

Environmental Migrants: Challenges and Opportunities for the Protection of their Rights

**LEGAL FRAMEWORK MANUAL
AND ACTIVITY PACKET**

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Introduction

Climate change has altered the relationship between humanity and the planet. In the years to come, policymakers, organizations, practitioners, civil society, and the private sector will need to come together at all levels to address its effects. It is expected that the number of people migrating due to environmental factors is only expected to grow thereby raising the need to protect these migrant populations and their rights, especially those in vulnerable situations.

To date, environmental disasters are estimated to have displaced 22.6 million people already, between 2008 and 2016.¹ States are increasingly acknowledging the growing relationship between climate change and human mobility across borders, but there is much more that can be done.

The International Organization on Migration (IOM) uses the following general definition of environmental migrants:

“Persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their homes or choose to do so, either temporarily or permanently, and who move either within their country or abroad.”²

While there is no single international legal instrument dedicated specifically to the protection of the rights of environmental migrants, several existing legal frameworks under international law, in particular international human rights law, among other branches of international law,³ do provide relevant protection for the rights of environmental migrants, such as the right to life, right to health, rights of the child, etc., which are affected by the negative impacts of climate change and/or environmental degradation.

In general, amidst the challenges posed by the fragmentation of international law, norms and principles to protect certain individuals and groups, - in this case the lack of one treaty that protects environmental migrants -, the International Law Commission promotes the approach of complementarity of international law rules in different branches of law.⁴ When rules are not in conflict between each other, they should be considered as in a relationship of complementarity in which norms in one area of law may assist in the interpretation of norms of another area of international law. The principle of harmonization of the existing rules should guide any interpretation efforts.

This report will explore in more detail the legal protection that international human rights law framework in particular offers for environmental migrants and their rights. Regarding the “international protection”

¹ International Displacement Monitoring Center (IDMC), Global Report on Internal Displacement GRID 2017, (May 2017, <http://internal-displacement.org/global-report/grid2017/>). Around 18.8 million people were newly displaced by disasters in 2017, see IDMC, Global Report on Internal Displacement (May 2018) Part I, 6-7.

² IOM, “Migration, Environment and Climate Change: Evidence for Policy (MECLEP),” 2014, https://publications.iom.int/system/files/pdf/meclep_glossary_en.pdf?language=en

³ The rights of environmental migrants are protected under international human rights law, in conjunction with other branches of international law, especially those applicable in the context of disasters, such as disaster response law, climate change law, international humanitarian law and refugee law.

⁴ United Nations (UN), Yearbook of the International Law Commission 2006 Volume II Part Two, UN New York and Geneva 2013, p. 175, https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf

of migrants moving due to climate change, there is no specific legal framework providing such international protection (like the international protection for refugees under international refugee law).

Although existing human rights frameworks protect the rights of environmental migrants, as it does for any human being, the broader challenge lies in gaps at a national level in law and policy, lack of implementation, and lack of understanding of the connection between human rights and the underlying reasons for environmental migration. It is crucial to note that several human rights obligations of States also entail obligations to act to prevent and address climate change and its consequences.

Furthermore, it is difficult in most cases to attribute the migration to the sole cause of climate change. In some contexts, regional mechanisms can provide international protection for environmental migrants, including potential expansions on the refugee definition. In addition to this, jurisprudence from the decisions of regional human rights courts is an important resource to clarify some of the State obligations regarding the international protection of refugees, as well as the protection of the substantive and procedural rights of environmental migrants.

At an international level, the case of *Ioane Teitiota v. New Zealand* - a historic decision by the UN Human Rights Committee in 2020 - may provide a way forward for codifying the rights of environmental migrants and for defining the obligations of States in these situations globally, including regarding their protection. The following sections describe the case in detail and highlight the existing human rights instruments, regional mechanisms for recourse, examples of key human rights principles in practice, and the positive obligations of States that can further the conversation surrounding the protection of the rights of environmental migrants and their international protection.

Case of Ioane Teitiota v. New Zealand

In 2012, Ioane Teitiota, from the small island State of Kiribati, applied for protection as a refugee in New Zealand, claiming that the rising sea level and other effects of climate change rendered the living conditions in Kiribati so untenable that he should receive asylum status.

Kiribati is a low-lying island in the Pacific Ocean, only 2-3 meters above sea level. Due to severe storms and flooding, much of its land has become uninhabitable. It has been predicted that without immediate interventions, Kiribati will be completely submerged within the next two decades.⁵

Teitiota claimed that due to severe environmental degradation, citizens of Kiribati have been facing a scarcity of fresh drinking water, an inability to sustain a livelihood through agriculture due to soil salinization, and frequent flooding. Furthermore, as many parts of Kiribati are now uninhabitable, internal migration has increased, sparking violent land disputes.⁶

Teitiota's asylum claim was denied by New Zealand's Immigration Tribunal, and then again in New Zealand's Supreme Court, which upheld the Tribunal's decision. The Tribunal decided that Teitiota did not meet the necessary qualifications for asylum status, specifically he did not face a real risk of being persecuted, as is required in the traditional refugee definition.

Teitiota and his family were subsequently deported to Kiribati, leading Teitiota to file an individual complaint to the UN Human Rights Committee (ICCPR's treaty body) in September 2015, asserting that in sending him back to Kiribati, New Zealand violated his right to life under Article 6 of the ICCPR, therefore triggering protections under the principle of *non-refoulement*. On October 2019, the Committee adopted its views under article 5(4) of the Optional Protocol to the ICCPR concerning Teitiota's communication.⁷

Three points the Human Rights Committee deliberated on:

- | | |
|---|---|
| <p>1. Was Kiribati taking steps to reduce the impact of climate change?</p> | <p>Yes, the Kiribati Government set up a National Adaptation Programme of Action to address the water crisis.</p> |
| <p>2. Was the threat to life created by environmental degradations imminent enough to qualify as a threat to the right to life?</p> | <p>No, because Kiribati still had 10-15 years before the crisis reached the threshold of causing imminent death, this was enough time for action to be taken by Kiribati to mitigate the crisis.</p> |
| <p>3. Did Teitiota himself face imminent risk to his right to life?</p> | <p>No, there was no evidence that Teitiota's situation differed from any other citizen of Kiribati.</p> |

⁵ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 (26 November 2013), para 27, <https://forms.justice.govt.nz/search/Documents/pdf/jdo/56/alfresco/service/api/node/content/workspace/SpacesStore/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0.pdf>. The High Court decision is also available at <http://www.nzlii.org/nz/cases/NZHC/2013/3125.html>

⁶ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013]

⁷ *Ioane Teitiota v New Zealand*, CCPR/C/127/D/2728/2016, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016 (23 September 2020) available at: <https://juris.ohchr.org/Search/Details/2798>

In 2020, the Committee released its decision. While the Committee upheld New Zealand’s decision and decided that the right to life was not violated in this instance, it raised the question of whether Teitiota was exposed to a “real risk of irreparable harm” to his right to life in Kiribati.

The Committee reasoned that climate change-induced harm can occur both through sudden-onset events (such as intense storms and flooding), and slow-onset processes (such as sea level rise, salinization, and land degradation). Both sudden-onset events and slow-onset processes can prompt individuals to cross borders to seek protection from climate change-related harm. The Committee took the view that:

“[W]ithout robust national and international efforts, the effects of climate change in receiving States [of rejected asylum-seekers] may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States.” (para. 9.11)

Dissenting Opinions

Vasilka Sancin

Para. 3: “My concern arises from the fact that the notion of ‘potable water’ should not be equated with ‘safe drinking water’. Water can be designated as potable, while containing microorganisms dangerous for health, particularly for children (all three of the author’s dependent children were born in New Zealand and were thus never exposed to water conditions in Kiribati).”

Para. 5: “In these circumstances, it is my opinion that it falls on the State Party, not the author, to demonstrate that the author and his family would in fact enjoy access to safe drinking (or even potable) water in Kiribati, to comply with its positive duty to protect life from risks arising from known natural hazards.”

Duncan Laki Muhumuza

Para. 3: “Whereas the risk to a person expelled or otherwise removed, must be personal – not deriving from general conditions, except in extreme cases, the threshold should not be too high and unreasonable... it has been critical to consider all relevant facts and circumstances, including the general human rights situation in the author’s country of origin.”

Para. 5: “In my view, the author faces a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati. The considerable difficulty in accessing fresh water because of the environmental conditions, should be enough to reach the threshold of risk, without being a complete lack of fresh water.”

“It would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable; in order to consider the threshold of risk as met.”

Existing Legal Instruments

International Refugee Law

The 1951 Refugee Convention and its 1967 Protocol

The 1951 Refugee Convention and its 1967 Protocol were adopted to protect people fleeing persecution. While there is no universally adopted definition of “persecution,” Article 33 of the 1951 Convention suggests that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group would qualify as persecution.⁸ As such, the Refugee Convention currently provides limited protection for environmental migrants only when environmental drivers of migration overlap with the existing framework of the Convention, for example, when it is linked to the above mentioned criteria for persecution.

The 1951 Convention defines a refugee as a person who:

*“owing to well-founded fear of persecution for reasons of **race, religion, nationality, membership of a particular social group or political opinions**, 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 of 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.”⁹ (Article 1)*

Current interpretations of the Convention’s definition of a refugee **do not** extend its scope to those fleeing environmental disasters or slow-onset climate change. The risk and challenges faced by environmental migrants currently do not fit traditional understandings of the types of persecution, except perhaps through analogy, and they do not fit any permissible category protected from persecution under the 1951 Refugee Convention’s definition.

The 1951 Refugee Convention also establishes the principle of *non-refoulement*, which is now international customary law in international human rights law, international humanitarian law, and, of course, refugee law.¹⁰

Non-refoulement is a non-derogable customary international norm, i.e., under no circumstances may a person (regardless of their legal status) be expelled or returned to a territory when there are substantial grounds to believe that there is a real risk that they will face persecution, irreparable harm¹¹ to their

⁸ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979 (Re-edited January 1992), UN.

⁹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, UN.

¹⁰ Office of the UN High Commissioner for Human Rights (OHCHR), *The principle of non-refoulement under international human rights law*, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

¹¹ Examples of such risks of irreparable harm include, for example: risk to life, of torture and cruel, inhumane or degrading treatment or punishment; flagrant denial of the right to a fair trial; to liberty of the person; serious forms of sexual and gender-based violence; death penalty or death row; female genital mutilation; prolonged solitary confinement; severe violations of economic, social and cultural rights (amounting to violation of the right to life or freedom from torture, degrading living conditions, complete lack of medical treatment, or mental illness) (OHCHR, *The principle of non-refoulement under international human rights law*).

person or serious human rights violations upon return. As a customary international law norm, all States have the duty to respect the principle of non-refoulement. This non-derogable principle is also established in various instruments of international human rights law, international humanitarian law, transnational criminal law, and law of the sea.

The principle of *non-refoulement* applies when a return of a person to a country would threaten his or her life or freedom, or where there are substantial grounds for believing that he or she would risk being subjected to torture or other cruel, inhuman, and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm.

Under international human rights law in particular, the principle is commonly understood to be a norm of customary international law at least with respect to the right to life, the prohibition from torture or cruel, inhuman, or degrading treatment or punishment, the right to a fair trial, and combinations of rights violations that would produce ‘irreparable harm.’

The prohibition of inhuman or degrading treatment has developed into a norm of customary international human rights law, but whether being exposed to the effects of environmental degradation qualifies as torture, cruel, inhuman, or degrading treatment or punishment is untested and will likely proceed on a case-by-case basis. Some international courts, for example, have come to recognize that depending on the specific circumstances of the case, the living conditions in the country of return might amount to cruel, inhuman or degrading treatment, as demonstrated in the case of *Sufi and Elmi v. United Kingdom*.¹² Given these developments, removal may be prohibited in cases where one can establish a generalized situation of environmental degradation that seriously impacts the enjoyment of human rights, and/or individual circumstances aggravating vulnerability.¹³

According to the Human Rights Committee, this risk must be personal, and it cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.¹⁴ The CCPR also determined that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.

In the Global Compact for Safe, Orderly and Regular Migration, the General Assembly expressly reiterated the prohibition of returning migrants where there is a “real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm, in accordance with other obligations under international human rights law”.¹⁵

The prohibition against refoulement prohibits to send someone back to a location where one is at risk of irreparable harm. Irreparable harm could be conceived as multiple and overlapping rights violations that do not neatly fit into any single rights violation but that, taken together, amount to a similar level of harm as strictly prohibited, stand-alone rights violations. For example, the European Court of Human Rights expanded the scope of cruel, inhuman, or degrading treatment or punishment to include degrading living

¹² *Sufi and Elmi v the United Kingdom* (App no 8319/07 and 11449/07) ECHR 28 June 2011.

¹³ Caskey, Christopher “Non-refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection,” *The Global Migration Research Series No.26*, 2020, <https://www.graduateinstitute.ch/sites/internet/files/2020-11/C%20Caskey%20Research%20Paper%20-%20No.%2026%20-%20Final%20v2.pdf>

¹⁴ Human Rights Committee, general comment No. 36, para. 30; and *Ioane Teitiota v. New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, <https://www.refworld.org/cases,HRC,5e26f7134.html>

¹⁵ UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195, 19 Dec. 2018, para. 37.

conditions in the country of origin which could include lack of available medical treatment.¹⁶ As environmental degradation continue to worsen, degraded living conditions are sure to follow.

In assessing such a risk, all relevant facts, and circumstances (both objective and subjective) must be considered, including the general human rights situation in the petitioner's country of origin. Existing jurisprudence could help clarify the scope of State obligations with respect to risks emanating from environmental issues and provide answers to two key questions:

1. What determines if the disaster is severe enough to trigger a State's *non-refoulement* obligations?
2. What elements should be considered in assessing whether or not the impacts of *slow-onset* environmental degradation reach this threshold?

Two recent cases illustrate the potential of this path. The 2013 case of *Ioane Teitiota v. New Zealand* recognized that "[Tribunal] decisions did not mean that environmental degradation ... could never create a pathway into the Refugee Convention or protected person jurisdiction."¹⁷

Similarly, a recent case brought by a Tuvaluan national and his family in New Zealand clarified that *non-refoulement* protections could be used if the person can prove "exceptional circumstances of a humanitarian nature,"¹⁸ in which it would be unjust or unduly harsh to deport them.

¹⁶ *Sufi and Elmi v the United Kingdom*, App. Nos. 8319/07 and 11449/07 (ECtHR, Judgment of 28 June 2011) para 291. See also *Paposhvili v. Belgium*, App. No. 41738/10 (ECtHR [GC], Judgment of 13 December 2016) paras 175 and 183.

¹⁷ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 (26 November 2013), para 27, <https://forms.justice.govt.nz/search/Documents/pdf/jdo/56/alfresco/service/api/node/content/workspace/SpacesStore/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0.pdf> The High Court decision is also available through NZLII, <http://www.nzlii.org/nz/cases/NZHC/2013/3125.html>

¹⁸ *AC (Tuvalu)* [2014] NZIPT 800517-520 (4 June 2014), para 81. <http://www.nzlii.org/nz/cases/NZIPT/2014/800517.html>

Circumstances in which the principle of *non-refoulement* could apply related to environmental disasters¹⁹:

- Cross-border displacement after disaster because a government consciously withheld assistance in order to punish marginalized persons.
- Eviction targeted at a specific group of people, who were left without alternative accommodation options or assistance, resulting in serious threats to their health or life.
- Situations of violence or conflict over shrinking resources giving rise to persecution towards protected groups.
- Government policies affecting the environment and targeting groups that rely on the land or the sea for survival, such as farmers or fishers.
- Destruction of crops or poisoning of freshwater resources to provoke starvation or famine as a political tool.
- Policies contributing to rapid environmental degradation that seriously affect the health of local communities such as the disposal of toxic waste into local waterways.

¹⁹ These indications are a summary of the authors' interpretations based on the research conducted for this report of how the principle of *non-refoulement* may be applied to migrants displaced by environmental disasters.

International Human Rights Law

The International Bill of Human Rights

The 1948 Universal Declaration of Human Rights

The 1948 Universal Declaration of Human Rights (UDHR) is a foundational instrument in international human rights law and identified basic human rights which would later be enshrined in international law. However, the UDHR is a non-binding declaration and not a treaty with accountability mechanisms. Such mechanisms were established in future treaties, such as the International Covenant on civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The 1948 UDHR led the way towards the adoption of other regional and international human rights thereof. The UN General Assembly has since then adopted 9 core international human rights instruments. Each of these have established a committee of experts, which have the mandate to monitor implementation of the treaty provisions by its States parties.²⁰ Guided by the principles of universality, equality, and non-discrimination, among others, all these international human rights instruments are key in the protection of the human rights of all migrants.

The 1966 International Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights (ICCPR) established in international human rights law the inherent right to life, the right to bodily integrity, and prohibits torture or cruel, inhuman, or degrading treatment or punishment (among other civil and political rights) (Articles 6 and 7).²¹ As the state of the environment continues to worsen due to climate change, the enjoyment of these rights is increasingly threatened.²²

The 1966 International Covenant on Economic, Social and Cultural Rights

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) established in international human rights law economic rights such as the right to an adequate standard of living for oneself and her family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions, among others (Article 11). Additionally, ICESCR enshrines in law the right to enjoy the highest attainable standard of physical and mental health (Article 12).²³

The ICCPR and ICESCR, together with the UDHR are often referred to as the international bill of human rights.²⁴ As climate change continues, the deleterious effects on the human rights established in these

²⁰ For more information about the Core International Human Rights Instruments and their monitoring bodies, consult:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

²¹ UN Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of ICCPR, on the right to life*, para 9.

²² Caskey, Christopher "Non-refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection," *The Global Migration Research Series No.26*, 2020, 2, <https://www.graduateinstitute.ch/sites/internet/files/2020-11/C%20Caskey%20Research%20Paper%20-%20No.%2026%20-%20Final%20v2.pdf>

²³ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

²⁴ OHCHR, Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

treaties will grow. People in deeply affected areas will migrate and States will likely have to respond to both the migration and environmental degradation causing said migration.²⁵

Other relevant thematic international human rights instruments for the protection of the human rights of environmental migrants

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted to address racial discrimination and obligates States “to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, without distinction as to race, colour or national or ethnic origin, particularly in the enjoyment of rights” (Article 5). CERD may be especially relevant in cases where environmental impacts disproportionately affect a certain ethnic or racial population, especially as environmental migrants become more common.

The 1979 Convention on the Elimination of Discrimination Against Women

The 1979 Convention on the Elimination of Discrimination Against Women (CEDAW) was adopted to address the specific challenges faced by women with respect to enjoying their human rights, and further the realization of equality between women and men and includes rights to equal representation, education, and employment (Articles 8, 10 and 11). The CEDAW plays an integral part in framing an intersectional interpretation of migration policy with regard to women and girls, who make up around 50% of the global migrant population.²⁶ The rights elaborated upon in CEDAW will grow in importance, as climate change will increase gender inequality and women’s rights grow increasingly precarious.²⁷

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) specifically provides a prohibition against *refoulement*. The Committee Against Torture has concluded that the principle of *non-refoulement* under Article 3 applies not only to direct expulsion, return, or extradition, but also to indirect transfer to a third country from which the individual might be returned to a country where they would be in danger of being subjected to torture.²⁸ These elements will be defined in more detail below and relevant cases will be reviewed. The Committee has also concluded that the principle of *non-refoulement* extends to cruel, inhuman, or degrading treatment or punishment

²⁵ Caskey, Christopher “Non-refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection,” *The Global Migration Research Series No.26*, 2020, 2, <https://www.graduateinstitute.ch/sites/internet/files/2020-11/C%20Caskey%20Research%20Paper%20-%20No.%2026%20-%20Final%20v2.pdf>

²⁶ World Bank Group, *Gender Statistics Database: female migrants (% of international migrant stock)*, https://databank.worldbank.org/id/2ddc971b?Code=SG.POP.MIGR.FE.ZS&report_name=Gender_Indicators_Report&popularity=series

²⁷ Eastin, Joshua, “Climate change and gender equality in developing states,” *World Development*, April 5, 2018, <https://doi.org/10.1016/j.worlddev.2018.02.021>

²⁷ UN, Report of the UN Conference on the Human Environment, Stockholm, 5–16 June 1972.

²⁸ *Mutombo v. Switzerland*, Committee Against Torture, art.3, Communication No. 13/1993, UN Doc. A/49/44 at 45 (1994).

and is not limited only to acts that amount to torture. The Human Rights Committee determined in Teitiota that as environmental conditions worsen in certain locations due to climate change, those conditions may end up tantamount to cruel, inhuman, or degrading treatment or punishment.

The 1989 Convention on the Rights of the Child

The 1989 Convention on the Rights of the Child (CRC) offers specific protection for children. States must refrain from separating a child from their parents and ensure the right of children to express their views freely in all matters affecting them, in accordance with the child’s age and maturity (Article 9). The principle of the “best interests of the child” is also a foundational principle underpinning the CRC and must be a primary consideration in all actions and decisions concerning children, including in the context of migration (Article 12).

The Human Right to a Clean, Healthy and Sustainable Environment

On 8 October 2021, in its resolution 48/13, the United Nations Human Rights Council recognized for the first time that having a clean, healthy, and sustainable environment is a human right. Also, through its resolution 48/14, the Council established a Special Rapporteur to focus on the human rights impacts of climate change.

The Human Rights Council’s landmark decision on adopting the human right to a clean, healthy, and sustainable environment²⁹ may be able to offer future opportunities to potentially provide rights protection to environmental migrants. For example, through the application of the principle of non-refoulement in cases where sending a person back to their country, due to the impacts of climate change and the individual’s specific case and circumstances, their human right to a clean, healthy, and sustainable environment cannot be guaranteed and their right to life, health and/or physical integrity may be at risk.

²⁹ OHCHR, “Bachelet hails landmark recognition that having a healthy environment is a human right”, 8 October 2021, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27635&LangID=E>

The 9 Core International Human Rights Instruments

Treaty	Monitoring Body	Description
International Convention on the Elimination of All Forms of Racial Discrimination	Committee on the Elimination of Racial Discrimination	State parties to Convention commit to ending racial discrimination.
International Covenant on Civil and Political Rights	Human Rights Committee	State parties to Covenant commit to promote and observe civil and political rights.
International Covenant on Economic, Social and Cultural Rights	Committee on Economic, Social and Cultural Rights	State parties to Covenant commit to promote and observe economic, social and cultural rights.
Convention on the Elimination of All Forms of Discrimination against Women	Committee on the Elimination of Discrimination Against Women	State parties to Convention commit to ending discrimination against women.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Committee Against Torture	State parties to Convention commit to prohibit torture and other degrading treatment.
Convention on the Rights of the Child	Committee on the Rights of the Child	State parties to Convention commit to promote and observe the rights of the child.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Committee on Migrant Workers	State parties to Convention commit to bring about the protection of the rights of all migrant workers and members of their families.
International Convention for the Protection of All Persons from Enforced Disappearance	Committee on Enforced Disappearances	State parties to Convention commit to end the practice of enforced disappearance.
Convention on the Rights of Persons with Disabilities	Committee on the Rights of Persons with Disabilities	State parties to Convention commit to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Regional Mechanisms and Instruments

Regional Mechanisms as a Potential Recourse for Environmental Migrants

Regional mechanisms can also provide potential recourse for environmental migrants. While at the international level the definition of a refugee remains narrow, at regional levels there are expanded definitions.

The European Court of Human Rights, for example, has expanded the scope of cruel, inhuman, or degrading treatment or punishment outlined in Article 3 of the European Convention on Human Rights, to include those with severe illness and who would face living conditions that trigger irreparable harm. This expansion does not broaden the definition of “refugee,” but rather elaborates what further factors must be considered by States in the context of refoulement for all persons under human rights law. In this case the Court interpreted the prohibition of refoulement to come from the right to life, and the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment.

Several regional human rights courts’ decisions have also clarified State obligations with regard to both substantive rights (e.g., the right to life, to health, to adequate standards of living, to property) and procedural rights (e.g., such as the right to information and participation in decision-making, and the right to a remedy).

Two regional instruments, the OAU Convention Governing Specific Aspects of Refugee Problems in Africa³⁰ and the Cartagena Declaration,³¹ include fleeing armed conflicts, generalized violence, and events seriously disturbing public order—including potentially environmental disasters—as qualifying conditions for refugee status. In addition, the African Union’s Kampala Convention³² and the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons³³ both call on States to take measures to protect and assist internally displaced persons because of natural disasters. Similarly, the Brazil Declaration³⁴ asks States to consider the issue of persons displaced across international borders as a result of natural disasters.

³⁰ The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974), 1001 UNTS 45, art 1.2, para 3.

³¹ Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II .66/doc.10, rev.1 (22 November 1984) 190-93.

³² African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012), 3014 UNTS 3, article 5.4.

³³ International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons (30 November 2006), <https://www.refworld.org/pdfid/52384fe44.pdf> According to its Article 3.2, States are to mitigate the consequences of displacement caused by natural disasters.

³⁴ Brazil Declaration, “A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean”, (Brasilia, 3 December 2014), Chapter 7, <https://www.acnur.org/5b5101644.pdf>

Key Principles: Rights in Practice

Right to Life

Established by the UDHR, the right to life (Article 3) is further cemented in international human rights law in the ICCPR. The ICCPR reiterates that “every human being has the inherent right to life” (Article 6).” The right is interpreted broadly, and, at the very least, requires that States not only take effective measures against foreseeable and preventable loss of life, but also take positive steps to enable people to enjoy a life with dignity.³⁵

Environmental degradation causes threats to the right to life through an increase in hunger and malnutrition; effects on child growth and development; and changes in cardiorespiratory morbidity and mortality. Increased suffering due to disease and injury caused by heat waves, floods, storms, fires, and droughts are also all direct effects of climate change.³⁶

Several international human rights protection mechanisms refer to the violation of the right to life because of environmental degradation. For example, the Declaration of the United Nations Conference on the Human Environment proclaimed that “both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.”³⁷ In the ruling of the case of *Ioane Teitiota v. New Zealand*, the risk of violating his right to life if returned to Kiribati was assessed by the New Zealand tribunal and the Human Rights Committee. This case and its importance to the establishment of the protections of environmental migrants will be discussed below.

Right to Health

The right to health is articulated in Article 25 the UDHR and Article 12 of the ICESCR. It includes not only access to timely and appropriate healthcare, but also addresses the underlying determinants of health, such as:

- Access to safe and potable water and adequate sanitation;
- An adequate supply of safe food, nutrition and housing;
- Healthy occupational and environmental conditions; and
- Access to health-related education and information.³⁸

³⁵ UN Human Rights Committee, *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35.

³⁶ Caskey, Christopher “Non-refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection,” *The Global Migration Research Series No.26*, 2020, 2, <https://www.graduateinstitute.ch/sites/internet/files/2020-11/C%20Caskey%20Research%20Paper%20-%20No.%2026%20-%20Final%20v2.pdf>

³⁷ UN, Report of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972, para 1.

³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health.

General Comment No. 14 of the Committee on Economic, Social and Cultural Rights further elaborates on the right to the highest attainable standard of health, stating in paragraph 4:

“[...] the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”³⁹

States parties must also take steps to achieve the full realization of this right, including those necessary for the improvement of all aspects of environmental and industrial hygiene (Article 12(2)(b) of the ICESCR).

The right to health also intersects with and is closely linked with other rights like the right to life and the principle of *non-refoulement*. For example, the Court of Appeal of Bordeaux, France confirmed a renewal of a Bangladeshi man’s residence permit by considering environmental conditions in his country of origin as deadly: the air quality in Bangladesh proved so poor that it posed a danger to the man’s life due to his existing health issues.⁴⁰ This domestic case may serve as persuasive authority for future environmental migrants in cases related to the right to life.

Primary Responsibility

These rights, as with all rights, imply a corresponding duty for States to respect, protect and fulfil the rights of everyone within their jurisdiction, which entails negative obligations (to not cause harm, for example), and positive obligations (to adopt positive protection measures, for example). In the context of environmental migration in particular, these positive obligations could be various depending on the situation, for example: The obligation to *protect* people from environmental hazards, and thus *minimize* the risk of disasters and *prevent* forced movement, unless evacuation or preventive relocation is strictly necessary to protect people’s life or safety (Principles 5 and 6.2(d) of the UN Guiding Principle on Internal Displacement) and the obligation to *protect and fulfill the rights of all persons during and after movement*. The obligation to *fulfill the right to freedom of movement*, is primarily within a State.⁴¹

States must adopt action and policy plans to prevent potential violations of human rights on their territory or subject to their jurisdiction that arise from the effects of climate change.⁴² In addition, regional jurisprudence has further clarified that States have the obligation to relocate persons affected by

³⁹ Ibid, para 4.

⁴⁰ CAA de BORDEAUX, 2ème chambre, 18/12/2020, 20BX02193, 20BX02195, *Inédit au recueil Lebon*, <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042737615> For English article on the case, please see: <https://www.climate-refugees.org/spotlight/2021/1/15/french-court>

⁴¹ There is a long list of rights that should be protected during displacement and with the view to ensuring the solution of displacement situations. The UN Guiding Principles on Internal Displacement (1998), and particularly Principle 8 and Sections III to V, provide a list of the rights that may be affected during and after displacement. OHCHR, Report of the Representative of the Secretary-General, UN Doc. E/CN.4/1998/53/Add.2 (11 February 1998); and ICCPR Article 12.

⁴² ECtHR, *Budayeva and others v. Russia*, 20 March 2008, App. No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, paras 129, 131, 147-156.

environmental degradation.⁴³ This country-driven approach is emphasized and promoted by the Paris Agreement, for example.⁴⁴

In the case of *Ioane Teitiota v. New Zealand*, the Human Rights Committee noted New Zealand's Immigration and Protection Tribunal and Supreme Court decision:

*"[...] In particular, the Tribunal found that there was no evidence that: (f) the Government of Kiribati had failed to take programmatic steps to provide for the basic necessities of life, in order to meet its positive obligation to fulfill the author's right to life. The Tribunal observed that the Government of Kiribati had taken steps to address the effects of climate change, according to the 2007 National Adaptation Programme of Action submitted by Kiribati under the United Nations Framework Convention on Climate Change."*⁴⁵ (Para 9.6)

The observation makes clear that States are responsible for redressing any violations attributable to their failure to adopt an adequate policy framework to prevent displacement - including compensation.⁴⁶

International Cooperation

International cooperation is an obligation with regards to the realization of human rights in other States. Such obligation has been reinforced through mechanisms such as the Committee on the Rights of the Child, which affirmed that:

*"States parties have an obligation to cooperate with one another in the promotion of respect for, and observance of, human rights... States that lack the resources needed to implement the rights enshrined... are obliged to seek international cooperation, be it bilateral, regional, interregional, global... States parties with resources for international cooperation have an obligation to provide such cooperation with the aim of facilitating the implementation of... rights in the recipient State."*⁴⁷

As a global phenomenon, migration requires international, regional, and bilateral cooperation and dialogue, even more so when it relates to climate change, another global phenomenon. For example, in the context of climate change related migration, cooperation can include hosting, at least temporarily, environmental migrants in the event of extreme environmental degradation in which their country of origin has no capacity to cope with further internal displacement or relocation efforts. This logic also derives from the duties States have under International Humanitarian, Refugee and Human Rights Laws in terms of rights protection.

⁴³ EctHR, *Fadeyeva v. Russia*, 9 June 2005, App. No. 55723/00, sections 122, 123; EctHR, *Dubetska and Others v. Ukraine*, 11 February 2001, App. No. 30499/03, para 155; IACtHR, *Sawoyamaxa Indigenous Community v. Paraguay*, Ser. C, No. 146 (2006) (Merits, Reparations and Costs).

⁴⁴ Paris Agreement, UN Doc. FCCC/CP/2015/L.9 (adopted 12 December 2015, entered into force 4 November 2016).

⁴⁵ *Ioane Teitiota v. New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, para 9.6, available at: <https://www.refworld.org/cases,HRC,5e26f7134.html>

⁴⁶ *Ibid*; and African Union Convention for the protection and assistance of internally displaced persons in Africa (Kampala Convention), art. 12, (adopted on 23 October 2009) UNTS No. 52375.

⁴⁷ Committee on the Rights of the Child, General Comment No. 19 on Public Budgeting for the Realization of Children's Rights, UN Doc. CRC/C/GC/19 (20 July 2016), paras 35, 65, and 75.

In a 2017 resolution, the Human Rights Council called upon States to cooperate and assist developing countries vulnerable to the adverse effects of climate change as well as migrants displaced across international borders.⁴⁸

In December 2018, Heads of State and Government and High Representatives adopted the Global Compact for Safe, Orderly and Regular Migration (GCM) in order “to make an important contribution to enhanced cooperation on international migration in all its dimensions”.⁴⁹ Even though the GCM is a global policy instrument, it is anchored in international law, thus serving as a guiding operational bridge between international law standards on migration, and national level law, policy, and practice.

“We [States] acknowledge our shared responsibilities to one another as States Members of the United Nations to address each other’s needs and concerns over migration, and an overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status, while promoting the security and prosperity of all our communities.”⁵⁰

The GCM, as recognized by States during its adoption, “is a milestone in the history of the global dialogue and international cooperation on migration.”⁵¹ The GCM recognizes the adverse impact of climate change and environmental degradation on migrants, and under its Objective 2, States committed to “minimize the adverse drivers and structural factors that compel people to leave their country of origin”.⁵² GCM Objective 2 also identifies measures to take amidst “natural disasters, the adverse effects of climate change, and environmental degradation”, including among others, measures to “promote cooperation with neighbouring and other relevant countries to prepare for early warning, contingency planning, stockpiling, coordination mechanisms, evacuation planning, reception and assistance arrangements, and public information”.⁵³

At the national level, some States adopt measures of admission and stay based on human rights and humanitarian ground to provide protection to environmental migrants. For example, Argentina granted *ad hoc* access to residence and suspended the deportation of Haitians in 2017 due to the repeated natural disasters occurring in Haiti.⁵⁴ The 2017 Migration Law of Brazil grants a temporary residence permit for humanitarian reasons to people from any country enduring environmental disaster.⁵⁵

⁴⁸ UN Human Rights Council, Human rights and climate change, UN Doc. A/HRC/35/L.32 (June 2017), para. 6.

⁴⁹ UN General Assembly, A/RES/73/195 (11 January 2019), Global Compact for Safe, Orderly and Regular Migration (Resolution adopted by the General Assembly on 19 December 2018), p. 1, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195

⁵⁰ *Ibid.*, Shared Responsibilities, para. 11.

⁵¹ *Ibid.*, para. 6.

⁵² *Ibid.*, para. 18.

⁵³ *Ibid.*, para. 18(j).

⁵⁴ OHCHR, “Admission and Stay Based on Human Rights and Humanitarian Grounds: A Mapping of National Practice”, December 2018, p. 6, https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DLA_Piper_Study.pdf

⁵⁵ *Ibid.*, p. 10.

Conclusion

While at present there is no dedicated legal instrument that specifically protects environmental migrants, existing principles under customary international law and international human rights instruments bind States to respect, protect, and fulfil the rights of all peoples without discrimination, including all environmental migrants under their jurisdiction or effective control. To date, there is no international protection provided by a universal instrument – which is a legal gap remaining that affects all persons who are forced to migrate because of environmental factors and climate change. Nevertheless, while rights of environmental migrants are protected under international human rights law, in conjunction with other branches of international law, there remain gaps in the domestication and implementation of these obligations by States.

It is important to note that other branches of law, especially those applicable in the context of disasters, can contribute to the development of a clearer definition of the content of human rights obligations of States, mainly regarding forced movements. While human rights law is the most adapted field of international law to deal with the issue of rights protection of environmental migrants, it must be considered together with other branches of law, such as disaster response law, climate change law, international humanitarian law and refugee law.

Environmental migrants often flee untenable conditions and face similar conditions to refugees. However, there remains a lack of global political will to develop new international instruments, or amend existing ones, specifically addressing international protection of environmental migrants, suggesting that an environmental migrant-specific convention may not be feasible in the near future.⁵⁶ One of the roadblocks for a new convention on the protection of environmental migrants, among others, is the need to define the scope of its application - who exactly would qualify as an environmental migrant? Building a consensus on the definition of this complex and intersectional category could be difficult given the diverse drivers of environmental migration.

States have human rights obligations and must ensure that any measure or legislation that governs or affects migration is in line with their international law responsibilities, in particular the principle of *non-refoulement*, and does not adversely affect the full enjoyment of the human rights of environmental migrants.

Importantly, while the Human Rights Committee did not find that Ioane Teitiota fell within any existing protections provided in law, it did outline a pathway for future environmental migrants. The Committee determined that “countries may not deport individuals who face climate change-induced conditions that violate the right to life”⁵⁷, which upholds the principle of non-refoulement under international human rights law.

⁵⁶ There are several articles on this topic, for further reading on the protection gap in international human rights law we suggest reading: Bonnie Docherty and Tyler Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees”, *Harvard Environmental Law Review* (Vol. 33 No.2), 2009; Benoit Mayer, “The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework”, *Colorado Journal of International Environmental Law and Policy* (Vol.22 No.3), 2011.

⁵⁷ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 (26 November 2013), para 27, <https://forms.justice.govt.nz/search/Documents/pdf/>

In practice, the principle of *non-refoulement*, linked to the right to life, the right to health, prohibition of torture, cruel, inhuman, or degrading punishment and irreparable harm can be interpreted to include the specific vulnerabilities faced by environmental /climate migrants, and could provide for their international protection on human rights or humanitarian grounds on a case-by-case basis. To meet their obligations under these legal frameworks, States could facilitate migration in a manner that promotes dignity and addresses the specific human rights protection needs of environmental migrants.

As the number of environmental migrants grows linked to the effects of climate change, it will become increasingly unsustainable for the international community to fail to address this global challenge. As the climate changes, so too will the needs of migrant populations around the world. It is up to the international community to define the future for those moving because of environmental stress and climate change.

While there is not currently a dedicated legal instrument securing international protection for environmental migrants specifically, the moral imperative is clear, and legal solutions can be found under international migration law, in particular, under international human rights law and related jurisprudence.

Environmental Migrants: Challenges and Opportunities for the Protection of their Rights

ACTIVITY PACKET

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Instructions

This activity is designed to enable the target audience to understand the pathways for protection open to environmental migrants and their rights. A series of questions based on the initial **core scenario** is designed to illuminate relevant international legal considerations regarding environmental migration and protection. The steps are as follows:

Step 1: Split into Two Groups

Either prior to the training, or at the beginning of the training, allow the participants 5 minutes to familiarize themselves with the core scenario.

Participants will be divided into two groups: **Asylum Seeker** and the **Receiving State**.

The **Asylum Seeker** group represents the petitioner in this scenario. Their role is to use the facts given to them to identify the best arguments that an individual can make in order to improve their chances of receiving asylum/refugee status in the receiving State.

The **Receiving State** group decides whether or not to extend protection to the petitioner within its territory or subject to its jurisdiction. Their role is to use the facts presented in order to make a determination on legal obligations towards the asylum seeker.

Facilitator notes: The motivation of the receiving State can be:

- A. To lawfully exclude as many migrants as possible
- B. To aim to fulfill the highest level of protection to migrants.
- C. To find a middle-ground approach that suits the interests of the State where the training takes place, another particular State, or an imagined one.

Step 2:

Both groups will be given the same sample scenario, and will be asked 13 questions that adjust the facts of the case to explore different considerations for protection. When each successive question is presented, each group will be given 10 minutes to discuss the details of the question. The **Asylum Seeker** group will then have 5 minutes to present their case for asylum as an environmental migrant in the **Receiving State**. After this, the **Receiving State** will be given 10 minutes to deliberate and will subsequently have 5 minutes to deliver their determination.

The facilitator may adapt this step based on the level of expertise of participants, as well as the length of the training session.

Material

Presentation

Facilitators will present to participants the information needed to understand the challenges in the protection and rights of environmental migrants before embarking on the activity.

Summary Packet

The summary packet includes core information which can support the participants in crafting their answers to the questions. It is aligned with the PowerPoint presentation.

Activity Packet

Each participant will be provided with an activity packet that consists of guiding questions to measure their understanding of the material found in the presentation. The questions are cumulative, and it is therefore important to read and answer them in the order they are written. Depending on the purpose and time available, the facilitator can choose which questions to use (either all or some following the proposed order).

Glossary

The glossary consists of key terms from the presentation and summary, as well as additional terms and past cases that may be relevant when answering the questions.

Learning Objectives

After conducting this activity, participants will be able to:

- Explain the climate change and migration nexus, i.e., how climate, environmental degradation, and disasters increasingly interact with the drivers of migration.
- Expand knowledge of the provisions found in international human rights law that could potentially provide for the protection of environmental migrants, including formulations of the principle of *non-refoulement*, and other provisions related to public emergencies.
- Develop an understanding of the 1951 Refugee Convention and its Protocol, and deepen their knowledge on the limitations of the definition of *refugee* in the context of environmental migrants. In doing so, participants will deepen their knowledge of the vulnerabilities and legal considerations surrounding the protection of environmental migrants in certain categories.
- Explain how existing international legal instruments provide protection for environmental migrant even though no specifically dedicated instrument has been developed.
- Apply their understanding of relevant jurisprudence, international human rights treaties, and customary law in simulations of potential environmental migration scenarios.

Core Scenario

Due to the 2007 Tsunami, Mr. X and his wife left Sipania (a low-income small island developing State) and went to Capstonia (a high-income State) in search of work. They remained in Capstonia beyond the expiration of their migrant permits in 2010. Mr. X and his wife had two children while living in Capstonia. In 2012, after being served a deportation order, Mr. X applied for asylum on the grounds that Sipania is facing steadily rising sea levels because of climate change. Mr. X claims that Sipania was unlivable, pointing to coastal erosion and saltwater contamination in the freshwater supply, as well as housing degradation and scarcity that is causing violent land disputes.

A Capstonian Immigration Officer denied Mr. X's application on the grounds that his claim was not based on a protected status, and he presented no evidence of imminent personal risk. On appeal to the Immigration and Protection Tribunal, Mr. X was once again denied.

Sipania and Capstonia have ratified all of the core international human rights instruments and the 1951 Refugee Convention and its all relevant optional Protocols.

Guiding Questions

Question 1

Is the 1951 Refugee Convention and its Protocol applicable in this case? Why or why not?

Suggested Answer:

No, not based on the facts as presented. Mr. X doesn't meet any of the defined purposes for persecution under the Convention. The 1951 Convention relating to the Status of Refugees defines a person as a refugee who has crossed an international border "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." In this scenario there is no indication of persecution itself, from either the government or third parties, that the government would have an obligation to prevent.

Mr. X has not expressed any political opinion in relation to climate policy, and does not appear to be a member of a particular social group, but rather a person in the same circumstances as the rest of the general population in Sipania. The facts also fail to demonstrate any particular risk to Mr. X of imminent or future persecution upon return.

In some regional contexts, for example in Africa (1969 OAU Convention) and Latin America (1984 Cartagena Declaration), the refugee definition can extend to persons fleeing "events seriously disturbing public order." Protection through the 1951 Refugee Convention may also be possible in contexts in which the adverse effects of climate change interact with armed conflict and violence. Therefore, regional frameworks should always be considered.

Facilitator Notes:

See questions 6 and 8 to expand on this and possibly bring Mr. X back into the protections of the 1951 Convention.

Question 2

The domestic court has determined that the petitioner, Mr. X, does not meet the definition of a refugee based on the 1951 Convention and the petition does not meet existing domestic legal standards for refugee qualification. Given this, are there any other international human rights instruments that you think can be applicable?

Suggested Answer:

There are other avenues that Mr. X can pursue beyond the protection options offered by refugee law. Given that Sipania and Capstonia have ratified all of the core International Human Rights Law instruments, applicants would be able to bring their complaint to a regional or international human rights mechanism, such as a treaty body (e.g. the UN Human Rights Committee or the Committee on the Rights of the Child or any relevant regional mechanism) after she has exhausted all domestic remedies and cannot further appeal her case in Sipania.

There are nine core international human rights law instruments. Given that Mr. X is a woman with two children, was leaving due to violent land disputes, and based on the facts shared, the articles found within the CRC, CEDAW, and ICCPR (and their respective Optional Protocols) may be applicable to her case. So, she could file a petition or communication to one of these committees if the criteria for admissibility are met.⁵⁸

Question 3

Accepting for the time being that she does not qualify as a refugee, is the principle of *non-refoulement* applicable in this case?

Suggested Answer:

Yes, the principle of *non-refoulement* also applies to migrants. The primary protection available would be through the principle of *non-refoulement* as found in international human rights law, or through considerations based on comity/humanity, such as discretionary temporary protected status decisions.

The principle of *non-refoulement* forms an essential protection under international human rights, refugee, and humanitarian law for all without discrimination. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.⁵⁹ The principle is also found in regional instruments (e.g. Inter-American Convention on the Prevention of Torture, the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union).

In considering *non-refoulement* in *Teitiota v. New Zealand*, the Human Rights Committee raised questions in reference to the International Covenant on Civil and Political Rights and reviewed whether there were “substantial grounds for believing that there (was) a real risk of irreparable harm.”⁶⁰ It determined that to establish substantial grounds for believing there is a real risk of irreparable harm there must exist a substantial impact on a particular protected right.⁶¹

Facts from the core scenario might trigger *non-refoulement* based on Mr. X’s right to life, her right to be free of cruel, inhumane, or degrading treatment, or punishment and any potential irreparable harm she might suffer from restrictions or derogations to her other rights:

- Unlivable conditions (coastal erosion, lack of freshwater, food insecurity)
- Violence (land disputes)

⁵⁸ For more information on the Human Rights Bodies’ Complaints Procedures, please consult:

<https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#proceduregenerale>

⁵⁹ Global Compact for Migration, *Principle of Non-refoulement*

<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

⁶⁰ *Ioane Teitiota v. New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016, UN Human Rights Committee, 7 January 2020.

⁶¹ *Ibid.*

Facilitator Notes:

There are examples of regional mechanisms that provide additional multilateral protections to member States - please see the glossary/summary and take note if they could be applicable.

Question 4

Mr. X has two children but applied as a single petitioner. Are there any international legal standards that change the likelihood of Mr. X's case succeeding if she filed a complaint with her children as victims?

Suggested Answer:

Protections for the rights of children are found in international human rights law, and codified within the CRC. If Mr. X petitioned to the UN Committee on the Rights of the Child over articles found in the Convention, it may strengthen her case for protection.

Article 9 stipulates that "1. States Parties shall ensure that a child shall not be separated from his or her parents against their will" unless it is determined that "such separation is necessary for the best interests of the child."

Non-refoulement "prohibits States from removing individuals, regardless of migration, nationality, asylum or other status, from their jurisdiction when they would be at risk of irreparable harm upon return, including persecution, torture, gross violations of human rights or other irreparable harm."⁶²

A general comment on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that "States shall not reject a child at a border or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm."⁶³

Moreover, treaty bodies such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child have developed jurisprudence and general comments providing further interpretation on the protection of the rights of the child, including migrant children. For example, on the right to health, reading the ICESCR and CRC in conjunction, a State has an absolute and immediate minimum core obligation to provide basic health care to children regardless of available resources, whereas they only have an absolute and immediate minimum core obligation to provide emergency health care to adults regardless of available resources. Also, in its General comment No. 14, the Committee on Economic, Social and Cultural Rights further clarified States' legal obligations to refrain from denying or limiting equal access to preventive, curative, and palliative health care services to migrants in an irregular situation.

⁶² Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3- CRC/C/GC/22, 16 Nov 2017, para, 45.

⁶³ *Ibid.*, para, 46.

Facilitator Notes:

Questions to ignite discussion: *What is a real risk? What might constitute irreparable harm to a child? Are there any circumstances in Capstonia that might not rise to a level of risk that would result in the violation of Mr. X's rights, but might violate the rights of a minor? What might those be? Are there different legal standards set out in the conventions/jurisprudence?*

Question 5

It is now known that Mr. X is a member of an indigenous ethnic minority whose cultural practices and ways of living, including rice farming, are dependent on its native lands in Sipania's remote southern region, called region ABC. This ethnic minority and their land are very often the target of violence and severe discriminatory acts by another rival ethnic group. There is enough evidence that points to Sipania not been able to protect this indigenous ethnic minority from the discriminatory acts of the rival group.

What new rights/obligations can now be triggered or applied to Mr. X's case?

Suggested Answer:

There are now further considerations to make regarding the principle of *non-refoulement*. Applied through the lens of Mr. X being a member of an ethnic minority, relevant questions include whether Mr. X can be returned to region ABC at all, since the issues in ABC affect not just her as a single person but her specific ethnic group, their way of life and safety.

As Mr. X's ethnic group is indigenous to Sipania, there is analogous jurisprudence suggesting that Mr. X may have a stronger case. In *Sawoyamaza Indigenous Community v Paraguay 2006*, for instance, the Inter-American Court of Human Rights determined that "Paraguay had an obligation to find a suitable area to relocate indigenous communities who had been displaced from their ancestral lands."⁶⁴ Article 8 of the Declaration on the Rights of Indigenous Peoples obligates States to redress deprivations of indigenous culture or lands and territories.

Facilitator Notes:

Question to ignite discussion: *What would be the case if this ethnic group faces discrimination or persecution and Sipania failed to protect them? Does this bring Mr. X back within the protections of the 1951 Refugee Convention? Which reason for persecution could be invoked? What more might you need to know? Would Mr. X be safe and survive going back to Sipania? What are some indicators?*

⁶⁴ Taken from <https://www.eschr-net.org/caselaw/2006/case-indigenous-community-yakye-axa-v-paraguay-eng>, case citation: IACHR Series C no 125 (Official Case No) IHRL 1509 (IACHR 2005) (OUP reference).

Question 6 (a)

5 years ago, at the last climate forum hosted in Sipania, Sipania pledged itself to developing mitigating strategies to combat the intensifying environmental degradation occurring on its territories.

Since then, Sipania has failed to implement any programs to mitigate the effects of long-term environmental degradation that goes beyond emergency response. Does this failure to intervene trigger any special protections?

Suggested Answer:

Possibly, but it depends on the group's ability to argue that Sipania neglected to take the appropriate steps. While Mr. X has a protected right to life under Article 6 of the ICCPR, the existing jurisprudence regarding slow onset degradation affecting right to life has not yet been a successful argument. In the case *Teitiota vs. New Zealand*, the court ruled that while it is possible for environmental degradation to create an opening for the 1951 Refugee Convention, it did not find that the government of Kiribati had failed to take the appropriate steps to protect its citizens in this case. If it is possible to prove Sipania's inability to meet any of the promises made in its climate forum in 2016, then Mr. X could be protected under Article 6 of the ICCPR.

Question 6 (b)

What if environmental degradation was not slow onset, but triggered by a sudden mudslide, an occurrence that is becoming more frequent in Sipania?

Suggested Answer:

Based on these facts, Mr. X may have more success in her claim if she can show that Sipania neglected to address a risk that was becoming increasingly more dire. In the case *Öneryıldız v. Turkey*, the European Court of Human Rights ruled that Turkey had violated Articles 2 (Right to life), 8 (Right to respect for private and family life), and 13 (Right to an effective remedy) of European Convention on Human Rights and was responsible for the deaths of the applicants' close relatives and the destruction of their property in response to a methane explosion near a rubbish tip. The Court ruled that Turkish authorities should have understood the substantial risk to the people living near the rubbish tip and therefore had neglected their responsibility under Article 2. Furthermore, the Court ruled that authorities had failed to make proper adjustments to help avoid property destruction and had therefore violated Article 1 (Protection of property) of Protocol No. 1. Lastly, the Court ruled that the lack of appropriate and time-sensitive compensation to the applications also violated Article 13 of the European Convention.⁶⁵

Facilitator Notes:

Questions to ignite discussion: *Can/should this interpretation extend to those living in areas with foreseeable climate disaster risks such as volcanoes, tsunamis, drought? Why or why not? What is within a State's control? How can these obligations fit into a non-refoulement analysis? Is the situation concerning Mr. X similar to that of Öneryıldız, why or why not?*

⁶⁵ *Öneryıldız v. Turkey*, App No. 48939/99 (ECtHR, Judgment of November 2004).

Question 7 (a)

New information has come to light that the Sipanian Government has intentionally refused to build seawalls and dikes in region ABC only, thus intensifying the environmental degradation and its effects on Mr. X's minority group specifically. It is known that the Sipanian government has persecuted this group before.

Would this knowledge change the determination of the receiving State in relation to Mr. X?

Suggested Answer:

This has the potential to change the decision of the receiving State, but this hinges on the information about Sipania's ability to build infrastructure in ABC or take any other action for their protection. The rights of minority communities are protected under a variety of human rights treaties, but rarely have environmental complications been used to argue discrimination. There are avenues to pursue under Articles 2 and 26 of the ICCPR, which guarantee freedom from discrimination based on race, color, sex, language, religion, origin, or other status. The Convention on the Elimination of Racial Discrimination may also be an avenue, see glossary for concluding observations made by the Committee on the Elimination of Racial Discrimination.

Facilitator Notes:

Was the decision/omission discriminatory or did it fit into a pattern of failure in the fulfillment of their positive obligations towards the rights of the people in the region? What would that determination change? If it was not discrimination, is it still a failure of the State in its positive obligations to protect the life of its residents? Would it be appropriate to return Mr. X to another part of the country?

Question 7 (b)

Are the 1951 Refugee Convention and its Protocol now applicable?

Suggested Answer:

If the severity of the result of the deliberate negligence in building seawalls and dikes in region ABC amounts to conditions similar to **persecution**, and the claimant can show that it is based on ethnicity or membership in a particular social group, then yes, the 1951 **Refugee Convention** would apply.

Question 8 (a)

The Capstonian Court ruled that Mr. X's situation was not materially different from anyone else's in Sipania. The Court did not take into account that Mr. X has an underlying health condition that severely weakens her immune system. She has been hospitalized many times and doctors in Capstonia have told her that if she continues to drink contaminated water she is at risk of serious illness. If returned to Sipania, Mr. X, like other inhabitants, would likely have to drink pond water due to contamination of water systems caused by soil erosion and salinization.

Can Mr. X petition her case to remain in Capstonia by appealing to her right to life? What would need to change for her to successfully petition for her right to life?

Suggested Answer:

Mr. X may be able to petition for protection and to remain in Capstonia by appealing to her right to life, but only under specific circumstances and on human rights or humanitarian grounds. To petition under the right to life, Mr. X must demonstrate that drinking contaminated water would pose a threat to her life or severely decrease quality of life. However, if the drinking water quality does not pose a threat to Mr. X's life, her petition for asylum or another type of protection based on her right to life will likely be denied.

Participants should draw from the handout and refer to the right to life and irreparable harm to determine if this context fits the criteria of violating one's right to life under international human rights law.

Question 8 (b)

How would your considerations change if Mr. X petitioned her case to remain in Capstonia by appealing to her right to health?

Suggested Answer:

Appealing his right to health is unlikely to reach the needed threshold to trigger the principle of *non-refoulement*. In order to trigger *non-refoulement* obligations, Mr. X will need to prove that the medical facilities in Sipania cannot adequately treat Mr. X's medical condition, thus sending him back, where she would die without this treatment, would be a violation of his right to life or would subject him to irreparable harm.⁶⁶

However, if medical facilities in Sipania can adequately treat Mr. X's medical condition, it is less likely that her petition will be approved.

⁶⁶ OHCHR, The principle of non-refoulement under international human rights law, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>; and Human Rights Committee, C v Australia, No. 900/1999; ECtHR, *Paposhvili v Belgium*, 41738/10, 13 December 2016, IACtHR, Advisory Opinion OC-21/14, 19 August 2014, para 229.

Question 8 (c)

If Capstonia wanted to deny Mr. X asylum, what assessments does Capstonia have to make about the conditions in Sipania?

Suggested Answer:

Capstonia will have to examine the quality and adequacy of Sipania's medical facilities to treat Mr. X. Capstonia will also want to determine whether Sipania is taking necessary and adequate measures to mitigate the environmental degradation occurring in its territories. If mitigation is in progress or seems likely, Capstonia may very well decide that Mr. X does not face imminent danger to his health or life. If, however, it is determined that Sipania is systematically neglecting its obligations to mitigate environmental degradation, it might be argued that, with no possibility of relief in the near future, sending Mr. X to Sipania would be subjecting him to irreparable harm.

In the case of *CAA de BORDEAUX*, a Bangladeshi man was granted approval to stay in France because sending him back to Bangladesh without adequate medical equipment to treat his condition, combined with Bangladesh's continued struggle with air pollution, would be sentencing him to imminent death. *Paposhvili v. Belgium* is another case that might be relevant here. And the case of *Teitiota v. New Zealand* for assessment of the State's obligations to mitigate effects of environmental degradation on its citizens.

Question 9

How would your considerations change if the subject of this case was a woman (Mr. X is now Ms. X)? How are the effects of this specific environmental degradation case felt differently by women? What additional facts might inform the receiving State's decision?

Suggested Answer:

The most obvious and important change to the situation now that the asylee is a woman is that CEDAW may now be a vehicle for Ms. X to apply for asylum – the gendered effects of climate change in Sipania may have created conditions by which Ms. X's rights are sufficiently suppressed for Capstonia to allow Ms. X to remain.

Facilitator Notes:

Gendered effects of climate change could include (but aren't limited to):

- *Barriers to women's health care options due to environmental degradation and other effects of climate change.*
- *Discrimination in access to resources and livelihoods based on gender, exacerbated by climate change and/environmental degradation.*
- *Climate change-induced barriers to education which disproportionately impact women and girls.*

Question 10

Suppose Mr. X is 75 years old. How are the effects of this specific environmental degradation case felt differently by older persons? How does this case change if Mr. X is an elderly woman, what special protections are applicable? What could be argued in terms of the rights of older persons?

Suggested Answer:

Older persons are at a heightened risk when it comes to climate-related threats, due to an increased likelihood of deteriorating health and related factors that comes with age. Factors such as income, education, social support network, and access to social services, among others, will determine how well an individual will cope with climate-related threats. It has been found that “when older persons are displaced in emergencies, some face disproportionate difficulties in returning to their homes and in accessing restitution for damage, both because of physical factors and because of ageist exclusion from humanitarian aid for rebuilding purposes.”⁶⁷ Moreover, “when older people do move, migration and displacement in later life can be particularly traumatic, due to severed social ties and lack of facilities, rights and protection in unfamiliar new environments.”⁶⁸ The Human Rights Council and the Committee on Economic, Social and Cultural Rights have several reports and comments specifically relating to the rights of older persons and also in the face of climate change.⁶⁹

Facilitator Notes:

What changes if the Sipanian government is neglecting to relocate elderly communities? Overcrowding (like in the Teitiota case) can lead to increased spread of infectious diseases where older persons are particularly vulnerable? What other circumstances could amount to discrimination specifically against older persons? What about older persons in indigenous communities, where transfer of knowledge and cultural survival is often passed down from the Elders?

- The Universal Declaration of Human Rights (which is generally considered customary international law): Article 25(1): everyone has the right to security and a standard of living adequate for the health and well-being of himself and his family.
- ICESCR: right to work and right to just and favorable conditions of work (Articles 6-7), right to social security (Article 9), adequate standard of living (Article 11), highest attainable standard of physical and mental health (Article 12).
- Committee on Economic, Social and Cultural Rights General Comment No.6 on “the economic, social and cultural rights of older persons.”
- Article 26 of the ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, origin, or other

⁶⁷ UN General Assembly, UN DOC A/HRC/47/46, Analytical study on the promotion and protection of the rights of older persons in the context of climate change, p. 6, 30 April 2021, <https://undocs.org/A/HRC/47/46>

⁶⁸ Ibid.

⁶⁹ Ibid.; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, 8 December 1995, E/1996/22; UN Principles for Older Persons Adopted by General Assembly resolution 46/91 of 16 December 1991. For more information, consult:

<https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Reports.aspx> and
<https://www.ohchr.org/en/issues/olderpersons/pages/olderpersonsindex.aspx>

opinion, national or social origin, property, birth or other status.” Age can also be considered as other status.

- Convention on the Rights of Persons with Disabilities: Article 8(b) to combat stereotypes and prejudices relating to persons with disabilities, including those based on sex and age, age-sensitive assistance by States to ensure freedom from exploitation (Article 16.2); accessibility (article 9); independent living (article 19); personal mobility (article 20); habitation (article 26).

Question 11

As a consequence of the environmental degradation in Sipania, violent land disputes are compounding existing inequalities in the country, and have led to serious injury and deaths. If Mr. X was in imminent danger of irreparable harm upon her return, what provisions exist to protect him from forced return?

Suggested Answer:

The principle of *non-refoulement*, a customary international law norm, is commonly applied when there exist real risks to one’s life, limb, and/or dignity in cases of removal to another country. Besides, ICCPR article 6 [right to life] and article 7 [prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) can provide protections. Under the ICCPR, States have an obligation to refrain from deporting persons from their territory where there exist substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the ICCPR. CAT also prohibits refoulement or extradition of a person to another State where there is good reason to believe they would be in danger of being tortured (Article 3).

*Note: At the regional level, article 5 of the American Convention on Human Rights, article 3 of the European Convention on Human Rights, and article 5 of the African Charter on Human and Peoples Rights also prohibit torture and inhuman or degrading treatment or punishment, which provides a ground of providing protection for those who would face to these irreparable harms if returned.⁷⁰

- ICCPR, right to life (Article 6), prohibition of torture and other cruel, inhuman, or degrading treatment or punishment (Article 7).
- CAT Article 3: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
- European Convention on Human Rights, Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

⁷⁰ Organización de los Estados Americanos (OEA), Convención Americana sobre Derechos Humanos “Pacto de San José de Costa Rica”, Art. 5, 22 Noviembre 1969; Council of Europe, “Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as Amended by Protocol No. 11,” Art. 3, Council of Europe Treaty Series 155, Council of Europe, 1988; Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”), Art. 5, 27 June 1981.

However, it should be noted that the principle of *non-refoulement* is applied when there are real risks to one's life, limb, and/or dignity in cases of removal to another country. If the petitioner failed to prove the existence of such a risk, the petition will be rejected. In *Teitiota v. New Zealand* case, the Human Rights Committee supported the New Zealand authority's statement that there was no evidence that the author had faced a real risk of suffering serious physical harm from violence linked to housing, land, or property disputes, concluding that Teitiota's removal to Kiribati did not violate ICCPR Article 6.

Facilitator Notes:

What if Mr. X claims only general risks in Siania? Or what if Mr. X is more vulnerable to environmental degradation compared to other Sianians, and there is a risk specific to Mr. X?

*Note: A dissenting opinion of the *Teitiota v. NZ* case argued that the threshold in assessing risk to a person expelled or otherwise removed should not be too high or unreasonable, concluding that Teitiota faces a real, personal, and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati.

What if Siania has a plan to take measures to mitigate future environmental degradation? Can this influence MR. X's application?

*Note: In the ruling of *Teitiota v. NZ*, the Human Rights Committee took account of the climate change mitigation efforts already underway in Kiribati. It was ultimately decided that these efforts were enough to combat Teitiota's risks. However, one dissenting opinion argued that even if authorities take adaptive measures, it is clear that the situation of life continues to be inconsistent with the standards of dignity for Teitiota.

Question 12

A decision by the European Court of Human Rights in 2016 expanded the scope of Article 3 of the European Convention on Cruel, Inhuman or Degrading Treatment or Punishment. The Court wrote:

“Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a *serious, rapid and irreversible decline* in his or her state of health resulting in intense suffering or to a *significant reduction in life expectancy*.”⁷¹

- a. Assume that Capstonia is a State Party to the European Convention on Human Rights and accepts the jurisdiction of the European Court of Human Rights. In your group, come up with a scenario in which this scope could be applied directly to environmental causes.
- b. Present your scenario to the other group(s), do they agree that the scenario meets this threshold of Cruel, Inhuman or Degrading Treatment or Punishment?

Facilitator Notes:

Participants should draw from the cases of CAA de Bordeaux, Teitiota v. New Zealand Paposhvili v. Belgium, Sufi and Elmi v. United Kingdom, and other relevant cases to come up with a scenario that would adopt the above expanded scope.

- *What other illnesses besides asthma could be directly connected or a cause of environmental factors? Encourage them to think of the effects of pollution on health.*
- *Individual, or group of individuals, all affected by the same thing? For example, poisoning of certain water sources, etc.*
- *Play with the aspect of preexisting condition versus condition directly caused by environment - how environment can exacerbate pre-existing condition.*
- *Think about the treatment aspect of it - does Sipania have the capacity to treat the illness?*

⁷¹ European Court of Human Rights, *Paposhvili v Belgium*, 41738/10, 13 December 2016.