

What is the status of ‘environmental refugees’ under international and Australian law?

1. Introduction

A continual rise in the increase of migration caused by environmental reasons has led academics, lawyers and governments to identify a new category of displaced people—the ‘environmental refugee’. With evidence suggesting that over 50 million ‘environmental refugees’ are created each year, it is evident that this group of people represents a growing cause of concern to policy makers at a national and international level. Most problematic is the seemingly inexistent domestic and international protection afforded to victims of environmental events. The current international refugee mechanisms, created to suit the needs of post World War II Europe, are out of date as are the domestic laws of many treaty parties, including Australia. Consequently international law, in its current form, no longer offers sufficient protection to a category of displaced people which outnumbers those displaced by war and other conflict.

Remedying this problem, however, is fraught with difficulties. Firstly, defining who is an ‘environmental refugee’ is a complex process as a number of variable factors may contribute to the reasons that people choose or are forced to migrate. Secondly, if a definition is agreed upon, determining how this category of people is best protected will inevitably lead to international debate over issues of sovereignty, security and responsibility. Finally, in the event that no protection is extended to environmental refugees, history has demonstrated that the creation of a binding international treaty is no small feat, especially when it concerns such a contentious topic.

This paper aims to identify what an ‘environmental refugee’ is, if they are protected under the current international refugee mechanisms and if that protection extends to Australian domestic law. Furthermore, a solution to the problem will be suggested to ensure that the domestic and international community is capable of protecting the rights of people faced with displacement due to environmental reasons.

2. Definition

Defining an ‘environmental refugee’ is a complex scientific task that has profound legal consequences. This is evidenced by the different outcomes reached when the numerous definitions suggested by legal commentators are tested against the present international refugee mechanisms. Not only must the definition be broad enough to encompass the vast number of people and circumstances which may potentially fall within this category, but also sufficiently certain so that the processes of identification and classification are legally viable. One of the broader definitions, put forward by commentators Myers and Kent, suggested an ‘environmental refugee’ to be simply “persons who no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope”¹. A narrower definition, from Essam El-Hinnawi, defined environmental refugees as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and /or triggered by people) that jeopardized their existence and/or seriously affected their quality of life.”²

Astri Suhrke further refined the definition as she distinguished between environmental migrants and environmental refugees and states that “migrants make a voluntary rational choice to leave their country whereas refugees are compelled to flee by sudden, drastic environmental change that cannot be reversed”³.

These definitions demonstrate three critical concepts for the definition of an ‘environmental refugee’; displacement, an environmental event, and impact upon people. Difficulty arises when these concepts are further developed as each issue may take on a number of variations which drastically affect which people may be protected as an ‘environmental refugee’. The ability to clearly identify who does and who does not fill the criteria is essential if any domestic or international protection is to be afforded to these people. Consequently, elucidation of exactly what each of these terms means is essential. Does displacement only concern those people who have

¹ Norman Myers and J. Kent, *Environmental Exodus: an Emergent Crisis in the Global Arena*, The Climate Institute, 1995 18

² Essam El-Hinnawi, *The Environmental impacts of production and use of energy*, United Nations Environmental Programme, 1981 4

³ Astri Suhrke and A. Visentin, *The Environmental Refugee: A New Approach*, ECODECISION 1991 73- 74

crossed international borders or will internally displaced people also classify? Can an environmental event be both natural and man-made? And does it need to be quick and unexpected, such as an earthquake or can it be a result of a prolonged period of abnormal climate change, such as desertification? Finally, what is the extent of the impact upon people? Will it only include people forced to leave their homes because the land no longer exists, such as in the event of rising sea levels, or will a loss of livelihood be sufficient?

In a statement which addressed displaced persons more generally the United Nation's Secretary General's representative for displaced persons, Francis M Deng, proposed the following definition. "Displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflicts, situations of generalised conflicts, situations of generalised violence, violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognised State border."⁴ An 'environmental refugee' would clearly be incorporated by this definition but there is not authority in any international conventions that would afford it any legal significance. Under international law, displaced persons do not form a judicial category. Therefore there is little benefit in affording people affected by environmental degradation or destruction of the status of displaced persons. It only serves as a descriptive term, not as a status which confers obligations on States.⁵

Exploration of each definitional issue is outside the confines of this paper. Therefore the definition proposed by the International Organisation for Migration and Refugee Policy Centre will form the basis from which the problem, consequences and proposed solutions are based. The definition is both broad enough to offer protection to people in a wide range of circumstances, while maintaining a level of certainty which makes identification possible. It defines 'environmental refugees as "persons who are displaced within their own country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or

⁴ United Nation Office for the Co-ordination of Humanitarian Affairs, Guiding Principles on Internal Displacement, at 1, UN Doc. E/CN.4/1998/53/Add.2 (1998).

⁵ David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 209 *Georgetown International Environmental Law Review* 215

destruction is a major cause of their displacement, although not necessarily the sole one”⁶.

3. What creates an ‘environmental refugee’?

Migration and displacement caused by environmental factors is an issue that has effected the global population since its existence. Natural disasters, such as earthquakes and floods have, and continue to force people from their homes.⁷ Man-made disasters, such as war and industrial accidents, have also played a significant role in displacing people. Before looking at the international legal structure it is necessary to look at the causes of environmentally displaced person. As will be demonstrated later, confronting these issues is essential in offering complete protection for ‘environmental refugees’. While the causes for displacement are often complex and unable to be attributed to one factor, Keane has highlighted the consensus among scholars on the four broad causes of environmental displacement- natural disasters, long- term environmental degradation, industrial accidents and war.⁸ Due to the constraints of this paper only two of these causes will be looked at in detail.

3.1 Natural Disasters

A natural disaster refers to “events such as volcanic eruptions, droughts, earthquakes and all other types of disaster generated by an unstable natural environment”⁹. A report produced by the International Red Cross found that natural disasters affected 144 million people per year and contributed to the displacement of more persons globally than wars or other conflicts.¹⁰ These statistics demonstrate that the victims of natural disasters are a significant group worthy of international attention. While natural disasters do not usually displace people on a permanent basis, the findings of

⁶ Symposium, Environmentally- Induced Population Displacements and Environmental impacts Resulting from Mass Migrations, International Organisation for Migration and Refugee Policy Centre, 1996

⁷ David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2004) 209 *Georgetown International Environmental Law Review* 211

⁸ David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2004) 209 *Georgetown International Environmental Law Review* 211

⁹ David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2004) 209 *Georgetown International Environmental Law Review* 211

¹⁰ World Disasters Report 20, International Federation of the Red Cross and Red Crescent Societies 1999

scientists such as Tim Flannery and members of the Geoscience Division of the Munich Reinsurance Group (MRG) have created a sense of urgency in relation to both dealing with the effect of natural disasters as well as finding solutions for their cause.¹¹ Members of the MRG have concluded that “in recent years natural disasters have increased significantly”; while Flannery has suggested that in 50 years there will be no climatic event that is not the direct result of human activity.¹²

Furthering the urgency to recognise environmental refugees as a legitimate group is the evidence that natural disasters disproportionately affect Africa, Asia and South America.¹³ It was noted in the World Disasters Report that “ninety- six percent of all deaths from natural disasters occur in developing countries”¹⁴. These findings have enormous consequences for the international community as the governments of developing nations will be in less of a position to provide their citizens with aid and protection. Consequently these people will look to the international community. With predictions that eighty percent of the world’s population will live in developing countries by the year 2025, the pressure is already on the international community to act now.¹⁵

3.2 Industrial Accidents

Industrial accidents have resulted in the displacement of thousands of people. A chemical incident displaced over 200, 000 people in Bhopal, India while a nuclear accident displaced 10, 000 people in Three Mile Island in the United States.¹⁶ However the most infamous incident occurred in Chernobyl, Ukraine when an

¹¹ Tim Flannery, *The Weather Makers*, Oxford Press 2005 and Munich Reinsurance Group, Topic 2000: Natural Catastrophes—The Current Position 1999 62

¹² Tim Flannery, *The Weather Makers*, Oxford Press 2005 and Munich Reinsurance Group, Topic 2000: Natural Catastrophes—The Current Position 1999 62

¹³ David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2004) 209 *Georgetown International Environmental Law Review* 211

¹⁴ World Disasters Report 20, International Federation of the Red Cross and Red Crescent Societies 1999

¹⁵ David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2004) 209 *Georgetown International Environmental Law Review* 211

¹⁶ David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2004) 209 *Georgetown International Environmental Law Review* 212

explosion destroyed a nuclear reactor releasing radiation into the environment.¹⁷ The result was the worst technological disaster in history. The explosion had a devastating effect on the social and economic life of Ukraine and its neighbouring countries, but the impact of the explosions transcended national borders to become a symbol of global disaster and a common cause of concern for the entire world.¹⁸ Thousands of people became refugees as a result of the Chernobyl accident.¹⁹ Unlike refugees in other emergencies, many people displaced by Chernobyl may not be able to return to their homes because the area continues to be contaminated by radio nuclides. A decade after the accident a 30km zone around Chernobyl remained largely uninhabited. Most of the victims of Chernobyl fled to other parts of the Soviet Union. But they were scattered widely, and were a similar accident to occur again within the newly disbanded Soviet States, it is certain that victims would cross national borders in search of safety.²⁰

4. Definition of a ‘refugee’ under current international law

The 1951 Geneva Convention relating to the Status of Refugees was the first international instrument to codify a “general definition of who was to be considered a refugee”²¹. Those states who signed the agreement effectively accepted that a refugee was to be defined as “any person who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it”²². The Convention was then supplemented with the 1967 Protocol relating to the

¹⁷ Ellen Bober Moynagh, ‘ The Legacy of Chernobyl: Its Significance for [the] Ukraine and the World’ (1994) 709 *Environmental Affairs Law Review* 715- 16

¹⁸ Ellen Bober Moynagh, ‘ The Legacy of Chernobyl: Its Significance for [the] Ukraine and the World’ (1994) 709 *Environmental Affairs Law Review* 715- 16

¹⁹ Ellen Bober Moynagh, ‘ The Legacy of Chernobyl: Its Significance for [the] Ukraine and the World’ (1994) 709 *Environmental Affairs Law Review* 715- 16

²⁰ Jeanhee Hong. *Refugees of the 21st Century: Environmental Injustice*, Cornell Journal of Law and Public Policy 2001 333

²¹ *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Office of the United Nations High Commission for Refugees, UN Doc. HCR/1P/4/Eng.Rev. 2 (1979).

²² Article 1A (2) 1951 Convention Relating to the Status of Refugees

status of Refugees, which incorporated all elements of the Convention's definition of "refugee" except the requirement that the events giving rise to displacement have occurred before January 1, 1951.

From this definition four principle elements may be extracted. Firstly, the person must be outside their country of origin and secondly, they must be unwilling or unable to avail themselves of the protection of their country or return there. Thirdly such inability or unwillingness must be attributable to a well founded fear of being persecuted; and the persecution feared must be based on reasons of race, religion nationality, membership of a particular social group, or political opinion.²³

Prima facie the current legal definition of 'refugee' excludes those fleeing environmentally hazardous conditions caused by natural or man made environmental disasters.²⁴ This may be attributed to the emphasis on persecution which effectively eliminates any possibility of such a category being accepted. Commentators such as David Keane, have suggested that because the Convention was not drafted with 'environmental refugees' in mind, it cannot be reasonably interpreted in modern times to include those person.²⁵ This position was supported by Kirby J in *Applicant A v MIEA* when he commented that "the drafters of the Convention would not have included 'categories of persecution' had they intended refugees to be defined as people who feared persecution for any reason"²⁶.

5. Can 'Environmental Refugees' seek protection under the current refugee structure?

While the refugee definition contained in Art 1A (2) does not seem to encompass 'environmental refugees', David Keane has suggested that it may be possible to

²³ David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 209 *Georgetown International Environmental Law Review* 216

²⁴ Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, Cornell Journal of Law and Public Policy 2001 323

²⁵ David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 209 *Georgetown International Environmental Law Review* 210

²⁶ *Applicant A v MIEA* [1997] HCA 4

extend the 1951 definition along human rights lines.²⁷ In support of this argument is Jessica B. Cooper's comments which imply that the Refugee Convention recognises that refugee status results from the denial of human rights.²⁸ As the five freedoms contained in the definition are all rights set forth in the Universal Declaration of Human Rights, the Refugee Convention may also recognise the right to seek safety, as contained in Article 14(1) of the Universal Declaration.²⁹ Both the International Covenant for Civil and Political Rights and the International Convention for Economic and Social Rights acknowledge the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" and "in no case may a people be deprived of its own means of subsistence."³⁰ Keane's solution to the problem of environmentally displaced persons, therefore, would be to extend the 1951 definition contained in the Refugee Convention in line with those developments in international human rights law.³¹ However, such an extension would meet severe opposition from states for a number of reasons.

Firstly, as Masters points out,³² expanding the definition would lead to a devaluation of the current protection for refugees. This is because migration due to environmental factors, is rarely if ever, a result of government oppression. Secondly, for reasons already outlined, the vast majority of environmentally displaced persons are internally displaced because they are not fleeing state persecution, eliminating them from protection under Art 1 of the Refugee Convention. Thirdly, only a limited expansion of the definition would be possible given the enormous number of environmentally displaced persons.³³

²⁷ David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 209 *Georgetown International Environmental Law Review* 216

²⁸ Jessica B. Cooper 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', (1996) 480 *New York University Environmental Law Journal* 6

²⁹ Universal Declaration of Human Rights, General Assembly resolution 217A U.N. Art 14(1), stating, "[e]veryone has the right to seek and enjoy in other countries asylum from persecution."

³⁰ International Covenant on Civil and Political Rights Art 47, 999 U.N.T.S 171, 185; International Covenant on Economic, Social and Cultural Rights Art 1 993 U.N.T.S 3, 10.

³¹ David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 209 *Georgetown International Environmental Law Review* 216

³² Suzette Brooks Masters, 'Environmentally Induced Migration: Beyond a Culture of Reaction' (2001) *Georgetown Immigration Law Journal* 14 855

³³ David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 209 *Georgetown International Environmental Law Review* 216

Hong takes this point further suggesting any reinterpretation or revising of the refugee definition to include all environmentally displaced persons who lack the protection of their states would “open the door to a flood of refugees far beyond what the international community is able to manage.”³⁴ Such an interpretation, therefore, would have to be limited by specific requirements outlined in the definitions. These may include a differentiation between the different types of environmental event, such as man-made or natural, and the existence of specific circumstances rendering the applicants unable to avail themselves of their government’s protection within a designated period of time.³⁵

Another point of opposition comes from Falstrom in response to Jessica Cooper’s comments (which were used to support Keane’s arguments for an extension of the current Refugee convention along humanitarian lines). Cooper argued that “[e]xpanding the established refugee definition to encompass environmental refugees may require no more than an easy extension of human rights policy. Since the 1951 refugee definition is heavily imbued with human rights notions, and environmental refugees are no less entitled to their basic rights and needs than their traditional counterparts, using human rights concepts to expand the refugee definition has natural appeal.”³⁶

Although this solution may have natural appeal, Falstrom highlights that, the protections offered to refugees under the 1951 refugee convention are very specific, and current international human rights and environmental documents do not offer any similar protections to environmentally displaced persons.³⁷ Interpreting the current definition of refugee to cover environmentally displaced persons, therefore, is not possible based on the wording of the definition as it currently stands in international law. Furthermore, as the solution to the problem involves looking at causes as well as

³⁴ Jeanhee Hong. *Refugees of the 21st Century: Environmental Injustice*, Cornell Journal of Law and Public Policy 2001 340

³⁵ Jeanhee Hong. *Refugees of the 21st Century: Environmental Injustice*, Cornell Journal of Law and Public Policy 2001 340

³⁶ Jessica B. Cooper ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’, (1996) 480 *New York University Environmental Law Journal* 6

³⁷ Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

the effects, revising the definition to specifically include a phrase protecting environmentally displaced persons is not the answer either.³⁸ The solution may require looking further than solely within the confines of the current refugee mechanisms to ensure all of the key issues surrounding ‘environmental refugees’ are remedied.

6. What is the position in Australia?

The codification of the ‘refugee’ definition has provided the base from which many domestic laws of the treaty parties have been established. As a signatory to both the 1951 Convention and the 1967 Protocol, Australia is among the treaty parties and has subsequently codified its international refugee obligations in the Migration Act 1958.³⁹ As has been established there is no direct evidence to suggest that an environmental refugee will be afforded the same rights as those traditionally protected by the convention. However, it is necessary to determine whether applying an environmental refugee’s circumstances directly to Australian domestic law would afford them any further or different protection.

The ‘Handbook on Procedures and Criteria for Determining Refugee Status’⁴⁰, issued by the UNHCR as a guide to governments in determining refugee status in their states, offers some interpretive guidance to Australian courts.⁴¹ According to the Handbook three principals can be established. Under the Convention protection will only be offered to persons who are firstly “involuntarily displaced from their homelands and unable to return”⁴², secondly displacement must be due persecution, or fear of persecution based on race, religion, nationality, political opinion, or membership in a

³⁸ Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

³⁹ John Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia* (1st ed, 2005) 178

⁴⁰ *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Office of the United Nations High Commission for Refugees, UN Doc. HCR/1P/4/Eng.Rev. 2 (1979).

⁴¹ Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, *Cornell Journal of Law and Public Policy* 2001 327

⁴² Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, *Cornell Journal of Law and Public Policy* 2001 327

particular social group. Finally, this persecution must lead them to be in need and entitled to international protection.

The application of these principles were highlighted by Gummow J in *Applicant A v MIEA*⁴³ when he stated that “whilst as a matter of ordinary usage, a refugee might be one whose flight has been from invasion, earthquake, flood, famine or pestilence, the [Convention] definition is not concerned with such people”. The guidance given by the handbook and its interpretation in domestic law effectively excludes an ‘environmental refugee’ being afforded protection under Australian domestic law. The Migration Act 1958 also sets further limitations on the application of the refugee convention.⁴⁴ Section 91R(1) states that the persecution as defined by the definition will only be established if the reason for that persecution “is the essential and significant reason, or those reasons are the essential and significant reasons”⁴⁵. This section has the effect of making it even more difficult for people seeking protection as the requirement for persecution must now be the primary reason for protection, rather than a contributory factor which would satisfy the Convention definition.

The insertion of section 91R(1) is evidence of the political and economic limitations faced by governments when confronted with refugee protection. The Explanatory Memorandum⁴⁶ for this amendment states that its purpose was to stop a “trend by Australian courts to interpret ‘persecution; more widely than the government considered appropriate”⁴⁷. A further example of the politics involved with refugee protection is the limitation on numbers of Refugee and Humanitarian (Class XB) visas. Some commentators have seen this action as basing refugee protection on “government policy [rather than] on the circumstances of an individual applicant”⁴⁸. The balance between complying with international obligations and maintaining, what the Government believes to be an effective migration policy, is often a difficult task. As will be seen later, in the discussion which relates directly to the Australian position

⁴³ [1997] HCA 4

⁴⁴ John Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia* (1st ed, 2005) 191

⁴⁵ Section 91R(1) Migration Act 1958.

⁴⁶ Revised Explanatory Memorandum, Migration Legislation Amendment Bill (no. 6) 2001 (Cth)

⁴⁷ John Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia* (1st ed, 2005) 191

⁴⁸ John Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia* (1st ed, 2005) 184

on ‘environmental refugees’, issues concerning refugee protection go far beyond their original purpose and often get lost in the politics surrounding the issue without addressing the humanitarian problem.

7. Will the definition protect ‘environmental refugees’?

Given the definitions outlined above, stemming from an international document that has been in existence for fifty years, it is difficult to conceive how the term refugee can be expanded to fit those who have left their homes due to environmental reasons. A person might be forced to leave home for many reasons, only some environmental, which would qualify the person as a refugee. There must be a strong causal link between the particular acts that cause the person to leave his or her home and the person’s fear of returning. However, in the majority of situations where environmental situations are involved, it is impossible to demonstrate a link between a specific action causing the migration and a specific characteristic of the persons migrating (race, religion, nationality, public opinion, or membership in a particular social group). In other words, environmentally displaced persons cannot be protected under the existing refugee law.

Comments by the UNHCR that stated that those individuals displaced from their homes for environmental reasons are not considered refugees, is further evidence of this point.⁴⁹ As the “international body charged with monitoring, classifying, assisting and protecting refugees”⁵⁰, the UNHCR has determined that, “although many persons displaced for environmental reasons cross international borders, they do not meet the traditional criteria for refugee classification, are therefore not subject to automatic protections under the refugee convention and any corresponding domestic laws”⁵¹. ‘Environmental refugees’ usually look to their governments as the first call for protection and aid in the event of an environmental disaster. The UNHCR, therefore,

⁴⁹ United Nations High Commissioner for Refugees, ‘The State of the World’s Refugees, at http://www.unhcr.ch/refworld/pub/state/97/box1_2.htm as at Monday 30 January.

⁵⁰ Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

⁵¹ United Nations High Commissioner for refugees, ‘The State of the World’s Refugees, at http://www.unhcr.ch/refworld/pub/state/97/box1_2.htm as at Monday 30 January.

can make a distinction by noting that refugees lack the protection of their state and therefore look to the international community to provide them with security.⁵²

Considering the definition contained in the Refugee Convention, the comments of the UNHCR and opinions of commentators such as Hong, Falstrom and Keane there is a strong argument that “environmentally displaced persons do not meet the required criteria established in the definition of refugee in the Refugee Convention”⁵³. Due to this lack of protection, and considering the rising numbers of ‘environmental refugees’ it is understandable that people in this category are fearful. However, this fear would not meet the requirements of government persecution in the Refugee Convention or under the Australian Migration Act 1958.

In order to ensure adequate protection the requirements for classification under the Refugee Convention, and the Migration Act 1958, are very high. By being so the international community may take comfort that protection is available only for those who truly need it. However, the lack of protection afforded to environmental refugees has highlighted major inadequacies with the current international refugee structure. Since its creation the Convention had remained virtually untouched and may now be seen as out of touch with modern day problems.⁵⁴ That said, basic human rights are still a major focus of international law and the hundreds of thousands of people who are forced to leave their homes due wholly or in part to environmental reasons are deserving of its protection.

8. What is the solution?

The lack of protection for environmental refugees under the current Refugee Convention does not necessarily diminish all hope. The current international mechanisms for protection have proved outdated and ineffective in meeting the needs

⁵² Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

⁵³ Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

⁵⁴ Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, Cornell Journal of Law and Public Policy 2001 327

of many modern refugees, including environmentally displaced people, therefore, a solution is to develop a convention which directly targets the causes and alleviates the effects of environmental disasters which lead to displacement.⁵⁵

With the framework of the Convention Against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment (1985)⁵⁶ in mind, Falstrom has suggested that “a treaty could be drafted offering both temporary protections for those displaced due to environmental problems, and requiring the state parties to work towards ensuring that similar types of environmental problems do not recur”.⁵⁷

8.1 Torture Convention

The balance struck between the affirmative obligations for signatory States and the rights that it grants to individuals, makes the torture convention the ideal treaty from which to model a solution for environmental refugees. For example, article 3 of the Convention Against Torture prohibits a State party from returning any individual to a State where it is likely he or she will suffer torture.⁵⁸ This provision was a landmark event in international human rights, offering protection far beyond those offered in previous human rights documents. Under article 3 of the Convention Against Torture, a person cannot be returned if he or she fears torture, regardless of whether he or she has committed a crime or entered a country illegally.⁵⁹ More importantly there is no requirement that protection be based on race, religion, nationality, membership in a particular social group, or political opinion. A person only has to prove, to a substantial degree, that he or she fears torture; there is not affirmative requirement

⁵⁵ Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

⁵⁶ Convention Against Torture, and Other Cruel Inhumane, and Degrading Punishment, opened for signature Feb 4, 1985 S. Treaty DOC. NO. 100-20 (1988). 1465 U.N.T.S 85.

⁵⁷ Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

⁵⁸ Convention Against Torture article 3: “No State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

⁵⁹ Convention Against Torture Art 3

that he or she will have a well founded fear of torture on account of one of the five grounds necessary for refugees.⁶⁰

To balance this extra protection, however, a person who obtains protection under the Convention Against Torture is not absolutely guaranteed the right to remain in the country in which he or she seeks protection. The protection offered is temporary protection, lasting only as long as the threat of torture.⁶¹

Also a requirement of the Convention Against Torture are the affirmative acts from state parties to the Convention. Article 2, for example requires state parties to take “legislative, administrative, judicial, or other measures to prevent acts of torture within its territory”⁶². Article 4 requires the state parties to make all acts of torture offences under the states domestic criminal law.⁶³ Article 12 requires a “prompt and impartial investigation” of any possible acts of torture⁶⁴, and article 14 requires states to ensure that victims of torture have adequate means of redress.⁶⁵ Additionally, the Convention Against Torture requires states to undertake educational and training initiatives to ensure that torturous acts are not being committed by individuals within its territory.⁶⁶

These provisions, combined with the extensive reporting requirements and investigating authority granted to the Convention body⁶⁷, provide a unique framework that protects individuals from torture and requires state parties to ensure that the provisions of the convention are adequately supported by the states’ domestic legal structure. Furthermore, these provisions provide assurance that the states are working to educate and inform those individuals likely to commits acts of torture under the Convention that those types of acts are in violation of both domestic and international law.

⁶⁰Convention Against Torture Art 3

⁶¹ Convention Against Torture Art 3

⁶² Convention Against Torture Art 2

⁶³ Convention Against Torture Art 4(1)

⁶⁴ Convention Against Torture Art 12

⁶⁵ Convention Against Torture Art 14 (1)

⁶⁶ Convention Against Torture Art 10- 12

⁶⁷ Convention Against Torture Art 18- 24

This has proven to be an effective combination of provisions, as the CAT is one of the most widely ratified and widely implemented treaties in international human rights law.

9. A New Treaty

Considering the structure of the Convention Against Torture, it may be possible to create a new Convention on the Protection of Environmentally Displaced persons.⁶⁸ To create such a treaty a number of hurdles must be overcome. Firstly, the international community must recognise that 'environmental refugees' are in need of international protection. The success of such a treaty depends on the recognition in international law that environmentally displaced persons need protection. Secondly, the root causes of the environmental degradation must be addressed. In this way attempts may be made to alleviate growing numbers of 'environmental refugees' as States would be forced to address the root causes. If this can be achieved then the international community will already be well on its way to solving the overcoming the second hurdle- protecting the 'environmental refugees'. The convention would first define environmentally displaced persons and the types of environmental destruction that constitute a basis for classification under this convention. As seen above creating a definition to encompass all people displaced due to environmental factors is a difficult process particularly because this requires an identification of the causes for their displacement. The experience of the international community is that exhaustive lists may fail to count all types of environmental disasters, consequently denying protection to people in legitimate need of international protection. On the other hand environmentally displaced people need to be readily identifiable, so as protection is only afforded to those in real need.

Similar to the Convention Against Torture, the Convention would also specifically require state parties to take legislative, administrative, judicial or any other necessary action to protect these people who arrive in their territory because of an

⁶⁸ Dana Zartner Falsrom, 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment' (2001) *Colorado Journal of International Law and Policy* 12 1

environmental problem that falls within the definition . Falstrom has suggested that the language of this provision may read as follows:

*“No state party shall expel, return or extradite an environmentally displaced person to any state where there are substantial grounds for believing that he or she would be in danger due to one of the environmental problems listed in the Convention.”*⁶⁹

Like the CAT, this language does not provide any right of permanent residency in the receiving state. States would be obliged under the Convention to offer interim protection to those who arrive at their borders, but once the basis for their protection has ended, the State may re-examine the case and return the person to his or her home if it is deemed safe. This solution avoids one of the problems posed by the proponents for including environmentally displaced persons under existing refugee protections: States are more likely to assist victims of environmental degradation and disaster if it is seen as a temporary protection, rather than a permanent resettlement. While making the acceptance of such a treaty more attractive to State parties, the limited obligations required of the states may have wider reaching social implications. The nature of environmental disasters, both man made and natural, may mean that the country or region from which the refugee is fleeing may not be able to be reinhabited. Taking the Chernobyl example the fallout period for nuclear activity is thirty years, equal to an entire generation. Is it feasible to send somebody back to a country after this amount of time and if not what should the limit be. If a refugee has had time to create roots in the receiving country by either marrying or having children, is it fair and in the person best interest to send them home after the effects of the disaster have subsided? While these issues fall outside the confines of this paper they are factors which need to be considered for the effective implementation of a new Convention.

Addressing the root cause of the migration enables the proposed Convention on the Protection of Environmentally Displaced Persons to go further than the suggestions of those advocating for acceptance with in the present refugee structure. Like the

⁶⁹ Dana Zartner Falsrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Law and Policy* 12 1

Convention Against Torture, the new Convention should incorporate extensive provisions outlining state responsibility to find, correct and prevent occurrences of the environmental degradation and destruction that force people to migrate. Each party could be required to provide education and information to individual, corporations and governments on how to make less of an environmental impact. Finally, the new Convention would establish an oversight body, reporting mechanisms, dispute resolution procedures, and sanction provisions to encourage active compliance by all state parties.

10. Australia's Contribution to Fixing the Problem

As well as playing an active part in the implementation of an international convention, there are a number of efforts that can be made on a domestic level to both alleviate the causes of environmental displacement and offer protection to those people already affected. As a leader in the Asia- Pacific region, and considering that some of the most vulnerable people to climate change are some our closest neighbours, the Pacific Islands would be the most obvious focus of Australia's attention. While this focus does not aim to discriminate against vulnerable people in other areas, it sets an example for other regional leaders and recognises the economic limitations constraining individual states.

In January 2006 the Australian Labor Party released a policy discussion paper on climate change in the Pacific. The paper proposed a "Pacific Climate Change Strategy" which would adopt seven key elements that aimed, among other things, to assist migration for environmentally displaced people.⁷⁰ As part of this assistance it was proposed that Australia should offer resources to aid intra-country evacuation and if no habitable land remains to then offer training so that the evacuees "can meet the skilled migration requirements in a number of countries"⁷¹. Advantages of the strategies such as this are twofold. Firstly, they allow environmentally displaced people to seek protection, and secondly, in the event that they are not given refugee

⁷⁰ Bob Sercombe MP and Anthony Albanese MP, *Our drowning neighbours, Labor's Policy Discussion Paper on Climate Change in the Pacific*, Australian Labor Party, 2006 2

⁷¹ Bob Sercombe MP and Anthony Albanese MP, *Our drowning neighbours, Labor's Policy Discussion Paper on Climate Change in the Pacific*, Australian Labor Party, 2006 10

status in their own right, it makes migration under the current systems of many countries more accessible. The discussion paper also addresses the broader concerns of minimising carbon emission which lead to climate change as well as “establishing an international coalition to accept climate refugees”⁷².

Recognising these issues at a domestic level and acting towards achievable solutions, is the first step in progressing this issue. However, this discourse should not cloud the fact that Australia appears to lag far behind many other nations who are making huge gains for environmental and humanitarian protection. In response to the discussion paper the Australian Government emphatically rejected a new immigration category for environmental refugees.⁷³ Such a reform would require amending the Migration Act 1958 to create a humanitarian visa for such a category.

Such efforts have already been made by the New Zealand Government which has created a bilateral agreement with Pacific Island nations “to accept an annual quota of its (Tuvalu) citizens as refugees”⁷⁴. By doing so, New Zealand has effectively legalised an “environmental refugee” under its domestic law for migration purposes. Canada, while taking a different approach, has also taken active steps to alleviate the problem by providing funding for a relocation program for the citizens of Vanuatu.⁷⁵ As an influential leader on a local regional and global level, Australia could follow the lead of Canada and New Zealand to take proactive steps to protect ‘environmental refugees’. Rather than being reactionary, the global example has shown that any actions to address this problem, must address both the cause and consequence of this problem. Consequently, Australia must make progress in both the environmental and humanitarian fields.

⁷² Bob Sercombe MP and Anthony Albanese MP, *Our drowning neighbours, Labor’s Policy Discussion Paper on Climate Change in the Pacific*, Australian Labor Party, 2006 3

⁷³ *Government rebuffs climate refugee proposal*, Yahoo News
<<http://au.news.yahoo.com/060105/21/xgpt.html> at 5 January 2006.

⁷⁴ Alex Kirby, *Pacific Islanders flee rising seas*, BBC News
<<http://news.bbc.co.uk/1/hi/sci/tech/1581457.stm> at 31 January 2006.

⁷⁵ Alex Kirby, *Pacific Islanders flee rising seas*, BBC News
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11. Conclusion

While the international legal community has made huge advances in the field of human rights and refugee protection, the issue of ‘environmental refugees’ demonstrates that it is still faced with significant challenges. As a leader in the Asia-Pacific, an area that is particularly affected by this problem, Australia is in a position to make a large contribution to the solution of this issue. While the current refugee structure may not cope with such a burden, it is within the international community’s power to establish a new Convention that would extend basic human rights protections to people who have been displaced by environmental events.

History has demonstrated that the creation of a binding and effective international convention is no small feat. As with most international issues, creating a treaty for the protection of environmental refugees encompasses a wide range of issues that go well beyond the protection of people and the elimination of the causes of their displacement. However, the growing number of ‘environmental refugees’ has made this an issue which, in coming years, will be hard to ignore. By adopting a new Convention, the international community will protect human rights and significantly reduce the environmental events which lead to migration and displacement. Furthermore, such a convention would demonstrate that the international community is willing to advance refugee protections that have remained stagnant for over half a century.

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