



San José, Costa Rica and Washington, D.C., November 15, 2022

**Mr. Ian Fry**  
**Special Rapporteur on climate change**  
**United Nations High Commissioner for Human Rights**

**Re: Call for Inputs: Report on addressing the  
human rights implications of climate change  
displacement including legal protection of people  
displaced across international borders**

Dear Mr. Fry,

CEJIL is a regional NGO dedicated to strategic litigation and advocacy for human rights in the Americas, principally within the Inter-American Human Rights System, that has represented and accompanied migrants, refugees, and other civil society organizations in the Americas and litigated leading cases on migrants' rights for over 30 years. The considerations in this submission are based on our extensive work in the Americas.

Climate change will cause the displacement of tens of millions of people in the coming decades. Much of that displacement will take place within national borders<sup>1</sup>; however, millions of people are also likely to be displaced internationally. While climate change will affect all of humanity, it will not affect all equally. Some will have more and better choices about where and when to move, while others won't. This will be due to a large and non-exhaustive list of factors linked to relative situation of vulnerability of individuals and communities, the nature and extremity of the climate risks faced (including whether the phenomena are slow onset vs. sudden), and whether governments are willing and able to prevent, mitigate, and rebuild without discrimination. Individuals who are stateless or at risk of statelessness are also particularly vulnerable in the context of climate displacement. Given this reality, it is critically important to ensure the existence and accessibility of adequate regular migration and protection pathways for people on the move across borders to guarantee their human rights and ensure access to protection for those who need it.

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<sup>1</sup> The World Bank has projected that there will be up to 216 million climate IDPs by 2050, including 17 million in the Americas. World Bank, "[Climate Change Could Force 216 Million People to Migrate Within Their Own Countries by 2050](#)," September 13, 2021. In 2021, IDMC estimated a current total of 55 million IDPs worldwide, approximately 4.7 million in the Americas. Internal Displacement Monitoring Centre, [Global Report on Internal Displacement 2021](#), 2022.

Across Latin America and the Caribbean, people have been and are likely to become displaced in the future due to a variety of climate-related phenomena. One 2017 study highlighted displacement from Central America and Mexico due to drought, flooding, hurricanes, and earthquakes; evacuations of Caribbean nations following hurricanes, earthquakes (such as the 2010 earthquake in Haiti), and volcanic eruptions; and displacement, frequently internal, across South American countries including Colombia, Ecuador, Peru, Brasil, Chile, and Argentina due to drought, flooding, glacial melt in the Andes and disappearance of lakes and bodies of water, and earthquakes<sup>2</sup>.

This submission will focus principally on legal protection for people displaced across international borders due to climate. The question of whether climate-displaced people as a class should be considered climate refugees has provoked considerable debate over which there is no consensus to date<sup>3</sup>; however, it is clear that some climate-displaced people are refugees under both the 1951 Convention definition and other regional refugee definitions<sup>4</sup>. Moreover, international refugee law and international human rights law establish fundamental protections for people on the move that must be incorporated into any legal response to climate displacement. Finally, by analyzing currently existing visa, regularization, and protection pathways for climate-displaced people in the Americas, it is possible to identify gaps and desirable characteristics for future State responses to cross-border climate displacement.

## 1. Climate displacement and refugee status

Some climate-displaced persons are refugees under currently existing refugee law, both the 1951 Convention on Refugee Status definition<sup>5</sup> and regional definitions such as that established in the Cartagena Declaration, adopted by a group of Organization of American States (OAS) member states in 1984 and since incorporated into the national legislation of at least 14 Latin American countries<sup>6</sup>.

The Cartagena Declaration expands the regional definition of refugee in the Americas to include “persons who have fled their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances that have seriously disturbed the public order”<sup>7</sup>. The effects of climate change, including both slow- and sudden-onset events, may give rise to “other

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<sup>2</sup> Cantor, D., “[Cross-border Displacement, Climate Change and Disasters: Latin America and the Caribbean](#),” UNHCR (July 2018), pp. 13-20.

<sup>3</sup> Cfr. Elizabeth Ferris, “[Climate migrants can't wait for global frameworks](#),” *Wilson Quarterly*, Fall 2021; Jane McAdam, “[Seven reasons the UN Refugee Convention should not include 'climate refugees'](#),” *The Sydney Morning Herald*, June 6, 2017.

<sup>4</sup> UNHCR, [Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters](#), October 1, 2020.

<sup>5</sup> UNHCR has analyzed how climate change may cause or exacerbate sociopolitical conflicts and discrimination against certain groups that may rise to the level of persecution in the terms of the 1951 Convention. UNHCR, [Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters](#), October 1, 2020, paras. 6-12. Similarly, analyses of domestic application of the 1951 Convention definition make clear that climate-displaced persons may be recognized as refugees under certain circumstances. Cfr. International Refugee Assistance Project (IRAP), [U.S. Opportunities to Address Climate Displacement](#), August 2021, pp. 9-13.

<sup>6</sup> UNHCR, [Cuadro N° 1. Definición de refugiados \(Cartagena\) Países de América Latina que la han incorporado a su legislación Nacional \(Por orden cronológico\)](#), June 2017.

<sup>7</sup> *Cartagena Declaration on Refugees* (1984), Conclusion III (3).

circumstances that have seriously disturbed the public order”, as well as to situations of “massive violations of human rights”.

In a 2020 guidance note, UNHCR developed how government failure to adequately respond to climate conditions that “seriously disturb the public order” may be grounds for recognizing refugees under the Cartagena Declaration and other regional refugee definitions<sup>8</sup>. It considers that analysis of whether a situation meets the “serious” threshold requires “taking account of the nature and duration of the disruption and its consequences for the security and stability of the State and society” and, importantly, considers that

Whether a disturbance to public order stems from human or other causes is not determinative for concluding a serious disturbance of public order; the central concern is the effect of a given situation. Accordingly, the principal inquiry at the time of assessing a claim for refugee status is whether a serious disturbance to public order exists as a matter of fact, based on an assessment of available evidence<sup>9</sup>.

Climate-related events may also give rise to “massive violations of human rights”. Although there is no international instrument that defines “massive violations of human rights”<sup>10</sup>, UNHCR has found that the term “massive” “refers to the scale or magnitude of the violation, irrespective of the duration”, and may exist “where the effects of human rights violations go beyond the actual/direct victims to affect large segments of the population, or even the society as a whole”<sup>11</sup>. The International Conference on Central American Refugees (“CIREFCA”), held in 1989 to provide guidelines on the interpretation of the Cartagena Declaration, found that “the denial of civil, political, economic, social and cultural rights in a grave and systematic manner [...] can be considered as massive violations of human rights”<sup>12</sup>.

The effects of climate change in the Americas have included food shortages resulting from droughts that devastate poor, rural, and indigenous communities—for example, in the “dry corridor” of Central America—as well as hurricanes, flooding, and other extreme weather events<sup>13</sup>. Hurricanes and other extreme climate events also routinely leave families and communities without housing, potable water, and adequate food for extended periods of time<sup>14</sup>. These conditions are often worsened and perpetuated by lack of adequate government policy and response to extreme events that leaves affected people and communities in dire situations

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<sup>8</sup> UNHCR, [Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters](#), October 1, 2020, paras. 15-16.

<sup>9</sup> Id., para. 16.

<sup>10</sup> Berganza Setién, I., Feline Freier, L., & Blouin, C. (2020). El elemento situacional de violación masiva de derechos humanos de la definición ampliada de Cartagena: hacia una aplicación en el caso venezolano. *Revista chilena de derecho*, 47(2), 385-410.

<sup>11</sup> UNHCR, [Guidelines on International Protection No. 12](#), HCR/GIP/16/12, 2 December 2016, para. 76.

<sup>12</sup> United Nations, Conferencia Internacional sobre Refugiados Centroamericanos (CIREFCA), [Principios y criterios para la protección y asistencia a los refugiados, repatriados y desplazados en América Latina](#), April 1989, CIREFCA 89/9, para. 34.

Some countries of the region have also defined these terms in their domestic legislation. See, e.g., the definition of terms in Mexican law, which should be interpreted in light of the international guidance and human rights obligations of the State. *Reglamento de la ley sobre refugiados y protección complementaria* (Mex.), DOF 21-02-2021, art. 4.

<sup>13</sup> Washington Office on Latin America, WOLA. [“Climate Change Disasters Point to Urgent Need to Protect Climate Refugees”](#). August 13, 2021; FAO, [Erratic weather patterns in the Central American Dry Corridor leave 1.4 million people in urgent need of food assistance](#), 25 April 2019.

<sup>14</sup> Id.

during weeks, months, or years and causes forced migration in response<sup>15</sup>. In this regard, both slow- and sudden-onset climate events may cause widespread and serious violations of economic, social, and cultural rights and/or seriously disturb public order.

As to the question of whether these situations—whether considered a “serious disturbance of public order” or “massive violation of human rights” must be attributable to man-made causes, it is important to note first, that UNHCR has considered that “whether a disturbance to public order stems from human or other causes is not determinative for concluding a serious disturbance of public order”<sup>16</sup>. This is consistent with its finding that “Guided by the protection purpose of the Cartagena Declaration, the circumstances referred to in the Cartagena refugee definition are to be given their ordinary meaning, wherever possible, and interpreted in an evolutionary way so that they remain relevant to situations not foreseeable when the Cartagena Declaration was drafted”<sup>17</sup>. Second, where events caused by climate change are concerned, it is difficult and probably unnecessary—given that the critical question is the conditions of those affected—to separate natural vs. human causes. Third, there is important international agreement that climate change is a phenomenon directly attributable to human activity, which produces alterations in the composition of the planet's atmosphere in addition to the natural climate variability observed over comparable periods of time<sup>18</sup>.

Initiatives at the regional level in Latin America, such as the Brazil Plan of Action, have recognized the need to observe and pay attention to the challenges posed by climate change and natural disasters that generate displacement of people across borders<sup>19</sup>. Likewise, the international community, through the Global Compact on Refugees, recognizes that “climate, environmental degradation and natural disasters ... increasingly interact with the causes of climate change. increasingly interact with the causes of these movements ... the prevention and resolution of large-scale refugee situations are also of deep concern to the international community as a whole and require early action to address their causes and triggers, as well as enhanced cooperation among political, humanitarian, development and peace actors”<sup>20</sup>.

It is critically important that national asylum authorities across the Americas issue guidance recognizing that climate-displaced people may be recognized as refugees under each applicable refugee definition; and in particular, that authorities in the Latin American countries that have incorporated the Cartagena Declaration definition into their national legislation develop guidelines for the recognition of climate-displaced refugees under this definition. This is without prejudice to the creation of legislation or other initiatives at the national or regional level to address climate displacement.

## **2. Application of international human rights and refugee law protections to climate displacement**

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<sup>15</sup> Id.

<sup>16</sup> UNHCR, [Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters](#), October 1, 2020, para. 16.

<sup>17</sup> UNHCR, [Guidelines on International Protection No. 12](#), HCR/GIP/16/12, 2 December 2016, para. 70.

<sup>18</sup> [United Nations Framework Convention on Climate Change](#), Art. 1.2.

<sup>19</sup> [Brazil Declaration and Plan of Action](#), 3 December 2014.

<sup>20</sup> Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), *Pacto Mundial sobre Refugiados, con una nota introductoria de la Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR)*, 17 Diciembre 2018, disponible en: <https://www.refworld.org/es/docid/5c781b294.html>.

Any proposed legal regime to recognize and extend protection and regularization pathways to climate-displaced persons must take into account and incorporate the protections already existing in international human rights law and international refugee law. Likewise, countries must guarantee broad complementary protection and *non-refoulement* guarantees to climate-displaced persons.

For example, the broad protections currently existing in refugee law and complementary protection—including guarantees of access to territory, access to protection-sensitive screening mechanisms, non-penalization of irregular entry, and broad guarantees of non-refoulement—are critical to ensure protection for climate-displaced persons fleeing conditions that put at risk their lives and integrity<sup>21</sup>. Likewise, countries must ensure adequate due process protections in reviewing the claims of climate-displaced persons<sup>22</sup>. In these cases, ability to obtain regular status inside the country of refuge is an important safeguard. These guarantees may be especially relevant for people affected by sudden-onset disasters, persecution, and other situations putting at immediate risk their life or integrity.

UNHCR guidance also highlights the importance of complementary protection mechanisms and the observance of non-refoulement guarantees<sup>23</sup>. In this regard, the Inter-American human rights system has established broad non-refoulement protections, establishing that the principle must be interpreted broadly to encompass any circumstance that could lead to violations of the right to life or personal integrity<sup>24</sup> and applied to any person in human mobility, not just asylum-seekers, and in any proceeding that may result in return to home or a third country<sup>25</sup>. Ensuring that broad non-refoulement protection beyond that established in the 1951 Convention definition is available may in practice require domestic law reform. In *Ioane Teitota vs. New Zealand*, the Human Rights Committee established,

The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, *may be broader than the scope of the principle of non-refoulement under international refugee law*, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee *or other individualized or group status determination procedures that could offer them protection against refoulement*. Therefore, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin<sup>26</sup> (emphasis added).

Indeed, in Mr. Teitota's case, he had access to the asylum process in New Zealand, but his application was denied because the court considered that he was not a refugee within the

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<sup>21</sup> See guarantees outlined in I/A Ct. H.R., *Case of the Pacheco Tineo Family vs. Bolivia*, Judgment of November 25, 2013, Series C, No. 272.

<sup>22</sup> *Id.*, para. 128 *et seq.*

<sup>23</sup> *Id.*, para. 19.

<sup>24</sup> IACHR. *Andrea Mortlock* (United States) (Admissibility and Merits), Report No. 63/08, Case 12.534, 25 July 2008, para. 94 (“the Commission finds that knowingly sending Ms. Mortlock to Jamaica with the knowledge of her current health care regime and the country's sub-standard access to similar health for those with HIV/AIDS would violate Ms. Mortlock's rights, and would constitute a de facto sentence to protracted suffering and unnecessarily premature death”).

<sup>25</sup> IACHR. Report No. 29/20. Case 12.865. Merits (Publication). *Djamel Ameziane*. United States. 22 April 2020, paras. 263-266 (the IACHR found that Ameziane, an Algerian national detained at Guantanamo Bay for over 10 years, was *refouled* to Algeria in a non-asylum proceeding that violated due process).

<sup>26</sup> Human Rights Committee, [Ioane Teitota vs. New Zealand](#), 23 September 2020, párr. 9.3.

meaning of the 1951 Convention definition<sup>27</sup>. In order to ensure non-refoulement of climate-displaced persons who do not meet existing refugee definitions, States should incorporate broad non-refoulement provisions into their law that permit protection against any kind of risk to life, integrity and security due to, among others, climate change.

### **3. Additional characteristics of an adequate legal framework for climate-displaced persons**

In the Americas region, in addition to national refugee systems, a patchwork of national laws, policies, and visa regimes exists that can extend some protection to climate-displaced individuals. These additional mechanisms have promising characteristics, but it is also possible to identify gaps. The following considerations are not a systematic study of existing legal mechanisms, but initial considerations.

For example, Temporary Protected Status (TPS) in the United States<sup>28</sup>, which has the virtue of explicitly naming natural disasters as a basis for granting protection to people physically present in the US on the date of the grant and can be granted proactively in response to emerging conditions in countries of origin. However, TPS also has drawbacks, including that beneficiaries must already be in the US on the date protection is granted; the discretionary and political nature of the measure can sometimes prevent grants of TPS even when dire conditions exist; and TPS gives no path to permanent residence or family reunification, including for individuals who have been protected by TPS status for decades<sup>29</sup>.

Another example is Argentina's introduction of a climate visa for nationals of Mexico, Central America, and the Caribbean in May 2022<sup>30</sup>. It has the virtue of being an entry and stay visa; one open question is how accessible it will be in practice, particularly for the most vulnerable. Likewise, other countries of the region have varied humanitarian visa schemes, many of which do not explicitly recognize climate change or natural disasters as bases for granting the visa.

One way of advancing in a proposal for a legal regime that will best protect people displaced across international borders due to climate, then, is by undertaking a systematic review to identify the most important characteristics and gaps in currently existing mechanisms.

The ability to access regular migration alternatives through humanitarian visa regimes is an important component of voluntary migration and planned relocation across borders, which can help to mitigate loss and damage when people must flee or relocate due to climate change by offering a durable solution that respects and guarantees human rights. Visa regimes should ensure accessibility (financial, logistical, etc.), and permit a path to permanent residence and

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<sup>27</sup> See Helen Kerwin, "El principio de no-devolución", in *El acceso a la justicia de las personas migrantes, refugiadas y otras sujetas de protección internacional en las Américas* (International Committee of the Red Cross et al. eds., 2022), pp. 121-122. Available at: <https://www.icrc.org/es/document/acceso-la-justicia-de-las-personas-migrantes-refugiadas-y-otras-sujetas-de-proteccion>.

<sup>28</sup> This discussion of TPS is *incomplete* and intended to be merely illustrative of some relevant points of analysis of protection and regularization pathways for climate-displaced people. For further information, cfr. International Refugee Assistance Project (IRAP), *U.S. Opportunities to Address Climate Displacement*, August 2021, pp. 13 *et seq.*

<sup>29</sup> *Id.*

<sup>30</sup> Boletín Oficial de la República Argentina, Dirección Nacional de Migraciones, Disposición 891/2022, DI-2022-891-APN-DNM#MI, 16 May 2022, available at: <https://www.boletinoficial.gob.ar/detalleAviso/primera/262784/20220519>.

family reunification<sup>31</sup>, as well as ensure non-discrimination in access to rights and services in the receiving state.

Sincerely,

**Center for Justice and International Law**

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<sup>31</sup> Pathways to durable solutions are critical, given that we know little about the aftermath of disaster displacement, and can anticipate that the medium- and long-term effects of climate change may make voluntary return non-viable in many situations. In this regard, IDMC has found: “The most common misconception is that disaster displacement is short-term and that after life-saving evacuations people usually return quickly to rebuild their homes and livelihoods. The fact that little data is collected after the emergency phase of a disaster helps to feed this misunderstanding. Evacuees are not tracked to monitor if or when they are able to return.

“At worst this means that national policies and response mechanisms may not recognise disaster displacement, and at best that they underestimate its scale. This in turn means there are few if any programmes dedicated to responding to longer-term displacement”. IDMC, [Global Report on Internal Displacement 2021](#), p. 78.