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REFUGEES OF THE 21st CENTURY: ENVIRONMENTAL INJUSTICE

Jeanhee Hong†

INTRODUCTION

More than half a century after World War II, current U.S. refugee policy remains a reflection of postwar international needs and responses. But changes in global circumstances have created a need for a refugee program that more accurately addresses the needs of the modern age: an era of increasing international investment in developing countries, a continuing international waste trade, and growing industrialization. Among the fastest-growing causes of cross-border migrations throughout the world is environmental degradation.¹

The current legal definition of “refugee” excludes those fleeing environmentally hazardous conditions caused by natural or man-made environmental disasters. The 1951 Convention relating to the Status of Refugees,² upon which U.S. refugee law is largely modeled, emphasizes “persecution” or a belief in such persecution by a person’s own government as the basis for refugee protection.³ This definition was established largely in response to Cold War expectations and needs.⁴ Today’s refugees, however, often flee their countries for reasons other than government persecution. In particular, developing countries increasingly confront dangerous environmental conditions due to industrial activity and exploitation, often at the request or with the approval of their governments. When such government actions create life-threatening circumstances, the most seriously affected victims of those situations should be entitled to refugee status.

This Note focuses on two types of environmentally-induced migrations: (1) those caused by immediate man-made environmental catastrophes, such as industrial or technological accidents, and (2) those caused

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¹ See generally Gregory S. McCue, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT’L ENVTL. L. REV. 151 (1993); Jessica B. Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998).

² Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Convention].

³ *Id.* art. 1 A(2).

⁴ See KATHLEEN NEWLAND, U.S. REFUGEE POLICY: DILEMMAS AND DIRECTIONS 9 (1995).

by long-term human activity, such as exploitation or inefficient management of resources.⁵ Part I of the paper summarizes the development of international and U.S. refugee law. Part II discusses current U.S. refugee law — in particular the 1980 Refugee Act — and international refugee law, as well as the controversies surrounding the interpretation and application of the definitions of “refugee” under these laws. Part III discusses recent examples of the two types of man-made environmental disasters described above. Part IV assesses the reasons for recognizing victims of environmental disasters as refugees in light of legislative history and interpretive guides to international and U.S. refugee law. Part V proposes changes to the Immigration and Nationality Act (INA) and international refugee law that would accord refugee status to persons whose lives are threatened by man-made environmental disasters. Finally, Part VI concludes by summarizing the broader implications of such a change in refugee policy.

I. THE DEVELOPMENT OF REFUGEE LAW

The first international agreement to adopt a universal refugee definition was the 1951 Geneva Convention relating to the Status of Refugees.⁶ The proliferation of refugee problems after World War II prompted delegates to the Convention to replace the “*ad hoc* agreements adopted in relation to specific refugee situations” with “an instrument containing a *general* definition of who was to be considered a refugee.”⁷ Nations that ratified the Convention accepted its definition of refugee but are not required to admit those who acquire refugee status; however, they are required to grant such refugees specific rights.⁸ For example, the Convention prohibits states from “returning refugees to territories where they would face threats to their life or freedom due to race, religion,

⁵ Sudden natural calamities — such as hurricanes, earthquakes, and tidal waves — are a third major environmental cause of cross-border migrations, but these situations are beyond the scope of this paper. For a discussion of natural calamities causing mass migrations, see Cooper, *supra* note 1, at 503–07.

⁶ See Convention, *supra* note 2. The Convention defines a “refugee” as any person who “[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” *Id.* art. 1 A(2).

⁷ *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 U.N. High Comm’r for Refugees, U.N. Doc. HCR/IP/4/Eng. Rev. 2 (1979) (reedited January 1992) [hereinafter UNHCR Handbook] (emphasis added).

⁸ See John Hans Thomas, Note, *Seeing Through a Glass, Darkly: The Social Context of ‘Particular Social Groups’ in Lwin v. INS*, 1999 BYU L. REV. 799, 801 n.13 (citing Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 510 n.26 (1993)).

nationality, political opinion or membership in a social group;⁹ expelling refugees absent a showing of national security; and penalizing aliens who entered the state illegally” if they came directly from a state “where their lives or freedom are in jeopardy.”¹⁰

Although the United States did not sign the Convention, it later ratified the 1967 United Nations Protocol relating to the Status of Refugees, in effect adopting the Convention’s definition of refugee.¹¹ To comply with the Protocol, Congress passed the Refugee Act of 1980¹² (Refugee Act) which codified the Protocol’s definition of refugee in section 101(a)(42) of the INA.¹³ The Refugee Act eliminated the requirement in INA section 203(a)(7)(A) that the person had to flee persecution in a Communist or Communist-dominated or Middle Eastern country.¹⁴ It thus brought the United States into substantial conformity with the United Nations definition of refugee, and “removed existing geographical and ideological restrictions in its refugee admissions process in order to insure a ‘fair and workable asylum policy’ without regard to an alien’s political affiliation.”¹⁵

In the process of revising U.S. refugee law, however, Congress eliminated INA section 203(a)(7)(B), a provision for victims of catastrophic natural calamities.¹⁶ That provision had allowed conditional entry into the United States for “persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode.”¹⁷ No President ever declared an event

⁹ The principle of *non-refoulement* derives from Article 33 of the Convention, and protects all refugees – even those illegally present – against return to a country “where [the refugee’s] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1253–57 (1990) (quoting Convention, *supra* note 2, art. 33(1)).

¹⁰ Thomas, *supra* note 8, at 801–02 n.13.

¹¹ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268. The Protocol 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.

¹² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8, 22 U.S.C.).

¹³ *Id.*

¹⁴ See Janet L. Parker, *Victims of Natural Disasters in U.S. Refugee Law and Policy*, 1982 MICH. Y.B. OF INT’L LEGAL STUD.: TRANSNAT’L LEGAL PROB. OF REFUGEES, 91, 137.

¹⁵ Kerry Elizabeth Knobelsdorff, Note, *INS v. Canas-Segovia: Keeping Politics In and Refugees Out*, 8 CONN. J. INT’L L. 657, 663 (1993) (citing *INS v. Stevic*, 467 U.S. 407, 426 n.20 (1983)).

¹⁶ See Parker, *supra* note 14, at 137 (citing INA § 203(a)(7)(B), 8 U.S.C. § 1153(a)(7)(B) (1976) (repealed 1980)).

¹⁷ *Id.* at 139 (quoting INA § 203(a)(7) as amended by Act of October 3, 1965 § 3 (repealed 1980)). Although physically admitted into the United States, conditional entrants were not considered to have immigrated into the country; they were admitted only temporarily. They therefore were not accorded the status of permanent resident aliens and did not enjoy the

to be a "catastrophic natural calamity" within the meaning of this section.¹⁸

Evidence suggests that legislators and the Executive may have intended to keep the provision inoperative. INA section 203(a)(7)(B) clearly focused on victims of natural, not man-made, environmental disasters. In passing the 1965 amendments to the INA, Congress stated that its purpose in adding aliens uprooted by catastrophic natural calamity to the refugee category was "to provide relief in those cases where aliens have been forced to flee their homes as a result of serious natural disasters, such as earthquakes, volcanic eruptions, tidal waves, and in any similar natural catastrophes."¹⁹ There is no documented evidence explaining why no President ever declared an event to be a catastrophic natural calamity. However, a minority view attached to the Senate Report on the 1965 amendments suggests a view that may well have been shared by many legislators: that "the United States should render financial, technical, and material aid to areas struck by disasters, but should not encourage migration to the United States."²⁰

This view may have laid the groundwork for the 1980 repeal of section 203(a)(7)(B).²¹ An early draft of the 1980 refugee bill included victims of catastrophic natural calamities in the definition of refugee, but the provision was later removed.²² The omission was likely due to the fact that the major concerns in reformulating U.S. refugee policy were providing for political refugees and conforming with the United Nations definition of a refugee.²³ In addition, many legislators felt strongly that victims of natural disasters should be assisted in rebuilding their old homes, rather than in moving to the United States.²⁴ Some argued that a policy of encouraging relocation would result in a "brain drain" on a disaster area, while others argued that emergency situations are usually

basic guarantees of the U.S. Constitution, as did members of the other six preference groups. After two years, a conditional entrant reported to the Immigration and Naturalization Service (INS), unless his or her conditional entry status had already been terminated. After INS examination, the refugee would either be deported or granted permanent resident alien status. *Id.* at 139-40.

¹⁸ *See id.* at 140.

¹⁹ *Id.* at 140 (quoting S. REP. NO. 89-748, at 16 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3335).

²⁰ *Id.* at 141 (citing S. REP. NO. 89-748, at 54-55 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3349).

²¹ *See id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* (citing January 20, 1981 telephone interview with David A. Martin, Assistant Professor of Law at the University of Virginia Law School and former member of the U.S. Department of State, Bureau of Human Rights and Humanitarian Affairs, where he worked on the Refugee Act of 1980).

short-lived and therefore do not call for relocation.²⁵ In any case, Congress acquiesced in the failure of consecutive Presidents and Attorneys General to implement section 203(a)(7)(B) by effectuating repeal of the statutory section.²⁶

Environmental events cannot be separated from the political and social situations that cause cross-border migrations. The Haitian “boat people” of the 1990s were more than just political refugees — their displacement resulted in large part from a drastic reduction in agricultural productivity due to extreme soil erosion, which in turn was precipitated by massive destruction of forests and other vegetation.²⁷ Environmental degradation and the ensuing competition for scarce natural resources also contributed significantly to the Zapatista rebellion in the Chiapas state of Mexico, which led to the displacement of up to 35,000 people.²⁸ The causal chain also goes the other way — political strife and wars are largely to blame for the continuing famines in Sudan.²⁹ Poorly-designed and managed agricultural schemes under Soviet authorities have led to large-scale wastage of scarce resources, salinization of the land, and contamination of the food chain, making it increasingly difficult for some populations to remain in their usual place of residence.³⁰

Environmental causes of migration, however, merit increased international attention even apart from the political and social situations with which they may be linked. Despite their fast-growing numbers,³¹ persons displaced by environmental catastrophes are not included under the Convention’s definition of refugee and are only considered for international refugee protection in an *ad hoc* manner.

II. CURRENT INTERNATIONAL AND U.S. REFUGEE LAW

Persons displaced from their homes by environmental causes have no clear protections under either international or U.S. law. Two sections

²⁵ *Id.* (citing S. REP. NO. 89-748, at 52, 55 (1965), reprinted in 1965 U.S.C.C.A.N. 3328, 3349).

²⁶ *See id.* at 141.

²⁷ *See* ABA Standing Comm. on Env’tl. Law, *The Global Environment: Challenges, Choices and Will*, in 16 ENVTL. L. REP. 10255, 10262 (1986).

²⁸ *See* U.N. HIGH COMM’R FOR REFUGEES, THE STATE OF THE WORLD’S REFUGEES, 1997–98: A HUMANITARIAN AGENDA, 28 (1997) [hereinafter UNHCR, STATE OF THE WORLD’S REFUGEES].

²⁹ *See* Saleheen Mohamed, *WFP launches multi-million dollar appeal for Sudan*, AGENCE FRANCE-PRESSE, Feb. 25, 2000, available at 2000 WL 2740814.

³⁰ *See* UNHCR, STATE OF THE WORLD’S REFUGEES, *supra* note 28.

³¹ Persons seeking refuge from environmental degradation comprise the fastest-growing category of migrants in the world. The present estimate of such persons is 25 million; this number is expected to double by the year 2010, and possibly to 100 million by the year 2050. *See* Cooper, *supra* note 1, at 484–85 (1998) (citing NORMAN MYERS, CLIMATE INSTITUTE OF WASHINGTON, D.C., ENVIRONMENTAL REFUGEES 150 (1995)).

of the INA, however, provide avenues through which such persons should be able to seek refuge in the United States.

First, INA section 207(a)³² provides that the number of refugees who may be admitted annually to the United States in any fiscal year is “such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.”³³ The section thus gives the President an opportunity to propose that certain persons fleeing environmental catastrophes — provided they first meet the definition of refugee under the Refugee Act — be admitted to the United States, if such determination is justified on the requisite grounds. The provision does not, however, bind the President to consider such a measure.³⁴

Second, INA section 244A gives the Attorney General the discretion to grant temporary protected status (TPS) to aliens who are present in the United States and cannot return to their home countries due to “extraordinary and temporary conditions” in their state.³⁵ This section applies to all residents of a designated state who arrive in the United States before a cut-off date for that country, specified by the Attorney General.³⁶ The Attorney General may also grant TPS to an alien present in the United States if the Attorney General finds that “there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected.”³⁷ Temporary protected status has been extended to nationals of only twelve countries since INA section 244A was enacted in 1990.³⁸ The provision only applies to those who both have somehow entered the United States and who are nationals of one of the twelve enumerated countries. Even for those who qualify, TPS is effective only during the period designated by the Attorney General, and

³² INA § 207, 8 U.S.C. § 1157 (2000).

³³ INA § 207(a)(2), 8 U.S.C. § 1157(a)(2) (2000).

³⁴ The Senate report on the Refugee Act did specify the role that Congress was to play in the decision-making process governing the admission of refugees. According to these reports, the “consultation” required by the Executive under this provision means “personal contact by designated representatives of the President with members of the committees on the judiciary to review the refugee situation or emergency refugee situation, to project the extent of possible United States participation . . . to discuss the reason for believing that the proposed admission of refugees is in the national interest,” and to provide other detailed information, such as information on the specific refugee and his/her situation. S. REP. NO. 96-256, at 4 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 147.

³⁵ INA § 244A(b)(1)(C), 8 U.S.C. § 1254a(b)(1)(C) (1994).

³⁶ See Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 548 (1998).

³⁷ INA § 244A(b)(1)(B)(i), 8 U.S.C. § 1254a(b)(1)(B)(i) (1994).

³⁸ Martin et. al, *supra* note 36, at 550. Temporary protected status has been extended to nationals of El Salvador, Liberia, Lebanon, Kuwait, Somalia, Bosnia, Rwanda, Montserrat, Nicaragua, Guatemala, Burundi, and Sierra Leone. *Id.*

it permits the deportation of individuals who entered after the cut-off date, even though they would face substantially similar circumstances in the home country as those granted protection.³⁹ Both sections 207(a) and 244A are broadly discretionary and offer no guarantees that a person fleeing environmental disaster in his or her country will be admitted into the United States.

Congress has provided little meaningful guidance to courts interpreting the terms of the Refugee Act other than stating that its purpose in passing it was to comply with international refugee law which, in turn, also offers little interpretative guidance.⁴⁰ The legislative history of the Refugee Act, however, offers some insight into its original purposes. A 1979 Senate report states that the Refugee Act “reflects one of the oldest themes in America’s history — welcoming homeless refugees to our shores.”⁴¹ The report describes five basic objectives of the bill, including both substantive and procedural revisions to better provide for refugee needs.⁴² The bill’s stated purpose was “to provide a permanent and systematic procedure for the admission to this country of refugees of special concern to the United States, and to provide comprehensive and uniform provisions for assistance to those refugees who are admitted.”⁴³ The references to “homeless” persons and refugees “of special concern to the United States” indicate that legislators wanted both to broaden the humanitarian scope of U.S. refugee law and to condition these stated

³⁹ *Id.* at 549.

⁴⁰ See Thomas, *supra* note 8, at 803. See also discussion on international refugee law, *supra* text accompanying notes 6–11.

⁴¹ S. REP. 96-256 at 1 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 142.

⁴² The bill accomplishes five basic objectives:

First, it repeals the current immigration law’s discriminatory treatment of refugees by providing a new definition of a refugee that recognizes the plight of homeless people all over the world, and by according refugee admissions the same immigration status given all other immigrants.

Second, it raises the annual limitation on regular refugee admissions from 17,400 to 50,000. This is accomplished without really increasing overall annual immigration to the United States in recent years, since the parole authority has been used repeatedly to exceed the 17,400 limit.

Third, the bill provides an orderly but flexible procedure for meeting emergency refugee situations and any other situations of special concern to the United States, if the resettlement needs of the homeless people involved cannot be met within the regular 50,000 ceiling.

Fourth, it provides for the first time the statutory requirements that Congress be consulted before refugees are admitted, and defines and exerts congressional control over the process.

Fifth, it provides for federal support of the refugee resettlement process — and extends coverage to all refugees entering the United States for two years for cash and medical benefits, and longer for other programs that help the refugees normalize their lives in their adopted communities.

Id.

⁴³ *Id.* at 3, reprinted in 1980 U.S.C.C.A.N. 141, 147.

humanitarian principles upon consideration of U.S. interests. Not surprisingly, such language has led to considerable debate among immigration scholars and international human rights advocates — as well as disagreement among U.S. courts — over the definition of a “refugee.”⁴⁴

The United Nations High Commissioner for Refugees’ Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook),⁴⁵ issued in 1979 as a guide to governments in determining refugee status in their states, has offered some interpretive guidance to U.S. courts. According to the UNHCR Handbook, the determination of refugee status under the 1951 Convention consists of three parts: “inclusion,” “cessation,” and “exclusion” clauses.⁴⁶ The “inclusion” clauses form the positive basis upon which refugee status is determined.⁴⁷ The “cessation” and “exclusion” clauses have a negative effect — they indicate, respectively, the conditions under which a refugee ceases to be a refugee⁴⁸ and the circumstances in which a person is excluded from the application of the 1951 Convention despite meeting the criteria of the inclusion clauses.⁴⁹ The UNHCR Handbook further explains that refu-

⁴⁴ See Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243, 251 (1997).

⁴⁵ See UNHCR Handbook, *supra* note 7. Numerous decisions by the Board of Immigration Appeals and U.S. circuit courts indicate that U.S. courts have accorded significant interpretive authority to the UNHCR Handbook. See, e.g., *Aguirre-Aguirre v. INS*, 121 F.3d 521, 523 (9th Cir. 1997); *Fatin v. INS*, 12 F.3d 1233, 1238 n.5, 1240 n.10 (3d Cir. 1993); *In re Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989); *In re Acosta*, 19 I. & N. Dec. 211, 221 (BIA 1985).

⁴⁶ UNHCR Handbook, *supra* note 7, at ¶ 30.

⁴⁷ See *id.* at ¶¶ 37–53, 66–93. The elements of the “inclusion” clauses that remain in effect today include the requirement of a “well founded fear of being persecuted” — which consists of both a subjective and objective evaluation of such fear — with such “persecution” being on account of race, religion, nationality, political opinion, or membership in a particular social group; and the requirement that the applicant for refugee status be “outside the country of his nationality” (usually the nationality of his country of origin).

⁴⁸ A refugee ceases to be a refugee under the 1951 Convention if:

he has voluntarily re-availed himself of the protection of the country of his nationality; or
 having lost his nationality, he has voluntarily re-acquired it; or
 he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
 he has voluntarily re-established himself in the country which he left . . . or
 he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; . . .
 being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Id. at ¶ 113.

⁴⁹ The UNHCR Handbook provides:

Persons otherwise having the characteristics of refugees are excluded from refugee status if such persons are:

already receiving United Nations protection or assistance; or
 not considered to be in need of international protection; or

gees are to be distinguished from economic migrants — that is, those who are “moved exclusively by economic considerations” to “voluntarily” leave their country to “take up residence elsewhere.”⁵⁰ It points out, however, that the distinction between an economic migrant and a refugee is not always clear because economic and political circumstances in an applicant’s country of origin may often interrelate.⁵¹

According to the UNHCR Handbook then, the 1951 Convention was intended to extend refugee protection to persons who are 1) involuntarily displaced from their homelands and unable to return, 2) because of persecution or a reasonable fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group, and 3) in need of and entitled to international protection.⁵² This definition effectively excludes victims of natural disaster from the refugee definition.⁵³ In fact, a leading study of the time, conducted at the request of the UNHCR, explicitly stated that the Convention’s definition excludes victims of natural disasters from acquiring refugee status.⁵⁴ According to this source, the events that cause displacement must “derive from the relations between the State and its nationals.”⁵⁵ Thus, such interpretive guides appear to lend support to U.S. lawmakers’ hesitancy

not considered to be deserving of international protection — i.e., persons who have committed war crimes, serious non-political crimes outside the country of refuge prior to admission to that country as a refugee, or ‘acts contrary to the purposes and principles of the United Nations.’

Id. at ¶¶ 141–63.

⁵⁰ *Id.* at ¶ 62.

⁵¹ For example, victims of general economic measures that affect the whole population without discrimination may also claim refugee status if their motives for departure actually involve a political element — i.e., the individual’s political opinions, rather than his objections to the economic measures themselves, expose him to “serious consequences.” *Id.* at ¶ 63. The Handbook also provides that “where economic measures destroy the economic existence of a particular section of the population (e.g., withdrawal of trading rights from . . . a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.” *Id.*

⁵² *See id.* at ¶ 113–63.

⁵³ *See id.* at ¶ 39: “[O]nly one motive [for abandoning one’s home] has been singled out to denote a refugee. The expression ‘owing to well-founded fear of being persecuted’ — for the reasons stated — by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they *also* have well-founded fear of persecution for one of the reasons stated.”

⁵⁴ JACQUES VERNANT, *The Refugee in the Post-War World* 5–7 (1953). Vernant, invited in 1951 by the UNHCR to conduct an independent and scientific survey of the refugee situation at the time, described the definition of refugee in international law as consisting of two elements: 1) persons qualifying for refugee status must have left the territory of the state of which they were nationals, and 2) the root-causes of a person’s displacement must be of a political nature, and “accompanied by persecution or the threat of persecution against himself or at least against a section of the population with which he identifies himself.” *Id.* at 4–7. This second condition, Vernant concludes, “excludes victims of natural disasters from the definition of the refugee known to international law.” *Id.* at 5.

⁵⁵ *Id.* at 5.

to grant refugee status to persons displaced by natural environmental disasters.

The 1967 Protocol slightly altered the refugee definition but retained the core requirements of displacement, persecution on one of the five grounds, and the need for international protection. Scholars have argued that these requirements are both too broad and too narrow when applied to real situations. On the one hand, the ambiguous terms of the refugee definition raise enormous uncertainties when applied to particular cases.⁵⁶ On the other hand, these concepts are too narrow to encompass the diverse circumstances and motives that may prompt refugee flows.⁵⁷

The development of refugee law, as evidenced by legislative history and interpretive guides, indicates that the drafters recognized natural calamities as major causes of human migrations and purposefully declined to extend refugee status to the victims of such events. But the drafters seem not to have considered man-made environmental disasters — at least not on the scale that the world has seen in recent years. The legal concepts underpinning the definition of refugee therefore must be revised, or at least reinterpreted, to bring refugee law in line with the most pressing needs of the day. Several environmental crises of the 20th century illustrate the need to adapt international and U.S. refugee laws to better assist the victims of these kinds of catastrophes.

III. MAN-MADE ENVIRONMENTAL DISASTERS

Before considering extending refugee status to persons displaced by man-made environmental causes, it is first necessary to determine what constitutes an environmental disaster meriting such status. Man-made environmental catastrophes can be broadly divided into two categories: 1) immediate environmental disasters, and 2) long-term environmental degradation. Recent occurrences show that, under specific circumstances, both of these types of catastrophes merit application of refugee protection consistent with the purposes of international and U.S. refugee law.

⁵⁶ The key to the refugee definition is “persecution” or “well-founded fear” of such persecution on one of the five grounds, but the definition of these terms has engendered much controversy. See Schuck, *supra* note 44.

⁵⁷ For example, persons who are displaced and their lives threatened by environmental catastrophes are not considered refugees. See generally William A. Plummer, *The Big Push: Emigration in the Age of Environmental Catastrophe*, 4 IND. J. GLOBAL LEGAL STUD. 231 (1996).

A. IMMEDIATE MAN-MADE ENVIRONMENTAL DISASTERS: CHERNOBYL, BHO PAL, AND KUWAIT

On the morning of April 26, 1986, a series of explosions at a nuclear plant in Chernobyl, Ukraine destroyed a reactor and started a protracted release of nuclear fuel and radiation into the environment, spreading over what is now Ukraine, Byelorussia, the Russian Federation, and most of Europe.⁵⁸ The result was the worst technological disaster in history. Soviet authorities remained silent, refusing to publicly acknowledge the accident and failing to take any action in the critical first hours after the explosion.⁵⁹ Only some thirty hours after the explosion, following strong diplomatic pressure and world-wide news coverage, did the Soviet government issue a brief press release stating that a nuclear accident had occurred.⁶⁰ The explosions had a devastating effect on the social and economic life of Ukraine and its neighboring countries, but the impact of the explosions transcended national borders to become a symbol of global disaster and a cause of common concern for the entire world.⁶¹

Soviet leaders naturally wanted to reveal as little as possible of the Chernobyl accident to the outside world because, to them, the disaster threatened the fate of their country.⁶² By the 1980s, nuclear energy had become the key expansion area of the Soviet Union's power industry. Hence the entire economic future of the country hinged on the success of its civil nuclear power plants.⁶³ Years of strict communist ideology likely planted the seeds for the disaster. The Soviet leadership emphasized productivity at all costs; employed secrecy at all levels to preserve the integrity of all Soviet Party policies; and harshly suppressed any information — even if accurate and pertinent — that would undermine a project to which the Party had committed itself.⁶⁴ As a result, Soviet industries left crucial considerations unexplored.

Thousands of people became refugees as a result of the Chernobyl accident.⁶⁵ Unlike refugees in other emergencies, many people displaced by Chernobyl may never be able to return to their homes because the area continues to be contaminated by radio nuclides.⁶⁶ A decade after

⁵⁸ See Ellen Bober Moynagh, *The Legacy of Chernobyl: Its Significance for the Ukraine and the World*, 21 B.C. ENVTL. AFF. L. REV. 709, 715-16 (1994).

⁵⁹ Cooper, *supra* note 1, at 514.

⁶⁰ *Id.*

⁶¹ *UN Assembly President Calls for Continued UN Involvement in Tackling Consequences of Chernobyl*, M2 PRESSWIRE, Apr. 27, 1998, available at 1998 WL 11308832.

⁶² See Cooper, *supra* note 1, at 514.

⁶³ See *id.*

⁶⁴ See Moynagh, *supra* note 58, at 724.

⁶⁵ Cooper, *supra* note 1, at 518.

⁶⁶ See *Supra* note 61.

the accident, the 30-kilometer zone around Chernobyl remained largely uninhabited.⁶⁷ 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.⁶⁸

The 1984 toxic leak in Bhopal, India — considered the world's worst industrial accident⁶⁹ — is another example of a sudden man-made environmental disaster that compelled human migration. Union Carbide India Limited (Carbide), an Indian corporation owned predominantly by a New York corporation,⁷⁰ manufactured pesticides at the Bhopal plant at the request of the Government of India.⁷¹ The waste disposal system of Carbide in Bhopal was highly suspect even before the leak. Not only had Carbide dumped waste in open pits and solar evaporation ponds, it also discharged toxic effluents for years into open sewage drains.⁷² On the night of December 2, 1984, forty tons of a highly toxic gas leaked from the plant and spread quickly throughout the overpopulated areas adjacent to the plant and into the densely occupied parts of the city.⁷³ More than 2,500 people died immediately, and over 200,000 fled their homes, half of them with serious or permanent injuries.⁷⁴

Four days after the incident, American lawyers in the United States filed the first lawsuit on behalf of thousands of Indians.⁷⁵ One hundred forty-four additional actions were brought in federal courts in the United States, all of which were joined and assigned to the Southern District of New York.⁷⁶ The consolidated action was later dismissed on the grounds of forum non conveniens,⁷⁷ ending the litigation in the United States.

⁶⁷ Cooper, *supra* note 1, at 516.

⁶⁸ *See id.*

⁶⁹ *See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

⁷⁰ 50.9% of the corporation's stock was owned by the Union Carbide Corporation, a New York corporation. *Id.*

⁷¹ *Id.*

⁷² *See Meena Menon, Carbide's Toxic Legacy, Poisoned Water, Wastes*, INTER PRESS SERV., Sept. 9, 1999, available at 1999 WL 27373911.

⁷³ Tim Covell, *The Bhopal Disaster Litigation: It's Not Over Yet*, 16 N.C. J. INT'L L. & COM. REG. 279, 279 (1991).

⁷⁴ McCue, *supra* note 1, at 163.

⁷⁵ *In re Union Carbide*, 634 F. Supp. at 844.

⁷⁶ *See id.*

⁷⁷ The court concluded that "the Indian legal system was in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability. Further, the Indian courts have greater access to all the information needed to arrive at the amount of the compensation to be awarded the victims." *Id.* at 866.

But the litigation in India continues to date, and most of the victims still have not received compensation.⁷⁸

More significantly, the environmental consequences continue to plague the citizens of Bhopal and its neighboring areas, and government cleanup of the area is slow in coming.⁷⁹ Tons of toxic chemicals and tar-like waste residues — possibly contaminated with mercury from empty seal pots dumped in the waste area — remain on the premises of the Union Carbide plant, which is now the property of the government.⁸⁰ A 1996 report of the public health engineering department in Bhopal shows that the ground water is heavily contaminated with bacteria and chemicals.⁸¹ The factory's solar evaporation ponds still contain waste that poisons and kills cattle that drink from them.⁸² An estimated 10,000 people live in the vicinity of the abandoned plant,⁸³ all of whom remain threatened with the deadly effects of the disaster over a decade after it occurred. Unless the drinking water becomes potable soon, these people will be forced to move elsewhere or die from their government's negligence.

The burning of Kuwaiti oil wells is a third example of an immediate man-made environmental disaster. At the end of the Persian Gulf War, retreating Iraqi troops deliberately set the wells ablaze in Saddam Hussein's last act of vindictiveness, reminding Western nations of their dependence on Middle Eastern oil.⁸⁴ For eight months, more than seven hundred oil wells burned uncontrollably until a multinational coalition of firefighters extinguished them.⁸⁵ In addition to causing immense economic harm, these fires wreaked immeasurable destruction on the environment and population of the region. The region's levels of mortality from lung cancer and other respiratory and skin diseases are expected to rise dramatically over the next ten years due to the heightened exposure to air pollution caused by smoke clouds.⁸⁶ In addition to the air pollu-

⁷⁸ Covell, *supra* note 73, at 279–80. Union Carbide paid \$465 million to the Indian Supreme Court through a court-approved settlement in India. But the victims of the disaster have not yet received any of this payment. *Id.*

⁷⁹ See Menon, *supra* note 72.

⁸⁰ *Id.* (“The mercury-filled pots were part of the U.S.-based transnational’s ‘Sevin’ pesticide-manufacturing plant’s chemical reactor, and crumbled from disuse. While the mercury was scooped up, the pots were carelessly dumped . . . [M]ercury is dangerously volatile and one of the most toxic of chemicals. Long-term exposure to mercury permanently damages the brain, kidneys and even the foetus, posing a serious threat to poor communities living around the plant.”).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Jessica E. Seacor, *Environmental Terrorism: Lessons from the Oil Fires of Kuwait*, 10 AM. U. J. INT’L L. & POL’Y 481, 482 (1994).

⁸⁵ *Id.* at 481.

⁸⁶ See *id.* at 493.

tion, the region's fresh water supplies are severely threatened, including dozens of desalination plants that convert salt water into drinking water.⁸⁷ As the region continues to rapidly industrialize and populate, the demand for clean water will become even more critical.⁸⁸

B. LONG-TERM EXPLOITATION OF NATURAL RESOURCES: CENTRAL AND SOUTHEAST ASIA

Clear examples of migration and displacement induced by long-term environmental degradation are found in the former Soviet states of Central Asia.⁸⁹ Much of Central Asia is affected by problems such as soil degradation and desertification, brought about by decades of agricultural exploitation, industrial pollution, and overgrazing during the Soviet years.⁹⁰ The Soviets' monocultural agricultural system used massive amounts of chemicals to control weed growth and to replace soil nutrients, resulting in poisoning of the region's land and water.⁹¹ The most severe degradation of the environment in Central Asia is in and around the Aral Sea, a large lake between Kazakstan and Uzbekistan. The Soviets siphoned off most of the water flowing into the sea and used it to irrigate the area's cotton crops.⁹² By the early 1980s, the lake's surface area had been reduced by more than half, and dust from the dried-up bed of the sea — containing large amounts of agricultural and industrial chemicals — now travels long distances, contributing to the further pollution, salinization, and desertification of the land.⁹³

Semipalatinsk in Kazakstan is another example of man-made environmental disaster in Central Asia. Between 1949 and 1989, the U.S.S.R. exploded nearly 500 nuclear bombs in the area, 150 of them above ground.⁹⁴ As the local population has become increasingly aware of the consequences of nuclear radiation, around 160,000 people have left the area — about half moved to other parts of Kazakstan, the remainder going to Russia, Ukraine and other former Soviet states.⁹⁵ Often the better educated and more affluent members of the population move away, leaving behind the members of poorer and less mobile groups who lack the social networks required to establish new homes elsewhere.⁹⁶

⁸⁷ See *id.* at 501.

⁸⁸ See *id.* at 501-02.

⁸⁹ See UNHCR, STATE OF THE WORLD'S REFUGEES, *supra* note 28. According to a recent UNHCR report, in the first half of the 1990s about 270,000 people in Central Asia were displaced due to environmental conditions. *Id.* at 28.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *id.*

⁹⁴ See *id.* at 29.

⁹⁵ See *id.* at 28-29.

⁹⁶ *Id.* at 28.

A third example of continued environmental exploitation is the plunder of forests in Southeast Asia, most notably in Cambodia. According to scientists, foreign-aid officials, and Cambodian critics of the current government of Hun Sen, Cambodia faces an environmental crisis that could prove as devastating as the recently ended threat from the Khmer Rouge, which caused widespread death and destruction during its years in power.⁹⁷ Agreements reached in the late 1980s between Hun Sen's communist regime, the Thai military, and private entrepreneurs has led to a spiral of conversion, corruption, and the pillaging of Cambodia's forests for wealth.⁹⁸ The loss of forest cover in turn has led to disastrous flooding in recent years, siltation and fish die-offs, and other consequences of large scale deforestation.⁹⁹ The biggest threat is to Cambodia's Tonle Sap (Great Lake), described as one of the richest freshwater fishing grounds in the world, which is silting up as a result of deforestation and could disappear within the next two decades.¹⁰⁰ Other reports have indicated that uncontrolled logging at current rates could destroy Cambodia's remaining forests in the next few years.¹⁰¹ Such ecological destruction has rendered the land dangerously vulnerable to drought and flooding, as well as erosion that fills water channels.¹⁰² It is also threatening the livelihoods of communities, often marginalized, that depend on the forests and lake for food, shelter, and water resources.¹⁰³

The Cambodian government recently ordered a ban on the export of unprocessed wood and told the military to clamp down on illegal loggers, but enforcement is lax and the destruction continues.¹⁰⁴ Moreover, certain government departments and the military may be colluding to thwart the restrictions.¹⁰⁵ It is clear that mining of Cambodia's forests has been key to the power of the military and political leaders in Cambodia — not only for the ruling governments, but also for the guerilla armies that have challenged them.¹⁰⁶ Although the exploitation of the forests in Cambo-

⁹⁷ Michael Richardson, *Ecology: Cambodia's Next Man-Made Disaster*, INT'L HERALD TRIB., Jan. 15, 1999, available at <http://www.iht.com/IHT/MR/99/mr011599.html>.

⁹⁸ See Kirk Talbott & Melissa Brown, *Forest Plunder in Southeast Asia: An Environmental Security Nexus in Burma and Cambodia*, ENVIRONMENTAL CHANGE AND SECURITY PROJECT REP., Spring 1998, at 53–60, 54.

⁹⁹ *Id.* at 59.

¹⁰⁰ See *Loggers Use Loophole to Decimate Cambodia's Disappearing Forests*, CHRISTIAN SCIENCE MONITOR, May 1, 1997, available at <http://www.hartford-hwp.com/archives/54/068.html>.

¹⁰¹ See Michael Richardson, *supra* note 97.

¹⁰² See *id.*

¹⁰³ See Talbott & Brown, *supra* note 98, at 59.

¹⁰⁴ See *Cambodia Could Soon Lose Forests to Illegal Loggers: Green Group*, AGENCE FRANCE-PRESSE, Dec. 15, 1997, available at <http://www.forests.org/recent/1997/cambols.htm>.

¹⁰⁵ *Id.*

¹⁰⁶ See Talbott & Brown, *supra* note 98, at 55.

dia has both fueled and been fueled by decades of violent political conflict and civil war, the environmental devastation alone could soon render large parts of the region uninhabitable.

IV. ANALYSIS

The victims of these kinds of man-made environmental disasters merit refugee status for several reasons. First, one reading of the UNHCR Handbook — arguably the most authoritative interpretation of the Convention and the Protocol — suggests that such victims may, or at least should, merit refugee status. Under the Convention and the Protocol, refugees are distinguished from other migrants in that they lack the protection of their state and therefore must rely upon the international community for protection.¹⁰⁷ A refugee is a person who is outside of his country because of persecution on one of the five grounds, or fear of such persecution, and “is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁰⁸ The UNHCR Handbook explains that the term “unwilling,” refers to “refugees who refuse to accept the protection of the Government of the country,” and is “qualified by the phrase ‘owing to such fear.’”¹⁰⁹ When the protection of the country of nationality is available, and there is “no ground based on well-founded fear for refusing it,” the person does not need international protection and is not a refugee.¹¹⁰ Thus, fear of persecution is a necessary precondition of a refugee’s failure to receive government protection when that person is “unwilling” to accept such protection.

In contrast, the absence of any such qualifying language for the term “unable” implies that such fear is not a necessary basis of a refugee’s lack of government protection when the refugee is *unable* to receive such protection. According to the UNHCR Handbook, being “unable” to avail oneself of the protection of one’s government “implies circumstances that are beyond the will of the person concerned.”¹¹¹ For example, there

¹⁰⁷ See UNHCR, STATE OF THE WORLD’S REFUGEES, *supra* note 28, at 28.

¹⁰⁸ Convention, *supra* note 2, art. 1A(2). This portion of the definition refers to persons who have a nationality. The Convention also accords refugee status to certain stateless persons: *i.e.*, any person “who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.” *Id.* The UNHCR Handbook explains that the reasons for the change in language is that “in the case of a stateless refugee, the question of ‘availment of protection’ of the country of his former habitual residence” does not arise, and “once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return.” UNHCR Handbook, *supra* note 7, at ¶ 101.

¹⁰⁹ *Id.* at ¶ 100 (“Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country ‘owing to well-founded fear of persecution.’”).

¹¹⁰ *Id.*

¹¹¹ *Id.* at ¶ 98.

may be a state of war or "other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective."¹¹² The country of nationality may also have denied protection to the applicant.¹¹³ A refugee's "inability" to receive protection can thus arise from two circumstances: (1) where the government refused to extend effective protection, or (2) where the government was incapable of extending such protection. The first situation would encompass cases of state persecution. The second situation, however, suggests that a refugee may be "unable" to avail himself from the protection of his government even where that government is willing and attempting to do so.

Absence of state persecution does not necessarily mean absence of persecution, for persecution may also come from non-government persons such as guerillas, extremist groups or mobs. In such cases, one could both be displaced due to persecution and be "unable" to avail oneself of effective government protection if circumstances prevent the government from offering protection. The language of the Convention and the Protocol suggests, however, that refugeehood can result even in the absence of persecution — i.e., from circumstances that simply render a government unable to extend effective protection.

But even if the drafters of the Convention and the Protocol did not intend for refugee status to apply in the absence of persecution, the UNHCR Handbook's recognition of "grave circumstances" rendering a government's protection "ineffective" suggests that the refugee definition should be revised to consider environmentally hazardous circumstances. Given the humanitarian goals of refugee policy, it makes little sense to extend refugee status to persons whose governments are attempting to protect them while not extending refugee status to persons whose governments create and refuse to offer protection from equally grave circumstances, such as those caused by the Chernobyl explosion and the years of bomb testing in central Asia. Furthermore, whichever way the UNHCR Handbook is read, it states that "whether unable or unwilling to avail himself of the protection of his Government, a refugee is always a person who does not enjoy such protection."¹¹⁴ Such language emphasizes the significance of *absence* of state protection in the refugee definition, regardless of its cause.

Admittedly, reinterpreting or revising 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. Such an interpretation,

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at ¶ 97.

therefore, would have to be limited by specific requirements, such as the occurrence of certain threshold levels of environmental destruction in the country of origin, and the existence of specific circumstances rendering the applicants unable to avail themselves of their government's protection within a designated period of time.

A second argument for extending refugee status to victims of environmental disaster is simply that extensive changes have occurred worldwide in the conditions giving rise to mass migrations. It is clear that the drafters of international and U.S. refugee law anticipated the extent to which refugee needs could change in the future. The UNHCR Handbook explains that the reason for the original 1951 cut-off date in the Convention was that "there was a desire by a number of States not to assume obligations the extent of which could not be foreseen."¹¹⁵ Thus, in addition to the 1951 dateline, the Convention also gave contracting states the "possibility of limiting their obligations under the Convention to persons who had become refugees as a result of events occurring in Europe."¹¹⁶ The 1967 Protocol, however, abolished the temporal and geographic limitations on the refugee definition, due to the understanding that "new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention."¹¹⁷ A decade and a half after the Convention, then, the drafters of the Protocol acknowledged the need to amend the refugee definition, albeit only slightly, in view of changed circumstances.

The international refugee definition has remained the same since the Protocol was adopted in 1967. After three decades, however, environmental conditions have drastically changed. Rapid industrialization and economic growth in many developing countries have come at the cost of citizens' environmental safety.¹¹⁸ For example, "in the hopes of generating rapid economic growth, governments of developing countries will permit industries to operate dangerous technologies in under-monitored, under-regulated, and accordingly, more disaster-prone conditions."¹¹⁹ The disaster in Bhopal provides a clear example: it "occurred because the government of India permitted the prospect of industrial growth to outweigh the importance of environmental risk management."¹²⁰ Chances are high that another accident like that in Chernobyl will occur in the near future, as the majority of the Soviet nuclear power plants are located

¹¹⁵ *Id.* at ¶ 108.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at annex III.

¹¹⁸ See Cooper, *supra* note 1, at 517 n.215.

¹¹⁹ *Id.* (citing Sheila Jasanoff, *Introduction to LEARNING FROM DISASTER – RISK MANAGEMENT AFTER BHOPAL 5* (Sheila Jasanoff et al. eds., 1994)).

¹²⁰ *Id.* (citing Michael R. Reich, *Toxic Politics and Pollution Victims in the Third World*, in *LEARNING FROM DISASTER*, *supra* note 119, at 191).

near densely populated areas, and the former Soviet states' reliance on nuclear electric power is greater than ever.¹²¹ The magnitude of these industrial and technological developments, and their potential dangers, could not have been foreseen at a time when such large scale industrial and technological activities did not exist.

The legislative history of U.S. refugee law also indicates recognition of the need to have a flexible refugee program. According to a 1979 Senate report,¹²² the Refugee Act could not explicitly define all of its terms — in particular, what refugees are deemed to be “of special concern to the United States” — for this was “an issue only the future can define.”¹²³ Rather, the bill was “designed for the decades to come, and what refugees will be deemed of special concern to the American people will be a public policy issue that will be . . . debated and reviewed continuously by Congress, the President, and the American people.”¹²⁴ These statements indicate legislative intent to establish a refugee system that would accommodate both the changing needs of refugees and the domestic interests of the United States.

Historical context played a definitive role in drafting the 1951 Refugee Convention.¹²⁵ In its final form, the Convention encompassed persons who had fled, or might flee, as a result of events that had already taken place — most significantly the Nazi persecutions of 1933–45 — as well as “increasingly repressive communist regimes in Eastern Europe.”¹²⁶ Thus, the history of the Convention itself suggests that its original intent was to accommodate existing refugee needs. This history, and the apparent recognition under both international and U.S. refugee law of the need for flexibility in refugee definitions, demonstrates that amending the refugee definition to recognize today's victims of specific environmental disasters as refugees would be consistent with the original intent and purpose of both international and domestic refugee law.

A third argument for according refugee status to environmentally displaced persons calls for amending the refugee definition to reduce the ambiguity of both international and U.S. refugee law. Unlike the admission of migrants, the admission of refugees often sends a strong foreign policy message to the state from which the refugees come. Accepting refugees can send a particularly hostile message when that acceptance is based on a condition that the state of origin can, but will not, remedy — such as political or religious persecution. These foreign policy consider-

¹²¹ See *id.* at 518.

¹²² See S. REP. NO. 96-256 (1979), reprinted in 1980 U.S.C.C.A.N. 141.

¹²³ *Id.* at 6, reprinted in 1980 U.S.C.C.A.N. 141, 146.

¹²⁴ *Id.*

¹²⁵ Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 766 (1998).

¹²⁶ *Id.* at 766–77.

ations, in turn, are often inextricably linked with domestic interests — such as the desire to appease nations from whom the United States seeks economic or political cooperation. Arguably, while the language and legislative history of the Refugee Act indicate a humanitarian focus, practice suggests that U.S. refugee admissions have, instead, been driven far more by these foreign policy and domestic interests.

For example, Central American aliens have traditionally gained little U.S. sympathy, and the Immigration and Naturalization Service (INS), under pressure from the State Department, maintains a presumption that Salvadoran refugees are primarily economic immigrants and, thus, ineligible for relief.¹²⁷ Meanwhile, since *glasnost* and the subsequent changes in the former Soviet Union, the U.S. has generously accepted ex-Soviet refugees.¹²⁸ In 1990 the United States accepted 40,000 Soviets who were not outside of the country of their nationality, who were not displaced by war or civil strife and who, in many cases, did not meet the U.N. definition of a refugee as contained in the Refugee Act.¹²⁹ They were admitted to the United States “in response to domestic political considerations, under new refugee profiles and studies and assumptions and presumptions.”¹³⁰ Thus, despite Congress’ elimination of political language from the Refugee statute, foreign policy and domestic political concerns continue to significantly influence the process of refugee admissions.¹³¹

This tendency toward politicking in refugee admissions is largely made possible by the ambiguous language of the Refugee Act. Aside from the requirements of “appropriate consultation” with Congress,¹³² the Refugee Act establishes few restrictions or guidelines for the Executive and Attorney General to follow when they exercise their “discretion” in determining refugee admissions.¹³³ Thus, there are no clear standards binding U.S. authorities to make refugee admissions consistent with the original purpose of the refugee system — that is, to provide refuge to those who cannot find protection under their own governments. In the absence of a clear statutory mandate, even the standards to which the executive and administrative agencies are ordinarily held do little to check the decision-making process, other than provide a cause of action

¹²⁷ See Knobelsdorff, *supra* note 15, at 659 (citing Jeffrey L. Romig, Comment, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 315 (1985), which suggests that the United States’ friendly relationship with El Salvador is the reason that the U.S. fails to acknowledge that large numbers of Salvadoran refugees face persecution upon return to their homeland).

¹²⁸ See 136 CONG. REC. S7711-01 (daily ed. June 1, 1990) (statement of Sen. Simpson).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See Knobelsdorff, *supra* note 15, at 659.

¹³² See *supra* note 34.

¹³³ See INA § 207, *supra* note 32 and accompanying text.

against the U.S. government — an avenue not readily available to most migrants seeking refugee status. If refugee law does not explicitly accord refugee status to victims of environmental disaster, tens of thousands of such victims each year may be denied refugee status despite the fact that thousands of others arguably less in need of international protection are granted refugee protection, based on considerations wholly inconsistent with the purposes of refugee law.

Finally, victims of man-made environmental disasters should be able to seek refuge in other states for humanitarian reasons. Those who flee their homes and often their countries because of such disasters as Chernobyl and Bhopal are victims of environmental injustice¹³⁴ because they lack the political power to protect their environment. One scholar has argued that these victims therefore fit within the already existing 1951 refugee definition because they are members of a “social group” lacking the political power to protect their environment.¹³⁵ This argument is problematic, however, because it stretches the terms of the 1951 definition by distorting the concept of a “social group,”¹³⁶ and by asserting that by virtue of this characteristic these persons are “persecuted” by their governments.¹³⁷ Victims of environmental catastrophes are often politically disempowered. But that does not make them a “social group,” for such disempowerment is unrelated to any characteristic other than the nearly universal characteristic of being a person under an undemocratic government. And it does not establish that they are “persecuted” for reasons of their membership in a social group, because there is no specific reason for which they are distinguished and oppressed. The “refugee” definition, therefore, does not include these victims under its terms, despite the fact that they are involuntarily displaced and no more able to seek the protection of their governments than are political or religious refugees.

¹³⁴ Environmental justice is an emerging movement in the United States that emphasizes equal enforcement of environmental laws among all communities regardless of race, ethnicity, class, or any other category, and the right of all communities to participate in the decision-making processes that shape environmental policies. See generally Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U. L. REV. 221 (1997).

¹³⁵ See Cooper, *supra* note 1, at 526.

¹³⁶ See Thomas, *supra* note 8, at 812–13 (quoting the UNHCR Handbook as stating “that ‘[a] particular social group’ normally comprises persons of similar background, habits or social status Thus, the United Nations has determined that one can be persecuted because of both immutable characteristics (background and social status) and characteristics which one should not be forced to change (habits).”).

¹³⁷ See Steinbock, *supra* note 125, at 758 (indicating that the plain meaning of “persecution” indicates that it involves “the infliction of harm on others because of their perceived difference.” The development of the modern concept of refugeehood confirms this interpretation.).

Several international instruments have established a fundamental right to life and prohibited the intentional deprivation of life. The Universal Declaration for Human Rights states that "everyone has the right to life, liberty, and security of person."¹³⁸ The International Human Rights Committee has clarified that right by declaring that "a state's failure to take appropriate measures to prevent the disappearance and killing of an individual violates the right to life under Article 6 of the International Covenant on Civil and Political Rights."¹³⁹ This affirmative duty of states to protect the right to life should logically apply to "circumstances in which a state's activities pose life-threatening environmental risks."¹⁴⁰ Environmental threats may also violate other human rights, such as the rights to health, livelihood, culture, privacy, and property – rights embodied in international instruments such as the Universal Declaration, the International Covenant on Civil and Political Rights, and arguably in customary international law.¹⁴¹ Neither international human rights bodies nor other tribunals, however, have determined the content or limits of these rights.¹⁴²

The United States has, at least in rhetoric, committed itself to upholding these international human rights. Recognizing that the past serves as a guide to interpreting the refugee definition, a 1979 Senate report on the Refugee Act noted that the United States has admitted refugees, among other domestic and foreign policy reasons, "to respond to human rights concerns embodied in the Universal Declaration for Human Rights."¹⁴³ Furthermore, the U.S. Supreme Court has stated, although only in dicta, that the central theme of United States refugee legislation is "the creation of a haven for the world's homeless people," not simply the maintenance of a preference for people who at one time had to flee persecution.¹⁴⁴ Persons fleeing environmental disasters not of their own making are certainly deprived of their homes, and their lives are threatened, in a way at least as devastating and inescapable as political, religious or ethnic persecution. If these humanitarian principles underlay U.S. refugee laws, as legislative history indicates, then it is the United States' duty to encourage the international community to take in as refu-

¹³⁸ Universal Declaration of Human Rights, art. 3, G.A.Res. 217A, U.N. Doc. A/810 (1948).

¹³⁹ Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 *YALE J. INT'L L.* 355, 362 (1993). Article 6 of the International Covenant on Civil and Political Rights states that "[e]very human being has the inherent right to life No one shall be arbitrarily deprived of his life." Int'l Covenant on Civil and Political Rights, art. 6, G.A. Res. 2200A, U.N. Doc. A/810 (1966).

¹⁴⁰ Schwartz, *supra* note 139, at 362–63.

¹⁴¹ See *id.* at 366.

¹⁴² *Id.*

¹⁴³ S. REP. NO. 96-256, at 6, (1979), reprinted in 1980 U.S.C.C.A.N. 141, 146–47.

¹⁴⁴ *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55 (1971).

gees those who flee from man-made environmental disasters that render them homeless.

Major hurricanes, floods, and earthquakes undoubtedly necessitate an international humanitarian response. But such disasters differ from the types of environmental tragedies that occurred in Chernobyl and that continue to occur in Southeast Asia, for they are not directly caused by state action. An expansion in the definition of "refugee" may not be the most effective approach to these situations, for in the aftermath of such disasters the international response must include humanitarian aid and assistance in rebuilding the damaged infrastructures, where possible. Simply opening foreign doors to an increased number of the victims does not, in the long run, help the devastated regions. Man-made environmental disasters, on the other hand, constitute human rights violations where they are caused or condoned by government action. If the current language of international and domestic refugee law does not recognize victims of such disasters as refugees, modern circumstances necessitate a revision of the language to bring refugee law into compliance with international human rights agreements.

V. POLICY PROPOSAL

Refugee status under the INA for persons displaced by man-made environmental disasters may therefore be the first step in according these victims much-needed international recognition. U.S. refugee law, however, should be held to a standard independent from the "discretion" of the Executive and the Attorney General — such as to an international standard that will be binding on all U.N. member states. This paper proposes revising international and U.S. refugee law to include in the definition of "refugee" any person: (1) whose country of nationality is rendered unlivable due to an environmental disaster caused or condoned by the state, "unlivable" being defined by the standards for the right to life under the Universal Declaration and other international instruments and norms that bind a significant number of states; and (2) who is unable to seek protection from the government of that state, due either to the government's inability or unwillingness to render effective protection, (3) where the United Nations General Assembly,¹⁴⁵ upon appropriate consultation, determines that circumstances in the country of origin cannot be improved to a "livable" condition within a specified number of years, such time period to be determined by the General Assembly at the time of amending the definition. "Appropriate consultation" should in-

¹⁴⁵ The U.N. General Assembly is charged with the responsibility to "initiate studies and make recommendations for the purpose of . . . promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all . . ." U.N. CHARTER art. 13 ¶ 1.

clude recommendations from both the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Environment Programme (UNEP),¹⁴⁶ both of which would assess global refugee and environmental situations and recommend specific measures to the General Assembly. The key terms of this new refugee definition should also be set by the General Assembly through this process of consultation with authoritative U.N. organs.

Arguably, by subjecting the United States to standards set by international organs, such a law could infringe upon the powers conferred on the Legislative and Executive branches by Articles I¹⁴⁷ and II¹⁴⁸ of the Constitution. This potential problem can be avoided, however, if the standard is ratified by the United States as an international treaty, with the reservation that the United States refuses to be bound by any provision that causes it to act contrary to the U.S. Constitution. Granted, the United States could proclaim in almost any case that a decision under this standard is unconstitutional because it infringes upon U.S. legislative or executive powers. But as with all international agreements, foreign policy considerations would provide the incentive for adherence to the provisions of the treaty. The United States would exercise its option to reject the treaty's provisions only as a last resort, as such a step could significantly affect the United States' relations with the international community. Thus, the United States would not be bound to any agreement that violates the Constitution, yet important foreign policy considerations would also prevent it from disregarding the agreed-upon standard except in the most pressing circumstances — those considerations significant enough to call for international attention. Under such an international standard, refugee status would be determined in a far more objective manner than under the current system, which grants each state broad latitude to define and apply the ambiguous terms of the international refugee definition in accordance with its own domestic or diplomatic interests.

¹⁴⁶ The United Nations is comprised of six principal organs: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. U.N. CHARTER art. 7 ¶ 1. The UNHCR and the UNEP are subsidiary organs established under the Charter's provision authorizing the creation of "[s]uch subsidiary organs as may be found necessary . . . in accordance with the present Charter." U.N. CHARTER art. 7 ¶ 2.

¹⁴⁷ "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

¹⁴⁸ "[The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors." U.S. CONST. art. II, § 2, cl. 2. The language has been construed to give the Executive plenary power over all foreign relations matters, including immigration to the United States.

VI. CONCLUSION

We are no longer living in a Cold War. Persecution of various social groups persists in many parts of the world, and those caught within these situations undoubtedly deserve international aid. But to offer refugee status only to those who can prove their lives are in danger due to the social group to which they belong or the worldview which they hold is to suggest that only membership in specific groups and freedom of opinion or belief are fundamental human rights deserving of global protection. It disregards the fundamental right that all human beings have to live in an environment free from perils caused by human irresponsibility. Where a government facilitates or condones the creation of such environmental crises, human rights are at stake and the victims are entitled to flee elsewhere as refugees. Without this designation of "refugee" in international law, countries are not required to apply the principle of non-refoulement¹⁴⁹ and environmental migrants can always be forced back to areas where their lives are endangered.

A policy of recognizing "environmental refugees" will channel international efforts toward dealing with the root causes of migration.¹⁵⁰ It will compel those nations with the power to influence activities affecting the environment to make not just economic and political decisions, but decisions that will benefit the global environment as well. The current legal system in the United States gives the President and the Attorney General broad powers to admit or exclude the victims of environmental disasters based on "humanitarian considerations" and the "national interest." These terms, however lofty they may sound, are an invitation for shrewd political decisionmaking and leveraging whenever U.S. interests are at stake. There is no check on the admission process, other than what consultation is considered to be "appropriate" at the moment. Notwithstanding the Executive's broad powers to determine immigration matters in the national interest, such powers do not explain a ratification of the 1967 Protocol that is void of any commitment.

Undoubtedly, the refugee burden should be shared by the entire international community, not by the United States alone. But as international agreements are effective only insofar as they are upheld under domestic laws, the United States would do well to set an example by recognizing that such persons are entitled to the aid of the international community. Such a step would encourage the United Nations to revise the mid-century definition of refugee and set a new international standard for refugee protection that will address the most pressing needs of the day. Broadly stated, refugee recognition is premised upon an interna-

¹⁴⁹ See Martin, *supra* note 9.

¹⁵⁰ See Plummer, *supra* note 57.

tional agreement to protect those who are forced out of their homelands due to injustices created or condoned by their governments. If this is the underlying principle, then persons displaced from their home countries due to man-made environmental disaster are entitled to international recognition as refugees.