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THE PRINCIPLE OF *NON-REFOULEMENT* IN THE FACE OF CLIMATE-INDUCED MIGRATION. PROSPECTS FOR PROTECTION UNDER THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Martina Sardo [*]

SUMMARY: 1. Introduction. – 2. The Origins of *Non-Refoulement* under International Law. – 2.1. The Principle of *Non-Refoulement* in International Refugee Law. – 2.2. The Principle of *Non-Refoulement* in International Human Rights Law. – 2.2.1. Broadening the Horizon: *Non-Refoulement* in the Inter-American Human Rights System. – 2.3. *Non-Refoulement* as a Customary or Peremptory Norm? – 3. The Principle of *Non-Refoulement* in the Face of Climate Change: the Legacy" of the *Teitiota* Case, between Significant Developments and Persisting Limitations. – 3.1. A Missed Opportunity to Go Further? The Principle of *Non-Refoulement* in the Inter-American Court of Human Rights Advisory Opinions on *Climate Emergency and Human Rights.* – 4. Climate-Related *Non-Refoulement* in the Inter-American Human Rights System. – 4.1. Climate-Induced Migration and *Non-Refoulement* in the Evolving Practice of the Inter-American Court and the Inter-American Commission on Human Rights. – 4.2. Climate-Related *Non-Refoulement* in States' Written Observations. – 5. Conclusions.

1. Introduction

In the landmark *Teitiota* v. *New Zealand* decision,[1] the United Nations Human Rights Committee (HRC) recognized that «without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights [to life and not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment],[2] thereby triggering the *non-refoulement* obligations of sending States».[3] Since then, the principle of *non-refoulement* has assumed a central role in contemporary

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[1] HRC, *Ioane Teitiota v. New Zealand*, communication no. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016, Views adopted on 24 October 2019.

[2] Cf. Arts. 6 and 7, International Covenant on Civil and Political Rights, 1966 (ICCPR).

[3] HRC, *Ioane Teitiota v. New Zealand*, cit., par. 9.11.

debates concerning climate-induced migration,[4] and the protection of 'climate migrants'[5] within international human rights law.

Even before the *Teitiota* case, domestic courts and tribunals have been called upon to grant refugee status or other forms of complementary protection[6] to persons forced to move because of the adverse impacts of climate change. However, in the absence of a distinct legal category and of specific protection instruments,[7] such claims have generally proven unsuccessful for a variety of reasons, including the fact that the harm feared by applicants has often been considered insufficient to amount to 'persecution' within the

[4] Human mobility related to climate change is a complex phenomenon that has raised growing concern within the international community in recent years. It is generally regarded as part of the broader category of the environmentally related migration, which may also be unrelated to climate factors. Climate-related human mobility is widely recognized as a multicausal phenomenon arising from the interaction of climate, social, economic, political, and demographic factors (See *inter alia* J. MCADAM, *Climate Change, Forced Migration, and International Law*, Oxford, 2012; M. SCOTT, *Climate Change, Disasters, and the Refugee Convention*, Cambridge, 2020). It may encompass induced displacement, voluntary migration and planned relocation, occurring both within the State or across international borders (Cf. 'Human mobility' in Executive Committee of the Warsaw International Mechanism for Loss and Damage, *Technical Guide on Integrating Human Mobility and Climate Change Linkages into Relevant National Climate Change Planning Processes*, UNFCCC, 2024, p. 10). Focusing on the principle of *non-refoulement*, this article necessarily concentrates on cross-border movements associated with climate change. Accordingly, it uses the term *climate-induced migration* to refer to such movements. The term *migration* is adopted here because it is widely used in public discourse to refer to cross-border movements. Moreover, considering that climate-related movements are often characterized by at least some degree of compulsion (cf., *inter alia*, D. C. BATES, *Environmental Refugees? Classifying Human Migrations Caused by Environmental Change*, in *Population and Environment*, 2002, n. 5, p. 468), the expression 'climate-induced migration' is considered the most appropriate for this analysis.

[5] International law lacks a legal definition for people who move because of the effects of climate change. They are often referred to as 'climate migrants', a subcategory of the broader 'environmental migrants' (cf. International Organization for Migration (IOM), *Glossary on Migration*, 2019, entries 'climate migration', p. 31, and 'environmental migrant', p. 64). The latter encompasses a wide range of environmental factors, whereas the former refers specifically to movements associated with climate change. Since this contribution focuses on migration related to the adverse effects of climate change, the term 'climate migrant' is preferred, although 'environmental migrant' is also used where appropriate, while acknowledging that both terms remain politically and legally debated (see, *inter alia*, S. BEHRMAN, A. KENT (eds.), *Climate Refugees: Beyond the Legal Impasse?*, London, 2018).

[6] 'Complementary protection' generally refers to forms of protection established under States' domestic law in implementation of their obligations, particularly in the field of human rights, prohibiting the return *(refoulement)* of persons who, although they do not qualify as refugees under the Convention *relating to the Status of Refugees*, 1951 (hereinafter 1951 Refugee Convention), face a real risk of suffering serious harm, including a violation of the right to life or exposure to torture or other cruel, inhuman or degrading treatment or punishment (Cf. J. MCADAM, *Complementary Protection*, in V. CHETAIL (ed.), *Elgar Concise Encyclopedia of Migration and Asylum Law*, 2025, Cheltenham, Northampton, pp. 64-69; J. MCADAM, *Complementary Protection in International Refugee Law*, Oxford, 2007).

[7] Since the 1990s, when scientific evidence began to confirm that climate change would significantly affect human mobility, extensive scholarly and policy debate has focused on whether international protection, in the form of asylum, or other protective measures, should be afforded to environmental migrants. These outcomes reflected, and continue to reflect, a limitation of international law, which does not recognize an autonomous legal *status* for environmental migrants. The 1951 Refugee Convention confines refugee *status* to persons fleeing persecution on specific grounds, without expressly addressing environmental and climate-related causes despite their potentially devastating effects on life and human dignity. As a result, environmental migrants continue to face a significant protection gap and often lack formal recognition and consistent safeguards under international law (On this point, see, *inter alia*, J. MCADAM, *Complementary Protection in International Refugee Law*, cit.; *Climate Change, Forced Migration, and International Law*, Oxford, 2012).

meaning of the 1951 Convention *relating to the Status of Refugees* (1951 Refugee Convention).[8]

This *impasse* has been, to some extent, overcome by the HRC's approach, which, although still subject to significant limitations,[9] has nevertheless influenced a growing body of scholarship and subsequent judicial developments. In particular, the 2025 Advisory Opinions of the International Court of Justice (ICJ) on *Obligations of States in respect of Climate Change* and of the Inter-American Court of Human Rights (IACtHR) on *Climate Emergency and Human Rights* (2025 Advisory Opinion) could have represented an important opportunity to clarify, and potentially move beyond, the framework established by the HRC. Yet, while both Opinions reaffirm the relevance of *non-refoulement* in the context of climate-induced migration, neither clarifies how the real-risk threshold set out in *Teitiota* applies to climate-related harm, nor whether – and to what extent – that harm must be imminent.[10]

Nevertheless, the Inter-American Human Rights System (IAHRS) may offer a promising framework for the development of *non-refoulement* in this context. This is due to the principle's broader scope within this regional system, the evolving practice of its judicial and quasi-judicial bodies, as well as to the legal positions some States have adopted on applying *non-refoulement* to climate-induced migration.

Against this background, this article examines the potential of the principle of *non-refoulement* as a source of protection for climate migrants, particularly within the IAHRS. After briefly outlining the scope of *non-refoulement* under international refugee law and international human rights law, and summarizing the innovative aspects and limitations of the HRC's decision in *Teitiota v. New Zealand*, the article turns to subsequent developments concerning climate-induced migration, notably the 2025 Advisory Opinion of the IACtHR. At the heart of the analysis are the evolving practice of the Inter-American Commission on Human Rights (IACmHR) and the legal positions set out by Member States of the Organization of American States (OAS) in the written observations submitted in the advisory proceedings. The IACmHR's reports and resolutions are examined as 'pronouncements'[11] that the IACtHR may take into account in light of its evolutive approach to interpretation, and that may also inform the practice of States Parties, while the States' observations are assessed as potential subsequent practice, which may serve at least as a supplementary means of interpretation under the Vienna Convention on the Law of Treaties (VCLT).[12]

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[8] J. MCADAM, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, in *American Journal of International Law*, 2020, n. 4, 708-725, p. 708.

[9] On this point, *see* section 3 *infra*.

[10] The two Advisory Opinions are discussed in greater detail in sections 3 and 3.1 *infra*.

[11] International Law Commission (ILC), *Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, 2018, UN Doc. A/73/10, Conclusion 13. On this point, see section 4.1 *infra*.

[12] Vienna Convention on the Law of Treaties, 1969 (VCLT).

The article assesses how these developments may be relevant to the interpretation of *non-refoulement* in the context of climate-induced migration under the American Convention on Human Rights (ACHR), and whether they point towards an emerging regional tendency in favor of applying the principle to climate migrants. Following the 'missed opportunity' of the 2025 Advisory Opinion, this tendency could guide the IACtHR in clarifying, in future cases, the conditions under which the principle applies. Ultimately, the article argues that the IAHRS may progressively emerge as a particularly favorable framework for consolidating the application of the principle of *non-refoulement* in the context of climate-induced migration.

2. The Origins of *Non-Refoulement* under International Law

The principle of *non-refoulement* provides, in broad terms, that no person «should be returned to a country where he or she is likely to face persecution, torture, or other serious ill-treatment».[13] The principle originally developed within the specific framework of international refugee law, and it subsequently became firmly embedded in international human rights law as well.

Considering this development, it seems useful to begin by briefly tracing the origins of the principle before examining its scope and application under both international refugee law and international human rights law.

The prohibition of *refoulement* was first formulated in Article 3 of the 1933 Convention *relating to the International Status of Refugees* (1933 Refugee Convention)[14] and later crystallized in Article 33 of the 1951 Refugee Convention.[15]

Before its first formal recognition in 1933, a state practice of granting protection against forcible return already existed, although a precise dating is difficult to establish.[16] According to some scholars, its origins can be traced back to the early twentieth century,[17] specifically to the massive displacement of persons caused by persecution and civil wars in that period.[18]

The League of Nations played a particularly significant role in the interwar period. In 1921, it expressly acknowledged that its Member States were expected to offer political asylum to persons in need of protection.[19] Nevertheless, no legally binding rules were

[13] G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, in *The Refugee in International Law*, Oxford, 2021, p. 241.
[14] Convention *relating to the International Status of Refugees*, 1933 (hereinafter 1933 Refugee Convention).
[15] For the full reference, see note 6 *supra*.
[16] For a detailed analysis of the origins of the principle of *non-refoulement*, see: G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-Refoulement-Part 1*, cit.; J. C. HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2021, pp. 10-127; C. FRANCES MORAN, *Strengthening the Principle of Non- Refoulement*, in *The International Journal of Human Rights*, 2021, n. 6, pp. 1032-1052, pp. 1033-1039.
[17] G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., p. 241.
[18] C. FRANCES MORAN, *Strengthening the Principle of Non- Refoulement*, cit., p. 1034.
[19] *Ibidem*.

adopted to guarantee admission to the territory, to establish a right to asylum, or to prohibit *refoulement*.[20]

Between 1922 and 1928, the League adopted several agreements, known as 'arrangements', to provide guarantees to persons who no longer enjoyed the protection of their State of origin and who lacked any other nationality. These measures included introducing the Nansen passport system in 1922 for stateless persons of Russian origin, and arrangements extending protection to individuals of Armenian origin formerly subject to the Ottoman Empire.[21] These instruments, however, were primarily aimed at providing identity documents to facilitate travel and employment, not directly referring to the prohibition of *refoulement*.[22]

In 1928, a first recommendation in favor of *non-refoulement* was adopted, calling on States to avoid or suspend the expulsion of Russian and Armenian refugees who were unable to enter a neighboring country lawfully.[23] Like the earlier arrangements, however, it had no binding force, so that States remained free to expel them.[24]

In 1933, the concept of *refoulement* – from the French *refouler*, conveying the idea of forcing back or repelling someone[25] – was formally incorporated into binding international refugee law.

Article 3 of the 1933 Refugee Convention provided that all Contracting States undertook «not to remove or keep from [their] territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order».[26]

Although only a few States ratified the 1933 Refugee Convention,[27] it nevertheless played a fundamental role in the development of the principle of *non-refoulement* in international refugee law.[28]

The 1936 and 1938 agreements on German refugees placed some limits on expulsion or return.[29] During the interwar period, efforts focused mainly on facilitating refugee resettlement and easing the burden on countries of first asylum.[30] While the need for

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[20] *Ibidem*.
[21] *Ibidem*.
[22] *Ibidem*.
[23] *Arrangement relating to the Legal Status of Russian and Armenian Refugees*, 1928, para. 7.
[24] C. FRANCES MORAN, *Strengthening the Principle of Non- Refoulement*, cit., p. 1035.
[25] G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., p. 241, «[…] *as of an enemy who fails to breach one's defences*» (*Ibidem*). The idea of *refoulement* has its origins in the French administrative power of expelling migrants, documented as early as 1849 and widely employed during the interwar period to deport foreign nationals convicted of offences against public order (C. FRANCES MORAN, *Strengthening the Principle of Non- Refoulement*, cit., p. 1037). The concept was discussed and revisited during the *travaux préparatoires* of the 1951 Refugee Convention and ultimately enshrined in Article 33 thereof.
[26] Art. 3, 1933 Refugee Convention.
[27] G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., p. 242.
[28] R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, in *The Future of Refugee Law*, RLI Working Paper Series, Special Edition (16-22), 2016, pp. 58-69, p. 59.
[29] G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., p. 242.
[30] *Ibidem*.

stronger protection gradually emerged, limited ratification and weak treaty provisions kept a formal principle of *non-refoulement* from consolidating.[31] Still, large numbers of refugees were in practice not returned.[32]

After the Second World War, international law increasingly placed the individual, rather than the State alone, at its core.[33] The large-scale displacement of populations and the humanitarian crisis that affected Europe in the immediate aftermath of the conflict revealed the inadequacy of the existing legal framework to respond to the needs of those fleeing their countries of origin.[34] This, in turn, called for a new international instrument capable of meeting the protection needs that had emerged.

2.1. The Principle of *Non-Refoulement* in International Refugee Law

In the aftermath of the Second World War, a new Convention on the status of refugees was adopted under the auspices of the newly established United Nations. The 1951 Refugee Convention provided a comprehensive legal definition of a refugee,[35] while enshrining, in Article 33(1), the principle of *non-refoulement*, according to which: «No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion».[36]

The obligation of non-*refoulement* prohibits any conduct attributable to a State which could have the effect of expelling or returning, 'in any manner whatsoever', a refugee to a territory where they would face a risk of persecution.[37] The prohibition enshrined in Article 33(1) is reinforced by Article 42(1), which expressly precludes any reservations to that provision.[38]

As reflected in Article 33, the principle of *non-refoulement* raises several questions concerning its scope and content.[39] The present section does not seek to address these

[31] *Ibidem.*
[32] *Ibidem.*
[33] *Ibidem*; Cf. R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., p. 59.
[34] *Ibid*., p. 60.
[35] According to Article 1A(2) of the 1951 Refugee Convention, «*the term 'refugee' shall apply to any person who: (…) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*».
[36] Art. 33, 1951 Refugee Convention. For a broader analysis, see, *inter alia*, J.C. HATHAWAY, *The Evolution of Refugee Status in International Law: 1920-1950*, in *International and Comparative Law Quarterly*, 1984, n. 2, pp. 348-380.
[37] G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., pp. 241-306.
[38] According to Article 42 (1) of the 1951 Refugee Convention: «*At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive*».
[39] G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., p. 244.

issues exhaustively, but rather to outline some of the principle's key features as they have emerged from State practice and jurisprudence.

Ratione personae, Article 33(1) applies to every individual who has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and, owing to such fear, is unwilling or unable to avail themselves of the protection of their country of origin.[40] This position rests on the declaratory nature of refugee status, in that an individual becomes a refugee at the moment the legal criteria set out in Article 1A(2) of the 1951 Refugee Convention are met, irrespective of whether refugee status has been formally recognized.[41]

The application of the principle of *non-refoulement* to individual cases is a complex matter, one which has led many States, as well as the United Nations High Commissioner for Refugees (UNHCR) and leading scholars, to adopt an interpretation according to which the protection afforded by the principle extends not only to recognized refugees, but also to asylum-seekers, who «should not be returned or expelled pending a final determination of their status».[42]

The scope *ratione loci* of Article 33(1) of the 1951 Refugee Convention has also been extensively debated. Increasingly, the obligation under Article 33(1) not to return a refugee or asylum-seeker to a country where he or she would face a risk of persecution goes beyond territorial application and extends wherever a State exercises jurisdiction.[43]

Within the framework of the 1951 Refugee Convention, the principle of *non-refoulement* is not absolute. Indeed, Article 33(2) provides for exceptions, stipulating that the protection against *refoulement* «may not […] be claimed by a refugee whom there are

[40] Article 1A(2), 1951 Refugee Convention. United Nations High Commissioner for Refugees (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*, 1979, reedited Geneva 2011, par. 28, available at www.unhcr.org; G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., p. 244.

[41] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007, par. 6; See also 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*, cit., par. 28; G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *Determination of Refugee Status: Analysis and Application*, in *The Refugee in International Law*, cit., p. 54 ff.; J. C. HATHAWAY, *The Structure of Entitlement under the Refugee Convention*, cit., p. 173 ff.

[42] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, cit., par. 6; Cf. J. C. HATHAWAY, *Rights of Refugees Physically Present in The Rights of Refugees under International Law*, cit., p. 312 ff.; G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., pp. 265-267.

[43] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, cit., par. 9; J. C. HATHAWAY, *Rights of Refugees Physically Present in The Rights of Refugees under International Law*, cit., pp. 379-399; G. S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 2*, cit., pp. 308-329; Cf. also European Court of Human Rights (ECtHR), Grand Chamber, judgment of 23 February 2012, application no. 27765/09, *Hirsi Jamaa and others v. Italy*. On this point, however, several national courts have rejected the extraterritorial application of the principle, most notably the Supreme Court of the United States in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), concerning the interdiction of Haitian nationals seeking protection in international waters (on this point, cf. J.C. HATHAWAY, *Rights of Refugees Physically Present in The Rights of Refugees under International Law*, cit., p. 380).

reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country».[44]

The application of Article 33(2) requires an individualized assessment by the host State to determine whether the refugee falls within one of the two exceptions provided for by the Convention.[45]

The principle of *non-refoulement* has been incorporated into several regional instruments concerning refugee protection, both binding and non-binding, though with differences in their scope and application.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention),[46] for instance, provides a textually broader protection than the 1951 Refugee Convention by extending the prohibition of *refoulement* to threats to "life, physical integrity or liberty",[47] applying it "at the frontier", and referring to "persons" rather than only to "refugee".[48]

Likewise, the 1984 Cartagena Declaration on Refugees[49] reaffirms the centrality of the principle by recognizing *non-refoulement*, including the prohibition of rejection at the frontier, as a cornerstone of international refugee protection in the Latin American region and calling for its recognition as a rule of *jus cogens*.[50] Although non-binding in nature, the Declaration has significantly influenced the legislation and practice of several Latin American States in the field of refugee protection.[51]

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[44] Article 33(2), 1951 Refugee Convention. On this point, see J.C. HATHAWAY, M. FOSTER, *The Law of Refugee Status*, Cambridge, 2014, p. 524 ff.

[45] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, cit., par. 10.

[46] OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969 (OAU Convention).

[47] Article II(3), OAU Convention. Article 33 of the 1951 Refugee Convention refers only to threats to life or freedom.

[48] The OAU Convention establishes a regional framework for refugee protection that complements the 1951 Refugee Convention. It enshrines the principle of *non-refoulement* in Article II(3), providing that: «*No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2*» (emphasis added). On this point, see, in more detail, R.M. D'SA, *The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity*, in *Netherlands International Law Review*, 1984, n. 3, pp. 378-397.

[49] *Cartagena Declaration on Refugees*, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena de Indias, Colombia, 19-22 November 1984. On this point, see, *inter alia*, J.H. FISCHEL DE ANDRADE, *Regional Refugee Regimes: Latin America*, in C. COSTELLO, M. FOSTER, J. MCADAM (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 2021, pp. 315-333.

[50] Paragraph 5 of the Cartagena Declaration reaffirms «*the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens*».

[51] Cf., *inter alia*, L.L. JUBILUT, M.V. ESPINOZA, G. MEZZANOTTI (eds.), *Latin America and Refugee Protection: Regimes, Logics, and Challenges*, New York, 2021; J.H. FISCHEL DE ANDRADE, *Regional Refugee Regimes: Latin America*, cit.; 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, pp. 1-36, pp. 13-14. On this point, see, in more detail, section 2.2.1 *infra*.

The principle of *non-refoulement* has progressively extended beyond the boundaries of international refugee law, acquiring relevance in other areas of international law, such as international humanitarian law[52] and, most significantly, international human rights law,[53] where its scope of application is wider.

2.2. The Principle of *Non-Refoulement* in International Human Rights Law

Under international human rights law, the principle of *non-refoulement* guarantees that «no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm».[54] Its personal scope is therefore broader than under international refugee law, as the protection applies irrespective of whether the individual qualifies as a refugee. In other words, persons who fall outside the refugee definition, or who have lost refugee status and the protection attached to it, may nevertheless benefit from the safeguards provided by international human rights instruments. In this respect, international human rights law operates as complementary protection, since the *non-refoulement* obligation «derives from sources that are complementary to the Refugee Convention».[55]

Moreover, within the framework of international human rights law, the *non-refoulement* principle has acquired an absolute character, thereby overriding the exception clause contained in Article 33(2) of the 1951 Refugee Convention. Indeed, protection against return where there is a real risk of torture or other cruel, inhuman or degrading treatment or punishment is non-derogable, even in situations of public emergency or national security concern.[56]

This is reflected in both the 1984 Convention against Torture (CAT) and the 1966 International Covenant on Civil and Political Rights (ICCPR).

In its Article 3(1), the CAT prohibits States from returning a person to another State where «there are substantial grounds for believing that he would be in danger of being subjected to torture».[57] Unlike Article 33(2) of the 1951 Refugee Convention, this prohibition admits no exceptions.[58] As the Committee against Torture has clarified, the principle also applies to the so-called *chain refoulement* (or indirect refoulement),

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[52] Cf. Article 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (Fourth Geneva Convention).
[53] Cf. *inter alia* Art. 3(1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT); Art. 7, ICCPR.
[54] Office of the United Nations High Commissioner for Human Rights (OHCHR), *The Principle of Non-refoulement under International Human Rights Law*, 2018, p. 1.
[55] G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *Protection under Human Rights and General International Law*, cit., p. 350.
[56] *Ibid*., pp. 364-365.
[57] Art. 3(1), CAT.
[58] G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *Protection under Human Rights and General International Law*, cit., p. 365; R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., p. 61.

whereby a State is prohibited from transferring an individual to a country from which he or she may subsequently be removed to a third State where torture is likely to occur.[59]

Within the framework of the CAT, the scope of the principle of *non-refoulement* is limited to the definition of torture set out in Article 1 of the Convention. Consequently, the protection afforded by Article 3 does not extend to cruel, inhuman or degrading treatment or punishment falling short of torture.[60]

Although the ICCPR does not expressly enshrine the principle of *non-refoulement*, the HRC has inferred it from Article 7, which prohibits torture and other cruel, inhuman or degrading treatment or punishment.[61] Accordingly, States are prohibited from removing an individual to a territory where there are substantial grounds for believing that he or she would face a real risk of such treatment. The prohibition of *refoulement* thus constitutes an inherent component of the absolute prohibition of torture and other forms of inhuman and degrading treatment under the Covenant.[62] Unlike the CAT, moreover, Article 7 of the ICCPR does not distinguish between torture and cruel, inhuman or degrading treatment or punishment. Consequently, the scope of *non-refoulement* under the ICCPR is wider than Article 3 of the CAT.[63]

The principle of *non-refoulement*, with the characteristics outlined above, is also enshrined in several regional human rights instruments. In some cases, these instruments expressly provide for the principle, while in others it has been inferred through the interpretation of other protected human rights.

The principle of *non-refoulement* is not expressly enshrined in the European Convention on Human Rights (ECHR). Nevertheless, the European Court of Human Rights (ECtHR) has indirectly acknowledged its protection through the interpretation of the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined in Article 3.[64] It is precisely in the context of *refoulement* that the ECtHR developed the so-called protection *par ricochet* doctrine, according to which a

[59] Committee against Torture, decision of 16 November 1998, communication no. 88/1997, *Korban v. Sweden*. On this point, see again G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *Protection under Human Rights and General International Law*, cit., pp. 365-366.
[60] *Ibidem*; R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., pp. 61-62.
[61] G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *Protection under Human Rights and General International Law*, cit., pp. 368-372. According to Article 7, ICCPR: «*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation*».
[62] G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *Protection under Human Rights and General International Law*, cit., p. 369.
[63] *Ibidem*; R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., pp. 61-62.
[64] Article 3 of the European Convention on Human Rights (ECHR) states that: «*no one shall be subjected to torture or inhuman or degrading treatment or punishment*». In the leading case *Soering v. the United Kingdom* (judgment of 7 July 1989, application no. 14038/88) the ECtHR held that extraditing an individual to a State where he would face a real risk of torture or other forms of inhuman or degrading treatment or punishment would be contrary to Article 3 of the ECHR. At the same time, it stresses that Article 3 makes «*no provision for exceptions and no derogation from it is permissible*» under the Convention (parr. 86 and 88). In *Chahal v. the United Kingdom* (judgment of 15 November 1996, application no. 22414/93) the ECtHR clarified that the absolute nature of the prohibition enshrined in Article 3 extends to expulsion cases (par. 80).

right formally guaranteed by the ECHR may be interpreted so as to protect a right that is not expressly recognized under the Convention.[65] The ECtHR's interpretation of Article 3 encompasses indirect return, including rejection at borders, reinforcing the view that States cannot escape responsibility by outsourcing risk.[66]

The African Charter on Human and Peoples' Rights[67] does not expressly recognize the principle of *non-refoulement*. Nevertheless, the principle may be inferred from the right to seek and obtain asylum, in case of persecution, enshrined in Article 12,[68] and from the prohibition of «all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment», in Article 5.[69]

Indeed, the African Commission on Human and Peoples' Rights (ACmHPR) has clarified that Article 12 of the Charter «should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state […]».[70] At the same time, the Commission has found violations of Article 5 of the African Charter where deportation or expulsion exposed individuals to a risk of torture or cruel, inhuman, or degrading treatment or punishment.[71]

In general terms, the African human rights system is fragmented and comparatively underdeveloped in the field of migration.[72] To date, the case law of the African Commission and of the African Court on Human and Peoples' Rights offers little guidance on the scope and content of *non-refoulement* within the African regional system. This may be partly explained by the limited number of migration-related cases brought before either body.[73]

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[65] A. TERRASI, *The Role of Environmental Protection Under the International Covenant on Civil and Political Rights and the European Convention on Human Rights*, in G. PALMISANO (ed.), *Environmental Sustainability as a Protected Collective Interest in International and EU Law*, Napoli, 2026, pp. 177-208, p. 179. For an analysis of the concept, see A. SACCUCCI, *The Protection from Removal to Unsafe Countries Under the ECHR: Not All That Glitters Is Gold*, in *Questions of International Law*, Zoom-in, 2014, n. 5, pp. 3-24.

[66] ECtHR, Grand Chamber, judgment of 21 January 2011, application no. 30696/09, *M.S.S. v. Belgium and Greece*, parr. 286-322.

[67] African Charter on Human and Peoples' Rights, 1981.

[68] Article 12(3), African Charter on Human and Peoples' Rights, according to which: «*Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions*».

[69] Article 5, African Charter on Human and Peoples' Rights, according to which: «*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited*».

[70] African Commission on Human and Peoples' Rights (ACmHPR), decision of 31 October 1996, communications nos. 27/89, 46/91, 49/91 and 99/93, *Organisation mondiale contre la torture, Association Internationale des juristes democrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda.*

[71] ACmHPR, decision of 6 November 2000, communication no. 97/93, *Modise v. Botswana*, par. 92.

[72] M. SAHLI FADEL, *Study on African Responses to Migration and the Protection of Migrant Rights*, 2023, pp. 9-10.

[73] *Ibidem*.

By contrast, within the IAHRS, judicial and quasi-judicial bodies have progressively expanded the scope of the principle of *non-refoulement* through an extensive body of case law, also in light of its express recognition in the ACHR.

2.2.1. Broadening the Horizon: *Non-Refoulement* in the Inter-American Human Rights System

The IAHRS is grounded in some foundational instruments, including the 1948 Charter of the OAS, the so-called Charter of Bogotá;[74] the American Declaration of the Rights and Duties of Man, a non-binding instrument also adopted in 1948; and the ACHR, the "Pact of San José" adopted in 1969 under the auspices of the OAS.[75] The implementation of these instruments is overseen, with complementary functions, by the IACmHR and the IACtHR.[76]

Within the IAHRS, protection against *refoulemen*t is provided by the American Declaration and the ACHR, both in connection with the right to seek and receive asylum and with the prohibition of torture and cruel, inhuman, or degrading treatment or punishment.

According to Article XXVII of the American Declaration of the Rights and Duties of Man, «Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements».[77]

Likewise, Article 22 of the ACHR, entitled "Freedom of Movement and Residence", provides, in its paragraph 7, that: «Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and

[74] The OAS brings together 34 of the 35 independent States of the Americas. Nicaragua is no longer a member of the Organization (cf. www.oas.org/ext/en/main/oas/member-states). For a more detailed reconstruction of the principle of *non-refoulement* within the IAHRS, see R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., pp. 63-69.

[75] *The Inter-American corpus iuris includes other instruments like the two A*dditional Protocols to the American Convention (the 1988 Protocol of San Salvador on Economic, Social, and Cultural Rights, and the 1990 Protocol to Abolish the Death Penalty), the Inter-American Convention against Torture, and the Inter-American Convention on Extradition (Cf. R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., p. 64).

[76] The Inter-American Commission on Human Rights (IACmHR), as a quasi-judicial body, and the Inter-American Court of Human Rights (IACtHR), as a judicial body, supervise compliance with the ACHR through complementary functions. The Commission receives individual complaints, assesses their admissibility and merits, and makes recommendations to the States concerned. It also prepares studies and reports necessary for the exercise of its functions (cf. Arts. 41-47, ACHR). The Court, by contrast, is the only body empowered to issue legally binding judgments (cf. Arts. 61-65, ACHR). While individuals may submit petitions directly to the Commission, they have no direct access to the Court. Only States Parties and the Commission are entitled to refer contentious cases to the Court. In addition to its contentious jurisdiction, the Court also exercises advisory jurisdiction (G. PANE, *Justiciability of the collective right to a healthy environment, Between the protection of the environment and international human rights law*, Napoli, 2026, p. 71; V. GOMEZ, *The Inter-American Commission and Court of Human Rights*, in G. OBERLEITNER (ed.), *International Human Rights Institutions, Tribunals, and Courts, Singapore*, 2018, p. 461 ff.).

[77] Article XXVII, *American Declaration of the Rights and Duties of Man*.

international conventions, in the event he is being pursued for political offenses or related common crimes».[78]

Immediately after recognizing the individual right to asylum,[79] Article 22(8) of the ACHR expressly prohibits *refoulement*, stating that: «In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions».[80]

In light of these provisions, under the IAHRS the principle of *non-refoulement* constitutes «an effective instrument for guaranteeing the right to seek and receive asylum».[81]

According to Article 22(8) of the ACHR, the prohibition of *refoulement* applies to any "alien", a term that the IACtHR has interpreted as encompassing any person who falls within the conditions set out in the provision, rather than being limited to specific categories of non-nationals, such as refugees. [82]

The broader *ratione personae* scope of application of the principle of *non-refoulement* was confirmed by the IACtHR in *Pacheco Tineo Family v. Bolivia*, where the Court emphasized that the principle protects not only refugees but also asylum seekers and «those who wish to assert their right to seek and receive asylum».[83]

In the same judgment, the Court further held that the principle of *non-refoulement* has attained the status of customary international law and is therefore binding on all States, irrespective of whether they are parties to the 1951 Refugee Convention. [84]

About its application *ratione materiae*, the IACtHR stated that States are prohibited from returning any person, whether an asylum seeker or a refugee, to a country where their life or liberty would be threatened on account of persecution for a Convention ground or where they would otherwise face «generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order, nor to a third State from which she or he may later be returned to the State where she or he suffered this risk – a situation that has been called indirect refoulement».[85]

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[78] Article 22(7), ACHR.
[79] R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., p. 66.
[80] Article 22(8), ACHR.
[81] IACtHR, Advisory Opinion OC-21/14 of 19 August 2014, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, requested by the Argentine Republic et al., par. 210.
[82] *Ibid*., par. 218. On this point, see, in more detail, R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., p. 66.
[83] IACtHR, Advisory Opinion OC-21/14, cit., par. 210; IACtHR, judgment of 25 November 2013 (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 272, *Pacheco Tineo Family v. Bolivia*, par. 151.
[84] IACtHR, Advisory Opinion OC-21/14, cit., par. 211; IACtHR, *Pacheco Tineo Family v. Bolivia*, cit., par. 151.
[85] IACtHR, Advisory Opinion OC-21/14, cit., par. 212; IACtHR, *Pacheco Tineo Family v. Bolivia*, cit., par. 153.

Finally, concerning the *ratione loci* scope of application, the IACtHR addressed the issue of the extraterritorial application of the principle, holding that it «can be invoked by any alien over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State».[86]

In addition to serving as a guarantee of the right to seek and receive asylum, the principle of *non-refoulement* has also been recognized within the IAHRS as a corollary of the absolute prohibition of torture and other cruel, inhuman or degrading treatment enshrined in Article 5 of the ACHR.[87]

In *Tibi v. Ecuador*, the IACtHR recognized the absolute and *jus cogens* character of the prohibition of «all forms of torture, both physical and psychological».[88] In *Caesar v. Trinidad and Tobago*, the Court reaffirmed the peremptory nature of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, as enshrined in Articles 5(1) and 5(2) of the American Convention, making no distinction between the different thresholds applicable to torture and other forms of ill-treatment.[89]

In so doing, the Court consolidated its jurisprudence recognizing the prohibition of torture and other cruel, inhuman or degrading treatment or punishment as non-derogable under all circumstances and as giving rise to *erga omnes* obligations on the international community.[90]

Building on this, the Court has identified the principle of *non-refoulement* as one of the obligations deriving from the prohibition of torture, and other cruel, inhuman or degrading treatment.[91]

Since it stems from this prohibition, the obligation of *non-refoulement* is likewise «*absolute and also becomes a peremptory norm of customary international law*».[92] Accordingly, States are bound not to return any person to a territory where he or she

[86] IACtHR, Advisory Opinion OC-21/14, cit., par. 219.
[87] According to Article 5, ACHR: «*1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person […]*».
[88] IACtHR, judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 114, *Tibi v. Ecuador*, par. 143.
[89] IACtHR, judgment of 11 March 2005 (Merits, Reparations and Costs), Series C No. 123, *Caesar v. Trinidad and Tobago*, par. 70. On this point, cf. R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., pp. 67-68.
[90] IACtHR, *Caesar v. Trinidad and Tobago*, cit., par. 70; see also R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., p. 68.
[91] IACtHR, Advisory Opinion OC-25/18 of 30 May 2018, *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American Protection System (Interpretation and Scope of Articles 5, 22(7) and 22(8), in Relation to Article 1(1) of the American Convention on Human Rights)*, requested by the Republic of Ecuador, par. 181; IACtHR, Advisory Opinion OC-21/14, cit., par. 225.
[92] *Ibidem*. See also IACtHR, Advisory Opinion OC-26/20 of 9 November 2020**,** *The Obligations in Matters of Human Rights of a State that Has Denounced the American Convention on Human Rights and the Charter of the Organization of American States*, requested by the Republic of Colombia, par. 106.

would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment, or any other practice prohibited under *jus cogens*. [93]

From the foregoing analysis, it emerges that, within the IAHRS, the principle of *non-refoulement* has a broader scope of application *ratione personae*, *ratione materiae*, and *ratione loci* than under other human rights protection systems.[94] It is conceived both as a crucial component of the right to asylum, expressly enshrined in Article 22(8), and as an accessory obligation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment included in Article 5(2). As such, according to the IACtHR, it acquires the absolute and peremptory nature of the primary norm from which it stems.[95]

Yet, the nature of the principle of *non-refoulement* remains complex and highly debated. It therefore seems appropriate to offer some brief considerations in this regard before proceeding to the analysis of *non-refoulement* in the context of climate-induced migration.

2.3. *Non-refoulement* as a Customary or Peremptory Norm?

As discussed above, the principle of *non-refoulement*, originally enshrined in the 1951 Refugee Convention, has progressively expanded beyond refugee law and is now incorporated into a wide range of international instruments operating in different branches of international law, at both the universal and regional levels. Despite this widespread recognition, its legal status remains controversial.[96]

A first point of debate concerns whether *non-refoulement* has evolved into a norm of customary international law. According to a significant body of scholarship, the principle has attained customary *status*, binding upon all States regardless of whether they are parties to the treaties in which it is expressly codified.[97] In support of this view, particular attention has been paid to State practice in the implementation of the 1951 Refugee Convention, as well as to the positions adopted by UNHCR.[98]

The customary nature of the principle has also been inferred from the customary status acquired by the prohibition of torture and cruel, inhuman or degrading treatment

[93] R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, cit., p. 68.
[94] *Ibid.*, p. 69.
[95] *Ibid.*, p. 68.
[96] J.Y. CARLIER, *Droit d'asile et des réfugiés. De la protection aux droits*, in *Recueil des cours de l'Académie de droit international de La Haye*, 2007, n. 332, p. 354 ff; J. C. HATHAWAY, *Leveraging Asylum*, in *Texas International Law Journal*, 2010, n. 3, pp. 502-536.
[97] See, *inter alia*, G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Principle of Non-refoulement-Part 1*, cit., pp. 300-306; E. LAUTERPACHT, D. BETHLEHEM, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in E. FELLER et al. (eds.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge, 2003, pp. 89-177.
[98] UNHCR, Executive Committee, Conclusion No. 25 (XXXIII), *General Conclusion on International Protection*, 1982, par. (b); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, cit., parr. 14-16; See also: UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994.

under international human rights law, *non-refoulement* being regarded as a necessary corollary of that prohibition.[99]

By contrast, other scholars observe that the available evidence of international practice is neither sufficiently widespread nor sufficiently consistent to support the existence of a customary rule of *non-refoulement*, whether in relation to refugees or to individuals protected under the principal international human rights treaties, particularly in the context of the prohibition of torture.[100]

Indeed, according to some scholarly opinion, the principle of *non-refoulement* has evolved, at most, into a "principle of general nature"[101] within the specific field of international human rights law, where it enjoys a broader scope of application.[102] It would therefore *not* constitute a customary norm of international law, but rather a principle of a sectoral character, operating within the supervisory mechanisms that characterize that field.[103] Moreover, the same scholars suggest that doubts as to its customary status are further reinforced by the restrictive approaches adopted by certain States with high levels of immigration, notwithstanding their membership in human rights protection systems.[104]

An even more controversial issue concerns the possible *jus cogens* character of the principle.[105] A significant body of scholarship, together with important strands of international jurisprudence, considers *non-refoulement* to possess peremptory status, at least insofar as it derives from and safeguards the prohibition of torture.[106] The IACtHR has repeatedly adopted this position,[107] emphasizing that obligations arising from peremptory norms «remain binding for a State – even after it has denounced the American Convention or has withdrawn from the OAS – as well as for the entire community of States, since they are the foundation on which the international order is built».[108] Likewise, UNHCR has consistently maintained that the principle is progressively acquiring the status of a norm of *jus cogens*.[109]

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[99] E. LAUTERPACHT, D. BETHLEHEM, *The Scope and Content of the Principle of Non-Refoulement*, cit., pp. 140-163; A. DUFFY, *Expulsion to Face Torture? Non-Refoulement in International Law*, in *International Journal of Refugee Law*, 2008, n. 3, pp. 373-390, p. 384.

[100] In this sense, see: J. Y. CARLIER, *Droit d'asile et des réfugiés. De la protection aux droits*, in *Recueil des cours de l'Académie de droit international de La Haye*, cit.; J.C. HATHAWAY, *Leveraging Asylum*, in *Texas International Law Journal*, cit., and, in particular, p. 502 and pp. 507-527.

[101] P. DE SENA, M. STARITA, *Corso di diritto internazionale*, Bologna, 2023, p. 124.

[102] *Ibidem*.

[103] *Ibidem*.

[104] *Ibidem*.

[105] «*Jus cogens is presented as the legal expression of the international community as a whole, based on universal and superior values, which embodies basic standards that guarantee essential or fundamental human values related to life, human dignity, peace and security*» (IACtHR, Advisory Opinion OC-26/20, cit., par. 105). For a comprehensive discussion of the concept and legal regime of *jus cogens* norms see, *inter alia*, P. DE SENA, M. STARITA, *Corso di diritto internazionale*, cit., pp. 113-121; C. FOCARELLI, *Diritto internazionale*, Milano, 2021, pp. 252-258.

[106] Cf., *inter alia*, C. COSTELLO, M. FOSTER, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, in *Netherlands Yearbook of International Law*, 2016, n. 46, pp. 273-327.

[107] Cf. IACtHR: Advisory Opinion OC-21/14, cit., par. 225; Advisory Opinion OC-25/18, cit., par. 181; Advisory Opinion OC-26/20, cit., par. 107.

[108] *Ibidem*.

[109] UNHCR, Executive Committee, Conclusion No. 25 (XXXIII), cit., par. (b).

From a formal perspective,[110] recognizing *non-refoulement* as a peremptory norm would have significant legal consequences. Indeed, *jus cogens* norms occupy the highest position within the hierarchy of international law and admit no derogation. This is reflected in the VCLT, under which a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law,[111] while the emergence of a new peremptory norm terminates any existing treaty that conflicts with it.[112]

If *non-refoulement* were recognized as a norm of *jus cogens*, either autonomously or insofar as it is inseparably linked to the prohibition of torture, treaties (including extradition treaties, prisoner transfer agreements or readmission agreements) which require the transfer or return of individuals to places where they face a real risk of torture or other prohibited treatment would, in principle, be void under Articles 53 and 64 of the VCLT.[113] However, there are no clear examples of treaties or treaty provisions having been declared void on that basis.[114]

Likewise, even assuming that the principle of *non-refoulement* has attained the status of customary international law or *jus cogens*, such recognition would not necessarily produce different legal consequences in individual cases. This is because, under treaty law, some prohibitions of *refoulement* are already absolute, «notably that under CAT, concerning return to face torture, and that under the ECHR to face any breach of Article 3 ECHR, which prohibits not only torture, but also inhuman and degrading treatment».[115] Accordingly, for States bound by these treaties, recognizing *non-refoulement* as a rule of customary international law or as a norm of *jus cogens* would not ordinarily alter the legal standard applicable to individual claims.

The added value of recognizing *non-refoulement* as a rule of customary international law – and, *a fortiori*, as a norm of *jus cogens* – would more plausibly emerge in situations

[110] The 'formal' conception of peremptory norms understands *jus cogens* as a set of internationally binding rules that are non-derogable and formally superior to all other norms (P. DE SENA, M. STARITA, *Corso di diritto internazionale*, cit., pp. 113-121).
[111] Cf. Article 53, VCLT.
[112] *Ibid*., Article 64. Cf. P. DE SENA, M. STARITA, *Corso di diritto internazionale*, cit., p. 112. The Vienna Convention does not provide for a list of *jus cogens* norms. The prohibitions of aggression, genocide, slavery, torture, racial discrimination and apartheid, crimes against humanity, as well as the right of self-determination, together with the basic rules of international humanitarian law, have been recognized as norms of *jus cogens*. These norms protect fundamental rights and universal values shared by the international community as a whole and therefore give rise to obligations *erga omnes* (Cf. International Court of Justice (ICJ): *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006, par. 64; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, par. 99; cf. also IACtHR, Advisory Opinion OC-26/20, cit., par. 105). These norms are also referred to by the ILC in the 2022 *Draft Conclusions on identification and legal consequences of peremptory norms of general international law* (jus cogens), *with commentaries*, UN Doc. A/77/10, which expressly clarify that the list is not exhaustive (see Conclusion 23).
[113] On this point, cf. C. COSTELLO, M. FOSTER, *Non-Refoulement as Custom and Jus Cogens?*, cit., pp. 312-314; cf. also, ECtHR: Grand Chamber, judgment of 4 November 2014, application no. 29217/12, *Tarakhel v. Switzerland*; *Hirsi Jamaa and others v. Italy*, cit.
[114] For example, despite widespread criticism that the 2017 *Italy-Libya Memorandum of Understanding* is incompatible with the principle of *non-refoulement*, no legal consequences have followed under the law of treaties.
[115] C. COSTELLO, M. FOSTER, *Non-Refoulement as Custom and Jus Cogens?*, cit., p. 314.

involving gross or systematic violations. Indeed, according to Articles 40 and 41 of the International Law Commission (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, a serious breach of an obligation arising under a peremptory norm of general international law entails aggravated consequences, so that all States are required to cooperate to bring the unlawful situation to an end through lawful means and must neither recognize as lawful, nor render aid or assistance in maintaining, the situation created by the breach.[116]

Costello and Foster have pointed out, in this regard, that «[a]ssuming that non-refoulement is *jus cogens*, if a state were grossly or systematically to fail to respect this obligation, Article 40 ASR [ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts*] would apply. In that context, other states have positive duties to cooperate to bring that conduct to an end, and have specific negative duties not to render 'aid or assistance' to the state seriously breaching jus cogens».[117]

This consideration may represent one of the most significant implications of recognizing *non-refoulement* as a *jus cogens* norm. It is widely acknowledged that the effectiveness of the international refugee protection regime, and more broadly of migration governance, depends on the principles of solidarity and responsibility-sharing. However, conferring genuine legal force on these principles has proved difficult.[118]

In other words, the central question is not simply whether *non-refoulement* has become a rule of customary international law or a norm of *jus cogens*, but whether these classifications produce legal consequences that differ in any meaningful way from those already ensured by the existing treaty framework. At present, the answer appears to be, especially in relation to individual protection, largely in the negative.

This conclusion is reinforced by the fact that an overwhelming majority of States are bound by one or more international or regional instruments incorporating the principle of *non-refoulement*.[119] Within these treaties, the obligation is generally formulated in absolute terms and reinforced by effective supervisory mechanisms, including international and regional courts competent to examine individual cases and to provide remedies where violations are found.[120]

These considerations suggest that the principle of *non-refoulement* currently derives its effectiveness primarily from the international and regional treaties by which most States are bound, as well as from the interpretative practice of the judicial and quasi-judicial bodies entrusted with their supervision. From this perspective, the debate over its characterization under general international law is, in the ordinary run of cases, of comparatively limited practical significance. This is evident also in the context of climate-induced migration, where protection against *refoulement* relies on an extensive

[116] Arts. 40 and 41, ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* in Yearbook of the International Law Commission, 2001, vol. II, Part Two, UN Doc. A/56/10.
[117] C. COSTELLO, M. FOSTER, *Non-Refoulement as Custom and Jus Cogens?*, cit., p. 315.
[118] *Ibid*., pp. 315-316.
[119] M. DI FILIPPO, *L'allontanamento dell'individuo straniero*, in A.M. CALAMIA *et al.* (a cura di), *Lineamenti di diritto internazionale ed europeo delle migrazioni*, Milano, 2021, pp. 237-288, p. 257.
[120] *Ibidem*.

interpretation of international human rights instruments, and in particular on the existence of a real, foreseeable and personal risk that removal would expose the individual to torture or to other forms of cruel, inhuman or degrading treatment or punishment.

3. The Principle of *Non-Refoulement* in the Face of Climate Change: the "Legacy" of the *Teitiota* Case, between Significant Developments and Persisting Limitations

The principle of *non-refoulement* may be of paramount importance in protecting individuals from the adverse consequences of climate change. Indeed, within international human rights law, it may operate as a form of protection for climate migrants, even when they do not qualify as refugees.

This approach was confirmed, as mentioned, by the landmark *Teitiota* case,[121] in which the HRC demonstrated that climate change may, in certain circumstances, give rise to *non-refoulement* obligations where removal would expose an individual to a real risk of a violation of fundamental human rights, particularly the right to life.[122]

The *Teitiota case* concerned a communication brought before the HRC by a national of Kiribati who claimed that his removal from New Zealand would expose him to the life-threatening consequences of climate change in violation of Article 6 of the ICCPR.[123]

Relying on the expansive interpretation of the right to life set out in General Comment No. 36, according to which the right to life encompasses not only protection against arbitrary deprivation of life, but also the right to live with dignity,[124] the HRC acknowledged that environmental degradation and climate change may, in the absence of adequate adaptation measures by the State of origin, expose individuals to violations of that right, as well as of the prohibition of cruel, inhuman or degrading treatment,[125] and consequently, give rise to *non-refoulement* obligations under the ICCPR. Such obligations arise where there are substantial grounds for believing that removal would expose an individual to "a real risk of irreparable harm"[126] within the meaning of Article 6 and Article 7. The Committee has clarified that the risk must be «personal in nature and cannot derive merely from the general conditions in the receiving State, except in the

[121] HRC, *Ioane Teitiota v. New Zealand*, cit., note 1.
[122] Art. 6, ICCPR.
[123] For comments on the decision, see, *inter alia*: A. MANEGGIA, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee*, in *Diritti umani e diritto internazionale*, 2020, n. 2, pp. 635-643; E. SOMMARIO, *When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision*, in *Questions of International Law*, Zoom-in, 2021, n. 77, pp. 51-60; J. MCADAM, *Protecting People Displaced by the Impacts of Climate Change*, cit.
[124] HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, adopted at its 124th session (8 October-2 November 2018), UN Doc. CCPR/C/GC/36, par. 30.
[125] Art. 7, ICCPR.
[126] HRC: *Ioane Teitiota v. New Zealand*, cit., parr. 9.7 and 9.11; cf. *General comment No. 36*, cit., par. 30.

most extreme cases»[127] and that a high threshold applies «to establish that a real risk of irreparable harm exists».[128]

In the present case, the HRC found that Mr. Teitiota had failed to establish a real, personal, and foreseeable risk to his right to life, noting, *inter alia*, that Kiribati was taking adaptation measures to address the effects of climate change.[129] It therefore concluded that New Zealand's *non-refoulement* obligations had not been triggered and found no violations of Article 6 of the ICCPR.[130]

Notwithstanding the negative outcome of the case, the HRC's decision undoubtedly represented a significant step forward in the protection of climate migrants, acknowledging, for the first time, the possibility of a causal link between climate change and human mobility, clarifying how the adverse effects of the environmental crisis may give rise to human rights violations and, in turn, triggering States' *non-refoulement* obligations.

Since its adoption, the *Teitiota* case has become a significant interpretative benchmark in shaping the evolving relationship between climate change and *non-refoulement* obligations under international human rights law.

While, at the regional level, no judicial body has yet been called upon to rule directly on claims concerning climate migrants,[131] the influence of the interpretation advanced in *Teitiota* can be observed in a growing body of domestic case law,[132] recognizing complementary forms of protection[133] where return would expose individuals to serious human rights risks arising from the adverse impacts of climate change. National courts are increasingly accepting that such conditions may threaten applicants' survival, subject them to extreme humanitarian conditions, or cause a serious and irreversible deterioration in their health, thereby giving rise to *non-refoulement* obligations under the prohibition of cruel, inhuman or degrading treatment.[134] Examples can be found in the jurisprudence

[127] HRC: *Ioane Teitiota v. New Zealand*, cit., par. 9.3; cf. *General comment No. 36*, cit., par. 30.
[128] HRC: *Ioane Teitiota v. New Zealand*, cit., par. 9.3.
[129] *Ibid*., par. 9.12.
[130] The Committee concluded that there was no «*real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life, including his right to a life with dignity*» (HRC, *Ioane Teitiota v. New Zealand*, cit., par. 9.9).
[131] M. V. IYER, *Environmental Migration in Regional Human Rights Courts: A Lifeboat from the "Sinking Vessel"*, in *Tennessee Law Review*, 2024, n. 2, pp. 363-429.
[132] J. MCADAM, C. SCISSA, *How Domestic Courts Are Using International Refugee Law and Human Rights Law in the Context of Climate Change and Disasters*, in *EJIL:Talk!*, 22 November 2022, available at https://www.ejiltalk.org/how-domestic-courts-are-using-international-refugee-law-and-human-rights-law-in-the-context-of-climate-change-and-disasters/.
[133] On "complementary protection", see note 6, *supra*.
[134] W. KÄLIN, H. ENTWISLE CHAPUISAT, *Protection of Persons Displaced Across Borders in the Context of Disasters and the Adverse Effects of Climate Change. A Review of Literature, Legislation and Case Law to Support the Implementation of the Global Compact on Refugees*, UNHCR, Legal and Protection Policy Research Series, June 2024, p. 16.

of some countries, including Germany,[135] France,[136] and Italy, [137] where environmental and climate-related considerations increasingly inform the determination of protection claims. [138]

The number of documented cases nevertheless remains limited, also in light of the significant criticism associated with the effective application of *non-refoulement* obligations as interpreted by the HRC.[139]

Indeed, the HRC's reasoning in *Teitiota* suggests that *non-refoulement* obligations under the ICCPR are triggered only when the harm an individual would face in the receiving State reaches a particularly high threshold of severity.[140]

As several scholars have pointed out, the HRC failed to adequately consider the cumulative impact of the multiple risk factors associated with slow-onset climate events, such as sea-level rise.[141] In their view, the HRC examined each source of harm in isolation, overlooking the possibility that, taken together, their effects might reach the threshold of a real risk of irreparable harm required to give rise to *non-refoulement* obligations.[142] As a result, the standard adopted by the HRC may prove particularly difficult to satisfy in practice.

A further limitation of the decision lies in its reliance on the notion of 'imminence' of the risk, which may significantly restrict protection for individuals facing harms that unfold gradually yet remain ultimately unavoidable.[143] The requirement of imminence is particularly problematic in the context of slow-onset climate processes, such as sea-level rise and desertification, which may cause the progressive loss of the habitability of entire territories. Because these phenomena unfold over extended periods of time, affected

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[135] C. SCHLOSS, *Climate Migrants. How German Courts Take the Environment into Account When Considering Non-Refoulement*, in *Völkerrechtsblog*, 3 March 2021, available at https://voelkerrechtsblog.org/climate-migrants/; See, for example, the Baden-Württemberg Administrative Court: Judgment No. A 11 S 2042/20, 17 December 2020, par. 25; Judgment No. A 13 S 3196/19, 16 December 2021, parr. 57 ff.; and Judgment No. A 11 S 1329/20, 22 February 2023, par. 143.

[136] M. COURTOY, *Le contexte environnemental dans le pays d'origine, un nouveau critère d'appréciation du droit au séjour médical? in Cahiers de l'EDEM*, 2021, available at https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/cour-administrative-d-appel-de-bordeaux-france-2eme-chambre-18-decembre-2020-n-20bx02193-20bx02195.html.

[137] F. PASSARINI, *Environment: Protection of Environmental Migrants in Italy in Light of the Latest Jurisprudential Developments*, in *The Italian Yearbook of International Law*, 2022, p. 446. See, for example, Italian Court of Cassation, order of 24 February 2021, n. 5022/2021.

[138] A. CALIGIURI, *Introduction: Invisible in Law: Environmental and Climate Migrants and the Gap in International Protection*, in *Questions of International Law, Zoom-out*, 2025, n. 111, pp. 1-6, p. 6.

[139] For a comment underlining the criticisms of the *Teitiota* case, see S. BEHRMAN, A. KENT, *The Teitiota Case and the Limitations of the Human Rights Framework*, in *Questions of International Law*, Zoom-in, 2020, n. 75, pp. 25-39. On this point, cf. also E. SOMMARIO, R. LUPORINI, *Climate Displacement under International Law: The Recent Practice of Human Rights Treaty Monitoring Bodies and Other International Judicial Bodies*, in *DPCE Online*, 2026, n. 1, pp. 259-284, pp. 265-268.

[140] *Ibid*., p. 268.

[141] *Ibidem*. See also D. CANTOR, B. BURSON, B. AYCOCK et al., *International Protection, Disasters and Climate Change*, in *International Journal of Refugee Law*, 2024, n. 1-2, pp. 176-197.

[142] E. SOMMARIO, R. LUPORINI, *Climate Displacement under International Law*, cit., p. 268.

[143] M.T. MORSHED, M. FERDOUSY, *Reconceptualising the Principle of Non-Refoulement in the Context of Climate-Induced Migration: Navigating Through International Obligations*, in *Dhaka University Law Journal*, 2025, n. 1, pp. 101-122, p. 115.

individuals may be excluded from international protection despite facing foreseeable and irreversible harm.[144] In contexts affected by the adverse impacts of slow-onset climate processes, living conditions may progressively deteriorate to the point of becoming incompatible with a life of dignity.[145] From this perspective, some scholars have argued that the inevitable nature of such deterioration, as in the case of that projected in several Pacific Islands because of sea-level rise, should in itself be sufficient to trigger the protections afforded by the principle of *non-refoulement*. [146]

Over the past few years, several international courts have been requested to render advisory opinions on States' obligations in relation to climate change.[147] In 2025, the ICJ and the IACtHR delivered two landmark Advisory Opinions – respectively, on *Obligations of States in respect of Climate Change*[148] and on *Climate Emergency and Human Rights*[149] – which expressly acknowledged the applicability of the principle of *non-refoulement* in the specific context of climate-induced migration. However, neither went beyond the limitations identified in *Teitiota*, thereby missing the opportunity, as highlighted by many commentators,[150] to further clarify the threshold of harm required to trigger *non-refoulement* obligations. This is even more striking in the case of the IACtHR, considering that it had been expressly requested to pronounce on the issue.

3.1. A Missed Opportunity to Go Further? The Principle of *Non-Refoulement* in the Inter-American Court of Human Rights Advisory Opinion on *Climate Emergency and Human Rights*

[144] *Ibid*., p. 116.
[145] *Ibidem*.
[146] *Ibidem*.
[147] Cf. International Tribunal for the Law of the Sea (ITLOS), *Advisory Opinion of 21 May 2024, Case No. 31, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law.*
[148] ICJ, Advisory Opinion of 23 July 2025, *Obligations of States in respect of Climate Change* (hereinafter ICJ Advisory Opinion 2025). For an analysis of the ICJ Advisory Opinion 2025, see, *inter alia*, M. A. TIGRE, M. BÖNNEMANN, *The ICJ's Advisory Opinion on Climate Change*, in *Verfassungsblog*, 24 July 2025, available at https://verfassungsblog.de/the-icj-advisory-opinion-on-climate-change/; J. MCADAM, *How the ICJ's Advisory Opinion on Climate Change Addresses Displacement, International Protection and Ongoing Statehood*, in *Researching Internal Displacement*, 24 July 2025, available at https://researchinginternaldisplacement.org/short_pieces/how-the-icjs-advisory-opinion-on-climate-change-addresses-displacement-international-protection-and-ongoing-statehood/, with particular reference to climate migration-related issues.
[149] On the IACtHR's Advisory Opinion, see section 3.1 *infra*.
[150] Cf., *inter alia*, M. COURTOY, F.L. GATTA, *(Im)mobility in the Context of Climate Change: Between Legal Challenges and Legal Experiments*, in this *Journal*, 2026, n. 1, pp. 82-117, p. 97; E. SOMMARIO, R. LUPORINI, *Climate Displacement under International Law*, cit., pp. 269-272. The ICJ devoted a single paragraph to climate-induced migration, conceptualizing *non-refoulement* as a corollary of States' obligations to respect, protect, and fulfil the right to life (ICJ Advisory Opinion 2025, par. 378). The ICJ affirmed that «*States have obligations under the principle of non-refoulement where there are substantial grounds for believing that there is a real risk of irreparable harm to the right to life in breach of Article 6 of the ICCPR if individuals are returned to their country of origin*» (*Ibidem*). In so doing, the Court recalled the *Teitiota* case (*Ibidem*) yet remained largely silent on the scope of *non-refoulement* as previously elaborated by the HRC, thus refraining from providing guidance on the threshold of risk or harm required to trigger the principle's application.

The *Advisory Opinion on Climate Emergency and Human Rights*[151] was adopted by the IACtHR in May 2025, following a request jointly submitted by the Republic of Colombia and the Republic of Chile that expressly asked, *inter alia*, to clarify States' obligations in relation to climate-related human mobility.[152]

Accordingly, in specifying the content of States' obligations with respect to the substantive and procedural rights affected by climate emergency,[153] the IACtHR devoted particular attention to the right to freedom of movement and residence, enshrined in Article 22 of the ACHR, which it described as «an indispensable requirement for the free development of the individual».[154] According to the IACtHR, this right protects not only against arbitrary restrictions on movement but also «the right not to be forcibly displaced within a State Party and not be forcibly removed from the territory of the State in which they are legally present».[155]

Within this framework, the Court develops its reasoning on climate-induced migration and on the role of the principle of *non-refoulement* in affording protection to climate migrants. Drawing on authoritative reports of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the UNHCR, it examined the various forms of human mobility associated with climate change, including forced displacement, voluntary migration and 'immobility',[156] as well as the different ways in which environmental degradation and climate-related harm may affect the exercise of the right to freedom of movement,[157] with particular attention to persons in situations of vulnerability.[158]

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[151] IACtHR, Advisory Opinion OC-32/25 of 29 May 2025, *Climate Emergency and Human Rights*, requested by the Republic of Chile and the Republic of Colombia (hereinafter Advisory Opinion OC-32/25). For an analysis of the IACtHR's Advisory Opinion OC-32/25, see *inter alia* J. AUZ, *The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency: A Global South Contribution to Climate Governance*, in *EJIL:Talk!*, 18 July 2025, available at https://www.ejiltalk.org/the-inter-american-court-of-human-rights-advisory-opinion-on-the-climate-emergency-a-global-south-contribution-to-climate-governance/; M. A. TIGRE, M. BÖNNEMANN, K. SILVERMAN-ROATI, *A Blueprint for Rights-Based Climate Action: The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency*, in *Verfassungsblog*, 9 July 2025, available at https://verfassungsblog.de/inter-american-court-of-human-rights-advisory-opinion-climate/.

[152] *Request for an advisory opinion on the Climate Emergency and Human Rights*, submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile of 9 January 2023, par. F, p.13. The request specifically asked, «*what obligations and principles should guide the individual and coordinated measures that the States of the region should adopt to deal with involuntary human mobility exacerbated by the climate emergency*».

[153] See, in more detail, E. SOMMARIO, R. LUPORINI, *Climate Displacement under International Law*, cit., pp. 269-272.

[154] IACtHR, Advisory Opinion OC-32/25, cit., par. 414.

[155] *Ibidem*. In this sense, the IACtHR refers to *Moiwana Community v. Suriname*, judgment of 15 June 2005, Series C No. 124, par. 119; and *Carrión González et al. v. Nicaragua*, judgment of 25 November 2024, Series C No. 550, par. 60.

[156] IACtHR, Advisory Opinion OC-32/25, cit., parr. 415-420.

[157] *Ibidem*.

[158] *Ibid.*, par. 420. The IACtHR first emphasized that States have a duty to adopt measures aimed at preventing migration resulting directly or indirectly from the adverse effects of climate change, in accordance with the standard of "enhanced due diligence" (IACtHR, Advisory Opinion OC-32/25, cit., par.

In addressing cross-border climate-induced migration, the IACtHR emphasized that managing this phenomenon is a shared responsibility of the international community, and requires enhanced international and regional cooperation based on solidarity, equity, and common but differentiated responsibilities.[159] It further stressed that receiving States have an obligation to «establish an appropriate regulatory framework that provides effective legal and/or administrative mechanisms at the domestic level to guarantee the legal and humanitarian protection of persons displaced across international borders due to the impacts of climate change»,[160] thereby becoming the first human rights body to require States to adopt such mechanisms in the context of climate-induced migration.[161]

More specifically, the IACtHR affirmed that «States must implement effective mechanisms to ensure humanitarian protection for these persons by establishing appropriate migration categories such as humanitarian visas, temporary residence permits, and/or protection under refugee status or similar status, status *which can provide them with protection against refoulement*» (emphasis added).[162]

In distinguishing between short-term and long-term protection measures,[163] the IACtHR emphasized that States must establish complementary forms of protection in order to ensure compliance with the principle of *non-refoulement* where the adverse effects of climate change expose individuals to a real risk of human rights violations.

In so doing, the Court makes only a brief reference to the *Teitiota case*. Indeed, paragraph 433, the only passage in which the principle of *non-refoulement* is expressly addressed, merely quotes the HRC's decision without engaging with the criticisms directed at its interpretation, including the crucial issue of the 'high threshold' of harm

422, recalling also parr. 324, 335, 368-373, and 384; on this standard, see R. COSTA SALES, *Enhanced Due Diligence: A New Legal Standard for Climate Action in the Inter-American System, in Verfassungsblog*, 25 July 2025, available at https://verfassungsblog.de/enhanced-due-diligence-climate-iacthr/). It then turned to the protection of climate migrants. This broad and holistic approach may find its foundation in the previously examined Article 22 of the American Convention, which enshrines a broad range of guarantees relating to the right to freedom of movement and residence, extending from the right to move freely within a State to the protections afforded, among others, by the principle of *non-refoulement* (Cf. section 2.2.1 *supra*. On this point see: L. RIEMER, L. SCHEID, *A Differentiated Path Forward: The Inter-American Court's Advisory Opinion on Climate Change and Human Mobility Rights, in Verfassungsblog*, 10 July 2025, available at https://verfassungsblog.de/inter-american-courts-advisory-opinion-on-climate-change-and-human-mobility-rights/). For a more detailed analysis of the provisions relating to the different forms of mobility considered by the Court, see E. SOMMARIO, R. LUPORINI, *Climate Displacement under International Law*, cit., pp. 269-272.

[159] IACtHR, Advisory Opinion OC-32/25, cit., parr. 431 and 432. In particular, the IACtHR called upon States to strengthen bilateral and regional protection mechanisms for climate-displaced persons, ensure humanitarian and consular assistance, facilitate safe and regular mobility pathways, and develop cooperative frameworks, guaranteeing protection throughout all stages of displacement (*Ibidem*).

[160] IACtHR, Advisory Opinion OC-32/25, cit., par. 433.

[161] E. SOMMARIO, R. LUPORINI, *Climate Displacement under International Law*, cit., p. 270.

[162] IACtHR, Advisory Opinion OC-32/25, cit., par. 433.

[163] *Ibidem*.

required to trigger protection,[164] and does not provide any further guidance on the application of the principle within the IAHRS.

This omission was somewhat surprising, especially given the considerable number of written submissions presented by States and other participants during the advisory proceedings, many of which stressed the central role of *non-refoulement* in responding to climate-induced migration.[165]

This does not, however, preclude further developments in applying the principle of *non-refoulement* to protect climate migrants within the IAHRS. Indeed, the growing body of the IACmHR's reports and resolutions emphasizing the relevance of *non-refoulement* guarantees in this context[166] and the submissions made by States in the advisory proceedings constitute significant elements bearing on the principle's future application within the region. Their relevance is further enhanced by the broader scope of protection afforded under the IAHRS and the expansive interpretation that its judicial and quasi-judicial bodies have historically accorded to *non-refoulement*.

4. Climate-Related *Non-Refoulement* in the Inter-American Human Rights System

In recent years, both the IACtHR and the IACmHR have shown a particular sensitivity in addressing environmental issues and the relationship between human rights and climate change.[167] Through the exercise of their judicial and quasi-judicial functions,[168] driven in particular by the claims and advocacy of Indigenous Peoples and local communities across Latin America, they have played a significant role in advancing the right to a healthy environment and in affirming the intrinsic relationship between human beings and nature.[169]

This sensitivity has also extended, through the IACtHR's advisory jurisdiction and, particularly, the IACmHR's recommendatory activities, to issues relating to climate-induced migration, including the conditions for granting protection to climate migrants and the interpretation of the principle of *non-refoulement*. A similar approach is reflected

[164] For a comment on the matter see M. NAMANYA, *The Inter-American Court's Advisory Opinion on the Climate Emergency and Human Rights: A Win for Climate-Displaced Persons?*, in *EJIL:Talk!*, 29 July 2025, available at https://www.ejiltalk.org/the-inter-american-courts-advisory-opinion-on-the-climate-emergency-and-human-rights-a-win-for-climate-displaced-persons/.

[165] Cf. F. NAVARRO, *How the Inter-American Court Could Advance Protection for Climate-Displaced Individuals*, in *Just Security*, 12 June 2024, available at https://www.justsecurity.org/96690/inter-american-court-climate-displacement/. See section 4.2 *infra*.

[166] See section 4.1 *infra*.

[167] Cf. *inter alia*, M. FERIA-TINTA, S.C. MILNES, *The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights*, in *Yearbook of International Environmental Law*, 2016, n. 27, pp. 64-81; E. TRAMONTANA, *The Right to a Healthy Environment before the Inter-American Court of Human Rights: Some Remarks in the Aftermath of the Judgment in Habitantes de La Oroya vs. Perú*, *in Rivista Giuridica dell'Ambiente*, 2025, n. 1, pp. 123-154.

[168] For the functions of the IACtHR and IACmHR, cf. section 2.2.1, note 76 *supra*.

[169] Cf. G. PANE, *Justiciability of the collective right to a healthy environment*, cit., pp. 70-74; 184-191.

in the positions of certain States, most notably in the observations submitted during the advisory proceedings that led to the IACtHR's 2025 Advisory Opinion, where States also underlined the role of *non-refoulement* in protecting persons forced to move because of the adverse effects of climate change.

4.1. Climate-Induced Migration and *Non-Refoulement* in the Evolving Practice of the Inter-American Court and the Inter-American Commission on Human Rights

Before 2025, in its 2017 Advisory Opinion on *Environment and Human Rights*, the IACtHR acknowledged the «undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights»,[170] while also recognizing that the adverse effects of climate change on those rights «may be felt with greater intensity by certain groups in vulnerable situations»,[171] including women, children, Indigenous Peoples, people living in extreme poverty as well as coastal communities, and populations inhabiting small island territories.[172] In so doing, the IACtHR also underlined that environmental degradation and climate change can compel people, particularly those in vulnerable situations, to abandon their lands and migrate, and that they have already led to their relocation or internal displacement.[173]

In its 2015 Report on *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons*, the IACmHR expressly identified climate change and disasters as drivers of displacement and forced migration within the region. The Commission recognized that, together with other structural factors such as socio-economic inequalities and armed conflict, environmental degradation and climate-related events already contribute to both internal displacement and cross-border migration and are likely to become increasingly significant drivers of human mobility in the decades to come.[174]

In the same Report, the Commission noted that climate-related internal displacement and cross-border migration have become increasingly common, particularly in Central America and the Caribbean, where the increasing frequency and intensity of hurricanes, floods, droughts, fires, and other extreme events, combined with inadequate public

[170] IACtHR, Advisory Opinion OC-23/17 of 15 November 2017, *Environment and Human Rights*, requested by the Republic of Colombia, par. 47, referring to IACtHR, judgment of 3 April 2009 (Merits, Reparations and Costs), Series C No. 196, *Kawas Fernández v. Honduras*, par. 148. This Advisory Opinion is regarded as a landmark decision, as the Court affirmed the existence of a right to a healthy environment, describing it as a «*fundamental right for the existence of humankind*» (IACtHR, Advisory Opinion OC-23/17, cit., par. 59). On this point, see G. PANE, *Justiciability of the collective right to a healthy environment*, cit., pp. 70-74.
[171] IACtHR, Advisory Opinion OC-23/17, cit., par. 67.
[172] *Ibidem*.
[173] *Ibidem*, see also footnote 127 therein.
[174] IACmHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 46/15, 31 December 2015, parr. 17-18 and 63. On this point, see also C. SCISSA, *The Principle of Non-Refoulement and Environmental Migration*, cit., p. 16.

services and insufficient sustainable development policies, have left many communities unable to cope with environmental shocks, forcing individuals to relocate within their countries or migrate abroad looking for protection.[175]

More importantly for this analysis, the Commission underlined that OAS Member States have not taken adequate protection measures for persons forced to migrate because of climate change, while highlighting the growing number of climate-induced displacements in the region.[176]

The IACmHR had already addressed this issue in its 2013 report on human mobility in Mexico, observing that climate change, and natural disasters in particular, had forced thousands of people "to migrate to and through"[177] the country, and emphasizing that climate change affects a wide range of fundamental human rights, including the rights to life, health, food, housing, property, and work, with particularly severe consequences for vulnerable groups.[178]

Some recent developments within the IACmHR's practice relate even more directly to the principle of *non-refoulement*.

In its Resolution 3/2021 on the *Emergencia climática*, the Commission expressly refers to the safeguards afforded by the principle of *non-refoulement* for migrant workers and, more broadly, for individuals who move for reasons directly or indirectly linked to climate change.[179] According to the Resolution, States must guarantee due process during the procedure leading to the recognition of their migratory status, and in any case ensure protection for their human rights, such as the protection against *refoulement* (*salvaguardia de no devolución*), pending the determination of their status.[180]

The thematic report *Pobreza, Cambio Climático y DESCA en Centro América y México, en el contexto de Movilidad Humana*, approved in 2023 by the IACmHR, addressed migration phenomena in contexts shaped by climate change and other emergencies, such as pandemics.[181] The report emphasized that States are required to ensure access to protection mechanisms and to respect the principle of *non-refoulement* concerning persons whose life and physical integrity are at risk.[182] The report further reiterates that the principle of *non-refoulement* has to be observed even during public health emergencies. In this regard, States must include persons in situations of human mobility in their emergency responses, irrespective of their migratory status, to protect

[175] IACmHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons*, cit., par. 63.
[176] *Ibid.*, par. 65.
[177] IACmHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II. Doc. 48/13, 30 December 2013, par. 76.
[178] *Ibidem*.
[179] IACmHR, Resolution No. 3/2021, *Climate Emergency. Scope of Inter-American Human Rights Obligations* (*Emergencia climática: alcance y obligaciones interamericanas de derechos humanos*), 31 December 2021, par. 20.
[180] *Ibidem*.
[181] IACmHR, Relatoría Especial sobre Derechos Económicos, Sociales, Culturales y Ambientales (REDESCA), *Pobreza, Cambio Climático y DESCA en Centro América y México, en el contexto de Movilidad Humana*, OEA/Ser.L/V/II, Doc. 158, 28 July 2023.
[182] *Ibid.*, par. 356.

their life and health, in accordance with the standards developed in Inter-American jurisprudence on *non-refoulement*.[183]

Intending to provide States in the region with general guidelines for adopting a comprehensive and lasting response to climate mobility grounded in a human rights-based approach,[184] the IACmHR's Resolution 2/24 on *Human Mobility Induced by Climate Change* (*Resolución sobre movilidad humana inducida por el cambio climático*) frames the principle of *non-refoulement* as a cornerstone of international protection, extending its application to persons forced to move because of the adverse effects of climate change.[185]

The Resolution reaffirms *non-refoulement* as a non-derogable principle[186] and expressly emphasizes that the obligation may be triggered not only by a risk of persecution within the meaning of refugee law but also by new risk and threat factors, such as those arising from the climate emergency.[187]

In the section specifically devoted to *non-refoulement*,[188] the Resolution provides that States «must not deny entry, expel or return persons to territories where their life, security, or liberty may be threatened due to serious disturbances of public order, including those induced or caused by the impacts of climate change or socio-environmental disasters».[189]

To this end, States are required to undertake an adequate and thorough assessment of the threats that such impacts may pose to individuals' rights to life, personal integrity, security, or liberty.[190] This assessment must involve a cumulative evaluation of the risk associated with return, taking into account the circumstances and characteristics of the person concerned, the interaction between human mobility and the direct or indirect consequences of climate change, including socio-environmental disasters, as well as the measures adopted in this regard by the country of nationality or habitual residence.[191] Furthermore, the cumulative risk assessment should take into account the specific circumstances of persons in situations of vulnerability.[192] In this respect, Resolution 2/24 offers interpretative guidance that transcends some of the limitations identified in *Teitiota*, particularly those concerning the assessment of risk.

Although non-binding, the IACmHR's recent reports and resolutions offer important insights into the interpretation and implementation of States' human rights obligations in the context of environmental and climate-related human mobility. Adopted in the exercise

[183] *Ibid.*, par. 361. The report recalls, *inter alia*, the IACtHR's *Pacheco Tineo* case, already mentioned in this analysis (cf. note 83, *supra*).
[184] IACmHR, Resolution No. 2/24, *Resolution on Human Mobility Induced by Climate Change*, adopted on 26 December 2024.
[185] *Ibid.*, Introduction (International Protection).
[186] *Ibid.*, par. 39. The IACmHR underlines that the principle of *non-refoulement* «*must be guaranteed and respected under all circumstances, including in situations of a state of emergency, public emergency, or public calamity*».
[187] IACmHR, Resolution No. 2/24, cit., Introduction.
[188] *Ibid*., section D, parr. 36-39.
[189] *Ibid*., par. 36.
[190] *Ibid.*, par. 37.
[191] *Ibidem*.
[192] *Ibidem*.

of the Commission's mandate to promote and protect human rights,[193] these instruments help highlight the relevance and implications of the principle of *non-refoulement* in situations of climate-induced migration. They may contribute to clarifying and progressively developing regional standards governing its scope and application, particularly since they form part of the broader body of materials on which the IACtHR may draw in interpreting the ACHR.

Indeed, the IACtHR has long treated the ACHR as a living instrument, applying an evolutive approach to interpretation in line with Article 31 of the VCLT,[194] and considering the broader *corpus iuris* of international and regional human rights law.[195] More broadly, the IACtHR's practice shows that the Court takes into account reports, standards, and other interpretative materials developed by the IACmHR when determining the scope of the rights and obligations under the ACHR.[196]

Against this background, the IACmHR's reports and resolutions – and Resolution 2/24 in particular, as regards the assessment of risk in return cases – could have informed the IACtHR's reasoning in the 2025 Advisory Opinion. Their absence from that reasoning does not, however, preclude the IACtHR from relying on such instruments in future cases concerning application of the principle of *non-refoulement* in the context of climate-induced migration. This appears even more plausible given the Court's expansive interpretation of the principle in its earlier pronouncements.[197]

Furthermore, the IACmHR's reports and resolutions may be regarded, in a broad sense, as 'pronouncements' of an expert treaty body within the meaning of the ILC's 2018 *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the*

[193] Art. 41, ACHR.

[194] IACtHR, Advisory Opinion OC-10/89 of 14 July 1989, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, requested by the Government of the Republic of Colombia, parr. 37-38; IACtHR, Advisory Opinion OC-16/99 of 1 October 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, requested by the United Mexican States, par. 114, in which the Court emphasizes that international human rights law «*has made great headway thanks to an evolutive interpretation of international instruments of protection. […] Both this Court […] and the European Court of Human Rights […], among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions*». Art. 31 VCLT sets out the "general rule of interpretation" of the Treaties. On Article 31(3), see section 4.2 *infra*. On the evolutionary interpretation, see, *inter alia*, E. BJORGE, *The Evolutionary Interpretation of Treaties*, Oxford, 2014; P. TURRINI, *Teoria e prassi dell'interpretazione evolutiva nel diritto internazionale*, Napoli, 2019.

[195] IACtHR, Advisory Opinion OC-16/99, cit., par. 115. As the Court has itself recognized, that *corpus iuris* encompasses instruments of varying content and legal effect, including resolutions and declarations (*Ibidem*).

[196] The IACtHR has relied on the Commission's reports and standards in its case law on migration and asylum, see, e.g., Advisory Opinion OC-21/14, cit., par. 220, citing IACmHR, Report on the merits No. 51/96, Case 10.675, *Haitian Interdiction v. United States*, 13 March 1997; Advisory Opinion OC-25/18, cit., par. 97, citing IACmHR, *Report on the Situation of Human Rights of Asylum-seekers in the Framework of the Canadian System of Refugee Status Determination*, 28 February 2000, and par. 122, citing IACmHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons*, cit.

[197] Cf. section 2.2.1, *supra*.

Interpretation of Treaties.[198] As such, they may also have an impact on State practice, by influencing their positions on the interpretation of the ACHR. Indeed, under paragraph 3 of Conclusion 13, a pronouncement of an expert treaty body «may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32».[199] As discussed in the next section, the written observations of some OAS Member States draw on the Commission's pronouncements, which is consistent with the first of these mechanisms.[200]

The IACmHR's reports and resolutions may thus inform both the IACtHR's assessment and States' practice, helping to consolidate an interpretation that applies the principle of *non-refoulement* to climate migrants and moves beyond the limitations identified in *Teitiota*.

4.2. Climate-Related *Non-Refoulement* in States' Written Observations

Further support for the applicability of the principle of *non-refoulement* to situations of climate-induced migration can be found in the positions expressed by some American States. In particular, the written observations submitted during the advisory proceedings leading to the IACtHR's 2025 Advisory Opinion – the most participatory proceedings in the Court's history[201] – constitute official statements of States' legal positions and, as

[198] The ILC provides a broad and generic definition of an expert treaty body as a «*body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization*» (ILC, *Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, cit., Conclusion 13, commentary, parr. (1)-(3)). This may raise the doubt that the IACmHR, being also an organ of the OAS, may fall outside that definition, and that its practice should rather be assessed under *Draft Conclusion* 12, on the "Constituent instruments of international organizations". However, *Draft Conclusion* 12 concerns the practice of an international organization in interpreting its own constituent instrument (*Ibid.*, Conclusion 12) and thus does not appear to be the relevant framework for the interpretation of the ACHR. Moreover, the ILC itself clarifies that «*the substance of the present draft conclusion may apply,* mutatis mutandis, *to pronouncements of independent expert bodies that are organs of international organizations*» (*Ibid.*, Conclusion 13, commentary, par. (4)). On this basis, *Draft Conclusion* 13 may be applied to the Commission's pronouncements. The ILC uses the generic term 'pronouncements' to refer to «*the forms of action of expert treaty bodies*», understood as encompassing «*all relevant factual and normative assessments*» made by such bodies (*Ibid.*, Conclusion 13, commentary, par. (6)).

[199] A more detailed analysis of Articles 31 and 32 will be provided in section 4.2, *infra*.

[200] Cf. section 4.2, *infra*, particularly Chile and Colombia's Written Observations.

[201] CGRS, *The IACtHR's Advisory Opinion on the Climate Emergency: An Important Step for the Protection of Climate-Displaced Individuals*, 7 July 2025, p. 2, available at https://cgrs.uclawsf.edu/our-work/publications/iacthrs-advisory-opinion-climate-emergency-important-step-protection-climate. The IACtHR received 263 *amicus curiae* briefs, submitted by nine States, four organs of the Organization of American States, 14 international bodies, ten state institutions, 62 communities, 178 non-governmental organizations, 70 non-governmental organizations together with members of civil society or academic institutions, 1 business enterprise, 134 academic institutions, and 131 members of civil society, for a total of 613 participants (IACtHR, Advisory Opinion OC-32/25, cit., par. 8). The full list of written observations is available at the following link: https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634.

such, provide valuable insight into their views on the scope of *non-refoulement* in the context of climate-induced migration.

Of the eight submissions made by OAS Member States,[202] all recognize that the adverse impacts of climate change *force* people to move, internally or across borders. Six of them address climate-related human mobility specifically, and two of these expressly refer to the principle of *non-refoulement* as a key safeguard for protecting persons displaced by environmental degradation and climate-related events.

Although it does not invoke the principle of *non-refoulement*, in its written observations Costa Rica acknowledges the need to adopt measures addressing forced human mobility, including in the context of climate change. It further recognizes the obligation to establish a legal framework governing the rights and duties of foreign nationals residing in the country. According to Costa Rica, this framework encompasses the international protection instruments ratified by the State, including the 1951 Refugee Convention and its 1967 Protocol, as well as the ICCPR.[203]

In Paraguay's written observations, migrants, refugees, and internally displaced persons are expressly included among the groups most affected by the adverse effects of climate change,[204] and are identified as requiring a cross-sectoral, comprehensive, and intersectional approach to protection.[205] The observations further reaffirm Paraguay's commitment to providing specialized legal assistance to refugees and migrants and to recognizing their particular vulnerability in the context of climate emergencies.[206]

El Salvador and Mexico acknowledged both the right not to be subjected to forced displacement and the need for a protection framework for persons compelled to migrate as a result of climate-related events.[207] They frame the issue as a human rights concern requiring both preventive and remedial action by States.[208] Referring to its *Ley General de Cambio Climático*, Mexico further maintains that, in adopting measures to address climate change, States must invariably respect human rights, including the rights of migrants and persons in situations of vulnerability.[209]

Colombia refers to the relationship between the effective enjoyment of human rights and environmental protection, citing the *Teitiota* case in connection with persons forced to migrate because of the effects of climate change. In addressing issues relating to climate-induced migration, Colombia invited the Court to draw, *inter alia*, on the *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons*

[202] The OAS Members that submitted written observations were the Republic of Costa Rica, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay, the Republic of El Salvador, the United Mexican States, Barbados, and the Federative Republic of Brazil. The Republic of Vanuatu, the only non-American State to participate in the proceedings, also submitted written observations.
[203] Costa Rica, Written Observations, p. 19.
[204] Paraguay, Written Observations, par. III.12.
[205] *Ibid.*, par. III.14.
[206] *Ibid.*, par. VII.43.
[207] El Salvador, Written Observations, pp. 8 and 20; Mexico, Written Observations, par. 302.
[208] *Ibidem*.
[209] Mexico, Written Observations, par. 116.

and Victims of Human Trafficking,[210] which expressly include the *principle of non-refoulement* as one of the fundamental principles of international human rights law, international humanitarian law, and refugee law.[211] The IACmHR's Resolution 4/19 containing the Principles affirms that *non-refoulement* admits no exceptions whenever there are substantial grounds for believing that a person would face a risk of torture or other irreparable harm in the place to which they would be transferred or returned.[212] It also emphasizes that States must respect the principle of *non-refoulement*, including the prohibition of rejection at the border and of indirect *refoulement*, concerning all persons seeking asylum or any other form of international protection.[213]

In its written observations, Chile acknowledges that persons who cross international borders as a result of climate change, while falling outside the traditional definition contained in the 1951 Refugee Convention, may nevertheless face serious human rights violations and, therefore, be entitled to complementary protection.[214] In light of this circumstance, the State emphasizes the need to develop a normative framework capable of ensuring both national and international protection for environmental migrants.[215]

In affirming this, Chile specifically refers to the approach adopted in the above-mentioned IACmHR's Resolution 3/2021, which calls for national and international forms of protection, including protection against *refoulement*, as guarantees to be afforded to persons who move because of climate-related reasons.[216]

The written observations examined above point to the need to protect persons forced to move because of climate change and to an initial recognition of the relevance of the principle of *non-refoulement* as a safeguard for climate migrants.[217] Although the number of States involved remains numerically limited and, therefore, not representative of the region as a whole, the significance of their positions should not be underestimated.

The observations expressed by States may be relevant as (other) subsequent practice for the interpretation of the ACHR.[218] Whether they amount to subsequent practice within

[210] Colombia, Written Observations, parr. 142-143.
[211] Cf. IACmHR, Resolution No. 4/19, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking* (*Principios Interamericanos sobre los Derechos Humanos de Todas las Personas Migrantes, Refugiadas, Apátridas y las Víctimas de la Trata de Personas*), adopted on 7 December 2019, Preamble.
[212] *Ibid*., Principle 6.
[213] *Ibidem*.
[214] Chile, Written Observations, par. F.5, p. 102, referring to IACmHR, Relatoría Especial sobre Derechos Económicos, Sociales, Culturales y Ambientales (REDESCA), *Pobreza, Cambio Climático y DESCA en Centro América y México, en el contexto de Movilidad Humana*, cit., Recommendation No. 13.
[215] *Ibidem*.
[216] *Ibidem*. Cf. IACmHR, Resolution No. 3/2021, cit., par. 20.
[217] It is worth noting that beyond States, a significant number of civil society organizations and other actors participating in the proceedings leading to the adoption of the IACtHR's 2025 Advisory Opinion likewise emphasized the relevance of *non-refoulement* in the context of climate-induced migration (See, *inter alia*, E. FORNALÉ, V. BÍLKOVÁ, L. BURGORGUE-LARSEN et al., *Amicus Curiae – Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 2023).
[218] On the matter see, *inter alia*, I. BUGA, *Subsequent Practice as a Means of Treaty Interpretation*, in *Modification of Treaties by Subsequent Practice*, Oxford, 2018, pp. 16-106; L. CREMA, *La prassi successiva e l'interpretazione del diritto internazionale scritto*, Milano, 2017.

the meaning of Article 31(3)(b) VCLT or may otherwise be taken into account as supplementary means of interpretation under Article 32 VCLT must be assessed in light of the requirements set out in the relevant provisions.

According to Article 31(3)(b) VCLT, in interpreting a treaty, account shall be taken, together with the context, of «any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation».[219]

Within the meaning of Article 31(3)(b), subsequent practice must consist of conduct "in the application of the treaty".[220] Such conduct may include, *inter alia*, official statements concerning the interpretation of a treaty, such as statements made during legal proceedings.[221]

Article 31(3)(b), however, sets a demanding standard. Although it does not require every party actively to engage in the relevant practice, since the acceptance of other parties may be inferred from silence where «the circumstances call for some reaction»,[222] such practice must nevertheless be sufficiently «concordant, common and consistent» [223] to establish the agreement of the parties regarding the treaty's interpretation.[224] The ICJ has, at times, applied this standard with some flexibility.[225] Even so, the threshold appears difficult to satisfy in the present case. The written observations, although substantively significant, were submitted by only eight States and do not reflect a uniform position. Moreover, most States Parties to the ACHR did not submit observations, and it remains uncertain whether any interpretative significance may be attributed to their silence.

This does not, however, exhaust the potential relevance of the States' positions. As clarified by the ILC in its 2018 *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, State conduct that does not establish the agreement required by Article 31(3)(b) may nevertheless constitute "other subsequent practice" for the purposes of Article 32,[226] and may therefore be taken into account as a supplementary means of interpretation.[227]

Indeed, according to *Draft Conclusion* 4(3) «a subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion».[228] Such practice may take

[219] Art. 31(3)(b) VCLT.
[220] ILC, *Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, cit., Conclusion 4, commentary, par. (18).
[221] *Ibidem*.
[222] *Ibid.*, Conclusion 10, commentary, par. (12).
[223] *Ibid.*, Conclusion 9, commentary parr. (7)-(8). «*Such a threshold would imply that subsequent practice under article 31, paragraph 3 (b), requires a broad-based, settled and qualified form of common practice in order to establish agreement among the parties regarding interpretation*» (*Ibid.*, Conclusion 9, commentary par. (8)).
[224] *Ibid.*, Conclusion 10.
[225] See, e.g., ICJ, *Kasikili/Sedudu Island (Botswana/Namibia)*, judgment of 13 December 1999, parr. 47-50 and 63. On the matter, cf. ILC, *Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, cit., Conclusion 9, commentary parr. (9)-(12).
[226] *Ibid*., Conclusion 2(4).
[227] Art. 32, VCLT.
[228] ILC, *Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, cit., Conclusion 4(3).

various forms, including official statements concerning the interpretation or application of the treaty.[229]

On this basis, the written observations submitted in the advisory proceedings may qualify as such 'other subsequent practice', insofar as they constitute official expressions of States' understanding of the interpretation and application of the ACHR. Their interpretative weight may depend on their clarity and specificity, and on whether and how they are repeated over time,[230] but it is in any case more limited than that attaching to subsequent practice establishing the agreement of the parties under Article 31(3)(b).

Nor can it be excluded that these positions may gradually contribute to the emergence of an agreement for the purposes of Article 31(3)(b), should subsequent State conduct confirm and consolidate the interpretative approach they reflect. This will depend on further State practice, including State reactions to the IACtHR's 2025 Advisory Opinion and its implementation in domestic law.

For present purposes, the written observations are relevant because they may qualify as 'other subsequent practice' under Article 32 VCLT. This means that the IACtHR could have considered them as a supplementary means of interpretation in the 2025 Advisory Opinion. Although the Court did not rely on them in that context, such State practice may still inform its reasoning in future cases concerning the application of *non-refoulement* to climate migrants under the ACHR.

5. Conclusions

The analysis conducted in this article suggests that the principle of *non-refoulement* is emerging as an increasingly important safeguard for addressing the human rights implications of climate-induced migration. While its application to climate migrants under international refugee law remains relatively limited, international human rights law offers greater potential for its development. In particular, the IAHRS appears as a promising framework for the progressive expansion of *non-refoulement* in climate-related contexts.

Indeed, the IAHRS represents, first and foremost, a particularly "fertile terrain"[231] for the progressive development of the principle. This is owing both to the broader scope of *non-refoulement* under the regional system – closely linked to the right to asylum and to protection against torture and other cruel, inhuman or degrading treatment, in the light of which, according to the IACtHR and the IACmHR, it assumes an absolute and peremptory character – and to the expansive interpretation of the principle historically adopted by its judicial and quasi-judicial bodies.[232]

[229] *Ibid.*, Conclusion 4, commentary, par. (35).
[230] *Ibid.*, Conclusion 9(3).
[231] R. MARQUES, *Non-refoulement under the Inter-American Human Rights System*, in *The Future of Refugee Law*, cit., p. 59.
[232] Cf. section 2.2.1 *supra*.

Although the IACtHR's 2025 Advisory Opinion on *Climate Emergency and Human Rights* did not address the limitations identified in *Teitiota* or further define the threshold for protection articulated in that case, it nevertheless confirms the principle's application in the context of climate-induced migration.

More significantly, the practice of the IACmHR, especially its thematic reports and Resolution 2/24,[233] provides the most detailed interpretative guidance to date, by endorsing a wider understanding of the principle of *non-refoulement* in the protection of climate migrants. It goes beyond some of the limitations of the *Teitiota* approach by requiring a cumulative assessment of the risks associated with return, considering both the individual circumstances of the person concerned and the broader impacts of climate change and socio-environmental disasters in the country of return.[234]

This interpretation is further supported by some written observations submitted by OAS Member States during the advisory proceedings. [235] These observations refer to the principle of *non-refoulement*, also drawing on the IACmHR's own pronouncements, and suggest an emerging tendency towards extending protection against *refoulement* to persons forced to move for climate-related reasons.

Some concluding observations may be drawn from the foregoing analysis.

First, the IACmHR's thematic reports and resolutions reflect an evolving interpretation of the principle of *non-refoulement* in the context of climate-induced migration. Although these pronouncements are not legally binding, the IACtHR may take them into account, given its evolutive approach to interpreting the ACHR. They may also shape States' positions in the region, as illustrated by the written observations of Chile and Colombia, which expressly draw on the IACmHR's pronouncements.

Second, eight of the thirty-four OAS Member States submitted written observations during the advisory proceedings, all recognizing that climate change may give rise to forced migration. It is therefore plausible that these States will be increasingly encouraged to address climate-induced migration within their domestic legal systems, including through the application of *non-refoulement*, thereby contributing to the principle's progressive consolidation within the IAHRS. Moreover, although they do not amount to an agreement of the parties under Article 31(3)(b) VCLT, these positions may qualify as 'other subsequent practice' that the IACtHR may take into consideration as a supplementary means of interpretation under Article 32 VCLT, when interpreting the principle under the ACHR.

In this regard, the cautious approach adopted by the IACtHR in its 2025 Advisory Opinion arguably leaves room for the principle to be progressively developed within the IAHRS, drawing on the IACmHR's pronouncements and any further State practice within the region, also to move beyond the limitations of *Teitiota*.

Taken together, the IACmHR's evolving practice and the legal positions expressed by some OAS Member States may be viewed as the building blocks of an emerging

[233] Cf. IACmHR, Resolution No. 2/24, cit., section D, parr. 36-39.
[234] *Ibidem*.
[235] Cf., in particular, the Written Observations of Chile and Colombia.

process of regional consolidation in the interpretation and application of the principle of *non-refoulement* in the context of climate-induced migration. This is a process the IACtHR can build on in future cases, and it suggests that the IAHRS may be a particularly favorable framework for strengthening protection against *refoulement* for climate migrants.

ABSTRACT: This article examines the role of *non-refoulement* in protecting climate migrants, with particular focus on the Inter-American Human Rights System. After briefly outlining the scope of the principle under international refugee law and international human rights law, and assessing the innovative aspects and limitations of the Human Rights Committee's decision in *Teitiota v. New Zealand*, the article considers more recent pronouncements concerning climate-induced migration, especially the 2025 Advisory Opinion of the Inter-American Court of Human Rights on *Climate Emergency and Human Rights*. Although the Advisory Opinion may be regarded as a missed opportunity to clarify the conditions for applying *non-refoulement* to climate migrants, other developments within the Inter-American Human Rights System – notably reports and resolutions of the Inter-American Commission on Human Rights and the positions expressed by States in the advisory proceedings – may inform the principle's future interpretation and application under the American Convention on Human Rights. The article argues that the Inter-American Human Rights System may progressively emerge as a particularly favorable framework for consolidating *non-refoulement* as a key safeguard for climate migrants.

KEYWORDS: *Non-Refoulement* – Climate Change – Migration – Human Rights – Inter-American Human Rights System.