

How Recognition and Implementation of the Right to a Healthy Environment Can Advance the Human Rights of Migrants

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Abstract: The relationship between climate change and other forms of environmental degradation, on the one hand, and migration and displacement, on the other, is a human rights topic of critical and growing importance. However, the conversation around environment and migration has tended to focus on security thus far. The humanity and agency of those who may leave their homes due to climate and environmental impacts, and their status as rights-holders, are too often an afterthought, if not completely forgotten. Global recognition and implementation of the human right to a clean, healthy, and sustainable environment can contribute to adopting a more human rights-based approach to the intersection of environment and migration around the world. This article identifies and explores four ways in which the human right to a healthy environment may have relevance and value in the migration context: 1) addressing the circumstances that compel people to leave their homes; 2) countering the devastating human rights and environmental consequences of overly securitized migration governance; 3) contributing to the growing jurisprudence around climate change and environmental degradation as a basis for *non-refoulement* claims; and 4) fostering sustainable and human rights-based solidarity between migrants and environmentally-affected communities in destination countries.

I. Introduction

The relationship between migration, displacement and the triple environmental crisis of climate change, pollution, and biodiversity loss is a human rights topic of critical and growing importance. Thus, the newly appointed United Nations (“UN”) Special Rapporteur on human rights and climate change has identified ‘Climate Change Displacement’ as a ‘key theme’ to address in his mandate.² The interaction between climate change and migration was also studied in the 2022 report of the UN Special Rapporteur on the human rights of migrants to the General Assembly.³ Reports of the Intergovernmental Panel on Climate Change have recognized environmental migration as an ongoing and future impact of climate change which could contribute to situations of vulnerability.⁴ While ‘there is an emerging consensus that climate change influences migration and displacement pathways’,⁵ theoretical and practical approaches to this understanding vary. Some take a humanitarian perspective, others adopt a more securitized

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² UNHRC, ‘Initial planning and vision for the mandate’ (2022) UN Doc A/HRC/50/39.

³ UNHRC, ‘Report of the Special Rapporteur on the human rights of migrants’ (2022) UN Doc A/77/189.

⁴ Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2007: Impacts, Adaptation and Vulnerability’ (2007) 365; IPCC, ‘AR5 Synthesis Report: Climate Change 2014’ (2014) 16; IPCC, ‘Climate Change 2022: Impacts, Adaptation and Vulnerability’ (2022) 11.

⁵ Ritu Bhargava and others, ‘Climate-Induced Migration and Modern Slavery: A Toolkit for Policymakers’ (IIED 2021) 7.

approach,⁶ or go as far as ‘eco-fascism’.⁷ Thus far, the conversation around climate change and migration has tended to focus ‘on the security of potential receiving States – developed nations that fear mass migration and yet have contributed most to the causes of climate change’.⁸ The humanity and agency of those who may be leaving their homes due to climate and environmental impacts, and their status as rights-holders, are too often an afterthought, if not completely forgotten. Yet, respecting, protecting, and fulfilling the human rights of migrants⁹ is essential to States’ human rights obligations, as ‘human rights are not derived from being a national of a certain state, but are based upon attributes of the human person’. Thus, ‘people in the context of migration, whether they are not nationals of the State in which they are, are entitled to’ human rights protection.¹⁰

The human right to a clean, healthy, and sustainable environment has recently attained global recognition through resolutions of the UN Human Rights Council¹¹ and UN General Assembly.¹² This right had been recognized previously in the domestic law, constitutions, or regional commitments of more than 150 States.¹³ Some commentators have extolled the positive impacts that recognizing this right could have for both the environment and human rights.¹⁴ Greater worldwide recognition and implementation of the right could also contribute to adopting a more human rights-based approach to the intersection of environmental crises and migration around the world.¹⁵ These developments could provide greater protections to those moving in the context of environmental harms, by recognizing that environmental factors can act as drivers of migration and, in turn, generate or contribute to certain situations of vulnerability requiring specific human rights protection.¹⁶ This article also seeks to understand how this right can contribute to better

⁶ See generally Eliza Pan, ‘Reimagining the Climate Migration Paradigm: Bridging Conceptual Barriers to Climate Migration Responses’ (2020) 50 *Envtl L* 1173.

⁷ See, e.g., Jariel Arvin, ‘The far right is weaponizing climate change to argue against immigration’ (Vox 2021) <www.vox.com/22456663/arizona-environment-immigration-climate-change-right-wing> accessed 27 May 2022.

⁸ Lauren Nishimura, ‘Climate Change Migrants: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies’ (2015) 27 *Int’l J Refugee L* 107, 109.

⁹ This article adopts the broad definition of ‘migrant’ used by the Office of the United Nations High Commissioner for Human Rights: ‘any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations’. Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Recommended Principles and Guidelines on Human Rights at International Borders’ (2014) 4 n 2.

¹⁰ Inter-American Commission on Human Rights, ‘Human Mobility: Inter-American Standards’ (2015) 37.

¹¹ UNHRC Res 48/13 (18 October 2021) UN Doc A/HRC/48/13.

¹² UNGA Res 76/300 (1 August 2022) UN Doc A/RES/76/300.

¹³ UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd’ (2022) UN Doc A/77/284 ¶ 26.

¹⁴ E.g., David Boyd, *The Environmental Rights Revolution* (UBC Press 2012); Magdalena Smieszek, ‘Three Cheers for Evolving New Rights: A Healthy Environment, International Solidarity, and Climate Refugee Protection’ (GNHRE 2022) <<https://gnhre.org/community/three-cheers-for-evolving-new-rights-a-healthy-environment-international-solidarity-and-climate-refugee-protection/>> accessed 11 December 2022; Margaretha Wewerinke-Singh, ‘Enabling the Right to a Healthy Environment’ (2022) 12 *Nature Climate Change* 885.

¹⁵ This article considers both the impact of recognition of the right at the global level and greater regional and national recognition and implementation, recognizing that ‘[l]egal developments . . . at any level or in any region contribute to further recognition of the right to a healthy environment at all levels and in all regions’. Boyd, *The Environmental Rights Revolution* (n 14) 8.

¹⁶ OHCHR and Global Migration Group, ‘Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations’ (2018) 6.

human rights outcomes for all migrants, regardless of their reasons for moving.¹⁷ The article identifies and explores four ways in which the human right to a healthy environment may have relevance and value in the migration context: 1) addressing the circumstances that compel people to leave their homes; 2) countering the devastating human rights and environmental consequences of overly securitized migration governance; 3) contributing to the growing jurisprudence around climate change and environmental degradation as a basis for asylum and *non-refoulement* claims; and 4) fostering sustainable and human rights-based solidarity between migrants and environmentally-affected communities in destination countries. The discussion of each topic seeks to illuminate the human experience of this period of environmental crises, provides context to the interplay of environmental and climate impacts, and analyzes the relevance of the human right to a healthy environment to this specific area. In doing so, it elaborates on different aspects of the right and impacts of its recognition, including its practical and conceptual value and its relationship to other human rights.

II. Addressing the Circumstances that Compel People to Leave Their Homes

As the world grew warmer, the ice began to melt and the oceans began to rise. The ocean licked up the coasts of small islands, and salt seeped into their fresh water. Powerful and destructive storms threatened people and homes. Some began to say that the islands were doomed, and the only choice the people had was to find new ground. But the people of the islands believed that the people of the world were not powerless against the rising tide. ‘We are not drowning, we are fighting’, they said, and they fought for the action that would preserve their homes.¹⁸

a. Context: Compelled Migration in the Context of Environmental Crises

In 2019 alone, almost 25 million people around the world were recorded as having been displaced as a result of disasters.¹⁹ Most people displaced by the slow and sudden-onset disasters associated with climate change will move within national borders.²⁰ However, many will likely also turn to international migration as their situation becomes untenable.²¹ There is also significant concern that parts of countries or even entire countries may become uninhabitable, especially low-lying small island States facing rising sea levels.²² Other forms of environmental damage may also drive people to leave their homes, such as the environmental destruction wrought by extractives industries.²³ Climate and environmental actions may force people off of land through ‘green

¹⁷ See Benoît Mayer, ‘Critical perspective on the identification of “environmental refugees” as a category of human rights concern,’ in Dimitra Manou and others (eds), *Climate Change, Migration, and Human Rights* (Routledge 2017) 34 (arguing that ‘environmental inducement’ in and of itself ‘should not be relevant in terms of protection, as no rationale justifies distinguishing “environmental migrant” as a category of migrant who is specifically entitled to a certain form of protection’).

¹⁸ Inspired by the Pacific Climate Warriors campaign. See Hannah Fair, ‘Not Drowning but Fighting: Pacific Islands Activists’ (2015) 49 *Forced Migration Rev* 58.

¹⁹ Internal Displacement Monitoring Center, ‘Global Report on Internal Displacement’ (2020), 1.

²⁰ OHCHR and Platform on Disaster Displacement, ‘The slow onset effects of climate change and human rights protection for cross-border migrants’ (2018) ¶ 13.

²¹ See *ibid* ¶ 20. See also UNHRC, ‘Report of the Special Rapporteur on the human rights of migrants’ (n 3) ¶ 15.

²² See Fair (n 18).

²³ United Nations Expert Mechanism on the Rights of Indigenous Peoples, ‘Indigenous Peoples’ Rights in the Context of Borders, Migration and Displacement’ (2019), UN Doc A/HRC/EMRIP/2019/2/Rev. 1 ¶ 27.

grabs', where land is appropriated for environmental or climate change purposes.²⁴ Crucially, these effects will be magnified by existing situations of vulnerability, discrimination, and marginalization. Individuals and groups who have historically experienced disproportionate human rights violations will continue to do so in the context of environmental destruction and related migration.²⁵ One should acknowledge that, through international legal and policy instruments, States have committed to addressing adverse drivers of displacement and migration.²⁶

Importantly, many affected by environmental crises have significant emotional and cultural attachment to their homes and would prefer not to move.²⁷ While many might choose migration as an adaptation response, many others will be unable or unwilling to make such moves.²⁸ Research has found, for example, a significant preference among Indigenous peoples for remaining in their communities, despite the challenges they face from both climate change and historic deficits in land rights and land tenure.²⁹ The government of the Marshall Islands has invoked the right of peoples facing climate change threats to remain in their homelands, including in its Nationally Determined Contribution under the Paris Agreement.³⁰ Protection of the right to a healthy environment can help secure that right and ability to stay for those who desire it.

b. Relevance of the Right to a Healthy Environment: Requiring Participation and Accountability

Where homes and livelihoods are threatened by climate change and other forms of environmental destruction, the recognition and implementation of the right to a healthy environment provides an important tool to protect against those threats. In some countries, recognition of this right has led to strengthened environmental laws, including improved 'environmental rights, as well as access to environmental information, public participation in decision making, and access to justice'.³¹ The African Commission on Human and Peoples Rights has found that the right to a healthy environment 'requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.³² A range of human rights, are potentially threatened in the context of environmentally-induced migration, including the rights to life, housing, food, water, and sanitation. Critically, recognizing the right to a healthy

²⁴ Harsha Walia, *Border & Rule* (Haymarket Books 2021) 71.

²⁵ Ezekiel Simperingham, 'State Responsibility to Prevent Climate Displacement: The importance of housing, land and property rights' in Manou and others (n 17) 88 (internal citations omitted).

²⁶ See, e.g., United Nations Office for the Coordination of Humanitarian Affairs, 'Guiding Principles on Internal Displacement' (2004) Principle 6; UNGA, 'Global Compact for Safe, Regular and Orderly Migration' (2019) UN Doc A/RES/73/195 ¶ 18.

²⁷ Jane McAdam and others, 'International Law and Sea-Level Rise: Climate Change and Forced Migration' (FNI 2016) ¶ 61.

²⁸ Dug Cubie, 'In-situ Adaptation: Non-migration as a coping strategy for vulnerable persons' in Manou and others (n 17) 100. See also UNHRC, 'Report of the Special Rapporteur on the human rights of migrants' (n 3) ¶ 46.

²⁹ Angela R. Riley and Kristen A. Carpenter, 'Decolonizing Indigenous Migration' (2021) 109 Cal L Rev 63, 121.

³⁰ Tile Til Eo 2050 Climate Strategy (2018) (RMI) ¶ 150.

³¹ David R. Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H. Knox and Ramin Pejman (eds), *The Human Right to a Healthy Environment* (Cambridge 2015) 26.

³² *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001) ¶ 52 (African Commission on Human and Peoples Rights).

environment allows for action to protect the environment before specific impacts on other human rights materialize or become known.³³ Thus, recognition provides an avenue for communities to prevent the consequences that might eventually drive them to migrate.

Fully recognizing and implementing the right to a healthy environment contains both procedural elements (such as impact assessment, access to information, participation rights, and access to remedies) and substantive elements (such as adopting effective environmental policies and regulating business conduct).³⁴ These elements are crucial to ensuring that people are not forced from their homes by environmental drivers. Focusing on the human rights of those most affected provides more effective protection by ‘addressing not only environmental change but also the way in which inequalities in the power to influence the local political economy affect human rights consequences of that change’.³⁵ For example, in the province of Esmeraldas, Ecuador, climate change leads to more frequent flooding which particularly affects the homes and livelihoods of Afro-descendent and Indigenous communities.³⁶ The solution offered by the State was community relocation, but community members did not wish to relocate, and instead favored reforestation efforts that would allow for in-place adaptation.³⁷ Lack of community participation, driven in part by historic discrimination against and marginalization, led to a failure of the government’s relocation project and continued situations of vulnerability.³⁸ Meaningful implementation of the right to a healthy environment, by contrast, would require genuine consultation with the affected community and understanding of their needs and preferences, thus also making it more likely for adaptation policies to succeed.

Recognition of the right to a healthy environment also creates the possibility of action to enforce the right.³⁹ It emphasizes that policymakers are duty-bearers with specific obligations towards rights-bearers.⁴⁰ Domestic recognition of this right provides opportunities for litigation in domestic courts. International recognition of the right may provide interpretive guidance or support for domestic court rulings,⁴¹ and may provide openings for enforcement action through the international human rights system.⁴² ‘What is novel about judicial protection of the right to a healthy environment is that it can impose a positive duty on the State to take preventive or remedial action’.⁴³ In sum, recognizing the right to a healthy environment, through its guarantees of

³³ Elena Cima, ‘The right to a healthy environment: Reconceptualizing human rights in the context of climate change’ (2022) 31 *RECIEL* 38, 46, 48.

³⁴ John H. Knox and Ramin Pejan, ‘Introduction’ in Knox and Pejan (n 31) 4; *see also* Boyd, *The Environmental Rights Revolution* (n 14) 25-27.

³⁵ Brooke A. Ackerly and others, ‘Climate and Community: the human rights, livelihood, and migration impacts of climate change’ in Manou and others (n 17), 190.

³⁶ Victoria Salinas and others, ‘Afrodescendientes e indígenas vulnerables al cambio climático: desacuerdos frente a medidas preventivas estatales ecuatorianas’ (2020) 66 *ÍCONOS Revista de Ciencias Social* 107, 113-15.

³⁷ *ibid* 119.

³⁸ *ibid* 124.

³⁹ Boyd, ‘Catalyst for Change’ (n 31) 29.

⁴⁰ Brandon L. Garrett and others, ‘Closing International Law’s Innocence Gap’ (2022) 95 *Southern California L Rev* 311, 329.

⁴¹ Wewerinke-Singh (n 14) 885.

⁴² Garrett and others (n 40) 331; *see also* Margaretha Wewerinke and Melina Antoniadis, ‘Vessel for Drowning Persons? The Standard-Setting Potential of International Human Rights Litigation in Addressing Climate Displacement’ (2022) 3 *Yearbook Int’l Disaster L Online* 238.

⁴³ Boyd, *The Environmental Rights Revolution* (n 14) 240.

participation and access to justice in environmental matters, provides expanded opportunities for people who are threatened by environment-related displacement to demand preventative action, through policy advocacy or judicial action.

The systems that create climate change and many other forms of environmental destruction are complex and global. Thus, the environmental factors that might drive migration do not necessarily find their cause within the borders of the State where affected people are located. The international community committed in the Global Compact for Safe, Regular and Orderly Migration, an intergovernmental agreement which was endorsed by the UN General Assembly, to work cooperatively to address the adverse drivers of migration, including ‘natural disasters, the adverse effects of climate change and environmental degradation’.⁴⁴ Recognizing the right to a healthy environment, especially at the regional and international level, also provides for seeking transnational preventive action for transboundary environmental harms.⁴⁵ The Inter-American Court of Human Rights held in a landmark 2017 Advisory Opinion on this right that ‘States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority’.⁴⁶ This creates possibilities for affected communities or States to seek justice, redress, and preventive action from the States most responsible for climate change or other environmental degradation,⁴⁷ including action to prevent the consequences that might lead to environmentally-induced migration.

III. Countering Securitized Migration Governance

*In the desert grow plants that grow nowhere else. Javelinas and tortoises, deer and mountain lions range freely through the desert, and so have people for thousands of years. The desert knows nothing of lines on a map, and its people make their homes and live their lives bridging outsiders’ imagined boundaries. When those outsiders tried to build a wall through the desert, the people of the desert resisted in defense of their way of life and of nature.*⁴⁸

a. Context: A Dominant Migration Governance Paradigm that Harms People and Planet

⁴⁴ UNGA, ‘Global Compact for Safe, Regular and Orderly Migration’ (2019) UN Doc A/RES/73/195 ¶ 18.

⁴⁵ Cima (n 33) 44.

⁴⁶ Advisory Opinion OC-23/17 of November 15, 2017 (Inter-American Court of Human Rights) ¶ 103; see further Committee on the Rights of the Child, *Sacchi v. Argentina*, Communication No. 104/2019 (2021), ¶¶ 10.2-10.12 (confirming the possibility of holding States responsible for extraterritorial human rights consequences of climate change).

⁴⁷ See e.g. Silja Klepp and Johannes Herbeek, ‘Politicising Climate Change Adaptation: Negotiating Environmental Migration in the European Union and the Pacific’ in Manou and others (n 17) 181 (documenting how grounding arguments around climate change in human rights and access to justice enabled calls by iKiribati officials for greater adaptation aid from Australia).

⁴⁸ Inspired by Tohono O’Odham resistance to Donald Trump’s proposed border wall between the United States and Mexico. Elizabeth Ellis, ‘The Border(s) Crossed Us Too: The Intersections of Native American and Immigrant Fights for Justice’ (2018) 14 (1) *Emisférica* <<https://hemisphericinstitute.org/en/emisferica-14-1-expulsion.html>> accessed 5 July 2022; see also Walia, *Border & Rule* (n 24) 78.

Recent decades have seen ‘dramatically enhanced border security efforts’ around the world.⁴⁹ ‘[C]ountries have deepened border controls by building fences, deploying patrols, and installing state-of-the-art surveillance technologies’.⁵⁰ These technologies are accompanied by policies and practices which include ‘[p]ushbacks, expedited return procedures, limited access to asylum and other human rights protections, lack of State-led humanitarian assistance, and the criminalization of irregularly arriving migrants’.⁵¹ These practices are all driven by a desire to prevent and deter migration, and ultimately ‘increase the vulnerability of people crossing international borders’ to human rights violations, injury, and death.⁵² The UN Special Rapporteur on the human rights of migrants has expressed concern that these practices ‘have instilled hostility and have failed to ensure the safety and dignity of migrants’.⁵³ Securitized borders ‘solidify a racialized nationalist identity and criminalize migrants and refugees as “undesirables” and “trespassers”’.⁵⁴ These border security measures also interfere with the lives and territories of Indigenous peoples whose traditional homelands transcended imposed settler colonial borders.⁵⁵ Wall construction and other security measures along the southern border of the United States have disrupted Indigenous sacred sites⁵⁶ and resulted in increased surveillance and arbitrary detention of Indigenous peoples, and restrictions on their freedom of movement.⁵⁷

In addition to violating human rights, these forms of border security violently damage the environment.⁵⁸ Borders themselves fundamentally ‘change[] the relationship between people and the environment by redefining land and oceans as closed areas of ownership that can be exploited for economic gain, not common spaces to be shared and conserved’.⁵⁹ In the name of security, the environmental impacts of activities at borders are ignored. Thus, the Department of Homeland Security in the United States is permitted by law to waive environmental laws when constructing border security infrastructure,⁶⁰ which can be resource intensive and environmentally destructive.⁶¹ Securitized borders are also sites of pollution, as ‘they tend not to be well-maintained, and often accumulate trash, debris, and detritus’.⁶²

⁴⁹ Gregory White, *Climate Change and Migration: Security and Borders in a Warming World* (Oxford University Press 2011) 5.

⁵⁰ *ibid* 14. White refers specifically to North Atlantic countries, but such technologies and practices are by no means limited to the Global North. See, e.g., Reece Jones, *Violent Borders: Refugees and the Right to Move* (Verso 2017) 48-69.

⁵¹ UNHRC, ‘Human rights violations at international borders: trends, prevention and accountability’ (2022) UN Doc A/HRC/50/31 ¶ 24.

⁵² *ibid*.

⁵³ *ibid*.

⁵⁴ Walia, *Border & Rule* (n 24) 79.

⁵⁵ Riley and Carpenter (n 29) 69.

⁵⁶ *ibid*.

⁵⁷ *ibid* 94-95.

⁵⁸ Jones (n 50) 9.

⁵⁹ *ibid* 117.

⁶⁰ Walia, *Border & Rule* (n 24) 55; see also Jones (n 50) 141-42 (noting the 37 environmental laws waived in efforts to construct walls along the southern border of the United States).

⁶¹ Walia, *Border & Rule* (n 24) 79.

⁶² *ibid* 142.

The construction of border walls and fences necessarily requires significant alteration to the land, clearing of vegetation, and disruption of animal habitats.⁶³ The fencing at the southern border of the United States blocks the movement of any animal ‘larger than a small rodent’, disrupting the traditional habits of many species.⁶⁴ It also disrupts the natural passage of water through the desert, leading to damaging floods.⁶⁵ Conservation scientists have raised alarms about the potentially lethal effects for animals of barbed wire on Poland’s border with Belarus and about the more permanent border wall, which was recently completed, and creates barriers to migration, and causes potential harm to birds as well as exposes the primeval forest to destruction and invasive species.⁶⁶ Other aspects of securitized border infrastructure are also linked to environmental destruction. Migrant detention facilities in the United States have been in dangerous proximity to environmentally contaminated sites⁶⁷ or have themselves been the sites of toxic pesticide usage.⁶⁸ A mining company linked to palm oil production manages Australia’s offshore migrant detention facility on Christmas Island,⁶⁹ most of which is a nature reserve.⁷⁰

Climate change and securitized migration governance can exponentially expose migrants to situations of vulnerability. This is the case of Rohingya refugees in Bangladesh who are largely concentrated in camps that are prone to flooding and other climate impacts.⁷¹ The United States, has deliberately used climate change as a tool in securitized migration policy, with the US Border Patrol Strategic Plan explicitly mentioning ‘searing heat’ in the desert as a factor to deter migration.⁷² Environmental crises and manufactured perceptions of migration crises have combined to undermine the human rights of migrants around the world. Depicting climate change-related migration as a security threat may be used as an excuse for further tightening and militarizing borders.⁷³ But the right to a healthy environment can combat these violations and build a new approach to migration governance.

b. Relevance of the Right to a Healthy Environment: Opening New Conceptual Approaches

⁶³ Jones (n 50) 142 (also raising examples related to walls in Israel and India); Walia, *Border & Rule* (n 24) 78; George Monbiot, ‘How border walls are triggering ecological disaster’ *The Guardian* (London, 15 December 2021) <<https://www.theguardian.com/commentisfree/2021/dec/15/border-walls-triggering-ecological-disaster-humanity-wildlife-habitats-extinction>> accessed 25 July 2022.

⁶⁴ Jones (n 50) 140.

⁶⁵ *ibid* 141.

⁶⁶ Bogdan Jaroszewicz and others, ‘Poland’s border wall threatens ancient forest’ (2021) 374 *Science* 1063 (letter).

⁶⁷ American Friends Service Committee & Earthjustice, ‘The Toxic Truth’ (2021) 15-20.

⁶⁸ Earthjustice, ‘Private Prison Company Poisoned Immigrants at Adelanto for A Decade’ (22 March 2021) <<https://earthjustice.org/news/press/2021/private-prison-company-poisoned-immigrants-at-adelanto-for-a-decade>> accessed 25 July 2022.

⁶⁹ Walia, *Border & Rule* (n 24) 95; Ben Butler, ‘Mining company gets \$20m contract to maintain Christmas Island detention centre that is holding four people’ *The Guardian* (London, 26 October 2019) <<https://www.theguardian.com/australia-news/2019/oct/27/20m-contract-granted-to-maintain-detention-centre-with-four-people-in-it>> accessed 25 July 2022.

⁷⁰ Jones (n 50) 65.

⁷¹ Walia, *Border & Rule* (n 24) 66.

⁷² Amnesty International, ‘In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest’ (2012) 17.

⁷³ White (n 49) 5-6.

The Council of Europe has recognized that ‘effective implementation of the human right to a safe, clean, healthy and sustainable environment . . . could also protect migrants moving in search of such a safe, clean, healthy and sustainable environment’.⁷⁴ It has called for the right to ‘be embedded in international instruments that influence migration’.⁷⁵ Recognizing and implementing the right to a healthy environment provide both practical and conceptual avenues for challenging securitized migration governance. Practically, as with environmentally-induced displacement, the right to a healthy environment provides enhanced opportunities to challenge the negative human rights and environmental impacts of border security measures through policy formation and litigation. As these elements of the right were explored in the previous section, this section focuses on more conceptual impacts of recognition and implementation.

Broadly, a ‘human rights framework for immigration stands in opposition to the idea that state sovereignty outweighs all other concerns, including migrants’ interests in life and dignity’.⁷⁶ Recognizing the right to a healthy environment also challenges the dominant notions of sovereignty and security in offering ‘a source of countervailing arguments and power vis-à-vis other legally protected goals’.⁷⁷ At the national level, enshrining the right to a healthy environment elevates environmental concerns when weighed against other State priorities.⁷⁸ Court rulings in jurisdictions as diverse as Nepal⁷⁹ and Greece⁸⁰ have found that recognizing the right to a healthy environment elevates environmental protection above other concerns or interests. Although these cases primarily dealt with economic or development issues, exclusionary conceptions of security are equally open to challenge and balancing when confronted with a conflicting right to a healthy environment.

Recognizing and implementing the rights of Indigenous peoples to a healthy environment also create space for reimagining securitized migration governance. Article 29 of the UN Declaration on the Rights of Indigenous Peoples protects Indigenous peoples’ right to preservation and conservation of the environment.⁸¹ Fulfilment of the rights of Indigenous peoples is also a specific principle of the Framework Principles on human rights and the environment.⁸² Respecting and protecting Indigenous peoples’ right to a healthy environment includes ensuring their right to free, prior, and informed consent with regard to activities which have an environmental impact on their traditional territories. Such activities include border security measures contemplated where Indigenous territories cross national borders. For example, many members of the Tohono O’Odham Nation in the Southwestern United States and Northern Mexico ‘object to a wall and resist militarization of their reservation’ and work with the O’Odham ‘to find collaborative solutions . . . that allow their members to move across their territory and enjoy their culture, while

⁷⁴ Parliamentary Resolution 2401 (2021) on climate and migration [2021] ¶ 4.

⁷⁵ *ibid* ¶ 5.

⁷⁶ Riley and Carpenter (n 29) 109.

⁷⁷ César Rodríguez-Garavito, ‘A Human Right to a Healthy Environment? Moral, Legal, and Empirical Considerations,’ in Knox and Pejan (n 31) 164.

⁷⁸ Boyd, *The Environmental Rights Revolution* (n 14) 243-44.

⁷⁹ *ibid* 170.

⁸⁰ *ibid* 218.

⁸¹ Declaration on the Rights of Indigenous Peoples (2 October 2007), UN Doc A/RES/61/295, Art 29.

⁸² UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2018) UN Doc A/HRC/37/59, Annex ¶¶ 47-53.

also protecting the physical environment and diminishing violence on the reservation'.⁸³ More fundamentally, fulfilling Indigenous peoples' right to a healthy environment 'requires conceptualizing and advancing a paradigm in which Indigenous practices and lifeways inform and reform migration in the settler state'.⁸⁴ This paradigm would recognize that 'Indigenous Peoples' relationships with land and traditional landscapes often predate, by hundreds or thousands of years, the contemporary formation of states'.⁸⁵ By calling into question the immutability of current political borders and, again, elevating values outside of mainstream notions of sovereignty and security, 'Indigenous practices, protocols, and norms maintained over hundreds or thousands of years can disrupt the logic of colonial borders and inform contemporary law reform'.⁸⁶

A rights and justice framework, integrating the right to a healthy environment, goes beyond countering the security framework that currently dominates migration governance. It can also contribute to creating new ways of conceiving of and approaching migration. Achiume has argued that, based on the interlinkages between former colonizing States and those that they formerly colonized, migration should be available as a 'means of pursuing political equality and asserting sovereignty'.⁸⁷ The 'subordination and exploitation' of formerly colonized nations sustain the 'political and economic benefits' of former colonizers and, in doing so, create a 'relationship [that] gives Third World persons a valid claim to membership in First World nation-states'.⁸⁸ Recognizing the right to a healthy environment provides additional support for such claims because (neo)colonial exploitation was and is reliant on environmental destruction, extractivism,⁸⁹ and other economic activities contributing to climate change. It focuses attention on the moral, ethical, and legal imperatives of the environmental law principles of "common but differentiated responsibilities" and "polluter pays". It asks whether it is 'ethical for people moving because of ecological changes wrought by industrialization to be barred from the spaces of the people who caused the problem'.⁹⁰ Thus, recognizing and identifying violations of the right to a healthy environment of residents of the Global South provide impetus for viewing migration less through a security lens and more through one of redistributive justice.

IV. Climate Change and Environmental Degradation as a Basis for Asylum and Non-Refoulement Claims

*A man lived in a land where the hot air hung thick with dirt and soot and chemicals. The air choked his lungs and threatened his life. The man journeyed many miles and arrived in a country where the air was cleaner. But in that new country there was something new to choke him –the fear of being sent back to where his life was in danger. The man went to a court that said that he could not be sent back to the country where he might die from the polluted air. The man was able to breathe a little easier.*⁹¹

⁸³ Riley and Carpenter (n 29) 116.

⁸⁴ *ibid* 71-72.

⁸⁵ *ibid* 71-72.

⁸⁶ *ibid* 118.

⁸⁷ E. Tendayi Achiume, 'Migration as Decolonization' (2019) 71 *Stan L Rev* 1509, 1552 (emphasis in original).

⁸⁸ *ibid* 1550.

⁸⁹ UNHRC, 'Global extractivism and racial equality' (2019) UN Doc A/HRC/41/54.

⁹⁰ White (n 49) 19.

⁹¹ Inspired by CAA Bordeaux 2ème, 18 dec 2020, 20BX02193, 20BX02195 (France).

a. Context: Growing Recognition that Migrants Should not be Returned to Sites of Environmental Risk

Different international and regional legal instruments contain a prohibition on *refoulement*: deporting, removing, or returning migrants to places where they would face risks of certain defined harms. Under international human rights law, ‘states are prohibited from removing people, inter alia, to places where they face a real risk of being arbitrarily deprived of life, or subjected to torture or other cruel, inhuman, or degrading treatment or punishment’.⁹² In recent years, there has been growing discussion on whether the risk of harm presented by climate change and other forms of environmental degradation might trigger States’ *non-refoulement* obligations.

In 2019, the UN Human Rights Committee decided the case of Ioane Teitiota, who argued that New Zealand had violated his right to protection from *refoulement* in returning him to Kiribati, where ‘[s]ea level rise . . . has resulted in the scarcity of habitable space, which has in turn caused violent land disputes that endanger [his] life, and environmental degradation, including saltwater contamination of the freshwater supply’.⁹³ The Committee ruled that New Zealand had not violated Teitiota’s rights in the specific case at hand. However, it also affirmed that climate change may give rise to human rights violations under articles 6 or 7 of the International Covenant on Civil and Political Rights which would trigger *non-refoulement* obligations.⁹⁴

Domestic courts have begun adopting similar rulings. In 2020, an appeals court in Bordeaux, France, considered the case of a Bangladeshi man with severe asthma who the French State was seeking to return to Bangladesh.⁹⁵ The court decided that the petitioner’s life would be in danger if he was returned and blocked his removal. The court considered pollution and air quality, noting that the concentration of fine particles in the air in Bangladesh was among the highest in the world.⁹⁶ In 2021, the Italian Supreme Court considered the case of a man who the Italian State sought to return to the region of the Niger Delta in Nigeria.⁹⁷ After discussing the Human Rights Committee’s ruling in *Teitiota*, the Supreme Court found that the court considering the applicant’s removal had erred in failing to consider the conditions of environmental damage in the Niger Delta.⁹⁸ The Court held that in considering *non-refoulement* claims, where the country to which the person would be removed faces environmental devastation, judges must consider ‘conditions of social, environmental, or climatic degradation, as well as contexts of unsustainable exploitation

⁹² Jane McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (2020) 114 Am. J. Int’l L. 708, 712-13; see also Chiara Scissa, ‘Recognition and Protection of Environmental Migrants in International Law,’ in Jasmin Lilian Diab (ed), *Dignity in Movement: Borders, Bodies and Rights* (E-International Relations 2021) 5.

⁹³ Human Rights Committee, *Teitiota v. New Zealand*, Communication No. 2728/2016 (2019), ¶ 3.

⁹⁴ *ibid* ¶ 9.11.

⁹⁵ CAA Bordeaux 2ème (n 91); see also Jon Henley, ‘Man saved from deportation after pollution plea in French legal “first”’ *The Guardian* (London, 12 January 2021) <<https://www.theguardian.com/world/2021/jan/12/bangladeshi-man-with-asthma-wins-france-deportation-fight>> accessed 29 July 2022.

⁹⁶ CAA Bordeaux 2ème (n 91).

⁹⁷ Corte di Cassazione Civile, Sez. 2^a 24/02/2021 (Ud. 12/11/2020), Ordinanza n.5022 (Italy); see also Fabrizio Vona, ‘Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy?’ (2021) 1 Ital J Int’l & Comp L 146.

⁹⁸ Corte di Cassazione Civile (n 97).

of natural resources, that constitute a grave risk for the survival of the individual concerned.’⁹⁹ There appears to be growing momentum towards understanding the relevance of the environmental situation of the country of return to *non-refoulement* claims. Recognizing the right to a healthy environment can contribute to this momentum.

b. Relevance of the Right to a Healthy Environment: Informing and Supplementing Interpretation of Other Human Rights

Generally, human rights-based *non-refoulement* claims center around threats to the right to life and the right to be free from torture and other cruel, inhuman, or degrading treatment. Recognizing of the right to a healthy environment may also lend weight to these claims, thus increasing migrants’ protections from return to situations of environmental risk.

Human rights are interdependent and interrelated, such that ‘fulfilment of one right often depends, wholly or in part, upon the fulfilment of others’.¹⁰⁰ This fundamental principle is woven into interpretation of human rights. For instance, the Committee on Economic, Social and Cultural Rights’ General Comment 4 on the right to housing acknowledges that ‘the right to housing is integrally linked to other human rights’¹⁰¹ and incorporates elements related to fulfillment of the right to health and cultural rights in its interpretation of what constitutes adequate housing.¹⁰² Thus, the right to a healthy environment and other rights ‘mutually reinforce one another’¹⁰³ Considering elements related to the right to a healthy environment may help guide decision-makers in interpreting the rights to life and to freedom from cruel, inhuman, or degrading treatment. The Human Rights Committee recognized in its General Comment 36 on the right to life that ‘[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life’.¹⁰⁴ Regional human rights courts have also linked concerns over environmental degradation and land access to the right to life.¹⁰⁵ The European Court of Human Rights has also examined environmental conditions in considering the extent to which returning migrants to their country of origin would constitute a violation of the right to be free from cruel, inhuman or degrading treatment.¹⁰⁶ These decisions did not specifically reference the right to a healthy environment. Yet, understanding healthy environment as a human right can bolster its relevance to other human rights and expand the possibility for courts to make such rulings. Global recognition of the right may provide interpretive weight for judges to consider environmental considerations when interpreting the rights to life and to freedom from cruel, inhuman, or degrading treatment.¹⁰⁷ This is particularly true for jurisdictions that have not yet incorporated the right to a healthy environment in domestic law.

⁹⁹ *ibid* 5-6 (translation by author).

¹⁰⁰ UNFPA, ‘Human Rights Principles’ (2005) <<https://www.unfpa.org/resources/human-rights-principles>> accessed 29 July 2022.

¹⁰¹ UN Committee on Economic, Social and Cultural Rights, ‘General comment No. 4: The right to adequate housing’ (1991) UN Doc E/1992/23 ¶ 7.

¹⁰² *ibid* ¶¶ 8(d)-(e), 8(g).

¹⁰³ Scissa (n 92) 5.

¹⁰⁴ UN Human Rights Committee, ‘General comment No. 36’ (2019) UN Doc CCPR/G/GC/36 ¶ 62.

¹⁰⁵ Scissa (n 92) 5.

¹⁰⁶ *Sufi and Elmi v. UK*, 54 EHRR 9 (2012) ¶ 284.

¹⁰⁷ See Boyd, ‘Catalyst for Change,’ (n 31) 24-25.

Further, while *non-refoulement* jurisprudence has focused, thus far, on the rights to life and to freedom from cruel, inhuman, or degrading treatment, courts are not limited to considering those rights only. In theory, at least, *non-refoulement* claims could be based on ‘any human rights violations’.¹⁰⁸ Recognizing the right to a healthy environment creates the possibility that courts could apply the principle of non-refoulement in cases where return would result in the violation of that right, alone or in conjunction with other rights.¹⁰⁹ At first, this may seem unlikely given the previously limited nature of *non-refoulement* jurisprudence. However, there is growing recognition of the unprecedented and existential nature of the threats posed by the current environmental crises and growing understanding that courts will play a role in meeting those threats.¹¹⁰ This may call for judicial innovation, including, for example by incorporating elements of international environmental law, like the precautionary principle, in human rights jurisprudence. The European Court of Human Rights has already shown some willingness to do so.¹¹¹ As described in Section II(b), violations of the right to a healthy environment may also be considered first before threats to other rights have materialized.¹¹²

V. Environmental Solidarity in Communities of Destination

*When the land began to dry up, the farmers began to leave their farms. They left behind the parched soil, but they took with them the years that they had worked, they took with them the knowledge of their ancestors. In their new home there were new threats to the land, threats born out of greed and wastefulness. The farmers worked with their new neighbors to show that there were other ways to work the land, that together they could build communities where everyone had enough.*¹¹³

a. Context: Models of Oppression and Opportunities for Shared Struggle

The dominant economic model in many industries and parts of the world is built on exploitation — both exploitation of the environment and exploitation of marginalized, low wage, often migrant, workers. There is a ‘cyclical, two-way nexus’ between exploitative forms of labor and environmental destruction: labor is undertaken under exploitative conditions in sectors like

¹⁰⁸ Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 52.

¹⁰⁹ Chandni Sinha Das and others, ‘Environmental Migrants: Challenges and Opportunities for Protection of their Rights’ (Columbia SIPA & IOM 2021) 14.

¹¹⁰ See, e.g., Tim Eicke, ‘Human Rights and Climate Change: What Role for the European Court of Human Rights?’ (Inaugural Annual Human Rights Lecture, Goldsmiths University, 2 March 2021) <<https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4>> accessed 29 July 2022; Council of Europe, ‘70th anniversary of European Convention on Human Rights: a convention for the people’ (29 January 2020) <<https://www.coe.int/en/web/portal/-/70th-anniversary-of-european-convention-on-human-rights-a-convention-for-the-people>> accessed 29 July 2022; see further Wewerinke and Antoniadis (n 42) (discussing potential contributions of international human rights mechanisms).

¹¹¹ See *Duarte Agostinho and others v Portugal and 32 other States*, No. 39371/20, ‘Communication to Parties’ (30 November 2020) (European Court of Human Rights).

¹¹² *Cima* (n 33) 46, 48.

¹¹³ Inspired by the work of the *Unión de Trabajadores y Trabajadoras de la Tierra* (Union of Workers of the Land). *Unión de Trabajadores y Trabajadoras de la Tierra*, ‘Quiénes Somos’ <https://uniondetrabajadoresdelatierra.com.ar/quienes_somos/> accessed 29 July 2022; see also OHCHR, ‘Climate Change and Migration: The Power of the Collective’ (11 November 2021) <<https://unhumanrights.exposure.co/climate-change-and-migration>> accessed 29 July 2022.

extractives and agribusiness. In turn, the resulting environmental destruction undermines the livelihood of local populations and makes them vulnerable to recruitment by the same industries under the same exploitative conditions.¹¹⁴ In many cases, companies within these industries rely notably on migrant labor and the environmental destruction they create takes place on traditional Indigenous lands. The Brazilian Amazon is an archetypal example of these interrelated phenomena: migrant workers are recruited to labor in the charcoal and cattle industries under conditions of debt-bondage, and the forest clearing that they participate in is deeply environmentally destructive and encroaches on Indigenous territories.¹¹⁵ The ‘twinned and mutually destructive’ practices of illegal logging and debt-bondage in the Amazon “compromis[e] both environmental sustainability and human rights”.¹¹⁶

By generating widespread exploitation, however, these models also generate opportunities for solidarity. Groups that are affected in disparate ways, by different practices, may come together to reinforce their claims against exploitation and human rights violations. In the United States, it has been observed that ‘increasingly both Native American and migrant communities see their struggles as intertwined’.¹¹⁷ In Western Canada, migrant rights groups have joined Indigenous communities in actions against environmentally destructive ‘tourism, mining, and real estate development’ on Indigenous land.¹¹⁸ Indigenous leaders in Western Canada have also advocated for the rights of migrants threatened with deportation.¹¹⁹ The *Unión de Trabajadores y Trabajadoras de la Tierra* (Union of Workers of the Land) in South America provides an example of arriving migrants joining local communities to propose alternatives to exploitative agribusiness models.¹²⁰ Recognizing the right to a healthy environment can lift up these shared struggles.

b. Relevance of the Right to a Healthy Environment: a Catalyst and Organizing Principle and Source of Protection

Recognizing the right to a healthy environment lends support to efforts by migrants and local communities to advocate together for systemic change which benefits all by adding both moral and legal weight to their demands. Such recognition provides symbolic value in recognizing the right as a matter of international priority.¹²¹ Global recognition of the right to a healthy environment can have significant organizing force even where there is no domestic recognition of the right to a healthy environment or meaningful enforcement of international law in domestic courts.¹²² Using ‘the language of rights . . . can be a source of political power’ because basing claims in rights ‘place[s] compelling principles on the side of the person asserting a right’.¹²³

¹¹⁴ Doreen Boyd and others, ‘Modern Slavery, Environmental Destruction and Climate Change: Fisheries, Field, Forests and Factories’ (Independent Anti-Slavery Commissioner 2018) 7.

¹¹⁵ *ibid* 20-21.

¹¹⁶ *ibid*.

¹¹⁷ Ellis (n 48).

¹¹⁸ Harsha Walia, *Undoing Border Imperialism* (AK Press 2013), 132.

¹¹⁹ *ibid* 135-37.

¹²⁰ *Unión de Trabajadores y Trabajadoras de la Tierra* (n 113); see also OHCHR, ‘Climate Change and Migration’ (n 113).

¹²¹ Garrett and others (n 40) 328.

¹²² Scott Walker, ‘The meaning and potential of a human rights-based approach to climate change post-*Sharma*’ (2022) 47 *Alternative L J* 194, 197-98.

¹²³ Boyd, *The Environmental Rights Revolution* (n 14), 8.

Conceptually, it also shifts affected communities into the position of rights-holders.¹²⁴ Understanding the right to a healthy environment as a human right provides a tool for motivating communal activism, with ‘activists ranging from Chico Mendes in Brazil to Ken Saro-Wiwa in Nigeria to Greenpeace members worldwide . . . using the language of rights to support their causes and campaigns’.¹²⁵ It helps to bring together disparate affected groups ‘by providing a common language and linking these efforts to a well-established social justice framework and enforcement infrastructure’.¹²⁶ It adds analytical weight to calls for environmental justice and action by placing environmental concerns on an equal level with, for example, economic development goals,¹²⁷ as discussed in Section III(b), as well as grounding such calls in ‘entitlements, as opposed to preferences’.¹²⁸

Finally, where individuals and groups face risks for challenging models of environmental destruction and violations of human rights, the right to a healthy environment protects them through incorporating the need to preserve civic space and protect environmental human rights defenders. According to the Framework Principles on Human Rights and the Environment, ‘States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence’.¹²⁹ The Human Rights Council’s resolution recognizing the right to a healthy environment also refers to respect for ‘the rights to life, liberty and security of human rights defenders working in environmental matters’.¹³⁰ Thus recognizing and implementing this right provide both an organizing principle and a safe space for coalitions to form and take action to demand a better system for people and planet.

VI. Conclusion

There are intimate and indelible ties between the injustices and human rights violations faced by migrants and the environmental injustice and destruction facing communities all over the world. Political and economic systems which are based on extraction and exclusion harm nature and people. They block the free movement of some while forcing the displacement of others and perpetuate racial and colonial inequalities. Recognizing and implementing the right to a healthy environment build understanding of the deep connection between environmental degradation and human rights violations, including violations of the rights of migrants. It provides practical, conceptual, interpretive, and moral support for efforts to construct new paradigms of migration which uphold dignity and solidarity among people and between people and nature. Building on the concepts and arguments discussed in this article, attorneys, advocates, and affected communities can draw on the recognition of the right to a healthy environment to demand participatory environmental policy, engage in litigation where rights are violated, promote more human rights-focused migration policies and asylum and *non-refoulement* jurisprudence, and build solidarity and social movements. Through such action, recognizing the right to a healthy

¹²⁴ Garrett and others (n 40) 328-29; Walker (n 122) 198.

¹²⁵ Rodríguez-Garavito (n 77) 158; see also Garrett and others (n 40) 329.

¹²⁶ Rodríguez-Garavito (n 77) 164-65.

¹²⁷ *ibid* 164.

¹²⁸ *ibid* 164-65.

¹²⁹ UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (n 82) Annex ¶¶ 10-11.

¹³⁰ UNHRC Res 48/13 (n 11).

environment helps to give life to the words of Indigenous artist Tania Willard: ‘Fences and borders can’t stop the flow of rivers, migration of butterflies, or the movement of people, and won’t stop the spirit of freedom’.¹³¹

¹³¹ Tania Willard, ‘Las Paredes Vueltas de Lado son Puentes,’ *People’s History of Kanada Poster Project*, <<https://noii-van.resist.ca/wp-content/uploads/2007/11/tania-for-web.gif>> accessed 6 July 2022.