. KÄLIN, *Conceptualising Climate-Induced Displacement*, cit., p. 98, often referred to as an example, cfr. F. CRÉPEAU, B. MAYER, *'Changements climatiques et droits de l'homme des migrants,* in C. COURNIL, C. VLASSOPOULOS (eds.), *Mobilité humaine et environnement. Du global au local*, Editions Quæ, 2015, p. 31; R. LYSTER, '*Protecting the Human Rights of Climate Displaced Persons: The Promise and Limits of the United Nations Framework Convention on Climate Change*, in A GREAR, L. KOTZE (eds.), *Research Handbook on Human Rights and the Environment*, Cheltenham, 2015, p. 429; S. ATAPATTU, *'Climate change: disappearing states, migration, and challenges for international law*, in *Washington Journal of Environmental Law & Policy*, n. 1/24, 2014, p. 24; R. LÉAL-ARCAS, *Climate migrants: Legal options*, in *Procedia - Social and Behavioral Sciences*, n. 37, 2012, p. 88, where he identifies five scenarios and the needs for each of them. See KÄLIN, SCHREPFER, *op. cit*., pp. 13-16 and 40-43.

[110] V. KOLMANNSKOG, *Climate change, environmental displacement and international law*, in *Journal of International Development*, 2012, n. 24, p. 1073.

[111] M. COURTOY, *Mobility in an era of climate change: a call for international law to fully realize itself*, in J. PEEL, S. MALJEAN-DUBOIS (ED.), *Climate Change and the Testing of International Law / Le droit international au défi des changements climatiques*, Centre for Studies and Research in International Law and International Relations Series, Leiden, 2023.

[112] As Paul De Guchteneire *et al.* said, "environmental migration is also a matter for migration policy at large". See DE GUCHTENEIRE, PÉCOUD, PIGUET, *op. cit*., p. 22.

"feasibility and comprehensiveness"[113], motivated the adoption of the Global Compact for Safe, Orderly and Regular Migration (Global Compact for Migration or GCM), a legally non-binding cooperative framework negotiated between States under the auspices of the United Nations and intended to "cover all dimensions of international migration in a holistic and comprehensive manner"[114]. (Im)mobility in the context of climate change was indeed an important concern in the drafting of the GCM, as it was already apparent in the 2016 New York Declaration[115]. The GCM aims to change the paradigm on which migration management is based: the purpose is no longer to prevent migration, but to "make migration work for all"[116]. This shift takes place through the pursuit of two major objectives, both of which are relevant to the governance of (im)mobility in the context of climate change[117]. The first is to *reduce forced migration*[118] by minimizing push factors in the countries of origin[119]. In the climate change context[120], this means cutting greenhouse gas emissions ("mitigation")[121], but also increasing the resilience of communities to the impact of climate change ("adaptation"). In this respect, the GCM emphasizes the international cooperation[122] needed to implement the Sustainable Development Agenda in the most vulnerable geographical areas[123]. The second objective

[113] P.D. WARREN, *Forced Migration after Paris COP21: Evaluating the "Climate Change Displacement Coordination Facility*, in *Columbia Law Review*, 2013, n. 116, p. 2127.
[114] UN, *Global compact for migration*, https://refugeesmigrants.un.org/migration-compact.
[115] UNGA, *New York Declaration for Refugees and Migrants*, UN doc A/RES/71/1 (19 September 2016) paras 1, 18, 43 and 50.
[116] A key word of the Global Compact, which is the title of the last report that preceded the negotiations (UNGA, *Making migration work for all. Report of the Secretary-General*, UN doc A/72/643 (12 December 2017)) and is found in the introduction to the Global Compact for Migration (para 8). It should be noted, however, that the two Global Compacts have been criticised as representing a Northern version of migration, leaving aside perspectives from the Global South which contributed little in the negotiations. See N. MAPLE, S. REARDON-SMITH, R. BLACK, *Immobility and the Containment of Solutions: Reflections on the Global Compacts, Mixed Migration and the Transformation of Protection*, in B. CHIMNI, '*Global Compact on Refugees: One Step Forward, Two Steps Back*, in *International Journal of Refugee Law*, Vol. 30, n. 4, 2019, p. 630; C. COSTELLO, *Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees*?, in *International Journal of Refugee Law*, vol. 30, 2018, n. 4, p. 643.
[117] W. KÄLIN, *The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons*, in *International Journal of Refugee Law*, n. 30/4, 2018, pp. 664-667.
[118] "Migration should never be an act of desperation" (UNGA, *Making migration work for all. Report of the Secretary-General*, UN doc A/72/643 (12 December 2017) 3).
[119] Objective 2 is entitled "Minimize the adverse drivers and structural factors that compel people to leave their country of origin".
[120] Climate or more generally environmental migration has been particularly taken into account since only a subtitle has been created under Objective 2 and it is devoted to natural disasters, the adverse effects of climate change and environmental degradation.
[121] This refers to environmental law, and more specifically the Paris Agreements (adopted in Paris on 12 December 2015 under the United Nations Framework Convention on Climate Change, FCCC/CP/2015/10/Add.1, decision 1/CP.21), which are explicitly mentioned in the Preamble and under Objective 2.
[122] Objective 23 is entitled "Strengthen international cooperation and global partnerships for safe, orderly and regular migration".
[123] Objective 23, point b), reads as follows: "Increase international and regional cooperation to accelerate the implementation of the 2030 Agenda for Sustainable Development in geographic areas from where irregular migration systematically originates due to consistent impacts of poverty, unemployment, climate change and disasters, inequality, corruption, poor governance, among other structural factors, through

is to open up *legal migration pathways*[124], especially when it comes to labour migration, which is often considered as a win-win situation[125]. Some specific avenues are encouraged for disaster or climate-related migrants "where adaptation in or return to their country of origin is not possible"[126], such as planned relocation or visa options. Finally, in the interest of policy coherence in the area of migration and the environment, the GCM refers to global instruments related to climate change, disaster and environmental governance[127] as well as to recommendations stemming from state-led initiatives[128], while stressing the importance of working at the regional level in this area[129].

Prior to the GCM, indeed, a number of initiatives had contributed to put the climate change-migration nexus on the international agenda and global policymaking map[130]. The overall result is a toolbox of strategies and recommendations to provide a roadmap for policy and legal developments, identifying gaps as well as best practices in addressing climate change-related displacement and mobility, setting out priorities, coordinate research of solutions and consultative processes. Among these efforts, the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (the Protection Agenda), endorsed by 109 States worldwide in 2015, provides significant directions for shaping organised mobility [131]. The Protection Agenda, indeed, recommends that States, *inter alia,* integrate organised mobility into disaster risk reduction and climate change adaptation strategies[132]; develop humanitarian protection mechanisms for temporary admission and stay[133]; enhance opportunities of legal and controlled migration (so called "migration with dignity" solutions) as a form of

appropriate cooperation frameworks, innovative partnerships and the involvement of all relevant stakeholders, while upholding national ownership and shared responsibility".

[124] Objective 5 is entitled "Enhance availability and flexibility of pathways for regular migration".

[125] However, Giovanni Bettini, Sarah Louise Nash and Giovanna Gioli noted with concern "a move away from inherent rights, towards the idea that risk should be governed through the fostering of individual preparedness, which in this case falls on the shoulders of (potential) migrants". See G. BETTINI, S.L. NASH, G. GIOLI, *One step forward, two steps back? The fading contours of (in)justice in competing discourses on climate migration*, in *The Geographical Journal*, 2017, n. 183/4, p. 349. See also F. GEMENNE, *'One good reason to speak of "climate refugees*, in *Forced Migration Review*, 2015, n. 49, p. 71.

[126] Objective 5, point h), reads as follows: "Cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible".

[127] Preamble, para 2.

[128] Objective 2, para 18.l).

[129] Objective 2, para 18.k).

[130] For an overview of the policy-making developments in this context, see N. Hall, *Displacement, Development, and Climate Change: International Organizations Moving Beyond Theri Mandates*, London, 2016; J. MCADAM, *Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010-2013*, in *Refuge*, Vol. 29, 2014, no. 2, p. 11.

[131] Nansen Initiative on Disaster-Induced Cross-Border Displacement, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, 2015. J. MCADAM, *From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement*, in *University of New South Wales Law Journal*, Vol. 39, 2016, n. 4.

[132] *Ibidem*, paras. 76-86; 117-118.

[133] *Ibidem*, paras. 46-47; 114-115.

adaptation[134]; foster the use of planned relocation as a preventive or remedial measure[135]. Similar options for an organised transfer of individual away from unsafe areas affected by climate change have been explored by IOM and UNHCR[136]. As Aleinikoff suggests "movement triggered by the impacts of climate change should be understood as a migration issue, with States opening up paths of managed legal immigration as an adaptation strategy."[137]

(Im)mobility in the context of climate change cannot be resolved solely through migration law since, as we have seen, most mobility occurs without crossing a border, and the issue of immobility and therefore adaptation *in situ* also arises within countries. In a recent attempt to highlight the wide variety of solutions required to respond to the multiple forms of (im)mobility, McAdam and Wood have proposed the *Kaldor Centre Principles on Climate Mobility*[138]. In its advisory opinion on climate emergency and human rights, the Inter-American Court of Human Rights also provides a detailed assessment of rights relating to climate (im)mobility: from the need to prevent forced movements to the need to regulate migration, displacement (internal or international), planned relocation and immobility[139]. The responses may sometimes come from existing instruments such as the Guiding Principles on Internal Displacement, or may require new guidelines, such as those developed for planned relocation[140].

5. *Ad hoc* Solutions and Experiments to Foster Climate Change-related Protection: The Case of Inhabitants of Small State Islands in the Oceania Region

Against the background of the challenges and difficulties arising from the existing legal tools, there have been some attempts to put in place innovative, multilevel governance solutions to enable the protection of climate change-affected population at

[134] *Ibidem*, paras. 87-93; 119-120.
[135] *Ibidem*, paras. 94-98; 121-122. The very term "planned relocation" has been criticized as referring to the mere physical movement from one place to another, whereas resettlement also aims at recreating the community and maintaining or even improving the socio-economic conditions of the resettled and should therefore be favoured. See J. MCADAM, E. FERRIS, *Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues*, in *Cambridge Journal of International and Comparative Law*, Vol. 4, n. 1, 2015, p. 151.
[136] UNHCR, *Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation*, 7 October 2015; UNHCR and IOM, *A Toolbox: Planning Relocation to Protect People from Disasters and Environmental Change*, 2017.
[137] T. A. ALEINIKOFF, '*The Unfinished Work of the Global Compact on Refugees,* in *International Journal of Refugee Law*, 2018, n. 30/4, p. 617.
[138] J. MCADAM, T. WOOD, *Kaldor Centre Principles on Climate Mobility*, in *International Journal of Refugee Law*, vol. 35, 2023, n. 4, pp. 483-507.
[139] Z. BRIARD, *Face à l'urgence climatique, esquisse d'une feuille de route basée sur les droits humains pour encadrer les (im)mobilités humaines*, in *Cahiers de l'EDEM*, octobre 2025.
[140] UNHCR, Georgetown University, IOM, *Toolbox: Planning Relocations to Protect People from Disasters and Environmental Change*, 2017; UNHCR, *Brookings Institution, Georgetown University, Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation*, 2015.

regional and local level. One of the most prominent "laboratories" in this respect is Oceania, which is the focus of this section of the article. The choice of such a case-study relies on two considerations. On the one hand, geographically and morphologically, this region is directly affected by adverse effects of climate change and, most notably, by sea-level rise. Many small State islands face such a risk and are exploring a variety of alternatives to the above-described protection gaps of the international protection regime, in order to find solutions for their citizens[141]. On the other hand, Oceania's regional legal and policy framework in the fields of asylum and migration is shaped by two main players, Australia and New Zealand, which have a story of legislation and migration agendas based on extraterritorial solutions, such as offshore detention and processing, resettlement and governance of migratory flows via specific and organised pathways[142].

5.1. Contextualization: Migratory Challenges, Legal Issues, New and Old Approaches to Displacement in Oceania

The area of Pacific Island States (PIS), a vast archipelago of island nations situated across the Pacific Ocean, is central to the global climate crisis: not because of their significant contribution to emissions, but, rather, because of their extreme vulnerability to the impacts of climate change. Vulnerability specifically arises due to the rise of sea level provoked by climate change. The Intergovernmental Panel on Climate Change (IPCC) estimates that, by 2050, global sea levels will rise by an average of 15 to 30 centimetres, with larger increases expected in equatorial regions, particularly the Pacific. Extreme sea-level events could happen annually by the end of this century. Nearly one billion people living in low-lying coastal areas will be directly affected by rising sea levels and climate impacts[143]. In this scenario, it is self-evident that PIS are and will be severely affected by sea-level rise, being one of the most exposed areas to this danger, as already highlighted by the IPCC[144].

One should note, moreover, that the issue of the potential disappearance of the land has multiple implications for PIS and their respective populations, which contribute to mark their specificity. First of all, the very issue of Statehood comes into play, as, unlike other regions, PIS face such an unprecedented challenge in case they become

[141] T.TV. DUONG, *When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law*, in *University of Pennsylvania Journal of International Law*, 2010, n. 31, p. 1239.

[142] For an overview of the regional legal and policy regime of Oceania concerning migration and asylum matters, see M. FOSTER, A. HOOD, *Regional Refugee Regimes – Oceania*, in C. COSTELLO, M. FOSTER, J. MCADAM (Eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 2021, pp. 441-459.

[143] United Nations. "High-Level Meeting on Sea-Level Rise." *UN: Office of the President of the General Assembly*, 2025.

[144] M. MYCOO, M. WAIRIU, D. CAMPBELL, V. DUVAT, Y. GOLBUU, S. MAHARAJ, J. NALAU, P. NUNN, J. PINNEGAR, O. WARRICK, *Small Islands*, in *Climate Change 2022: Impacts, Adaptation and Vulnerability.* Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (H.-O. PÖRTNER, D.C. ROBERTS, M. TIGNOR, E.S. POLOCZANSKA, K. MINTENBECK, A. ALEGRÍA, M. CRAIG, S. LANGSDORF, S. LÖSCHKE, V. MÖLLER, A. OKEM, B. RAMA (eds.), Cambridge and New York, pp. 2043-2121).

submerged[145]. Such an event would call into question the very concept of international personality, as it traditionally implies the presence of a territory[146]. The International Court of Justice, in its Advisory Opinion in 2025, also addresses concerns about sea-level rise, concerning the statehood and sovereignty of Small Island States. It declares, although not sufficiently affirmatively for Judge Aurescu[147], that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood"[148].

But there is more than that. For the Pacific Islanders, land is not just a legal notion, it is a concept intrinsically connected to their identity, culture and spirituality. When considering this context, thus, one should refrain from the typical Western legal vision of land, framed in terms of possession, property and economic value. For the Pacific islands' inhabitants, the land is a collective inheritance, which connects with the ideal of community and a common identity, passed through generations[149]. In some communities, trees, rocks, or reefs hold spiritual significance, which means that forced land loss and subsequent displacement imply more than physical relocation: it severs the spiritual connection between people and their land[150]. For this reason, Pacific leaders often stress that relocation cannot be treated as a neutral adaptation measure. Unlike material goods, land is not interchangeable; its value derives from the specific histories and stories enshrined therein.

In light of the above, and notwithstanding the exposure to the pressing dangers of climate change and sea-level rise, a number of PIS reject the idea of being framed as "climate refugees", whose only available option is to leave their countries and beg for protection elsewhere, in particular to the two "giants" of the region, Australia and New Zealand. The growing literature – which is marked by a predominance of scholars from the Global North – that is studying the issue of habitability of PIS and climate change, indeed, tends to examine the issue on whether and to what extent international refugee

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[145] On this issue, see A. MAAS, A. CARIUS, *Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond*, in J. SCHEFFRAN, M. BRZOSKA, H. G. BRAUCH, P. LINK, J. SCHILLING (eds.), *Climate Change, Human Security and Violent Conflict*, vol. 8, Hexagon Series on Human and Environmental Security and Peace, Berlin, 2012, pp. 479-492; L. YAMAMOTO, M. ESTEBAN, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty*, Berlin, 2014 ; M. BURKETT, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, in *Climate Law*, vol. 2, 2011, pp. 345-374; R. RAYFUSE, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma*, in *Faculty of Law Research Series, University of New South Wales*, Research Paper No. 52, November 2010; C. FARBOTKO, *Wishful Thinking : Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation,* in *Asia Pacific Viewpoint*, 2010, n. 51, p. 47 et seq.

[146] On this issue, see J. GROTE STOUTENBURG, *Disappearing Island States in International Law*, Leiden, 2015; S. OLIVER, *A New Challenge to International Law: The Disappearance of the Entire Territory of a State*, in *International Journal on Minority and Group Rights*, 2009, n. 16, p. 209.

[147] Separate opinion.

[148] International Court of Justice, Advisory Opinion of 23 July 2025, *Obligations of States in Respect of Climate Change*, No. 187, 2025, para. 163.

[149] V. BOEGE, *Climate Change, Identity and Sovereignty in the Pacific*, in *Toda Peace Institute*, 2 August 2021.

[150] J. COLLINS, *Climate Change Catastrophe: The Disappearance of Ancestral Graves in the Pacific Islands*, in *TalkDeath*, 19 August 2025.

law is applicable to such a situation, thereby reflecting on the category of climate or environmental refugees. Empirical research has shown, however, that the protagonists of this challenge themselves resist the imposition of labels, which are considered offensive in portraying populations of passive, weak and defenceless victims, depending on the foreign help[151]. These legal and socio-political dynamics need to be understood against the long and troubled history of colonial powers relocating populations in the Pacific, so that the current initiatives for organised migration and mobility pathways, including those relating to climate change, rest on previous experiences and logics[152].

The small island states of the Pacific illustrate the tension between different forms of (im)mobility and the limited role of the law in responding to it, which is fully reflected in the case of *Daniel Billy and Others v. Australia* before the United Nations Human Rights Committee[153]. The Committee did not find a violation of the right to life under Article 6 of the ICCPR on the grounds that "the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims". Yet the Committee recognised that Australia had violated Article 17 (right to privacy, family, and home) and Article 27 (right to enjoy culture) of the ICCPR since the authors' way of life cannot be pursued outside their islands, thereby implying the potential future uninhabitability of the islands. Planned relocation therefore appears to be both a potential violation of (some) rights and a way of preserving (other) rights.

In the same vein, the inhabitants of the Pacific have always used forms of mobility[154]. But moving between islands and abandoning their ancestral land are not the same thing. As indicated in the written statement by the Cook Islands to the International Court of Justice during the advisory opinion proceedings on climate change: "Climate mobility is not what Cook Islands people want. […] Just because Cook Islands people have demonstrated considerable innovation as mobile people, does not mean that they have an

[151] M. FOSTER, A. HOOD, *Regional Refugee Regimes – Oceania*, *op. cit*., pp. 456-457. See also R. HINGLEY, *"Climate Refugees": An Oceanic Perspective*, in *Asia & The Pacific Policy Studies*, 2017, n. 4, p. 158 et seq.; K. E. MCNAMARA, C. GIBSON, *We Do not Want to Leave Our Land: Pacific Ambassadors at the United Nations Resists the Category of "Climate Refugees",* in *Geoforum*, 2009, n. 20, p. 475.

[152] On this subject see J. MCADAM, *Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change*, in *The Journal of Pacific History*, 2014, no. 49, p. 301 et seq.

[153] UN Human Rights Committee, *Daniel Billy and Others v. Australia*, Communication No. 3624/2019, 21 July 2022. For comments and analyses, see F. MCGAUGHEY, A. MAGUIRE, S. PURCELL, *Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: Daniel Billy et al. v Australia*, in *University of Western Australia Law Review*, vol. 51, no. 2, 2023, pp. 82-98; M. COURTOY, *Between discomfort on how to address the future uninhabitability of certain territories and new avenues for climate justice*, in *Cahiers de l'EDEM*, November 2022; V. KAHL, *Rising Before Sinking: The Landmark Decision of the UN Human Rights Committee* in *Daniel Billy et al. v. Australia*, in *Völkerrechtsblog*, 21 November 2022.

[154] C. FRÖHLICH, S. KLEPP, *Effects of Climate Change on Migration Crises in Oceania*, in C. MENJÍVAR, M. RUIZ, ET I. NESS (eds.), *The Oxford Handbook of Migration Crises*, Oxford, 2019, pp. 331-346.

unqualified predisposition to move. Being mobile it's not the same is being a climate migrant forced to move because of the impacts of climate change"[155].

With this in mind, Australia and New Zealand, are beginning to assume some responsibility, but responses to the problem of climate change-related migration remain dubious, as they entail and reflect national interests and broader geopolitical strategies. The lack of normative clarity and specification creates doubts for PIS inhabitants who may face imminent loss of land, as they could be treated as economic migrants rather than migrants entitled to protection, which would constrain their access to resettlement opportunities and social services abroad.

5.2. New Zealand and Australia's Labour Mobility Schemes vs Possible Emerging Obligations

New Zealand has showed commitment to contributing to domestic action on climate change[156]. In addition, it has also been playing an active role in organising safe and legal channels for mobility in favour of PIS' citizens, thereby in some way indirectly responding to climate-induced migration in the Pacific.

Already back in 2002, in particular, the government established a formal immigration pathway called the Pacific Access Category (PAC), conceived as a programme to facilitate the migration of citizens from some PIS, such as Kiribati, Tuvalu and Tonga[157]. This pathway relates to employment opportunities and family reunification and does not formally recognise climate displacement as a ground for international protection[158]; instead, it provides a structured route for relocation that indirectly responds to environmental pressures. Under this programme, a limited number of citizens from each participating country are granted residence annually. Applicants must meet eligibility criteria, including age, health, and skills requirements, and secure an employment offer in New Zealand. Recipients of PAC residency have access to a number of socio-economic rights, such as healthcare, education, and social services.

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[155] Cook Islands, Written statement to the International Court of Justice, Advisory opinion on the Obligations of States in respect of Climate Change, 20 March 2024, para 110, quoting Yvonne Te Ruki Rangi a Tangaroa Underhill-Sem and Christina Newport, *Knowledge of climate-induced mobility in the Cook Islands – Expert Report*, University of Auckland, Auckland, 10 March 2024, p. 4.

[156] In 2019, for instance, it passed a Climate Change Response (Zero Carbon) Amendment Act designed to bring domestic law in line with the global commitments made under the Paris Agreement. On this initiative, see "Climate Change Response (Zero Carbon) Amendment Act 2019." *Ministry for the Environment NZ*, New Zealand Government, 5 Apr. 2021, environment.govt.nz/acts-and-regulations/acts/climate-change-response-amendment-act-2019/. More broadly on the action of New Zealand vis-à-vis climate change, see H. GHOSH, C. ORCHISTON, *Climate-induced Migration in the Pacific: The Role of New Zealand*. New Zealand Asia Institute, 2018; A. JACINDA, *Climate Change – Challenges and Opportunities – A Pacific Perspective*, in *Beehive.govt.nz*, 17 April 2018, available at https://www.beehive.govt.nz/speech/climate-change-challenges-and-opportunities-pacific-perspective.

[157] Immigration New Zealand. (n.d.). *Pacific Access Category Resident Visa*, available at https://immigration.govt.nz/visas/pacific-access-category-resident-visa.

[158] S. KLEPP ET J. HERBECK, *The Politics of Environmental Migration and Climate Justice in the Pacific Region*, in *Journal of Human Rights and the Environment*, vol. 7, n. 1, 1 mars 2016, p. 68.

On the other hand, the PAC also faces criticalities, mainly regarding the efficacy and fairness of the scheme. First, it is very small in scale, proving to be not suited to responding to the migration needs caused by climate change. Second, accessibility is limited, as its rigid eligibility criteria exclude many of the most vulnerable individuals, particularly older people, or people with disabilities who cannot work, as well as those with limited formal education, or individuals unable to secure a formal job offer. As a result, it presents itself as a sort of lottery system[159]. Finally, the PAC's reliance on voluntary application means it does not function as a large-scale emergency mechanism in response to acute environmental crises, leaving many communities in low-lying islands effectively trapped in their increasingly precarious homelands. In order to overcome such deficits, in 2017 New Zealand developed a specific programme of visas, introducing the "experimental humanitarian visa" for people who were forced to flee from the Pacific Islands due to climate change. However, the plan was not succeeding, and the country stopped issuing these permissions[160].

In addition to New Zealand, Australia plays a leading role in the governance of migration and asylum policies in Oceania, being regarded, in this respect, as the "region's traditional hegemon"[161]. A role that has often being criticised, as being aimed at influencing Pacific Island States' laws and policies to conform with and support Australian off-shore detention and processing techniques[162]. This has been done, in particular, via a number of *ad hoc* bilateral agreements, which, as it has been observed, appear to be marked by various elements of neo-colonialism, given Australia's political and economic leverage to convince PIS to cooperate[163].

Against this background, Australia too has a history of labour mobility schemes for Pacific peoples. In particular, the country designed the Pacific Australia Labour Mobility scheme (PALM), which merges the previously existing Seasonal Worker Programme (SWP) and Pacific Labour Scheme (PLS) and provide temporary work opportunities – up to nine months, or 1-4 years - in Australia for citizens of PIS, including Kiribati, Tuvalu, and the Solomon Islands, in sectors such as agriculture, horticulture, and

[159] I. STEWART, *Concerns Raised about NZ Pacific Visa Lottery*, in *RNZ*, 10 April 2017.
[160] H. DEMPSTER, K. OBER, *New Zealand's Climate Refugee Visas: Lessons for the Rest of the World*, in *ReliefWeb*, United Nations Office for the Coordination of Humanitarian Affairs, 30 October 2017.
[161] M. FOSTER, A. HOOD, *Regional Refugee Regimes – Oceania, op. cit*., p. 448.
[162] On Australia's migration and border policies, see M. CAMERON, *From « Queue Jumpers » to « Absolute Scum of the Earth» : Refugee and Organised Criminal Deviance in Australian Asylum Policy*, in *Australian Journal of Politics and History*, 2013, no. 59, p. 241 et seq.; M. CURLEY, K. VANDYK, *The Securitisation of Migrant Smuggling in Australia and its Consequences for the Bali Process*, in *Australian Journal of International Affairs*, no. 71, 2017, p. 42 et seq.; M. GLEESON, *Offshore : Behind the Wire on Manus and Nauru*, Sidney, 2016 ; M. GREWCOCK, *Australian Border Policing : Regional « Solutions » and Neocolonialism*, in *Race & Class*, Vol. 55, 2014, no. 3, p. 71 et seq.; E. LARKING, *Controlling Irregular Migration in the Asia Pacific: Is Australia Acting in Its Own Interests?*, in *Asia & The Pacific Policy Studies*, Vol. 4, 2017, p. 85 et seq.; A. SCHLOENHARDT, C. CRAIG, *Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea*, in *International Journal of Refugee Law*, no. 27, 2015, p. 536.
[163] M. GREWCOCK, *Australian Border Policing: Regional "Solutions" and Neocolonialism,* in *Race & Class*, Vol. 55, 2014, no. 3, p. 71.

aged care[164]. These programs serve multiple purposes, including addressing labour shortages in Australia, generating remittances for Pacific communities, and providing a form of migration that can function as an indirect buffer against climate-related economic stress. In this respect, from a climate adaptation viewpoint, these labour mobility schemes can be seen as a form of "managed relocation", since, by offering temporary income and skills development opportunities abroad, the schemes allow Pacific Islanders to strengthen their financial resilience, which can help counter the pressures of environmental degradation at home. Remittances from temporary workers often make up a significant part of household income in PIS, supporting investments in housing, education, and disaster preparedness.

However, these programs face some limitations, which are similar to those examined above with regard to New Zealand. They are temporary by design, leaving participants vulnerable to sudden changes if economic or political conditions shift in Australia. Additionally, the labour focus of these schemes prioritises workforce needs over humanitarian concerns, meaning, they do not directly address the long-term displacement risks caused by sea-level rise. There are also gendered and social implications, given the fact that the programmes tend to favour younger, male workers, potentially excluding women, older adults, and those with caregiving responsibilities. Such concerns have emerged especially with regard to the PALM scheme, which has increasingly been criticised for fostering conditions that leave workers vulnerable to exploitation (e.g. payroll deductions, contract violations, racism and harassment, limited labour mobility, also in consideration that visas, and thus the legal right to remain in Australia, are tied to a single employer)[165]. Attempts to reform the system have been limited, leading to the dual result of leaving the scheme skewed in favour of Australian employers while Pacific labour migrants enjoy minimal protections on the one hand, and deteriorating Australia's political and diplomatic relationships with participating PIS on the other[166].

The mentioned initiatives prove the difficulty of providing effective protection to individuals affected by adverse effects of climate change. They also show, on the other hand, an attempt to *voluntarily* make commitments to offer legal migration channels, however flawed and limited in their scope. Kraft indeed considers that these pathways "reflect geopolitical interests and neo-colonial power dynamics, rather than rights-based protection"[167]. What it is worth mentioning, on the other hand, is the parallel developing jurisprudence addressing the question of whether there exists an *obligation* to protect

[164] Australian Parliament House, *The Pacific Australia Labour Mobility scheme: a quick guide*, 2023, available at https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/Research/Quick_Guides/2023-24/PALMscheme

[165] M. NISHITANI, *Australia's Pacific Labour Mobility Scheme Needs Urgent Reform*, in *East Asia Forum*, 6 December 2024, available at eastasiaforum.org/2024/12/06/australias-pacific-labour-mobility-scheme-needs-urgent-reform/.

[166] C. HOGAN, *Exploitation Within Australia's PALM Scheme Is Jeopardising Its Regional Relationships*, in *Young Australians in International Affairs*, 2 March 2025.

[167] L. KRAFT, *Neo-Colonial Pathways to Safety? Climate Displacement and Australia and New Zealand's Migration Policies*, in *Forced Migration Review*, November 2025.

persons affected by climate change-related events. This is illustrated in the area of international protection: the famous *Teitiota* case, which recognised for the first time the possible application of the principle of *non-refoulement* in climate matters, comes from a resident of Kiribati, an island in the Pacific.

Yet the Pacific islanders have gone further in seeking assistance from industrialised countries, which bear greater responsibility for climate change, both in the sphere of international negotiations, notably by the Alliance of Small Island States pushing for the principle of loss and damage, and in the (quasi-)judicial sphere. Indeed, it was the Commission on Small Island States that filed the request for an advisory opinion with the International Tribunal for the Law of the Sea, while the request for an advisory opinion from the International Court of Justice was initiated by students at the University of the South Pacific[168]. This shows the creative efforts of judicial initiatives triggered by PIS citizens in the attempt to "push the normative boundaries of existing frameworks" and to explore and expand protective mechanisms applicable to their conditions[169].

5.3. The "Climate Change Visas" and the Special Mobility Pathway under the Australia-Tuvalu "Falepili" Agreement

Among the most recent, interesting and yet controversial initiatives put in place to address climate change-induced migration the 2023 bilateral agreement between Australia and Tuvalu stands out. The latter, a Polynesian State comprising nine atolls with around 11.000 inhabitants, is perhaps the most iconic representation of existential climate vulnerability. According to the 2024 UNICEF Australia report, children currently present in Tuvalu may be the last generation to live on an archipelago that is rapidly disappearing beneath the water[170]. Tuvaluan leaders have addressed international *fora* to raise awareness about the fragile future of the islands due to the sea-level rise[171]. At domestic level, programs have been implemented to protect coasts, such as the Tuvalu Coastal Adaptation Project aiming to keep the islands above water beyond 2100 and involving the construction of 3.6 square kilometres of elevated land, in order to also resist the tides[172].

Nevertheless, in consideration of the precarious scenario linked with the effects of sea-level rise, in addition to adaptation, Tuvalu is exploring alternative strategies, including legal pathways for mobility abroad. Indeed, despite the government declared

[168] On the issue of cooperation in the advisory opinion of the International Court of Justice on the Obligations of States in respect of Climate Change, see M. COURTOY, *Justice climatique en demi-teinte à La Haye: le choix d'une lecture ambitieuse mais formaliste du droit international*, in *Cahiers de l'EDEM*, octobre 2025.
[169] M. FOSTER, A. HOOD, *Regional Refugee Regimes – Oceania, op. cit.*, p. 455.
[170] UNICEF. "Tuvalu: The Last Generation." *UNICEF Australia*, 19 September 2024.
[171] Most famously, in November 2021, Tuvalu's Minister for Justice, Communication & Foreign Affairs, Simon Kofe, broadcasted a speech to the United Nations climate conference in Glasgow (COP26) while standing knee-deep in seawater to show the urgency of the situation in his Pacific island nation.
[172] Australian Government, Department of Foreign Affairs and Trade, *Tuvalu Coastal Adaptation Project (TCAP)*, available at: https://tcap.tv/

whish "to stand against relocation as a solution to the climate crisis because Tuvalu is a sovereign country, and its population has the right to live, develop, and prosper on its own land"[173], in the short-term organised relocation appears to be a necessary option to manage climate-induced migration in the face of disappearing lands.

Consequently, on 9 November 2023, Tuvalu signed the "Falepili Union Treaty" with Australia, which, *inter alia,* contains innovative provisions on controlled, legal and safe pathways related to climate change adverse effects[174]. In general terms, the agreement, which entered into force in August 2024, intends to promote good neighbours' relationship, mutual respect and support (this is the meaning of the Tuvaluan word "*falepili*"[175]), covering, to this end, a variety of areas of cooperation, such as security, defence or energy. The bilateral cooperation is also and especially designed to address climate change-related migration, one of its objectives being to "provide the citizens of Tuvalu with a special human mobility pathway to access Australia" while "ensuring human mobility with dignity" (Article 1). The Falepili Treaty, indeed, explicitly recognises the impact of climate change as "existential threat", affirms Tuvalu's statehood and sovereignty notwithstanding the impact of climate change and notably sea-level rise, and promotes cooperation through regional and international *fora* to work together on the issue (Article 2).

Against this background, the most innovative provision concerns an *ad hoc* system of climate change-related mobility, designed as a *specific, legal and safe channel* for transferring Tuvaluans from their islands to Australia, where they can access a number of rights and guarantees. Before going more into the details of such a mechanism, one should nevertheless note that the objective of the Treaty is not to relocate Tuvaluans at "all costs", the climate change-related relocation to Australia being understood not necessarily as the only and inevitable option. The bilateral cooperation, indeed, is aimed at countering the adverse effects of climate change so as to meet "the desire of Tuvalu's people *to continue* to live in their territory where possible", and to help them "*to stay* in their homes with safety and dignity" (Article 2, respectively, para. 2, letter a, and para. 3, emphasis added).

With that in mind, Article 3, titled "human mobility with dignity", sets Australia's commitment to establish and offer "a special human mobility pathway" for citizens of Tuvalu in order to enable their transfer to Australia where they shall live, study, work, and have access to education, health, income and family support on arrival (para. 1, letters a) and b)). Tuvalu, for its part, under the same provision commits itself to facilitate the implementation of the special pathway by ensuring that its immigration, passport,

[173] Government of Tuvalu, 2020, *Te Sikulagi: Tuvalu Foreign Policy 2020*, Funafuti: Ministry of Justice, Communication and Foreign Affairs.

[174] *Australia-Tuvalu Falepili Union Treaty*. Signed 9 Nov. 2023, entered into force 28 Aug. 2024. Governments of Tuvalu and Australia. "Treaty text: Falepili Union." *Department of Foreign Affairs and Trade*, Government of Australia, available at https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty

[175] In the Preamble of the Treaty one reads that the concept of Falepili «connotes the traditional values of good neighbourliness, duty of care and mutual respect».

citizenship, and border controls "are robust", and meet international standards for integrity and security (para. 2).

In terms of concrete implementation, according to an Explanatory Memorandum signed in May 2024, the scheme rests on 280 places made available by Australia on an annual basis[176]. The operationalization of the scheme covers the selection of beneficiaries, the issuance of visas, the subsequent transfer to Australia and the next reception in the host society. As seen above, indeed, Australia's commitment extends to a number of relevant socio-economic rights, which shall be enjoyed by resettled Tuvaluans. Indeed, upon arrival in Australia, Tuvaluans visa holders will receive, *inter alia*, immediate access to education (at the same subsidisation as Australian citizens), Medicare, the National Disability Insurance Scheme, family tax benefit, childcare subsidy and youth allowance. They will also have "freedom for unlimited travel" to and from Australia[177].

As to the special type of visa, its operationalization by the Australian government has started in 2025, which has chosen to incorporate it into the existing Pacific Engagement Visa category rather than creating a wholly new category of visa[178]. This choice is probably explainable with pragmatic considerations as to expedite the operationalization of the mobility scheme and avoid the significant costs of establishing a standalone visa. It should be stressed, nevertheless, that, unlike the Pacific Engagement Visa, which is contingent on applicants having a job offer in Australia, the new climate change-related visa is not employment-dependent. Moreover, the new visa does not specifically mention Tuvalu, which might point to the perspective of widening its application to other PIS in the future.

As to the scale of the scheme, doing the math by considering Tuvalu alone, it has been observed that, given that the Pacific State is home to approximately 11,000 people, the Falepili Treaty could potentially resettle around 2.5% of the population each year. Over a decade, this could amount to roughly a quarter of the Tuvalu population living in Australia. Moreover, adding to the 280 Treaty posts the ones already existing under the PAC and PALM schemes, up to 3.8% of the population might migrate per year, meaning that Tuvalu's net population would begin declining by 2030[179].

The "special mobility pathway" designed by the Falepili Treaty, however, is an innovative solution when compared to the purely labour market-driven migration pathways that have characterised the Pacific mobility to date. The PAC and the PALM schemes are seasonal worker programmes, tied to temporary, low-skilled labour needs, offering little prospect of residence or path to permanence. The Falepili Union Treaty

[176] Explanatory memorandum - Falepili Union between Tuvalu and Australia, signed at Funafuti, 8 May 2024.
[177] On the rights to which Tuvaluans are entitled under the Falepili Treaty, SEE J. MC ADAM, *New details emerge on new climate migration visa for Tuvalu residents*, in *UNSW Sidney*, 11 April 2025.
[178] For more details see Australian Government, Department of Home Affairs, Immigration and Citizenship, Pacific Engagement visa (subclass 192), available at https://immi.homeaffairs.gov.au.
[179] J. BARNETT, C. FARBOTKO, K. TAUKIEI, A. BATETEBA, *Migration as Adaptation? The Falepili Union between Australia and Tuvalu*, in *Wiley Interdisciplinary Reviews: Climate Change*, vol. 16, 2025, no. 1, e924. Wiley, available at https://doi.org/10.1002/wcc.924.

instead links mobility to climate hazards, ensuring a durable resettlement pathway[180]. To apply, applicants – who must first register their interest for the visa online in order to be then selected through a random computer ballot – must be at least 18 years of age; hold a Tuvaluan passport, and have been born in Tuvalu, or had a parent or a grandparent born there. These requirements exclude people with New Zealand citizenship, who cannot apply, the idea being to underline the humanitarian nature of the mobility scheme, so that people with comparable opportunities in New Zealand or elsewhere are ineligible to benefit from it. Applicants must also satisfy certain health and character requirements, but, quite surprisingly, the visa is open to those "with disabilities, special needs and chronic health conditions", which is often a bar to acquiring an Australian visa[181]. Finally, as said above, the visa does not depend on employment, nor it is contingent on the demonstration of an actual risk from the adverse impacts of climate change and disasters, even though climate change formed the backdrop to the scheme's creation. The Falepili treaty, thus, can be considered as the first bilateral agreement to treat safe and organised migration as an adaptation strategy to climate change. Yet, while waiting for a proper and full implementation of the commitments undertaken under the treaty, the mobility mechanism established therein has sparked the debate, pointing to pros as well as cons.

As to the first perspective, the safe mobility passage provided for under the treaty has been welcomed as an innovative solution, which might pave the way for replications in the region and beyond. Firstly, as stipulated by the treaty, the mobility mechanism does not intend to force the relocation of Tuvaluans, but, rather, it provides them with an "exit strategy", which, given the population's desire to continue living in their territory, enable to enjoy legal and psychological security. In this vein, the treaty works as a preventive mechanism, organising mobility *ex ante*, i.e. before the final, catastrophic event and potentially allowing for a gradual and controlled depopulation of the sinking islands. Secondly, the scheme allows Tuvaluans not only to move to Australia, but also and especially enables them to receive significant rights such as education, employment, healthcare, family support, in some cases at the same conditions of Australian citizens. Finally, the mechanism enables circular mobility, meaning that visa holders are authorised to legally travel back to Tuvalu, which would help maintain their cultural and familial connections and avoid, or, at least, limit brain drain[182].

As to the other side of the coin, first of all, the Falepili scheme appears to be subject to a risk typically posed by comparable, selective, safe mobility channels: the availability of 280 places per year inevitably involves selection criteria, which might lead to – even though the scheme is supposed to be unconditional upon the market demand – the risk of

[180] L. GAMBOA, D. GOH, *Australia-Tuvalu Falepili Union: The First Bilateral Climate Mobility Treaty*, in *Carnegie Endowment for International Peace*, 9 September 2025, available at https://carnegieendowment.org/research/2025/09/australia-tuvalu-falepili-union-the-first-bilateral-climate-mobility-treaty?lang=en.
[181] J. MC ADAM, *New details emerge on new climate migration visa for Tuvalu residents*, *op. cit.*
[182] L. GAMBOA, D. GOH, *Australia-Tuvalu Falepili Union: The First Bilateral Climate Mobility Treaty*, in *Carnegie Endowment for International Peace*, 9 September 2025.

privileging younger people, skilled or healthier individuals, replicating existing discriminatory practices.

Secondly, as to the legal status, the beneficiaries are not regarded as "climate refugees", which would entail a stronger level of protection. It has observed that Australia has carefully avoided such a terminology, due to its resistance to opening the current regulations in force to reinterpretation and to considering the Falepili Union Treaty as a legal precedent for a new category of refugees under international law[183]. The mechanism operates within the realm of migration policy, rather than within refugee or human rights law: an approach which, moreover, appears to be in line with regional rulings that so far have avoided expanding the notion to include climate refugees[184]. At the same time, evidence shows the desire of Tuvaluans themselves not to be considered as "climate refugees"[185]. This is due to a general concern of being stigmatized, in the media and in the local public opinion, as those who choose to migrate, abandon Tuvalu's communities and traditions, and eventually give up the fight against climate change[186].

Thirdly, specific scepticism has been expressed with regard to the implementation of the treaty, notably with regard to the integration of Tuvaluans in Australia. While the explanatory memorandum of the Falepili treaty establishes that the latter State "would provide support for applicants to find work and to the growing Tuvaluan diaspora in Australia to maintain connection to culture and improve settlement outcomes", how such a support will concretely be guaranteed remains unclear[187]. Concerns build on Australia's history of exploitation and marginalisation with Pacific migrants, so that, for the Falepili treaty to truly serve as a model of climate adaptation, Australia must ensure that Tuvaluans have equitable access to rights, which is only possible via government investments, consultation with Pacific communities from comparative experiences, as well as with diaspora communities that often take a heavy burden in the assistance of newcomers[188].

Finally, and more broadly, criticism has emerged with regard to Australia's genuine commitment to climate change-related mobility and support towards Tuvalu, which, with the 2023 Treaty, has handed over large portions of sovereignty and subjected itself to neo-colonial dynamics. Far from embracing the true spirit of *Falepili*, Australia seems to be hiding several strategic interests in the area, which is contested among other players, such as the USA and China. This led to the inclusion of specific clauses in the treaty with

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[183] S. KUCHARSKI, *Limited Success: Reflections on the Falepili Union Treaty*, in *Verfassungsblog: On Matters Constitutional*, 21 November 2023.
[184] A. MARICONDA, *Advancing climate-related obligations through security concerns: Lessons from the Falepili Union Treaty*, in *QIL-Questions of International Law/ Questions de Droit International (QIL-QDI)*, 30 September 2025; S. KUCHARSKI, *Limited Success: Reflections on the Falepili Union Treaty*, in *Verfassungsblog*, 21 November 2023.
[185] T. KITARA, *Tuvaluans Need Action, Not Pity*, in *E-Tangata*, 26 November 2023.
[186] J. BARNETT, C. FARBOTKO, T. KITARA, B. ASELU, *Migration as Adaptation? The Falepili Union between Australia and Tuvalu*, in *Wiley Interdisciplinary Reviews: Climate Change*, vol. 16, no. 1, 2025.
[187] Explanatory memorandum - Falepili Union between Tuvalu and Australia, *op cit.*
[188] J. MCADAM, *New Details Emerge on New Climate Migration Visa for Tuvalu Residents*, in *UNSW Newsroom*, 7 April 2025, available at https://www.unsw.edu.au/newsroom/news/2025/04/new-details-emerge-on-new-climate-migration-visa-for-tuvalu-residents

Tuvalu, which binds the latter State to get Australia's permission to enter into partnerships and cooperation arrangements with other countries[189].

All in all, it is still premature to formulate a comprehensive judgment on the mobility scheme for Falepili visa holders. Nonetheless, one cannot deny that it represents, even with some flaws, a potential, crucial step forward in filling the legal lacuna concerning protection and/or assistance of climate change-related migrants in the Pacific context. Its innovate character manifests itself especially in the fact that it is a mobility pathway that is independent from labour market demand and is not subordinate to demonstrating the risk of harm[190]. Whether the Falepili Union Treaty sets a precedent for future climate agreements and new international norms will depend on the ongoing political commitment of both parties and the international community's willingness to follow up.

5.4. The Pacific Regional Framework on Climate Mobility

One last, significant development that deserves a mention when it comes to safe and organised mobility pathways in the Oceania region is the Pacific Regional Framework on Climate Mobility, adopted in November 2023 at the 52nd Meeting of the Pacific Islands Forum, which brings together 18 States, including several low-lying island nations under threat, as well as Australia and New Zealand[191]. The agreed text constitutes the first framework of its kind in the world, being especially relevant for a region that is disproportionately affected by climate change despite its low contribution (paras 2 and 4) and for which mobility is already a reality (para. 3), causing loss and damage (para. 4). The Pacific communities thus intend to "courageously [position themselves] for the challenges that lie ahead" (last para) in order to be "able to anticipate, prepare for and respond to the hazardous impacts of climate change, including in relation to mobility" (para. 5).

The Framework defines a coordinated and collaborative approach to (im)mobility in the context of climate change, reflecting the common Pacific interests in a manner that respects their diverse cultures and values. It begins by recalling that the history of the Pacific "is a story of mobility", where the "connection to land and ocean is deep and immutable" (para. 1). *Staying in place* is described as the "fundamental priority" (para. 18), which requires mitigation efforts and adaptation measures (paras 19-22).

Building on such historical and socio-cultural premises, the Framework envisages various forms of organised mobility. With regard to *planned relocations*, the Framework provides for the development of regional guidelines and best practices to ensure respect for human rights, communities consultation, and the preservation of cultural, community

[189] See, for example, Article 4, para. 4, of the Falepili Treaty, which reads: "Tuvalu shall mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-related matters. Such matters include but are not limited to defence, policing, border protection, cyber security and critical infrastructure, including ports, telecommunications and energy infrastructure".
[190] *Ibidem*.
[191] Pacific Regional Framework on Climate Mobility, adopted at the 52nd Pacific Islands Forum Leaders Meeting, 6-10 November 2023, in Rarotonga, Cook Islands.

and religious ties (paras 23-27). For *migration* pathways, the Framework calls for strengthened national and regional cooperation while safeguarding cultural and family ties (paras 28-32). Under the heading of *displacement*, the Framework recommends strengthening regional collaboration to ensure lawful, necessary and proportionate *evacuations*, protect *internally displaced* persons, and explore policies for *cross-border displacement* (paras 33-40). Finally, the Framework encourages, "[i]n the spirit of Pacific solidarity, coordinate appropriate support for Pacific people who are *stranded* in other countries" (paras 41-42).

The Framework is still a relatively new initiative having a non-legally binding nature. However, according to the participant States, it "will be implemented in line with member country domestic laws and policies and is consistent with existing commitments under relevant global, regional and national laws, frameworks, policies and guidelines" (para. 8). It is also accompanied by an implementation and monitoring plan. Despite looking as innovative and promising, time will tell whether it would ensure a tangible implementation in terms of organised and safe mobility channels in the regions, its success being dependant on (sustained) political will and secured funding.

6. Conclusions

This article has addressed the problematic question of protection and assistance of climate change-induced migrants. A problematic and still open question because, on the one hand, the relevant EU and international legal frameworks appear to be not directly designed to cover this contemporary migratory category of individuals, and, on the other, because the legal and political approach to the matter is still evolving. States today are entangled in an increasingly complex global interdependence, where the setting up a system of collective risk management and solidarity towards climate migrants is one of the main challenges – and opportunities – of our time.

In the EU's legal order, protection of climate migrants is still largely lacking. If pre-existing legislative tools were not designed to cover this category of individuals, recent reforms have equally and intentionally avoided to fil such legal lacunae. The current political scenario, as well as the restrictive approach to migration governance, suggest that significant developments, at least in the short and mid-term, cannot be expected with regard to protection of so-called climate refugees and legal pathways for climate migration. A more interesting and promising evolution, on the contrary, is observable in some EU Member States.

In light of the EU's scarce results, the article has then broadened the analysis to other legal instruments possibly addressing the issue of (im)mobility in the context of climate migrants. Firstly, the 1951 Refugee Convention, which is often regarded as unintended to protect all kinds of forced migrants[192], and as bearing a number of significant obstacles

[192] F. CRÉPEAU, B. MAYER, *Introduction*, in F. CRÉPEAU, B. MAYER (eds.), *Research Handbook on Climate Change, Migration and the Law*, Cheltenham, 2017, p. 8.

in terms of applicability to the benefit of individuals displaced by climate change. Yet, the Convention may have an active role to play, even though this does not mean that all environmental migrants, in all their diversity, would be entitled to benefit from its protection.

Secondly, indeed, the parallel emergence of a global framework to govern migration shows the need to complement existing instruments. The combination of hard and soft law tools points to the attempt to foster more proactive forms of migration management and witnesses the aspiration for better organised and planned solutions of mobility.

Thirdly, the evolving scenario is enriched by *ad hoc* instruments that have been recently implemented at regional and local level to open and manage legal pathways of mobility, including solutions that may prove beneficial for individuals affected by adverse effects of climate change. The case of Oceania and Pacific States islands shows that potential significant developments are underway, paving the way to innovative solutions of organised mobility.

As far as the EU is concerned, in particular, Oceania's experience could represent a starting point for a discussion on the creation – also by way of a gradual experimentation – of a system of legal pathways from climate-affected third countries. Common procedures and documentation could be envisaged, so as to initially cover limited and defined groups of people, who would be eligible for legal mobility in the EU according to common requirements and criteria. This system of mobility could be based on protection as well as on labour purposes.

ABSTRACT: The article evaluates whether existing legal frameworks can effectively protect and assist individuals displaced by climate change-related events. It first analyses the EU legal order, highlighting the absence of a structured and protection-oriented approach to climate-induced migration. It then examines the international protection regime, focusing on refugee law and human rights law as potential sources of limited protection, including the analysis of soft law instruments that have promoted the idea of safe, legal, and organised migration management. Finally, the article explores recent practical solutions, with particular attention to legal and policy initiatives in Oceania, which has emerged as a significant laboratory for innovative responses to climate mobility. By way of conclusion, an assessment of the overall adequacy of current legal frameworks in addressing climate change–related displacement will be provided.

KEYWORDS: Environmental Migrants – Climate Change – Refugee Protection – Organised Mobility in Oceania Region – Legal Pathways for Climate Migration.