

# BRIEF 4: LEGAL FRAMEWORKS AND CHALLENGES

## OUR KEY MESSAGES

- Considering the difficulty of establishing clear categories and the complexity of the phenomenon, the search for legal solutions should be based on the identification of relevant individuals' rights and corresponding States' obligations.
- While the 1951 Refugee Convention is not applicable to environmentally driven movements, several existing legal principles and branches of law can be applied to environmental migration, including provisions under human rights law, as well as principles of international humanitarian law and of environmental law.
- Given the sensitivity behind both migration and environmental management, consensus among States over a single binding instrument may be hard to reach. In this context, a soft-law approach may be initially more viable, taking the example of the UN Guiding Principles on Internal Displacement.

## KEY IOM RESOURCES

- ➔ [Human Rights, Climate Change, Environmental Degradation and Migration: A New Paradigm \(2014\)](#)
- ➔ [International Migration Law No. 25: Glossary on Migration \(2011\)](#)

## What are the main challenges around legal terminology, categorization and definitions?

The issue of a legal framework to address environmental migration is a widely debated topic. There is no internationally accepted legal definition or specific status for people on the move due to environmental factors, and no legal instrument dedicated specifically to this issue. As a result, ensuring the protection of affected individuals seems challenging in the absence of one instrument that identifies the applicable rights and corresponding States' obligations tailored to the specificity of environmental migration. This has led to strong calls for international efforts to create a specific legal status for environmental migrants.

## Why is it difficult to draft an international legal instrument specifically applicable to environmental migrants?

The complexity of the phenomenon and diversity of individual situations makes legal codification, which must be guided by clear-cut categories, particularly difficult. Categorizing environmental migrants for the purpose of identifying the applicable legal instrument or specific provisions is arduous. Indeed, the causes behind the decision to move are seldom clear-cut: people migrating in the context of slow-onset processes of environmental degradation usually move for a variety of reasons, where environmental stress is just one of the factors. Even in the case of rapid-onset disasters associated with natural hazards, which seem to act as immediate triggers of displacement, the underlying causes of risk, vulnerability and displacement are in fact far more complex than may appear.

Contextual factors such as poverty, conflict, demographics or governance often influence a decision to move. In the same way, individual or household characteristics and (perceptions of) opportunities elsewhere also play a role in such scenarios. A clear categorization by cause would therefore be difficult to make in most of the cases.

A clear typology of the movement is also difficult to make: the distinction between forced and voluntary movement is often blurred, and the duration of the movement is rarely fixed. Categorization by distance or destination is less complex, insofar as it is objectively possible to determine whether the displacement is internal or if an international boundary has been crossed.

While the causes and type of movements are difficult to define through fixed categories, the type of environmental phenomenon and the impact on affected migrants is key in determining the type of response needed, and the States' obligations involved: the situation of displaced individuals and response needed in the context of a sudden-onset disaster are likely to differ, at least in part, from those applicable in the context of slow-onset disasters or slow processes of environmental degradation and/or threat.

These categorization issues constitute a great challenge in terms of defining a specific legal status for environmental migrants at the international level.

## **Can the refugee status be applied to environmental migration at large?**

People moving in the context of environmental change are not recognized as "refugees" under the 1951 Geneva Convention Relating to the Status of Refugees, since natural disasters or environmental degradation do not constitute a form of persecution as per the Convention criteria (fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion).<sup>1</sup> The terms *environmental refugee* and *climate change refugee* are therefore misleading and inappropriate, and there is a consensus among concerned agencies, including the International

Organization for Migration (IOM) and the Office of the United Nations High Commissioner for Refugees (UNHCR), to avoid their use, as they could potentially undermine the international legal regime for the protection of refugees. It is worth noting, however, that the 1951 Convention may apply in some specific cases where environmental and political factors are combined and the 1951 Convention criteria are met. In such cases, the affected persons could benefit from protection under the 1951 Convention, albeit not specifically because of environmental factors.

## **What legal tools exist for internally displaced persons?**

In the case of internal displacement, the definition set forth in the 1998 UN Guiding Principles on Internal Displacement includes "persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of [. . .] natural or human-made disasters, and who have not crossed an internationally recognized State border."<sup>2</sup>

This definition however does not apply to those who have crossed international borders, or those moving due to slow processes of environmental degradation, or, generally, to those who choose voluntarily to move. While the UN Guiding Principles on Internal Displacement are non-binding, States can decide to integrate the guiding principles in their national legislation and even to grant a specific legal status to internally displaced persons.

## **How can a protection agenda building on existing instruments be framed?**

Considering the difficulty of establishing clear categories of environmental migrants based on the type of factors involved, the search for legal solutions should primarily be focused on identifying relevant rights and on corresponding States' obligations tailored to the specific environmental situation and to the consequences suffered by the affected persons, instead of focusing on the

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1 United Nations, 1951.

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2 United Nations, 1998.

causes or types of movement that too often are not sufficiently clear-cut. Setting the protection of relevant rights of the affected individuals as a final aim would help define States' obligations to ensure an appropriate level of protection of such rights in each specific situation.

The type of environmental event or process can serve as a basis to determine the best response to a given situation: for example, disasters will require a response that is different from long-term planned movements in response to the progressive degradation of the environment. In this respect, the obligations of States towards persons moving as a consequence of sudden-onset events and the persons' corresponding rights can be divided into three phases: before, during and after (refer to Table 4.1). The same division does not apply to slow-onset phenomena, but the types of rights that come into play are similar.

The absence of a specific instrument to protect the rights of environmental migrants and the dispersion of applicable norms in different international law instruments lead many experts to contend that there are gaps in the normative framework to protect environmental migrants.

Indeed, if we consider the concept of protection from the humanitarian perspective, a field in which the concept initially developed,<sup>3</sup> situations not covered by either refugee law or international humanitarian law have been for a long time considered as falling into normative gaps.

Yet, with the development of a universally applicable and all-inclusive human rights framework, the concept of protection evolved and acquired a broader meaning, to encompass the protection of the rights granted to every human being at all times without any discrimination. IOM<sup>4</sup> uses the definition of protection as set forth by the Inter-Agency Standing Committee (IASC): "the concept of protection encompasses all activities aimed at obtaining full respect of the rights of the individual in accordance with the letter and spirit of the relevant bodies of law."<sup>5</sup> Whereas this is a definition developed in the humanitarian context, it can also be applied in the migration context if we interpret the "relevant bodies of law" as encompassing bodies of law that are also applicable to migration in general.

In that sense, protection as understood in the human rights context allows to cover gaps in the protection as identified under the refugee and humanitarian context, since the human rights framework is concerned with the respect for the rights of all individuals and at all times.

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3 Historically, the concept of "protection" developed from specific contexts in which individuals were no longer protected by their States (which under international law assume the primary responsibility to protect persons under their jurisdiction), such as in cases of war or of persons fleeing persecution in their countries. Thus, "protection" was initially conceived in a strict sense as referring to the international protection provided by States, other than the State of nationality, or by international organizations, such as UNHCR, in the case of refugees, and the International Committee of the Red Cross (ICRC), to civilians in times of war.

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4 IOM, 2011.

5 Office for the Coordination of Humanitarian Affairs (OCHA), 2010.

**Table 4.1: Relevant measures and rights to be guaranteed at each phase of a rapid-onset disaster**

Phase	Before (prevention or mitigation)	During (protection and management)	After (return or resettlement and reintegration)
States Measures to be undertaken by	<ul style="list-style-type: none"> <li>• Risk assessment</li> <li>• Collection and dissemination of risk information</li> <li>• Systems of early warnings</li> <li>• Evacuation plans</li> <li>• Community education</li> </ul>	<ul style="list-style-type: none"> <li>• Obligation of the affected State to seek assistance and not to withhold consent to offers of assistance</li> <li>• Application of protection measures</li> <li>• Evaluation of <b>feasible alternatives to displacement</b> and adoption of measures to <b>minimize displacement</b> and its adverse effects</li> <li>• The authorities should seek <b>free and informed consent</b> of those who are displaced</li> <li>• The law should identify the <b>authority that is primary responsible</b> to manage the displacement and adopt all displacement decisions</li> </ul>	<ul style="list-style-type: none"> <li>• The authorities should allow persons displaced or those who moved voluntarily to <b>return voluntarily, integrate in the host community or resettle voluntarily in another part of the country</b></li> <li>• Facilitate the reintegration of the persons upon return or in the place where they are resettled</li> <li>• Facilitate the recovery of land, houses, property and other possessions left behind</li> </ul>
Relevant rights to be guaranteed	<ul style="list-style-type: none"> <li>• <b>Right to life and physical and mental integrity</b></li> <li>• Right to information</li> <li>• Right to full participation in decision-making and in the development of plans</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Right to life and physical and mental integrity</b></li> <li>• <b>Right to health</b></li> <li>• <b>Right to request and to receive protection and humanitarian assistance</b></li> <li>• Principle of non-discrimination</li> <li>• <b>Prohibition of arbitrary displacement</b></li> <li>• Right to respect for family unity</li> <li>• Right to full information on the reasons and procedures for their displacement</li> <li>• <b>Right to safe conditions of displacement/voluntary movement</b></li> <li>• Right to an adequate standard of living</li> <li>• Right to a safe shelter during displacement</li> <li>• <b>Right to freedom of movement</b></li> <li>• <b>Right to seek safety in another part of the country</b></li> <li>• <b>Right to choose one's residence</b></li> <li>• Right to leave the country</li> <li>• <b>Right to protection of properties or possessions left behind</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Application of the principle of non-refoulement and protection from arbitrary expulsion</b></li> <li>• <b>Right to voluntary return, in safety and with dignity</b></li> <li>• <b>Right to be informed of the existing options and to participate in the planning of return</b></li> <li>• Right to an adequate standard of living, including essential food and potable water, appropriate clothing and essential medical services and sanitation</li> <li>• Right to housing</li> <li>• Right to access to employment or livelihood</li> <li>• Right to recover possessions or properties left behind</li> <li>• <b>Right to access to justice and to compensation</b></li> <li>• <b>Property rights</b></li> <li>• <b>Right to education</b></li> </ul>

## What are the already existing relevant principles, rights and instruments?

In the absence of an international instrument dealing specifically with environmental migrants, several existing legal principles and branches of law are applicable to environmental migration, including provisions under international human rights law, humanitarian law, environmental law and nationality law.

### Human rights law

Human rights remain the primary body of instruments that afford protection relevant to those who have to move due to environmental events or processes. Obligations in this respect are primarily borne by the States on the territory of which the individuals find themselves, but the State of nationality also bears a number of obligations towards its nationals abroad.

The principles of universality and non-discrimination in this framework are particularly important as they guarantee protection of human rights of all people regardless of their legal status. Human rights law covers such fundamental rights as the right to life and physical integrity, and other “core” human rights embodied in instruments such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights – right to health, right to an adequate standard of living and family rights.

Of most relevance to migrants, human rights law covers the principle of non-refoulement and right not to be collectively expelled, right to freedom of movement<sup>6</sup> (which applies also to movements to, within, and from camps or shelters), and right to return to one’s own country or, for internally displaced persons and regular migrants, to one’s initial or chosen place of residence.

### Environmental law

Environmental law deals primarily with the protection of the environment; it regulates the use and prevents abusive consumption of resources, identifies States’ responsibilities for environmental

harms and imposes a duty of cooperation among States. The general principles as well as some instruments of environmental law are also relevant in the context of environmental migration, as they impose a number of obligations on States to the benefit of individuals, including migrants, such as the obligation to ensure access to information and public participation in decision-making, as well as an individual’s right to a remedy for the damages suffered.

### International humanitarian law

Some of the key principles of international humanitarian law, such as the principles of neutrality, impartiality and humanity, are also applicable in situations of disasters.

### International disaster response law

In recent years, international disaster response law has grown as a new body of law on the threshold between environmental law and humanitarian law. Most of the instruments and principles falling under this branch of law are unwritten (customary law) or not binding (soft law). The International Law Commission is presently working on a codification of norms and principles in this new area of law and particularly of rules regarding the protection of persons in the event of a disaster<sup>7</sup> (draft articles on the protection of persons in the event of disaster).

### Nationality law

Nationality law may also apply in some specific cases. The 1961 Convention on the reduction of Statelessness may provide a basis to prevent children born from parents who had to migrate or to live in displacement due to environmental factors from becoming Stateless. With regard to disappearing States, the 1954 Convention relating to the status of Stateless persons could potentially be applied in the future to protect the rights of the nationals of those States in the event of their disappearance.

### Regional and national instruments

A number of existing regional and national instruments are also relevant in the context of both

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6 International Covenant on Civil and Political Rights, 1966.

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7 United Nations, 2008, 2011 and 2014.

internal and international migration induced by or related to environmental factors. At the regional level, in Europe, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) and the European Union Decision 2007/779 for a Civil Protection Mechanism include some provisions of relevance to an effective protection of the affected populations, including migrants. With regard to the former, the relevant provisions are mainly related to access to information and participation in decision-making in relation to environmental matters. The EU instrument is aimed at establishing a mechanism to reinforce the cooperation among the EU States in civil protection assistance interventions in the event of major emergencies caused by environmental or human-made disasters or accidents.

Some international soft law principles such as the UN Guiding Principles on Internal Displacement have been translated into regional or national law – this is the case with the African Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), and with some national legislation, such as the Angolan or Kenyan, which have integrated the Guiding Principles into their domestic laws. Some countries (e.g. Denmark, Finland, Sweden and the United States) have introduced temporary or in some cases permanent protection schemes in their domestic legislations that can also be applied to persons forced to leave a country because of environmental factors.

However, it is worth noting that even if numerous binding and non-binding legal instruments are relevant to environmental migrants, applying these instruments to individual cases, in the context of a general lack of knowledge and awareness of the issue among States, represents a very real challenge. As mentioned below, IOM works closely with States to address such challenges.

## **The way forward: Prioritizing a soft-law approach to ensure adequate protection**

The existing international legal framework – if systematically applied by States – would ensure that environmental migrants are not left without

protection. Yet, some migratory situations caused by environmental factors may still require better tailored legal solutions and protection for the affected individuals, particularly in the case of cross-border displacement.

Considering the difficulties in defining clear categories, and the complexity of the phenomenon, a single instrument or framework would be difficult to define. In addition, given the sensitivity behind both migration and environmental management, consensus among States over a single binding instrument may be hard to reach.

In this context, a soft-law approach may be more viable as a first step, taking the example of the UN Guiding Principles on Internal Displacement. A non-binding instrument built upon existing legislation and good practices and addressing key needs and vulnerabilities could offer a short-term solution, which could be translated into a binding text when adoption by States is likely to be reached, either at the international, regional, or national level. An example of such an approach in practice is the Nansen Initiative, which is a State-led consultative process whose objective is to build consensus on the development of a protection agenda for people displaced across international borders in the context of disasters and the effects of climate change.

## **IOM activities in relation to legal aspects of environmental migration**

### **Field operations**

IOM promotes a rights-based approach to migration. The Organization has always played a key operational role in protecting the rights of migrants, and in promoting dignity, well-being and respect for individuals. Protection of the rights of migrants is also a central concern in IOM's operational activities devoted to assisting and addressing the needs of migrants in the context of natural disasters and gradual environmental degradation.

### **Advocacy**

In addition to operational activities, IOM is dedicated to promoting awareness and understanding of international migration law in order to assist States

in managing migration more effectively. Over the years, IOM has developed a strong expertise and capacity in the area of international migration law, providing assistance to States through research, training, consultancy and capacity-building activities. IOM also provides support to the Nansen Initiative as a standing invitee to the Nansen Steering Group along with UNHCR, and a member of the Consultative Committee.

## Capacity-building

In the area of environmental migration and law, IOM conducts research and analysis of international, regional and national legislation addressing or potentially applicable to environmentally induced migration and the protection of migrants' rights. In addition, the Organization advises and guides States requesting assistance in strengthening or developing national legislation to address migration and displacement related to environmental factors. IOM has also developed training modules on legal aspects, frameworks and implications of environmental migration as part of its regional and national training on migration, environment and climate change for policymakers.

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Nairobi, Kenya, 2014. A view of Kibera where many environmental migrants go to live, fleeing their lands because of climate change and drought. © Alessandro Grassani

