

# Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection

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*ABSTRACT: The growing effects of climate change and global warming create a need for protection of environmentally displaced persons. While governments could use current international and domestic definitions of refugee to protect environmentally displaced persons, it is unlikely that any government will do so. Even if governments did extend existing refugee and asylum laws to include environmentally displaced persons, it would provide insufficient protection. In addition, it would consume judicial resources needed for persons currently receiving protection under refugee and asylum laws. The protection of environmentally displaced persons, while necessary, should not fall under current asylum and refugee laws. Instead, new domestic and international laws should grant environmentally displaced persons refuge under a more protective, cost-sharing approach.*

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## I. INTRODUCTION

*I hear the waves on our island shore  
They sound much louder than they did before  
A rising swell flecked with foam  
Threatens the existence of our island home.*<sup>1</sup>

One of the smallest and most remote nations in the world is becoming even smaller. Tuvalu is only twenty-six square kilometers of land, consisting of three islands and six atolls in the Pacific Ocean.<sup>2</sup> In 1997, the first of Tuvalu's islands, Tepuka Savilivili, disappeared into the sea.<sup>3</sup> Due to global warming and the corresponding rising sea levels, scientists predict that the nine remaining Tuvaluan islands will be completely submerged within the next fifty years, making Tuvalu the "first nation sunk by global warming."<sup>4</sup> Knowing that the demise of its homeland is inevitable, the Tuvalu government has, unsuccessfully, sought agreements with Australia and New Zealand that would allow Tuvaluans to migrate to Australia or New Zealand if an emergency evacuation is necessary.<sup>5</sup> While neither the Tuvaluan government nor its citizens desire to seek refuge outside of their home nation, they recognize that they may not have a choice.<sup>6</sup>

Whereas Tuvalu's complete submersion is impending, the more imminent fear is that current weather conditions are menacing the current habitability of the islands.<sup>7</sup> Tuvaluans depend on farming and fishing as

1. Jane Resture, Tuvalu and Global Warming, [http://www.janeresture.com/oceania\\_warming1/index.htm](http://www.janeresture.com/oceania_warming1/index.htm) (last visited Feb. 22, 2009).

2. CIA, The World Factbook: Tuvalu, <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html> (last visited Feb. 22, 2009) [hereinafter World Factbook].

3. Patrick Barkham, *Going Down*, GUARDIAN, Feb. 16, 2002, available at <http://www.guardian.co.uk/environment/2002/feb/16/weekendmagazine.globalwarming>.

4. *Id.*

5. World Factbook, *supra* note 2; see also N.Z. Ministry of Foreign Affairs & Trade, New Zealand's Immigration Relationship with Tuvalu, <http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php> (last visited Feb. 22, 2009) [hereinafter Immigration Relationship] (clarifying the lack of an agreement between New Zealand and Tuvalu that would allow Tuvaluans access to New Zealand immigration laws based on climate change).

6. Saufatu Sopoanga, Prime Minister & Minister of Foreign Affairs of Tuvalu, Statement at the 58th Session of the United Nations General Assembly (Sept. 24, 2003), available at <http://www.un.org/webcast/ga/58/statements/tuvaeng030924.htm>; see also Barkham, *supra* note 3 (discussing nationals' "ferocious[] loyal[ty] to the islands" and desire to remain in Tuvalu).

7. Barkham, *supra* note 3. The author notes how scientists and locals expect current weather conditions to affect Tuvaluan life:

Like the government, and the scientists at the Intergovernmental Panel on Climate Change, who predict a sea-level rise of up to 88cm in the next century, [Hilia Vavae, Director of Tuvalu's Meteorological Office] believes the islands will not

their means of survival.<sup>8</sup> The soil in Tuvalu, however, has become fragile, making farming difficult.<sup>9</sup> Flooding, as well as an increase of salt in the soil, is causing the crops that Tuvaluans depend on to die.<sup>10</sup> The storms in Tuvalu are increasingly ferocious, with flooding and high currents threatening to sweep Tuvaluans into the ocean.<sup>11</sup> To escape the “onslaught of sea level rise” in Tuvalu, many Tuvaluans are already seeking ways to immigrate to foreign countries.<sup>12</sup> Each year, seventy-five Tuvaluans may access New Zealand immigration status through employment immigration laws;<sup>13</sup> however, Tuvalu has an estimated population of 12,177 people living on its islands.<sup>14</sup>

Tuvalu is just one example of the many countries that are losing inhabitable land. The effects of climate change prevent Arctic hunters from traveling over thinning ice and snow as they pursue bears and seals, their sources of nourishment and income.<sup>15</sup> In the African Sahel, the warmer temperatures of climate change resulted in the death of millions of animals and hundreds of thousands of people.<sup>16</sup> The expanding deserts in Morocco,

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simply be swamped by water. It is far more likely that the ferocity and frequency of storms and high tides will simply make Tuvaluan daily life untenable.

*Id.*

8. World Factbook, *supra* note 2. Tuvalu has very few exports, and the people make a living mainly through exploitation of the sea, reefs, and atolls. *Id.*

9. Barkham, *supra* note 3.

10. Jane Resture, Oceania and Global Warming, [http://www.janeresture.com/oceania\\_warming/index.htm](http://www.janeresture.com/oceania_warming/index.htm) (last visited Feb. 22, 2009); BBC News, Country Profile: Tuvalu, [http://news.bbc.co.uk/1/hi/world/asia-pacific/country\\_profiles/1249549.stm](http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1249549.stm) (last visited Mar. 31, 2009).

11. Barkham, *supra* note 3 (“We were lucky to survive. If the water really rises and you cannot find anything to hold on to, the current will take you away and then you die.” (quoting a Tuvalu national)).

12. Press Release, Tuvalu Meteorological Serv., Tuvalu Governor General Appealed for International Cooperation at the United Nations (Sept. 20, 2002) [hereinafter Tuvalu Press Release], available at <http://informet.net/tuvmet/global.html> (citing the statement made by the Governor General of Tuvalu at the Fifty-seventh Session of the U.N. General Assembly).

13. N.Z. Dep’t of Labour, Pacific Access Category, <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/> (last visited Feb. 22, 2009).

14. World Factbook, *supra* note 2.

15. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE (M.L. Parry et al. eds., 2007) [hereinafter IPCC], available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf>; James Owen, *Arctic Expedition to Spotlight Warming Impact on Inuit Groups*, NAT’L GEOGRAPHIC NEWS, Feb. 23, 2007, <http://news.nationalgeographic.com/news/2007/02/070223-arctic-warming.html>.

16. NICK BROOKS, CLIMATE CHANGE, DROUGHT AND PASTORALISM IN THE SAHEL, DISCUSSION NOTE FOR THE WORLD INITIATIVE ON SUSTAINABLE PASTORALISM (2006), [http://cmsdata.iucn.org/downloads/e\\_conference\\_discussion\\_note\\_for\\_the\\_world\\_initiative\\_on\\_sustainable\\_pastoralism\\_.pdf](http://cmsdata.iucn.org/downloads/e_conference_discussion_note_for_the_world_initiative_on_sustainable_pastoralism_.pdf).

Tunisia, and Libya consume more than one thousand square kilometers of valuable land each year.<sup>17</sup>

It is clear that climate change and environmental displacement due to such climate change is occurring.<sup>18</sup> As the Prime Minister of Tuvalu, Saufatu Sopoanga, stated at the Fifty-eighth Session of the U.N. General Assembly, “The threat [of severe weather events] is real and serious.”<sup>19</sup> The 0.7 degree increase in the average temperature of the Earth’s surface since the late 1800s has already changed weather patterns, melted polar ice caps, heightened the spread of human diseases, and declined crop yields.<sup>20</sup> Already, earthquakes, hurricanes, floods, and other natural disasters have displaced twenty-five million people.<sup>21</sup> Ten percent of the world’s population currently lives on coastal lands that are less than ten meters above sea level; thus, rising sea levels will cause problems for hundreds of millions of people.<sup>22</sup> Also, hundreds of millions of people depend on melting snow and glaciers to supply water for irrigation.<sup>23</sup> As these sources deplete, many people face forced relocation.<sup>24</sup> Due to the greenhouse gases already in our atmosphere, even without the emission of any additional greenhouse gases, the temperature will continue to increase beyond the year 2100, causing further depletion of our environment.<sup>25</sup>

Among all the reasons for migration, natural disasters are the leading cause of displacement.<sup>26</sup> Hurricane Katrina alone resulted in the displacement of over half a million people within the United States.<sup>27</sup> Two

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17. Larry West, *Scholars Predict 50 Million Environmental Refugees by 2010*, ABOUT.COM, <http://environment.about.com/od/globalwarming/a/envirorefugees.htm> (last visited Feb. 22, 2009).

18. See generally IPCC, *supra* note 15, at 7–22 (stating observations of existing effects and predictions of future effects of climate change on the natural and human environment).

19. Sopoanga, *supra* note 6.

20. *Id.*

21. *Id.*

22. Jeffrey D. Sachs, *Climate Change Refugees (Extended Version): As Global Warming Tightens the Availability of Water, Prepare for a Torrent of Forced Migrations*, SCI. AM., June 2007, available at <http://www.sciam.com/article.cfm?id=climate-change-refugees-extended&ref=rss>.

23. *Id.*

24. *Id.*

25. Michael D. Mastrandrea & Stephen H. Schneider, World Book Online Reference Ctr., Global Warming, [http://www.nasa.gov/worldbook/global\\_warming\\_worldbook.html](http://www.nasa.gov/worldbook/global_warming_worldbook.html) (last visited Mar. 25, 2009) (reporting that scientists expect the Earth’s temperature to rise an additional 10.4 degrees by 2100).

26. David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees,”* 16 GEO. INT’L ENVTL. L. REV. 209, 211 (2004).

27. David Von Drehle & Jacqueline Salmon, *Displacement of Historic Proportions*, WASH. POST, Sept. 2, 2005, at A1. The Pew Center has warned:

[A]lthough we cannot be certain global warming intensified Katrina per se, it clearly has created circumstances under which powerful storms are more likely to occur at this point in history (and in the future) than they were in the past.

years after Hurricane Katrina, thousands of displaced victims remained unable to return to their homes in the Gulf Coast Region.<sup>28</sup>

While the situation for people affected by Hurricane Katrina is far from ideal, many of them were able to find refuge within the United States—in official shelters, private homes of friends and family, hotels, and other public facilities—and benefit from federal housing vouchers.<sup>29</sup> Further, they have the hope and expectation of returning to their homes in the Gulf Coast region.<sup>30</sup> For many people forced to relocate due to changes in environmental conditions, returning home is not an option<sup>31</sup> and resettlement may only be possible outside of their home nation.<sup>32</sup> Due to “drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty,” a large number of people “can no longer gain a secure livelihood in their homelands.”<sup>33</sup> As of now, however, there is no international protocol binding or even encouraging other nations to accept these environmentally displaced persons (“EDPs”).<sup>34</sup> Without either

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Moreover, it would be scientifically unsound to conclude that Katrina was not intensified by global warming.

Pew Ctr., *Katrina and Global Warming*, <http://www.pewclimate.org/specialreports/katrina.cfm> (last visited Feb. 22, 2009).

28. Sandra Zellmer, *A Tale of Two Imperiled Rivers: Reflections from a Post-Katrina World*, 59 FLA. L. REV. 599, 600 (2007).

29. Von Drehle & Salmon, *supra* note 27.

30. Borgna Brunner, Infoplease, *Hurricane Katrina: A Disaster and Its Catastrophic Aftermath*, <http://www.infoplease.com/spot/hurricanekatrina.html> (last visited Feb. 29, 2009) (“Still, more than a third of New Orleans homeowners whose houses were flooded have taken out building permits, providing a sign of hope: slowly and painfully, the city is rebuilding itself.”).

31. Keane, *supra* note 26, at 213 (discussing the situation in El Salvador in which deforestation led to soil erosion and the disappearance of water reserves, preventing displaced persons from returning to their homes); *see also* Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 ENVTL. L. 365, 365 (2007) (“[E]nvironmental degradation is causing a large number of people to flee environments that no longer sustain life.”). Lopez also discusses the environmental conditions of the African Sahel, which have “become intolerable for its human inhabitants,” resulting in 1.4 million sub-Saharan people migrating to the Ivory Coast. *Id.* at 370.

32. NORMAN MYERS, 13TH ECONOMIC FORUM, ENVIRONMENTAL REFUGEES: AN EMERGENT SECURITY ISSUE (2005), *available at* [http://www.osce.org/documents/eea/2005/05/14488\\_en.pdf](http://www.osce.org/documents/eea/2005/05/14488_en.pdf).

33. *Id.*

34. Many academics and journalists incorrectly believe that an agreement exists between citizens of Tuvalu, who face the complete submersion of their island within the next fifty to ninety years, and New Zealand. *See, e.g.*, Lopez, *supra* note 31, at 372 (stating that New Zealand’s annual allowance of seventy-five Tuvaluan immigrants to New Zealand was in response to Tuvalu’s plea for assistance in dealing with its environmental dilemma); Rebecca Elizabeth Jacobs, Comment, *Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL’Y J. 103, 107 (2005) (stating that New Zealand responded to the Tuvaluan Prime Minister’s request for environmental status for

the acceptance of or a recognized remedy for EDPs, questions remain about where EDPs and potential EDPs can seek new lives after climate change has taken their homes and their way of life.

This Note first addresses the failure of international laws to protect environmental migrants.<sup>35</sup> Second, it describes how the United States has applied the refugee definition in its overseas program and asylum law.<sup>36</sup> It addresses how environmental migrants are unlikely to benefit from the definition of refugee and the dangers in construing the law to allow EDPs to fall under the pre-existing refugee definition.<sup>37</sup> Finally, this Note argues that neither refugee nor asylum status should extend to protect EDPs and instead concludes that new U.S. and international laws are necessary to offer adequate protection to EDPs.<sup>38</sup> Such laws should encompass an immigration program that extends visas based on environmental displacement under a more protective, cost-sharing approach.<sup>39</sup>

## II. INTERNATIONAL REFUGEE LAWS FAIL TO PROTECT EDPs

While international law offers protection to displaced populations through refugee laws,<sup>40</sup> it does not extend that protection to EDPs. The Refugee Convention and Protocol provides the definition of refugee for the 147 countries that are parties to the convention.<sup>41</sup> It states that refugee status extends only to (1) persons outside their country of origin (2) who are

Tuvaluan citizens by allowing seventy-five Tuvaluans to relocate in New Zealand each year); Phil Bartsch, 'Action Now' on Pacific Exodus, COURIER MAIL (Austl.), Oct. 9, 2006, at 7, available at <http://www.climateimc.org/en/announcements/2006/10/09/pacific-exodus-likely-australia-should-take-environmental-refugees> (stating that citizens of Tuvalu "have been able to enter New Zealand as environmental refugees displaced by climate change" since 2001); Lisa Bryant, VOA News: Paris Conference to Discuss Climate Change, Rising Oceans, U.S. FED. NEWS, June 6, 2006 ("New Zealand agreed to take in as environmental refugees citizens of the Pacific nation of Tuvalu, who are leaving because of rising sea levels."). The New Zealand government, however, has denied the existence of any such agreement. Immigration Relationship, *supra* note 5 ("New Zealand does not have an explicit policy to accept people from Pacific island countries due to climate change. Stories circulated in the media stating that New Zealand has an agreement with Tuvalu to accept people displaced by rising sea levels due to climate change are incorrect.").

35. *Infra* Part II.

36. *Infra* Part III.

37. *Infra* Part IV.

38. *Infra* Part V.

39. *Infra* Part V.

40. Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMMIGR. L.J. 855, 865 (2000).

41. For the definition of refugee, see the Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention], amended by Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol]. For the signatories to the Refugee Convention and Protocol, see U.N. HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (2008), available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

unwilling or unable to receive protection from their country of origin or to return to their country of origin (3) due to a “well-founded fear of being persecuted” in their country of origin, and (4) that persecution is based on “reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>42</sup>

Persons displaced by the environment, therefore, do not fall directly under the international legal definition of refugee.<sup>43</sup> In 1979, the U.N. High Commissioner for Refugees (“UNHCR”) produced the United Nations’ *Handbook on Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”) as a guide for governments to determine who qualifies for refugee status.<sup>44</sup> In these guidelines, the UNHCR “rules out” victims of natural disasters from acquiring refugee status.<sup>45</sup> According to a study requested by the UNHCR, the “events that cause displacement must ‘derive from the relations between the State and its nationals,’” omitting persons displaced due to the environment from the definition of refugee in international law.<sup>46</sup>

Therefore, while many academics call persons displaced by environmental circumstances “environmental refugees,”<sup>47</sup> this term is a misnomer since EDPs do not technically qualify as refugees under international law.<sup>48</sup> Still, some academics attempt to stretch the definition of

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42. Refugee Convention, *supra* note 41, at 152.

43. For a more complete analysis of each component of the refugee definition, see *infra* Part III, which provides the interpretation that the United States uses.

44. See Jeanhee Hong, Note, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J.L. & PUB. POL’Y 323, 330 (2001) (discussing the UNHCR Handbook).

45. U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 1(ii) (1979) [hereinafter UNHCR HANDBOOK]; see also Luke T. Lee, *The London Declaration of International Law Principles on Internally Displaced Persons*, 95 AM. J. INT’L L. 454, 457 (2001) (discussing the omission of “natural or man-made disasters” from the definition of refugee); Hong, *supra* note 44, at 330 (discussing the determination of refugee status as given in the UNHCR Handbook).

46. Hong, *supra* note 44, at 331 (citing JACQUES VERNANT, *THE REFUGEE IN THE POST-WAR WORLD* 5–7 (1953)).

47. See, e.g., MYERS, *supra* note 32 (“[E]nvironmental refugees . . . are people who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty.”); Philippe Cullet, *Liability & Redress for Human-Induced Global Warming: Towards an International Regime*, 43A STAN. J. INT’L L. 99, 103 (2007) (stating that changes in climate and the subsequent environmental consequences have resulted in millions of environmental refugees); Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT’L & COMP. L. 515, 567 (1998) (claiming that environmental degradation produces environmental refugees); Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT’L & COMP. L. REV. 231, 257 (2007) (discussing whether environmental refugees fall under the Refugee Convention’s definition of refugee).

48. Lopez, *supra* note 31, at 366 (“The expression ‘environmental refugees,’ though widely used for the past twenty years, is mistakenly applied.”); see also Keane, *supra* note 26, at

refugee to include “environmental migrants” under the United Nations’ definition.<sup>49</sup> Others argue that while the current definition does not include EDPs, the United Nations should amend the definition so that it does.<sup>50</sup> As discussed in Part IV, extending protection to EDPs in either of these ways would result in more harm than it would solve.

Ultimately, extending any protection under current international refugee laws is discretionary for the countries that have ratified the Refugee Convention and Protocol.<sup>51</sup> Therefore, even if a country has accepted the definition of refugee in the Refugee Convention and Protocol, that country retains the discretion to interpret the definition as it pleases. Thus far, no country has extended refugee status to EDPs.<sup>52</sup> Instead, countries are construing the definition of refugee even more narrowly so that even fewer persons qualify for protection within their borders.<sup>53</sup>

217 (noting that the use of “environmental refugees’ has been severely criticized for being legally meaningless and confusing”).

49. See Jodi L. Jacobson, *Environmental Refugees: A Yardstick of Habitability*, in 86 WORLDWATCH PAPER 5, 5–6 (1988) (arguing that people forced to move due to environmental disruption caused by natural-resource degradation, natural disasters, or environmental accidents should receive legal refugee status); Jessica B. Cooper, Student Article, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 519–23, 528 (1998) (“Environmental refugees do meet the requirements of the 1951 definition and they are deserving of the help and protections traditional refugees receive.”); Hong, *supra* note 44, at 338 (giving “several reasons” that EDPs should receive status as refugees).

50. See Brooke Harvard, Comment, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. L.J. 65, 78–79 (2007) (“Recognizing the environmental causes of refugee movements and the staggering prediction of 50 million ‘environmental refugees’ by the year 2010, it is time to revise the understanding of the Refugee Convention to include this burgeoning group of displaced persons.”); see also Keane, *supra* note 26, at 223 (stating the importance of including “the relationship between people and the environment as part of [the] analysis” in migration laws); Masters, *supra* note 40, at 867 (stating that including environmental displacement in the definition of refugee would “dilute the refugee concept” (quoting SARAH COLLINSON, DITCHLEY FOUND., CONFERENCE REPORT ON INTERNATIONAL MIGRATION AND POPULATION PRESSURES (1994), excerpted in The RPN Deliberately Avoids Using the Term ‘Environmental Refugees,’ REFUGEE PARTICIPATION NETWORK (Jan. 1995), <http://www.fmreview.org/HTMLcontent/rpn182.htm>)).

51. Hong, *supra* note 46, at 324 (“Nations that ratified the Convention accepted its definition of refugee but are not required to admit those who acquire refugee status.”).

52. See *supra* note 34 (describing the false belief that an agreement exists between Tuvalu and New Zealand).

53. Satvinder Juss, *Toward a Morally Legitimate Reform of Refugee Law*, 11 HARV. HUM. RTS. J. 311, 311 (1998) (“[R]ights of refugees today are uncertain and shrinking.”); see, e.g., *id.* at 326 (citing Ulrike Davy, *Refugees from Bosnia and Herzegovina: Are They Genuine?*, 18 SUFFOLK TRANSNAT’L L. REV. 53, 63–65, 72–75 (1995) (discussing Germany’s denial of asylum to victims seeking protection from the former Yugoslavia because their claims of persecution were not original enough)); BBC News, Head-to-Head: Tory Immigration Plan, [http://news.bbc.co.uk/1/hi/uk\\_politics/4201539.stm](http://news.bbc.co.uk/1/hi/uk_politics/4201539.stm) (last visited Mar. 31, 2009) (supporting “asylum quotas and annual limits for other types of immigration” in the United Kingdom and quoting Sir Andrew Green, Migration Watch U.K. Chairman, who stated that “80% of the public want to see tighter immigration controls”); *infra* note 140 and accompanying text (describing the current trend in the United States to define refugee narrowly in asylum determinations).

Some international agreements expressly expand the definition of refugee; however, even they explicitly state that environmental danger and damage alone do not suffice.<sup>54</sup> For example, the Cartagena Declaration adds to the refugee definition persons compelled to leave their homes due to “circumstances seriously disturbing the public order.”<sup>55</sup> Its purpose, however, is to protect the thousands of persons displaced by generalized violence by distinguishing migrants from refugees.<sup>56</sup> In order to obtain recognition as a refugee as opposed to a migrant, EDPs still must show a level of persecution or violence. The current international laws offering protection to refugees, therefore, do not adequately protect EDPs.

While there are other international laws applicable to persons suffering from environmental degradation, they are ineffective and inapt to help EDPs. For example, the International Covenant for Civil and Political Rights (“ICCPR”) imparts the right to human life and to full and free utilization of natural wealth and resources.<sup>57</sup> The International Covenant for Economic and Social Rights (“ICESCR”) declares the right to health as well as to the enjoyment of and full and free utilization of natural wealth and resources.<sup>58</sup> Both of these covenants were to impose binding obligations on the parties.<sup>59</sup> Currently, however, the ICESCR does not have a protocol in force that gives individuals the right to make complaints to the monitoring body,<sup>60</sup> and several of the parties to the ICCPR have rendered their ratification essentially ineffective through extensive reservations.<sup>61</sup> In addition, in order

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54. See Keane, *supra* note 26, at 216–17 (analyzing the Organization for African Unity Convention, the Cartagena Declaration, and the San Jose Declaration—none of which provide “protection for environmental refugees” where there are no additional causes for the migration beyond environmental displacement—and citing a statement by JoAnn McGregor, *Refugees and the Environment*, in GEOGRAPHY AND REFUGEES: PATTERNS AND PROCESSES OF CHANGE 159 (Richard Black & Vaughan Robinson eds., 1993), to suggest that “political, economic and social changes” are necessary to receive refugee protections). For an argument that current human-rights laws should be extended to cover environmental violations, see generally Keane, *supra* note 26.

55. Cartagena Declaration on Refugees, Inter-Am. C.H.R. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93, art. III (1984).

56. *Id.*

57. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6(1), U.N. Doc. A/6316 (Dec. 19, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

58. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), art. 1, U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3, 10 [hereinafter ICESCR].

59. PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 25–26 (1983).

60. ICESCR, *supra* note 58. On December 10, 2008, however, the U.N. General Assembly adopted an Optional Protocol to ICESCR which will enter into force after the ratification or accession of ten parties. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117 (LXIII), annex, U.N. Doc. A/RES/63/117 (Dec. 10, 2008); see also *id.* art. 18 (stating the conditions for entry into force).

61. U.N. Treaty Collection, International Covenant on Civil and Political Rights, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en> (last visited Mar. 31, 2009). ICCPR’s voting record shows that of the 162 states that have ratified the ICCPR,

to succeed in a human-rights claim under either of these covenants, the plaintiff must show causation.<sup>62</sup> Since climate change is the result of many actors' greenhouse-gas emissions, and generally, EDPs cannot identify a specific actor as the cause of their displacement, causes of action under international human-rights laws do not result in effective remedies for EDPs.<sup>63</sup>

Further, the claims based on ICCPR, ICESCR, and similar internationally recognized human-rights laws only arise after the violation of a basic human right.<sup>64</sup> EDPs' claims under international human-rights law, therefore, do not come into effect until after the destruction of their homes or livelihoods has already occurred.<sup>65</sup> Even then, EDPs would have a difficult time raising claims since claims with even stronger merits under the Covenants are rarely successful.<sup>66</sup> For example, the U.N. Human Rights Committee dismissed a case brought against the Canadian government for failing to clean up a radioactive waste dump in Ontario, Canada, due to the plaintiff's "failure to exhaust local remedies."<sup>67</sup> Since that decision, the European Court of Human Rights has found that there is no right to a clean environment and has interpreted the "right to life" clause more narrowly, granting even less protection to persons affected by environmental disasters.<sup>68</sup> Current international laws and human-rights protocols, therefore, do not adequately protect EDPs. Instead, international laws leave the protection of EDPs to domestic law. Domestic laws, however, also fail to provide adequate protection.

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over sixty have included reservations. *Id.* The United States attached so many reservations to the ICCPR "that its implementation would have little domestic effect." Eleanor Roosevelt Nat'l Historic Site, Covenant on Civil and Political Rights, <http://www.nps.gov/archive/elro/glossary/cov-civilpol-rights.htm> (last visited Feb. 22, 2009); *see also* Office of the High Comm'n for Human Rights, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 11 (1994), *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/69c55b086f72957ec12563ed004ecf7a?opendocument> (listing the types of reservations adopted by the United States as "reservations which essentially render ineffective all Covenant rights").

62. Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?, The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 98–99 (2002).

63. *Id.* at 71 ("[E]nvironmental violations often involve groups and communities, are global in dimension, and sometimes affect even future generations. . . . The human rights machinery obviously cannot deal with such issues.").

64. Alison Lindsay Shinsato, Note, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. U. J. INT'L HUM. RTS. 186, 202 (2005).

65. *Id.* ("[C]ataclysmic environmental destruction must occur before the claimants can argue on the basis of the right to life.").

66. Keane, *supra* note 26, at 214–15; *see* Shinsato, *supra* note 64, at 201 (discussing the European Court of Human Rights's finding that there is no right to a clean environment).

67. Atapattu, *supra* note 62, at 100.

68. Shinsato, *supra* note 64, at 201.

## III. U.S. LAWS DO NOT OFFER PROTECTION TO EDPs

While Congress meant for the 1980 Refugee Act to reflect “one of the oldest themes in America’s history—welcoming homeless refugees to our shores,”<sup>69</sup> the Act fails to welcome homeless EDPs to the United States. The United States adopted the 1980 Refugee Act, its first comprehensive refugee resettlement and assistance policy, as an attempt to bring the United States into compliance with the U.N. Protocol Relating to the Status of Refugees, which it had ratified in 1968.<sup>70</sup> The 1980 Refugee Act provides a definition that is “virtually identical to the [Refugee Convention and Protocol’s] definition of a refugee.”<sup>71</sup> The United States defines refugee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>72</sup>

Even though Congress adopted the international legal definition of refugee and U.S. courts often use international law as a reference for whether certain cases meet the refugee definition, international applications of refugee status are not binding on the United States.<sup>73</sup> The Attorney General has discretion in determining whether a person falls within the definition of a refugee for the purposes of admission into the United States.<sup>74</sup>

The United States uses the refugee definition to determine whether to grant protection and certain benefits to refugees who apply for U.S. protection from overseas, as well as to asylees that apply from within the

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69. S. REP. NO. 96-256, at 141 (1979), as reprinted in 1980 U.S.C.C.A.N. 141.

70. *Id.*

71. KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 65 (3d ed. 2007).

72. 1980 Refugee Act, INA § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A) (2000)).

73. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987). The Court commented on how the international-law definition of refugee is not binding on U.S. courts:

We do not suggest, of course, that the explanation in the [UNHCR] Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a). . . . “[T]he determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.”

*Id.* (quoting UNHCR HANDBOOK, *supra* note 45).

74. *See* 8 U.S.C. § 1158 (“[T]he Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A).”).

United States.<sup>75</sup> Since refugees applying for protection through the Overseas Refugee Program do not have the right to an appeal and do not have a claim in international court,<sup>76</sup> it is easier to assess how the United States interprets the refugee definition by considering how it admits individuals under the U.S. asylum law. As this Note addresses the application of the refugee definition in the United States, it is important to remember that even a determination that EDPs meet the U.S. definition of refugee does not guarantee their acceptance under asylum or refugee laws—the Attorney General may still use discretion to deny an applicant from receiving refugee or asylum status and the accompanying benefits, even after determining that the applicant meets the refugee definition.<sup>77</sup> To meet the refugee definition, applicants must prove that they have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>78</sup>

#### A. THE “WELL-FOUNDED FEAR OF PERSECUTION” REQUIREMENT

EDPs would have a difficult time convincing U.S. courts that they have a well-founded fear of persecution. The well-founded-fear standard only gains meaning “through case-by-case adjudication.”<sup>79</sup> In 1987, the U.S. Supreme Court held that while the Attorney General has discretion, the “well-founded fear” standard does not require the applicant to show that “it is more likely than not that he or she will be persecuted in his or her home country.”<sup>80</sup> After looking at the legislative history as well as the purpose of the Refugee

75. See *id.* § 1157 (describing the U.S. program for admitting refugees); *id.* § 1158 (detailing the system for approving asylees).

76. *Id.* § 1158(a)(2)(C). “In contrast to asylum processing in the U.S., persons rejected by DHS/USCIS cannot appeal the decision.” Refugee Council USA, <http://www.rcusa.org/index.php?page=adjudication-and-appeal> (last visited Mar. 5, 2009); see also *infra* notes 149–52 and accompanying text.

77. Before applicants are even eligible for the Overseas Refugee Program, the Attorney General must first determine that they meet the refugee definition under 8 U.S.C. § 1101(a)(42). 8 U.S.C. § 1157(c). The Attorney General then has discretion to admit “any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . .” *Id.* (outlining the “[a]dmission by Attorney General of refugees”). The *Cardoza-Fonseca* Court stated:

It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that “the alien *may* be granted asylum *in the discretion of the Attorney General.*”

*Cardoza-Fonseca*, 480 U.S. at 428 n.5 (quoting *INS v. Stevic*, 467 U.S. 407, 423 n.18 (1984)).

78. See 1980 Refugee Act, INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (giving the definition of refugee).

79. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 20 (Paul T. Lufkin ed., 3d ed. 1999) (citing *Cardoza-Fonseca*, 480 U.S. at 448).

80. *Cardoza-Fonseca*, 480 U.S. at 449.

Protocol, the U.S. Supreme Court in *INS v. Cardoza-Fonseca*<sup>81</sup> determined that asylum applicants need not show that they “would be threatened” if returned to their country of origin.<sup>82</sup> Instead, the Court posited that “[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”<sup>83</sup> Later in the opinion, the Court suggested that even a 10% chance of a threatening event taking place may be enough.<sup>84</sup> On the other hand, persons who are able to find “effective protection” within the borders of the country of their origin may not meet the requirement of a “well-founded fear.”<sup>85</sup> At least some EDPs will easily be able to show that they have a well-founded-fear that their homes and livelihoods would be threatened, since global warming is no longer deniable nor preventable.<sup>86</sup>

The law, however, also requires a level of persecution.<sup>87</sup> In order to show a fear of persecution, an applicant must first show that the persecution is of a sufficient degree of harm.<sup>88</sup> The degree of harm necessary to qualify as a refugee is relatively low. In *Baballah v. Ashcroft*, the Ninth Circuit held that the existence of physical harm is not necessary for a finding of persecution.<sup>89</sup> Substantial economic deprivation alone may qualify as persecution.<sup>90</sup> Applicants are eligible for asylum on the basis of such economic harm without showing an “absolute inability to support [their]

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81. *Id.*

82. *Id.* at 430 (distinguishing the standard that applies to withholding of deportation cases from asylum cases).

83. *Id.* at 431.

84. *See id.* at 440 (stating that under the U.N. definition of “well-founded fear,” “a 10% chance of being shot, tortured, or otherwise persecuted” would constitute a “well-founded fear,” and while the U.N. definition is not binding on Immigration and Naturalization Services, it is taken into consideration in determining the application of the refugee definition to applicants within the United States).

85. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 133–34 (1991).

86. *See supra* text accompanying notes 18–21 (establishing that climate change is occurring).

87. *See* 1980 Refugee Act, INA § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A) (2000)) (defining refugee).

88. *Id.*

89. *Baballah v. Ashcroft*, 367 F.3d 1067, 1074 (9th Cir. 2004) (citing *Artiga Turcios v. INS*, 829 F.2d 720, 723–24 (9th Cir. 1987)).

90. *Id.* at 1075 (quoting *Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000)). The court further noted that Congress’s removal of “physical” as a modifier of persecution indicates “economic persecution alone could sustain an asylum claim.” *Id.*; *see also* IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 330 (9th ed. 2004) (citing *Baballah v. Ashcroft*, 335 F.3d 981, 990–91, *amended by Baballah*, 367 F.3d 1067) (stating that persecution exists where there is a “substantial economic deprivation constituting a threat to an individual’s life or freedom”).

family.”<sup>91</sup> In addition, the “cumulative impact of several incidents even where no single incident would constitute persecution on its own” is sufficient for a finding of persecution.<sup>92</sup> EDPs would not have a difficult time meeting this prong of the persecution standard.

The depletion of resources, for example, results in the economic deprivation of farmers who no longer have fertile land.<sup>93</sup> In Mali, the decline in rainfall—a result of climate change—has caused farmers’ harvests to be small or to fail altogether, leaving them unable to feed their family.<sup>94</sup> As a result, many farmers are leaving their land and their children with elderly parents to seek employment.<sup>95</sup> Climate change and environmental harms deplete the resources that people use to sustain life, resulting in physical danger and economic hardship.<sup>96</sup> Climate change causes death, disease, and injury due to heat waves, floods, storms, fires, and droughts.<sup>97</sup> Therefore, EDPs can generally meet the first prong of the persecution standard.

In order to show persecution, however, these climatic harms must also meet the “source-of-persecution” requirement. An applicant must show that the cause of harm is either the government or a person or group of persons that the government is unwilling or unable to prevent from continuing the persecution.<sup>98</sup> There are a few ways that EDPs could meet this prong. Since governments are failing to control the persons contributing to greenhouse-gas emissions that are causing global warming, EDPs can argue that their

91. *Baballah*, 367 F.3d at 1075 (citing *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)); cf. *Medhin v. Ashcroft* 350 F.3d 685, 689 (7th Cir. 2003) (holding that economic harassment is not sufficient for a finding of past or future persecution).

92. *Baballah*, 367 F.3d at 1076 (citing *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996)).

93. IPCC, *supra* note 15, at 13.

94. RACHEL BAIRD ET AL., CHRISTIAN AID REPORT, HUMAN TIDE: THE REAL MIGRATION CRISIS 40–41 (Angela Burton ed., 2007), available at [http://www.christianaid.org.uk/Images/human\\_tide3\\_tcm15-23335.pdf](http://www.christianaid.org.uk/Images/human_tide3_tcm15-23335.pdf). The report states:

During the past five years, farmers report rain disappearing in the middle of the growing season, which drastically reduces, if not totally destroys, their crops. This change in rainfall patterns is creating a new wave of migrants who are being driven from their homes in search of water, leaving the very old and the very young in the villages to cope as best they can.

*Id.*

95. *Id.* (giving the examples of Oumou Karembé and Mariam Tapily, both of whom are in their late seventies and have been left with their eight and two grandchildren, respectively, due to their families’ poor harvests that could not sustain their families).

96. See *supra* text accompanying notes 12–15 (describing how rising sea levels have displaced Tuvaluan citizens from their island homes in the southeast Pacific); *supra* text accompanying notes 16–17 (describing how warmer temperatures in the African Sahel have displaced thousands who can no longer sustain life in desert-like conditions).

97. *Id.*

98. KURZBAN, *supra* note 90, at 334 (citing *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000)).

government is the source of the persecution when the government is aware of the harms of climate change and does not or cannot do anything to decrease those harms.<sup>99</sup> In Tuvalu, the government has made efforts to reduce climate change as well as its harmful effects on the nation; but in the end, it will not be able to prevent the submersion of its islands.<sup>100</sup>

The EDPs that suffer the harshest effects of climate change live in countries that are both the least likely contributors to global warming and the least likely to have financial influence in the international world; therefore, these countries have little ability to control the causes of climate change.<sup>101</sup> Unfortunately, even if they could control the causes, they cannot control climate change.<sup>102</sup> If all emissions of greenhouse gases were to cease immediately, the temperature will still continue to increase beyond the year 2100 because of the greenhouse gases already in the atmosphere.<sup>103</sup> EDPs, therefore, could make a valid claim that their governments cannot do anything to prevent the harms that they fear.

The argument that governments are the source of persecution gains strength in cases where governmental actions actually exacerbate the harmful effects of climate change. In the African Sahel, for example, instead of attempting to mitigate the desertification, the Sahelian governments continue to demand “agricultural exports out of their impoverished citizens and their deteriorated lands.”<sup>104</sup> In Colombia, the paramilitary forced landowners off their land in order to profit themselves by using the land to grow palm trees, which are in high demand—as a result of climate change and the perceived need to be more environmentally conscious—since they are a substitute for high-emitting energy sources.<sup>105</sup> Instead of providing

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99. Cooper, *supra* note 49, at 519–20 (arguing that when governments do nothing to decrease climatic harms, they are knowingly harming “individuals by causing or contributing to the degradation of their environment,” therefore meeting the second prong of the persecution requirement).

100. Tuvalu Press Release, *supra* note 12; see also IPCC, *supra* note 15 (discussing the inevitability of climate change); Alexandra Berzon, *Tuvalu Is Drowning*, SALON, Mar. 31, 2006, <http://www.salon.com/news/feature/2006/03/31/tuvalu/print.html> (discussing government workshops for citizens regarding the impacts of global warming and how it will affect them); Elizabeth Pollock, *Tuvalu: That Sinking Feeling—Global Warming, Rising Seas*, FRONTLINE WORLD: ROUGH CUT, Dec. 6, 2005, [http://www.pbs.org/frontlineworld/rough/2005/12/tuvalu\\_that\\_sin\\_1.html](http://www.pbs.org/frontlineworld/rough/2005/12/tuvalu_that_sin_1.html) (giving the statement of Paani Laupepa, the Tuvaluan assistant secretary of foreign affairs, that the people of Tuvalu are being forced to relocate due to global warming and rising seas, something that the Tuvaluan government and people have no control over).

101. Juliet Eilperin, *Climate Shift Tied to 150,000 Fatalities: Most Victims Are Poor Study Says*, WASH. POST, Nov. 17, 2005, at A20.

102. Mastrandrea & Schneider, *supra* note 25.

103. *Id.*

104. Cooper, *supra* note 49, at 524.

105. Tony Allen-Mills, *Biofuel Gangs Kill for Green Profits*, SUNDAY TIMES (London), June 3, 2007, available at [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article1875709.ecc](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article1875709.ecc).

protection to landowners, the president of Columbia has demanded higher production from palm-oil producers and, according to his critics, “has effectively given a green light to paramilitaries to take the land.”<sup>106</sup> Palm-oil developers have also taken over land in Indonesia, which has resulted in 250 conflicts in which dozens of Indonesians were killed and approximately 500 were tortured.<sup>107</sup> At least some EDPs, therefore, could show that their government is “unwilling to avail” them protection.

In some instances, governments have attempted to mitigate climate change and its harmful effects. In these cases, however, they often create another class of persons forced to migrate due to the environmental changes. In Burma, for example, the government has undertaken dam-building projects to generate water for irrigation systems since the amount of rain that Burma receives has dramatically decreased and is no longer sufficient to sustain agricultural production.<sup>108</sup> These irrigation systems and dams, however, have uprooted numerous Burmese landowners.<sup>109</sup> In some cases, the EDPs left their homes to escape the new flood zones created by the irrigation systems.<sup>110</sup> In other cases, Burmese soldiers threatened and tortured people until they fled their own land, which will house the new irrigation systems.<sup>111</sup>

Similarly, the Colombian government’s endorsement of more palm-tree farms is an effort to meet the demand for alternative energy sources that produce fewer harmful emissions.<sup>112</sup> Its support for palm-tree farms, therefore, has the effect of reducing the speed and severity of climate change.<sup>113</sup> The government, however, is building these palm-tree farms by permitting the paramilitary to threaten and force farmers to sell their land for less than its value and by allowing “disappearances, extrajudicial executions, torture and forced displacement” of civilians to occur.<sup>114</sup> In these instances, climate change, or rather, the acknowledgment of and reaction to the new demands of climate change, is resulting in conflict that amounts to persecution by the government or by others with whom the government fails to prevent. Thus, EDPs can arguably claim that they have a “well-founded fear of persecution,” but it is a difficult argument to prove and is unlikely to succeed.

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106. *Id.*

107. BAIRD ET AL., *supra* note 94, at 25.

108. *Id.* at 35.

109. *Id.*

110. *See id.* at 35–36 (explaining how the Burmese army is shooting people and destroying their homes in an effort to force them to relocate out of the regions that will be flooded by the new dams).

111. *Id.* at 36.

112. Allen-Mills, *supra* note 105.

113. BAIRD ET AL., *supra* note 94, at 30.

114. *Id.* at 25.

B. *THE REQUIREMENT FOR REASONS ON ACCOUNT OF RACE, RELIGION, NATIONALITY, MEMBERSHIP IN A PARTICULAR SOCIAL GROUP, OR POLITICAL OPINION*

To qualify as an asylee under the 1980 Refugee Act, the basis of asylum seekers' persecution must be the applicant's race, religion, nationality, membership in a particular social group, or political opinion.<sup>115</sup> Membership in a particular social group is the broadest of the five categories.<sup>116</sup> Due to its nebulous nature, scholars describe it as the "catch-all" for persons who meet the persecution definition but do not fall directly under one of the other categories.<sup>117</sup> The court in *Matter of Acosta* held that a member of a particular social group is

[a]n individual who is a member of a group of persons all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.<sup>118</sup>

The courts often use the UNHCR Handbook to determine the meaning of "particular social group."<sup>119</sup> The UNHCR Handbook states that similar social status, habits, and backgrounds constitute a "particular social group," and, under special circumstances, these factors may be sufficient for a court to find that persecution or a fear of persecution exists, satisfying the refugee definition.<sup>120</sup> The UNHCR Handbook makes it clear that the unifying characteristic cannot be the persecution or the shared risk of persecution.<sup>121</sup> This, therefore, eliminates the easiest claim for EDPs as a particular social group.<sup>122</sup>

Still, those suffering from environmental problems are often of the same race, nationality, socio-economic class, or particular social group. "[M]any socio-political, economic and other environmental factors"

115. 1980 Refugee Act, INA § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A) (2000)).

116. ANKER, *supra* note 79, at 376–98; Cooper, *supra* note 49, at 521.

117. Cooper, *supra* note 49, at 521–23; *see* ANKER, *supra* note 79, at 379 ("[T]he particular social group ground is excessively open-ended and encompasses broad, vaguely defined or non-cohesive societal groups.").

118. *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (B.I.A. 1985), *overruled on other grounds by* *Matter of Mogharrabi*, 19 I. & N. Dec. 429 (B.I.A. 1987).

119. *Acosta*, 19 I. & N. Dec. at 211 (stating that the UNHCR Handbook is a "useful tool" in helping the court make its determinations on the refugee definition); *Zavala-Bonilla v. INS*, 730 F.2d 562, 567 (9th Cir. 1984) ("The [UNHCR] Handbook has been treated by the [Board of Immigration Appeals] as a significant source of guidance . . .").

120. UNHCR HANDBOOK, *supra* note 45, ¶¶ 77–78.

121. *Id.*

122. *See* Cooper, *supra* note 49, at 522 (claiming that EDPs are part of a social group characterized by their lack of political power necessary to protect their own environments).

influence the impact that environmental disasters have on certain people.<sup>123</sup> Research on climate change reveals that the impact is hardest among the poorer countries.<sup>124</sup> Specific countries and regions, such as Tuvalu and the African Sahel, suffer the most imminent dangers from climate change, making persons of the same nationalities the ones suffering from the harm of climate change.<sup>125</sup> The nuclear accident at Chernobyl, for example, “forced many thousands of Ukrainians to migrate out of the contaminated zone.”<sup>126</sup>

Even within specific countries, disasters affect specific classes of persons more severely.<sup>127</sup> Social systems within nations “generate the conditions that place different kinds of people, often differentiated along axes of class, race, ethnicity, gender, or age, at different levels of risk from the same hazard and suffering from the same event.”<sup>128</sup> These social structures within the United States were the cause of the disproportional number of poverty-stricken African-American neighborhoods hit hardest by Hurricane Katrina.<sup>129</sup> In other instances, members of a certain profession, such as the farmers in Colombia and Burma and the hunters in the Arctic, are suffering the most from climate change, and consequently, are the ones forced to leave their countries.<sup>130</sup> In *Matter of Acosta*, the court held that land ownership, while not an immutable characteristic, was one that people should not be required to change.<sup>131</sup> It therefore held that land ownership was proof of membership in a particular social group for the purpose of the applicant’s asylum claim.<sup>132</sup>

In *Sanchez-Trujillo v. INS*,<sup>133</sup> however, the Ninth Circuit rejected “the class of young, working class, urban males of military age” as a particular social group because it would create an “all-encompassing grouping” that would cover “a plethora of different lifestyles, varying interests, diverse

123. Gregor S. McCue, Note, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT’L ENVTL. L. REV. 151, 157 (1993).

124. BAIRD ET AL., *supra* note 94, at 23; Eilperin, *supra* note 101; Climate Inst., Impact of Climate Change on Human Health, <http://www.climate.org/topics/health.html> (last visited Feb. 22, 2009).

125. See *supra* text accompanying notes 7–11 (discussing the specific harms to Tuvalu); *supra* text accompanying note 104 (discussing the circumstances specific to the African Sahel).

126. Anthony Oliver-Smith, *Understanding Katrina: Disasters and Forced Migration in the 21st Century*, SSRC, June 11, 2006, <http://understandingkatrina.ssrc.org/Oliver-Smith/>.

127. *Id.*

128. *Id.*

129. Rebecca Eaton, Note, *Escape Denied: The Grenna Bridge and the Government’s Armed Blockade in the Wake of Katrina*, 13 TEX. WESLEYAN L. REV. 127, 137 (2000).

130. See *supra* text accompanying notes 105–06, 112–14 (discussing the situation in Colombia); *supra* text accompanying note 108–11 (discussing the situation in Burma).

131. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

132. *Id.*

133. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

cultures, and contrary political leanings.”<sup>134</sup> Courts are reluctant to approve asylum claims based on membership in a particular social group due to the vast number of people that many social-group definitions would encompass.<sup>135</sup> Even the Ninth Circuit has failed to do so. In *Pedro-Mateo v. INS*, the Ninth Circuit again held that an applicant’s association with a group of indigenous people is insufficient to demonstrate membership in a particular social group when the “indigenous people compris[e] a large percentage of the population of a disputed area.”<sup>136</sup>

Furthermore, the persecution must be “on account of” membership in that particular social class, which requires the applicant to “establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”<sup>137</sup> The U.S. Supreme Court in *INS v. Elias-Zacarias*<sup>138</sup> determined “on account of” to mean that the person’s inclusion in one of the protected categories at least partially motivated the persecutor’s actions. Some might consider various acts by governments as they attempt to mitigate climate change—for example, purposefully forcing palm-oil farmers off their land—to be on account of the persecuted person’s membership in that social group. It is more difficult to apply this requirement accurately, however, to persecution arising from a government’s inability to stop other countries from contributing to climate change or its failure to reduce climate change which arguably affects members of a particular social group.<sup>139</sup>

### C. EDPs WILL NOT RECEIVE PROTECTION UNDER CURRENT LEGISLATION

As discussed in Parts III.A and B, EDPs do not easily fall under current asylum laws or the definition of refugee. While at the time the United States adopted the international definition the Senate intended that the refugee definition would extend “to include aliens who have been . . . forced to flee their homes as a result of serious natural disasters, such as earthquakes,

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134. *Id.* at 1576–77; *see also* *Raffington v. INS*, 340 F.3d 720, 721–23 (8th Cir. 2003) (finding that “mentally ill female Jamaicans” is too large and diverse of a group to qualify as a social group for the purposes of meeting the refugee definition).

135. ANKER, *supra* note 79, at 380; *see also supra* text accompanying notes 134 (stating the courts’ reluctance to grant asylum based on persecution on account of membership in a social group); *infra* note 141 (discussing the reluctance in the United States to offer asylum protection); *supra* Part I (discussing previous and current EDPs as well as estimations of future EDPs).

136. *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (denying classification as a social group to indigenous Indians in Guatemala).

137. 1980 Refugee Act, INA § 208(b)(2)(B)(i) (codified at 8 U.S.C. § 1158(b)(2)(B)(i) (2000)).

138. *INS v. Elias-Zacarias*, 502 U.S. 478, 482–83 (1992).

139. *See supra* Part III.A (discussing the different ways of analyzing governments’ actions as persecution).

volcanic eruptions, tidal waves, and in any similar natural catastrophes,”<sup>140</sup> it has never been interpreted as offering protection to these displaced persons. It is unlikely that the United States will begin interpreting the refugee definition more broadly to include EDPs since the United States has gradually decreased the percentage of asylum applicants to whom it grants asylum status.<sup>141</sup>

Furthermore, it is unlikely that the United States will provide EDPs protection under the refugee definition since in 2007, the United States created a Temporary Protected Status (“TPS”) specifically for natural-disaster victims.<sup>142</sup> TPS, however, is very limited in application and scope.<sup>143</sup> For example, the Attorney General did not even extend temporary protection to India and Pakistan’s 2.6 million EDPs after the 2004 tsunami or the 2005 earthquake.<sup>144</sup>

In addition, TPS only applies to applicants from a foreign country that has officially requested recognition as temporarily inadequate to provide its nationals with a safe return based on the premise that the country will, in the future, provide the applicant with a safe return.<sup>145</sup> Tuvaluans, for example, would not have access to protection under TPS since the submersion of Tuvalu would result in the permanent inability of the Tuvaluan government to provide for its citizens. The current refugee definition, asylum laws, and TPS program, therefore, do not provide adequate protection to EDPs.

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140. S. REP. NO. 89-748, at 17 (1965), as reprinted in 1965 U.S.C.C.A.N. 3328, 3335. The bill passed; however, the adopted public law did not include more in the refugee definition than “persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode.” Pub. L. No. 89-236, 79 Stat. 911, 913 (1965).

141. See Executive Office for Immigration Review, Electronic Reading Room Information, <http://www.usdoj.gov/eoir/efoia/foiafreq.htm> (last visited Feb. 22, 2009) (compiling data on the numbers of asylum applications granted and denied by year). In 2002, 24% of asylum applicants received asylum. U.S. DEP’T OF JUSTICE, IMMIGRATION COURTS: FY 2002 ASYLUM STATISTICS (2002), available at <http://www.usdoj.gov/eoir/efoia/FY02AsyStats.pdf>. In 2007, only 23% of applicants received asylum status. U.S. DEP’T OF JUSTICE, IMMIGRATION COURTS: FY 2007 ASYLUM STATISTICS (2007), available at <http://www.usdoj.gov/eoir/efoia/FY07AsyStats.pdf>.

142. Temporary Protected Status, 8 U.S.C. § 1254a (2000).

143. *Id.* (giving the definition and statutory limitations of TPS).

144. Harvard, *supra* note 50, at 77–78; see also 8 U.S.C. § 1254a (providing that the Attorney General can grant temporary protection to persons if there has been a natural disaster). TPS does not require the applicant to meet the definition of a refugee and therefore is outside the scope of this Note. In addition, it is not a true remedy to the problem of EDPs because it only offers temporary protection—it neither grants immigration rights to its recipients nor allows recipients to get on track to becoming lawful permanent residents. *Id.* For the statutory language regarding TPS, see *id.*

145. 8 U.S.C. § 1254a.

## IV. PROTECTION FOR EDPs SHOULD NOT COME FROM THE REFUGEE LAWS

The refugee definition is not an adequate provision to protect EDPs, whether through interpreting the current definition more broadly or through an amendment to the definition that overtly provides that protection. First, it is unlikely that any country would take the initiative to expand its interpretation of refugee since no country has yet done so, and the trend has been to narrow, not broaden, the protection and immigration offered under refugee and asylum laws.<sup>146</sup> Second, expanding protection under the refugee definition would require governments to modify a definition that has not changed since its promulgation in 1951.<sup>147</sup> Even if they were to do so, including EDPs under immigration laws by expanding the refugee definition would provide only nominal protection to EDPs. The refugee definition is a precarious location for providing that protection because it is concurrently too broad and too limiting.

## A. IMPEDIMENT TO THE EXISTING ASYLUM/REFUGEE PROGRAMS

Altering the international definition to include EDPs would likely have negative results on the existing refugee and asylum programs. A binding expansion of the international definition of refugee may result in countries refusing to follow international refugee standards altogether to avoid the expanded definition, which would place an even larger burden on those countries that continue to abide by international laws. The countries that continue to abide by international laws will likely make access to their borders even more stringent to limit admission to their overburdened asylum programs. As noted above, the international refugee laws are not binding on a country until the refugee has entered that country.<sup>148</sup> Therefore, in the attempt to mitigate the higher number of applicants that can attain asylum status under the broader refugee definition, countries will make access to asylum programs even more difficult, inhibiting all potential applicants, not just EDPs, from qualifying for asylum.

Seeking resettlement through the Overseas Refugee Program is already more difficult than seeking resettlement from the U.S. Asylum Program.<sup>149</sup>

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146. *Supra* text accompanying note 53; see Part III (discussing the U.S. interpretation of refugee).

147. Lopez, *supra* note 31, at 391–92 (stating that most countries would be hesitant to even consider altering the long-standing definition).

148. See *infra* text accompanying note 172 (stating that the law only requires countries to offer refugees protection after they enter the country's borders).

149. See MUSALO ET AL., *supra* note 71, at 75–86 (explaining the Overseas Refugee Program, which applies to persons outside the country seeking protection in the United States, 8 U.S.C. § 1157, and the procedures for asylum and restriction on removal, which provide protection to persons within the United States, 8 U.S.C. § 1258). The number of aliens able to apply for protection under 8 U.S.C. § 1157 is limited in number and to certain situations in which refugees will be admitted. MUSALO ET AL., *supra*, at 75–76. These limitations do not apply to persons seeking resettlement from within the United States. *Id.* at 75.

While the Overseas Refugee Program allows applicants to surpass the difficulty of arriving within the United States before attaining eligibility, it sets a limit on the number of persons allowed to enter the United States under the overseas program each year.<sup>150</sup> In addition, there are several points at which the denial of the overseas applicants could occur,<sup>151</sup> and overseas applicants do not have the right to appeal their denial.<sup>152</sup>

Amending or interpreting the refugee definition to encompass EDPs will undermine the concept of refugee.<sup>153</sup> By broadening the refugee definition to include EDPs, the number of persons able to apply for protection under the refugee or asylum programs will increase dramatically.<sup>154</sup> Courts, therefore, will have to narrow who can receive protection by redefining “persecution” and “well-founded fear.” The difficulty in distinguishing economic migrants from environmentally displaced migrants and determining whether EDPs deserve permanent or temporary relief from their environmental circumstances<sup>155</sup> will result in arbitrary barriers that will further delay the programs and inhibit both EDPs and applicants currently eligible for refugee protection. Essentially, courts will be forced to tailor the refugee definition to weed some EDPs out while allowing others in, which will affect non-EDP applicants’ access to protection as well.

In addition, due to the increase in applicants, the programs will operate even more slowly.<sup>156</sup> Already, it may take ten years before an applicant

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150. MUSALO ET AL., *supra* note 149, at 75.

151. *See id.* at 75–76 (explaining how a person must fit into one of three priority categories and must also be approved in an interview). Overseas Refugee Program applicants must first prove to UNHCR representatives that they qualify for the refugee program and then must show that they are “in need of resettlement for specified and compelling reasons” of “special concern” to the United States or are a family member to a U.S. citizen. *Id.* After proving that the applicant has met these criteria, a representative of the Department of Homeland Security’s Bureau of Citizenship and Immigration Services must approve the refugee in an interview. *Id.* at 76.

152. *Supra* text accompanying note 76 (discussing the absence of the right to an appeal or to make a claim in international court for Overseas Refugee Program applicants).

153. Masters, *supra* note 40, at 867.

154. *See* BAIRD ET AL., *supra* note 94, at 26 (stating that the Intergovernmental Panel on Climate Change has predicted that by 2050 climate change will cause the displacement of at least one million people each year with a possibility of that number reaching twenty-six million per year).

155. *See* Press Release, U.N. Univ. Inst. for Env’t & Human Sec., Ranks of ‘Environmental Refugees’ Swell, Calls Grow for Better Definition, Recognition, Support (Nov. 11, 2005), available at [http://www.eurekalert.org/pub\\_releases/2005-11/unu-ro100405.php](http://www.eurekalert.org/pub_releases/2005-11/unu-ro100405.php) (discussing the difficulty in discerning “environmental refugees’ from economic migrants” and refugees from evacuees).

156. *See* U.N. High Comm’n for Refugees [UNHCR], Executive Comm. of the High Comm’n’s Programme, *Progress Report on Resettlement*, EC/59/SC/CRP.11 (June 2, 2008) [hereinafter *Progress Report*], available at <http://www.unhcr.org/excom/EXCOM/484514632.pdf> (discussing the lengthy delays in making resettlement determinations for Overseas Refugee

receives a decision on an asylum application in the United States.<sup>157</sup> Due to countries' caps on accepting refugees, in 2008, less than 50% of the refugees in need of resettlement were able to resettle, forcing refugees to wait in dangerous resettlement camps for at least another year before they have access to the refugee program again.<sup>158</sup> UNHCR projects that the number of refugees unable to resettle due to placement limitations is likely to increase in 2009,<sup>159</sup> and that projection does not even account for the inclusion of EDPs in the refugee definition.

A slower refugee-resettlement process will leave more individuals in refugee camps where they are in a "dangerous and difficult situation."<sup>160</sup> It will also hinder the purpose of refugee and asylum laws, which were designed "to protect those persons whose governments are the instruments of their oppression."<sup>161</sup> With the inclusion of EDPs into the definition of refugee, countries' limitations on refugee admissions will further decrease the number of persons suffering persecution from their governments from entering countries through the Overseas Refugee Program.

Each year, it will also prevent many asylum applicants who are in danger of being tortured by their governments from finding an attorney, standing before an immigration judge, and receiving asylum status due to the increase in demand for the already-limited resources available to asylum applicants. The approval rates of asylum applications for applicants who sought asylum without legal representation are significantly lower than for the applicants who received the assistance of counsel.<sup>162</sup> Since an asylum

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Program applicants and the "serious detrimental impact on the wellbeing of refugees who often have to wait in dangerous and difficult situations"); *see also* U.S. Citizenship & Immigration Servs., Frequently Asked Questions About Asylum, <http://www.uscis.gov> (follow "Services & Benefits"; then "Humanitarian Benefits"; then "Asylum"; then "Asylum Eligibility and Applications FAQ"; then "How Long Does the Process Take?") (last visited Feb. 22, 2009) [hereinafter USCIS FAQs] (stating that it could take up to 180 days after filing an asylum application before applicants receive a decision from the immigration court); U.N. HIGH COMM'R FOR REFUGEES, UNHCR POSITION ON THE RETURN OF ASYLUM-SEEKERS TO GREECE UNDER THE "DUBLIN REGULATION" (2008), *available at* <http://www.unhcr.org/protect/PROTECTION/482199802.pdf> (stating that asylum applicants in Greece have a waiting period of two months to four years due to the backlog of asylum cases).

157. *See* Joe Chapman, *Kennewick Family Returning to Russia After Being Denied Religious Asylum*, TRI-CITY HERALD (Kennewick, WA), Sept. 7, 2007, *available at* 2007 WLNR 17481063 (discussing the Korotkov family's ten-year wait after filing their application for asylum upon entering the United States and their ultimate rejection in 2007).

158. *Progress Report*, *supra* note 156, ¶4.

159. *Id.* These numbers only consider the refugees that UNHCR determines need resettlement. That number is typically "less than 1% of [the] world's refugee population . . . in any given year." Manuel Castillo & James Hathaway, *Temporary Protection*, in RECONCEIVING INTERNATIONAL REFUGEE LAW 1, 6 (James Hathaway ed., 1997).

160. *Progress Report*, *supra* note 156, ¶8.

161. Masters, *supra* note 40, at 868.

162. Donald Kerwin, Migration Policy Inst., *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, at 6 ("Thirty-nine (39) percent of nondetained, represented asylum seekers received

applicant must file his or her asylum claim within one year after arriving in the United States,<sup>163</sup> the inability to find an attorney could have serious implications.

Also, a delay in accessing the asylum program prolongs the applicant's inability to work. This is because an asylum applicant may not file for work authorization until 180 days after filing his or her asylum case or other immigrant authorization.<sup>164</sup> By the time applicants find counsel, file their asylum applications, wait 180 days after filing, file their applications for employment authorization, and actually receive employment authorization, they may have been living in the United States for over two years. Since many asylum seekers are coming from financially difficult situations and had to leave most of their belongings behind, a long period without employment is often very difficult for the applicants and their families, friends, or churches that are supporting the applicants during the long asylum process. Slowing down the application process will cause further hardship for all asylum seekers, and by broadening the refugee definition to include EDPs, all potential immigrants will face further difficulty in attaining immigrant status in the United States. Existing asylum and refugee programs, therefore, will be weaker and will reduce the number of applicants they currently would accept in order to provide spaces for the additional EDPs who will qualify for the program.

#### B. INSUFFICIENT SOURCE OF PROTECTION

While the addition of EDPs to current asylum laws will create an overly broad definition and too many persons falling under already-strained refugee programs, it is also too narrow to provide adequate protection to EDPs. The geographic and temporal limitations of the refugee programs will inhibit EDPs who need protection from qualifying for the program. In addition, inclusion of EDPs under the refugee definition will enhance climate change and its harmful effects instead of encouraging its mitigation.

The refugee definition limits protection only to those who have left their home countries.<sup>165</sup> Already, earthquakes, hurricanes, floods, and other natural disasters have displaced twenty-five million people within their own countries.<sup>166</sup> Extending refugee and asylum laws to cover environmental

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political asylum, in contrast to 14 percent of non-detained [sic], unrepresented asylum seekers. Eighteen (18) percent of represented, detained asylum seekers were granted asylum, compared to three percent of detained asylum seekers who did not have counsel.”).

163. INA § 208(a)(2)(B) (codified at 8 U.S.C. § 1158(a)(2)(B)(2000)).

164. USCIS FAQs, *supra* note 156 (follow the “Will I get a Work Permit” link) (“Asylum applicants cannot apply for employment authorization at the same time they apply for asylum.”).

165. Refugee Convention, *supra* note 41; Protocol, *supra* note 41; 1980 Refugee Act, INA § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A)).

166. BAIRD ET AL., *supra* note 94, at 23.

refugees would continue to exclude those who can find refuge within their home nations. This is problematic because, while seeking refuge in their homelands, EDPs overwork unstable land and exacerbate the problem of infertility within their home nations.<sup>167</sup> Others seek haven in their home nations' cities, where their pastoral and farming skills are useless, they are separated from their families, they may not speak the language, and they place an even greater "strain on an already overburdened urban infrastructure."<sup>168</sup> For example, Sana'a, Yemen may exhaust its water source by 2010 if its population continues to double every six years, as it has done since 1972.<sup>169</sup> Such a strain often results in political conflict as well as further destruction to land. While the United States provided makeshift shelters to persons displaced due to Hurricane Katrina, it is unlikely that the majority of the countries suffering from environmental damage will be able to provide adequate resources to the EDPs within their home countries' borders.<sup>170</sup> For example, of the three million people displaced by floods in Bihar, India, several of the indigenous tribes have not received any aid.<sup>171</sup> Leaving the burden of supplying support to EDPs on the EDPs' countries of origin, therefore, inhibits those countries' ability to sustain themselves and their citizens—accelerating the cycle of environmental degradation and forced migration.

Even if EDPs receive protection under the refugee definition, they would face difficulty in procuring their right to protection under international law due to the admission requirement in the Refugee Convention and Protocol. The Refugee Convention requires countries to offer protection to refugees only after they have entered the country's borders.<sup>172</sup> Wealthier countries have used stringent deterrent devices to ensure that noncitizens, including refugees, do not enter their borders.<sup>173</sup> They set rigid visa requirements and maintain highly guarded borders to keep refugees out, thereby avoiding the burden of housing displaced

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167. McCue, *supra* note 123, at 159.

168. BAIRD ET AL., *supra* note 94, at 23; *see also* Shamini Naidu, Global Change, *Planning a Climatic Future for Durban*, SCI. SCOPE, Mar. 2006, at 13, *available at* [http://www.csir.co.za/publications/pdfs/sciencescope/SS\\_March\\_2006.pdf](http://www.csir.co.za/publications/pdfs/sciencescope/SS_March_2006.pdf) (stating that climate change will result in the "migration of people from other dryer areas in [South Africa,] . . . placing a greater burden on already stressed resources").

169. Press Release, U.N. Univ. Inst. for Env't & Human Sec., *supra* note 155..

170. *See supra* text accompanying note 124 (noting that climate change affects impoverished nations more often and more severely than wealthier nations).

171. Christian Aid, Indian Floods Appeal, <http://www.christianaid.org.uk/emergencies/current/india-floods/index.aspx> (last visited Feb. 22, 2009) (reporting that the relief effort has failed to help several Dalits and indigenous tribes, which are groups that "are unlikely to be able to access support independently").

172. Refugee Convention, *supra* note 41, art. 25(1).

173. MUSALO ET AL., *supra* note 71, at 74; Juss, *supra* note 53, at 313 (explaining that states can evade their asylum obligations through deterrent devices).

persons.<sup>174</sup> The wealthier nations, therefore, would continue to push the burden of protection onto the poorest nations if EDPs received protection under the refugee definition.<sup>175</sup>

Refugee law is also too narrow because it does not allow for a gradual resettlement plan for persons living in unsustainable areas. Without a gradual resettlement plan, mass displacement will arise either when an environmental disaster is imminent—arguably giving a claim for well-founded fear—or after the harm has already occurred. Waiting until after the harm has occurred raises concerns for the safety of the potential EDPs.<sup>176</sup> It also reduces the likelihood that EDPs will have any economic value to bring to their host countries by waiting until their land has lost all value.<sup>177</sup> Regardless of whether the displacement occurs before or after the harm, environmental displacement affects millions of persons at once, and consequently, will result in mass migration.<sup>178</sup>

Mass migration further advances the harmful effects of climate change and inadequately assigns the burden to countries that are unable to sustain it. Mass migration creates security problems internally as well as internationally, making it more difficult for governments to locate individuals who may be a threat.<sup>179</sup> It also increases the likelihood of conflict, especially since the areas (such as the Middle East, South Asia, and the Sahara Belt) that climate change affects the most are already prone to instability.<sup>180</sup> Former U.S. military officials provided a report for CNA Corporation stating that “Darfur provides a case study of how existing marginal situations can be exacerbated beyond the tipping point by climate-related factors.”<sup>181</sup> The Darfur conflict began due to ecological difficulties

174. See Juss, *supra* note 53, at 313 (describing stringent visa requirements as a deterrent device that states use to avoid asylum obligations).

175. See generally *id.* (describing a nation-centered system of asylum, which results in burden shifting if wealthier nations circumvent the system).

176. “Despite technological and scientific advances in prediction and mitigation, we have seen a serious increase in both mortality and economic losses from disasters since 1960, particularly in the developing world. Disasters are, in fact, increasing in impact and scope . . . .” Oliver-Smith, *supra* note 126.

177. While the protection extended to EDPs should be based on their rights as human beings and not their economic value, governments have a valid concern with the potential harm that EDPs will have on their countries’ economic prosperity and sustainability.

178. *Supra* Part I.

179. Michael M. Hethmon, *Immigration Policy: Diversity, Mass Immigration, and National Security After 9/11—An Immigration Reform Movement Perspective*, 66 ALB. L. REV. 387, 409 (2003).

180. BAIRD ET AL., *supra* note 94, at 25; see also U.N. INTEGRATED REG’L INFO. NETWORKS, SUDAN: CLIMATE CHANGE—ONLY ONE CAUSE AMONG MANY FOR DARFUR CONFLICT (June 28, 2007), <http://www.irinnews.org/Report.aspx?ReportId=72985> [hereinafter SUDAN: CLIMATE CHANGE] (“[L]ack of essential resources threatens not only individuals and their communities but also the region and the international community at large.” (internal citations omitted)).

181. SUDAN CLIMATE CHANGE, *supra* note 180.

that were at least partly the result of climate change.<sup>182</sup> In the mid-1980s, a drought and corresponding famine “killed more than a million people and laid waste livestock herds.”<sup>183</sup> As a result, the pastoralists and farmers began fighting over the land.<sup>184</sup> “A string of conflicts broke out as both sides armed themselves, and those conflicts created the template for today’s disaster.”<sup>185</sup> Now, the Darfur conflict is affecting all three Darfur states, as well as Chad and the Central African Republic.<sup>186</sup> Environmental degradation, therefore, is likely to increase conflict when displaced persons remain within a home nation or neighboring nation that is unable to provide adequately for its EDPs. Such conflicts result in even further mass migration and environmental destruction, creating a vicious cycle.<sup>187</sup>

Also, mass migration challenges the host nation’s solidarity by integrating ethnically and culturally diverse refugees.<sup>188</sup> In Pakistan, for example, the public put massive pressure on the government to send Afghani refugees back to Afghanistan despite continuing danger in Afghanistan.<sup>189</sup> The Pakistani government struggled to provide an adequate solution because Afghanistan was still not safe for the Afghans, which prevented the Pakistani government from forcing repatriation.<sup>190</sup>

Host nations also suffer environmentally when they support massive populations of environmental migrants. Turkey and Honduras refused to accept asylum seekers due to the environmental damage that refugee camps cause.<sup>191</sup> The refugees’ consumption of natural resources threatens the environmental sustainability of the host nation.<sup>192</sup> EDPs often seek refuge in

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182. *Id.*; see also Julian Borger, *Scorched*, GUARDIAN (U.K.), Apr. 28, 2007, available at <http://www.guardian.co.uk/environment/2007/apr/28/sudan.climatechange> (“Darfur may be seen as one of the first true climate-change wars.”).

183. Borger, *supra* note 182.

184. *Id.*

185. *Id.*

186. *Id.*

187. See Wendy Vanasselt, *Armed Conflict: Killing Governance*, in WORLD RESOURCES 2002–2004: DECISIONS FOR THE EARTH: BALANCE, VOICE & POWER 25 (2003) (reporting that wars destroy “croplands, forests, water systems, and other natural resources” and cause additional pollution).

188. *Id.*

189. Ashfaq Yusufzai, *Pakistan: Afghan Refugee Camp Spared Closure Till Spring*, IPS NEWS, Sept. 8, 2007, available at <http://www.ipsnews.net/print.asp?idnews=39192>.

190. *Id.*

191. Keane, *supra* note 26, at 220.

192. See McCue, *supra* note 123, at 164 (stating that the destruction of trees to create space for refugee camps and to use for firewood causes deforestation and that water deficiencies cause sewage hazards). “Sudden mass migrations into a new ecosystem can often have devastating effects on local environment. Often, the host area will be only slightly better off than the one that the migrants left because it is near their previous site and under the same kinds of environmental pressures.” *Id.* at 163; see also Keane, *supra* note 26, at 219 (stating that refugee camps cause erosion, soil depletion, and decreased productivity of the land).

neighboring countries that already suffer from similar environmental problems and already cannot cope with their own environmental problems.<sup>193</sup> Alexandra Berzon has predicted that “climate change will have a disproportionate impact on underdeveloped nations.”<sup>194</sup> Providing protection to EDPs under current refugee definitions will only exacerbate the excessive burden borne by geographic areas that are already unable to sustain their own populations.

#### V. CONCLUSION: IMMIGRANT STATUS FROM A NONIMMIGRATION SOURCE

The number of EDPs is growing, and current international and domestic refugee laws do not offer sufficient protection. Countries are reluctant to accept EDPs under the refugee definition, and it is dangerous to assume that current refugee laws can adequately provide such protection to EDPs. Due to the limitations on the number of refugees accepted into the United States each year, allowing EDPs to enter countries under the pretext of being a refugee would limit the number of other, non-EDP persons who would currently be eligible for refugee protection. In addition, it is likely that refugee laws would not provide for EDPs until after climate change had already resulted in their migration. The large number of EDPs simultaneously affected would only continue to exacerbate climate change due to the subsequent mass migration. In order to prevent further deterioration of the land, countries must accept EDPs gradually and not in mass. Therefore, EDP protection should not fall under the existing definition of refugee.

EDPs should receive protection under their own Environmentally Based Immigration Visa (“EBIV”) Program. Similar to the current refugee program, countries should share the burden of accepting and supporting EDPs, with that burden resting more heavily on wealthier nations that are better able to sustain such populations. Unlike the refugee and asylum programs, however, protection should not only extend to people who have already suffered harm and forced migration, but also to potential EDPs. While countries should first issue visas to already-displaced persons, persons suffering from gradual environmental change or facing impending future environmental displacement, such as the Tuvaluans, also should be eligible for an EBIV.

International discussions regarding emissions-reduction requirements should also consider the adoption of an EBIV Program. Lawmakers and scientists have recognized the need for environmental protection, and have been involved in international discussions considering possible emissions-reduction requirements, but have not been able to agree on emissions

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193. See Juss, *supra* note 53, at 320 (discussing the burden of refugee camps on the land).

194. Berzon, *supra* note 100.

standards.<sup>195</sup> While discussions to reduce emissions should not cease, focusing international efforts on an EBIV Program would provide protection to EDPs and reduce the harmful effects of climate change by reducing the number of people dependent upon depreciating land, helping prevent mass migration and, therefore, facilitating environmental sustainability.

In addition, the EBIV Program should allocate the number of immigration visas that each country should extend in proportion to the percentage of greenhouse-gas emissions that countries produce. The highest emitters, therefore, will provide the most visas to EDPs or future EDPs. As a result, the countries that are most likely causing climate change will bear the costs of supporting EDPs, therefore discouraging high emissions and reducing the need for migrant protection due to climate change. Also, as noted above, it is generally the wealthiest nations that are the highest emitters. Placing the burden of EDPs on high emitters, therefore, would help alleviate the destruction and conflict that results when already unstable and impoverished countries attempt to provide for EDPs.

Alleviating the burden on other countries from further instability and unsustainable environmental circumstances would further inhibit the expansion of harmful climate change effects and would limit the expense on all nations in the future. Thus, it is beneficial to all countries to impede environmentally induced migration. This can result by providing protection to EDPs without requiring the determination that EDPs are refugees or that they fall under asylum qualifications. The United States is one of the highest emitters, but it is also one of the world's wealthiest nation and an international role model—it should take initiative by passing a law that supports and protects EDPs without requiring that they qualify as refugees or under the asylum law.

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195. See, e.g., *U.S. Re-Engagement in the Global Effort to Fight Climate Change, Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 11–13 (2007) (statement of Eileen Claussen, President, Pew Center on Global Climate Change), available at [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_congress/may1507.cfm](http://www.pewclimate.org/what_s_being_done/in_the_congress/may1507.cfm) (recognizing elements that must exist before countries will participate in a climate-change framework); Sheryl Gay Stolberg, *Bush Calls for Global Goal for Cutting Emissions*, N.Y. TIMES, May 31, 2007, at A2 (discussing the announcement of President Bush's desire to adopt a goal to curb emissions; the declaration of European leaders—Prime Minister Tony Blair (Britain), Chancellor Angela Merkel (Germany), and President Nicolas Sarkozy (France)—regarding the importance of addressing the climate change issue; and India and China's reluctance to accept emissions cuts but support of requests for a new treaty including emissions cuts); Press Release, Office of the Governor, Governor Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions (Sept. 27, 2006), available at <http://gov.ca.gov/index.php?/print-version/press-release/4111/> (stating that California, which has the highest emissions in the United States, has become the first state in the United States to create enforceable programs to limit emissions and therefore help reduce climate change); IPCC, *supra* note 15 (giving a report produced by approximately 600 authors from forty countries and reviewed by representatives from 113 governments during the 10th Session of Working Group II).