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Domestic Evolution: Amending The United States Refugee Definition of the INA to Include Environmentally Displaced Refugees

Barbara McIsaac

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Domestic Evolution: Amending The United States Refugee Definition of the INA to Include Environmentally Displaced Refugees

Barbara McIsaac*

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I. INTRODUCTION

Currently, the United States has not decided whether people who are forced to leave their home countries due to environmental harms should qualify for refugee and asylum status protections.¹ This paper proposes that the U.S. should amend the definition of refugee in the Immigration and Nationality Act (“INA”) to recognize these victims as refugees. In his farewell speech in January 2017, President Barack Obama acknowledged the crisis of these climate refugees in light of the climate change impacts they face. He said:

Take the challenge of climate change. In just eight years, we’ve halved our dependence on foreign oil, doubled our renewable energy, and led the world to an agreement that has the promise to save this planet. But without bolder action, our children won’t have time to debate the existence of climate change; they’ll be busy dealing with its effects: environmental disasters, economic disruptions, and *waves of climate refugees seeking sanctuary*.²

U.S. President Barack Obama,

Farewell Speech 2017

¹ See U.S. DEPARTMENT OF STATE, *Appendix E: Overview of U.S. Refugee Policy*, U.S. Dep’t of State, <http://www.state.gov/g/drl/rls/irf/2001/5562.htm> (last visited May 5, 2017).

² Barack Obama, Farewell Address to the American People, YOUTUBE, (Jan. 10, 2017), <https://www.youtube.com/watch?v=QDyjUIsD-wQ> (emphasis added); see also, Breanne Compton, *Rising Tide of Environmental Migrants: Our National Responsibilities*, 25 Colo. Nat. Resources, Energy & Envtl L. Rev. 357, 372 (2014) (discussing the fact that Barack Obama has discussed the plight of environmentally displaced climate migrants).

Climate refugees have not received any international protection under the United Nations High Commissioner for Refugees (“UNHCR”).³ Scholars have debated whether the term “climate refugee” is an acceptable term to describe victims of climate change who are forced to migrate from their homes.⁴ The number of climate refugees is expected to climb to 200 million in the next half-century.⁵ Climate change is a quandary that creates many challenges, such as the impacts that individuals will face when seeking sanctuary from their homeland due to forced displacement by environmental disasters, including but not limited to: sea- level rise, food scarcity, and/or water shortages.⁶ Under the United Nations Framework Convention on Climate Change (“UNFCCC”), climate change refers to “a change in climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.”⁷ Some scientists agree that climate change is a global warming problem caused by an excess of greenhouse gases, mainly carbon emissions into the atmosphere that are produced by developed countries. The two major carbon contributors are China and the United States.⁸ Developed countries

³ See generally Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention]; see also Protocol Relating to the Status of Refugees, Jan. 31 1967, 606 U.N.T.S. 267 [hereinafter Protocol] (showing an amendment to the 1951 Convention).

⁴ Sireesha V. Chirala, *Acclimating to Climate Change: Filling The International Policy Void for Environmentally Displaced People*, 35 Hous. J. Int’l L. 359, 388 (2013) (proposing an accepted climate refugee term as “environmentally displaced people”); see also Brittan J. Bush, *Redefining Environmental Refugees*, 27 GEO. IMMIGR. L.J. 553, 571 (2013) (proposing a competing definition for these environmentally displaced people as “environmental refugee”).

⁵ Holly D. Lange, *Climate Refugees Require Relocation Assistance: Guaranteeing Adequate Land Assets Through Treaties Based on the National Adaptation Programmes of Action*, 19 PAC. RIM L. & POL’Y J. 613, 613 (2010).

⁶ See Sumudu Anopama Atapattu, CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES, 299-301 (Randall S. Abate ed. 2016). [hereinafter CLIMATE JUSTICE].

⁷ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, May 9, 1992, 1771 U.N.T.S. 107 available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited April 4, 2017).

⁸ See Holly Shaftel ed., *A Blanket Around the Earth*, NASA, <https://climate.nasa.gov/causes/> (last updated May 5 2017); see also CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, 3-5 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013) [hereinafter CLIMATE CHANGE AND INDIGENOUS PEOPLES] (describing developed nations are more technologically and financially advanced over the less developed nations that are still developing and don’t have the resources to emit greenhouse gases industrially like developed nations); see generally U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data.html> (last visited 24 April 2017).

are generally more technologically, financially, and industrially advanced from developing countries.⁹

Human interference with the planet's climate system poses many climate risks for all of the species on earth.¹⁰ The International Panel on Climate Change ("IPCC") includes a group of scientists who take a more neutral approach to the definition of climate change.¹¹ The IPCC uses statistical analysis to identify changes in the variability of climate properties for an extended period of time, but most differentially examines the results of these changes by recognizing that they may be the result of natural variability or human activity.¹² The IPCC uses statistical reports and assessments to identify changes in the climate. In 1990, the first assessment report noted that climate change may displace an estimate of 200 million people by year 2050.¹³ Regardless of whether climate change is the result of human activity or natural phenomena, IPCC scientists recognize that its negative impacts are displacing people through sea level rise, droughts, excessive flooding, and/or natural disasters.¹⁴ These current threats and real problems must be addressed now. Current domestic immigration laws are insufficient to provide climate refugees any kind of relief in the United States.¹⁵

Part I shows that existing U.S. immigration law is insufficient to apply the Refugee Act to environmentally displaced persons.¹⁶ This section

⁹ Onyejekwe Kele, *International law of Trade Preferences: Emanations from the European Union and the United States*, 26 St. Mary's L.J. 425, 435 (1995) (describing developed nations leads to advancements, which exists in international customary law).

¹⁰ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Climate Change 2014: Impacts, Adaptation and Vulnerability: Summary for Policymakers* (last visited December 30, 2018), https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf

¹¹ *Id.*

¹² See UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, *supra* note 7.

¹³ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Climate Change 2014: Impacts, Adaptation and Vulnerability: Summary for Policymakers* (explaining that the IPCC was set up jointly by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988 to provide authoritative assessments, based on the best scientific literature, on climate change causes, impacts and possible response strategies); see also Oli Brown, *Climate change and forced migration: Observations, projections and implications*, HUMAN DEVELOPMENT REPORT OFFICE, https://www.iisd.org/pdf/2008/climate_forced_migration.pdf (last visited Oct. 13, 2018).

¹⁴ Accord, Gregory S. McCue, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO INT'L L. REV. 151, 157 (1993) (discussing the environmental causes of migration).

¹⁵ See, e.g., Emily Naser-Hall, *Square Pegs In Round Holes: The Case Of Environmentally Displaced Persons And The Need For A Specific Protection Regime In The United States*, 22 TUL. J. INT'L & COMP. L. 263, 265 (2014) (discussing the lack of United States Immigration law to adequately protect environmentally displaced people).

¹⁶ See *infra* Part I Section B for a thorough discussion of the lack of legal protections these victims face.

discusses the limitations of current domestic immigration law and how the INA does not currently protect environmentally displaced persons.¹⁷ Further, this part will show the history of the INA's definition of refugee and how that definition has changed over time.¹⁸ The current U.S. definition of refugee under the INA was influenced by international law and particularly the International Refugee Convention Act of 1951, the 1967 Protocol under the United Nations Human Commission of Refugee ("UNHCR").¹⁹

Part II will examine environmentally displaced persons through the lens of a newly defined term: "environmentally displaced refugees" ("EDRs").²⁰ This part will also discuss some of the threats to nations experiencing forced environmental displacement. The United States could be liable under international human rights law for its part in causing climate change.²¹ The potential U.S. liability will be discussed as it relates to climate change victims in the pursuit of justice.²² International law has evolved since the definition of refugee was first established, and the U.S. immigration law should likewise amend its refugee definition to account for the new plight of refugees.²³

Part III analyzes the progression of environmental law as it pertains to human rights and EDR's on an international and U.S. domestic level. This part examines how environmental law has progressed internationally and domestically since the UNHCR developed the Refugee Act of 1951 and the United States adopted the language for the term "refugee" in 1980.²⁴ For example, the United Nations Framework for Climate Change

¹⁷ Carey DeGenaro, *Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond*, 86 U. COLO. L. REV. 991, 1012 (2015).

¹⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C., Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

¹⁹ McCue, *supra* note 14, at 172 (explaining the history of international law and specifically describing the U.S. role in international negotiations regarding the refugee definition).

²⁰ See *infra* Part II Section A for a thorough discussion about the terming of climate refugees, environmental migrants, environmental refugees, environmentally displaced people, and how that leads to a proposed environmentally displaced refugee term.

²¹ Jacqueline Peel & Hari M. Osofsky, *Sue To Adapt*, 99 MINN. L. REV. 2177, 2235 (2015) (stating "... Australian litigation has significant implications for the U.S. context. As the U.S. case on hazard planning in the electricity context suggests, adapting to greater natural hazard risks could be an important emerging area for U.S. litigation").

²² Chirala, *supra* note 4, at 367 (explaining the visible effects of climate change and providing a table that shows the regions and the damages being experienced).

²³ See generally, William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25, 29 (1993) (discussing human evolution).

²⁴ Carl Bruch, *Is International Environmental Law Really "Law"?: An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423 (2006).

Convention (“UNFCCC”) was developed in 1992, and accepts climate change as a real threat to earth.²⁵ Part IV proposes an amendment to domestic immigration law to provide protections to EDRs and establishes criteria to obtain refugee status. Part IV also introduces a proposal for a related section to the amended refugee definition in the Immigration and Nationality Act. The proposed section describes the procedure and environmental situations that would qualify to give an individual EDR status.

The United States should amend its definition of refugee to show that environmentally displaced persons are refugees and should be included in the definition as a response to a humanitarian threat greatly caused by the United States.²⁶ The proposed amendment will mitigate liability that the United States could face in an International Criminal Court and will establish EDR’s in their own category of protection under the refugee definition in the INA. The decision of whether to grant refugee status would be discretionary based on a specified list of circumstances in which the person may qualify for refugee status as an EDR.

The U.S. would further benefit financially by allowing these refugees to join the United States tax and economic system.²⁷ There would be little administrative burden on the United States by adding environmentally displaced people to the refugee definition in the INA because the U.S. still maintains discretion over the annual amount of refugees admitted and which applications of asylum seekers are approved.²⁸ The end goal of this paper is to provide permanent status in the United States for victims fleeing environmental disasters.

II. EXISTING UNITED STATES DOMESTIC IMMIGRATION LAW

Subsection A of this section discusses the Refugee Act of 1980 and how the refugee definition has been expanded to include sterilization, as well as how those changes assist the proposal in determining the basis to amend the refugee definition further.²⁹ Subsection B discusses current

²⁵ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, May 9, 1992, 1771 U.N.T.S. 107 available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited April 4, 2017).

²⁶ Peel & Ofsofsky, *supra* note 21, at 2179 (discussing that the “slow-moving” or lack of U.S. adaptation to reduce greenhouse gas emissions affects the world’s climate change mitigation).

²⁷ DeGenaro, *supra* note 17, at 1025 (summarizing that by allowing refugees into the U.S. as legal residents it would help society and the economy).

²⁸ *Id.* at 1044 (suggesting that a new U.S. immigration law would minimize political turmoil).

²⁹ See 8 U.S.C. § 1101(a)(42); see *infra* Part I Section A for a detailed discussion.

United States immigration law and explains temporary protected status (“TPS”), refugees and asylum in the INA,³⁰ while demonstrating how current approaches are insufficient to provide relief for EDRs.

A. Refugee Act of 1980 and Congress’ Definition of Refugee Status

In 1980, Congress enacted the Refugee Act, which provides the process asylum seekers take to obtain refugee status in the United States by qualifying under the definition of a “refugee” of the United States.³¹ The purpose of the act was to bring Congress’ definition of refugee in conformance with the international definition of refugee.³² Congress relied on the 1967 United Nations Protocol to define the status of refugee seekers in the United States.³³

The United Nations Human Rights Convention of 1951 (“UNHCR”) and the 1967 United Nations Protocol provides international law with refugee protections.³⁴ In 1979, the UNHCR produced guidelines that refer refugees to the criteria necessary to obtain refugee protection, explicitly exempting “victims of natural disasters.”³⁵ The UNHCR conducted a study showing that the refugee status must be caused by situations that occur between a State and its nationals.³⁶

The United States sought to comply in full accordance with international refugee law by accepting the Protocol of 1967 and applying its refugee definition to domestic law.³⁷ The eventual domestic resolution of the international refugee definition came in the Refugee Act of 1980, which requires an asylum seeker to show the United States that they are unable to return to their homeland “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”³⁸ The Refugee Act of 1980, derives from the international refugee definition, determined by the UNHCR, to include people who are outside their country; unwilling or unable to return to their homeland because of a well-

³⁰ INA § 244(a); 8 U.S.C. § 1254(a).

³¹ Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 102 (1980).

³² Maritza I. Reyes, *The Latino Lawful Permanent Resident Removal Cases: A Case Study of Nicaragua and a Call for Fairness and Responsibility in the Administration of U.S. Immigration Law*, 11 HARV. LATINO L. REV. 279, 294 (2008).

³³ See Protocol, *supra* note 3.

³⁴ See Convention, *supra* note 3.

³⁵ Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1114 (2009).

³⁶ See Jeanhee Hong, Note, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J. L. & PUB. POL’Y 323, 330 (2001) (discussing the handbook to the UNHCR definition of Refugee).

³⁷ See Protocol, *supra* note 3.

³⁸ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42).

founded fear of persecution; and that the persecution is the result of “. . . reasons of race, religion, nationality, membership of a particular social group or political opinion.”³⁹ Environmentally displaced persons do not have a category under the UNHCR refugee definition or the U.S. Refugee Act of 1980.⁴⁰

Some scholars have stated that the refugee definition in the U.S. is tailored to the international law and cannot be changed unless international law is reformed first.⁴¹ However, Congress has not provided refugee protections beyond those in the Refugee Act of 1980, which means that individuals escaping natural disaster or war may not be granted refugee status.⁴² For example, in 1966, Congress enacted the Cuban Adjustment Act, which provides a way for Cubans who have been in the U.S. for one year to obtain automatic permanent residence status.⁴³ This automatic adjustment of status for Cubans in the U.S. gives them the ability to obtain lawful permanent residence without the need to prove that they are, individually, in fear of persecution under the refugee definition of the Refugee Act of 1980.⁴⁴

In 1996, under the INA, Congress expanded the definition of “refugee” to include people who were nationally forced to submit to sterilization or abortion.⁴⁵ The added portion of the INA to the refugee definition reads:

. . . For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a

³⁹ *Id.*

⁴⁰ Moberg, *supra* note 35, at 1114.

⁴¹ See Katherine J. Strandburg, *Official Notice Of Change Country Conditions In Asylum Adjudication: Lessons From International Refugee Law*, 11 GEO. IMMIGR. L. J. 45, 46-47 (1996) (stating that the Convention guides Asylum law and the Refugee Act).

⁴² *Matter of X-P-T*, 21 I&N Dec. 634 (BIA 1996) (recognizing a change in the refugee definition to grant asylum to a victim that would be forced to be sterilized upon return to country of origin); see also *M.A. v. INS*, 899 F.2d 304, 311 (4th Cir. 1990) (noting that courts have consistently rejected applications for asylum based on fear of general violence or unrest); *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987); *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982); *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) (holding that persecution does not encompass harm that arises out of civil or military strife in a country).

⁴³ Harvard Law Review Association, *The Cuban Adjustment Act of 1996: ¿Mirando por los ojos Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 902 (2001).

⁴⁴ Javier Talamo, Note, *The Cuban Adjustment Act: A Law Under Siege?*, 8 ILSA J. INT'L & COMP. L. 707, 710 (2002).

⁴⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.⁴⁶

The international definition of refugee does not specify protection, and specifically related to abortion or sterilization, yet the United States has recognized that persons satisfy the political opinion category of persecution and are worthy of refugee status, consistent with an amended refugee definition.⁴⁷

B. Current U.S. Immigration Law is Insufficient to Protect EDR

The United States does not offer sufficient protections to EDRs.⁴⁸ U.S. immigration laws relating to refugees and asylees are primarily found in the Immigration and Nationality Act (INA) which is enacted by Congress.⁴⁹ The Immigration laws are enforced under the Department of Homeland Security (DHS) and the Department of Justice (DOJ).⁵⁰ The portions of the INA that make up refugee and asylum law include the refugee definition, annual admission quotas for refugees and asylum.⁵¹ The U.S. refugee definition requires an individual to have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” in order to qualify as a refugee or asylee.⁵² The INA explicitly states that quota systems exist for

⁴⁶ INA § 101(a)(42)(B); 8 U.S.C. § 1101 (2012).

⁴⁷ FEDERATION FOR AMERICAN IMMIGRATION REFORM, <http://www.fairus.org/issue/Refugees> (last visited March 23, 2017) (noting that these refugee add-ons show that the UNHCR would not consider these people refugees by international standards but regardless the US allows the refugee status in the INA); *see infra* Section IV for a proposal to add EDR category to the INA definition of refugee.

⁴⁸ *Accord*, Compton, *supra* at note 2.

⁴⁹ §10:5 Domestic law, 2 Immigration Law Service 2d §10:5 (2017).

⁵⁰ *Id.*

⁵¹ 8 U.S.C. § 1101(a)(42) (2012) (describing the refugee definition requirements; *see, e.g.*, 8 U.S.C. § 1157 (2012) (describing refugee quotas); *see also* 8 U.S.C. § 1158 (2012) (describing asylum law); *see generally* 8 U.S.C. §1251(b)(3)(B) (2012) (describing withholding of removal).

⁵² § 1101(a)(42); INA § 208(a) (“The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien’s status, to apply for asylum, and the alien may be granted asylum

refugee admissions in the United States on a yearly basis; however those quotas do not apply to asylees who apply for asylum in the United States.⁵³

1. Temporary Protected Status

Since 1990, Temporary Protected Status (TPS) has been a way for undocumented persons in the United States to obtain temporary humanitarian relief in the circumstances of ongoing war, natural disaster, or other humanitarian cause for the inability of an individual to return to their homeland.⁵⁴ Under the INA §244(c) noncitizens are eligible for TPS when:

an alien, who is a national of a state designated under subsection (b)(1) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) meets the requirements of this paragraph only if: (i) the alien has been continuously physically present in the United States since the effective date of the most recent designation of that state; (ii) that alien has continuously resided in the United States since such date as Attorney General may designate; (iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph 2(A), and is not ineligible for temporary protected status under paragraph (2)(B); and (iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.⁵⁵

DHS denies a TPS application when the individual does not qualify under the eligibility requirements.⁵⁶ Although TPS creates a form of relief for non-citizens to hold legal presence in the United States, TPS is only a temporary form of relief.⁵⁷ TPS does not provide permanent relief for victims of climate change disasters such as: sea-level rise or droughts that

in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).”).

⁵³ 8 U.S.C. § 1157(c)(3) (2012); 8 U.S.C. § 1158(b)(2) (2012) (review for the grounds of inadmissibility applicable to asylum law procedures).

⁵⁴ Nadine Wettstein, *Temporary Protected Status: How Temporary, Who Is Protected, And What Kind Of Status?*, 13-12 IMMIGR. BRIEFINGS 1 (2013).

⁵⁵ 8 U.S.C. § 1254(a) (2012); *see generally* DeGenaro, *supra* note 17, at 1017.

⁵⁶ INA § 244(c)(2)(B), 8 U.S.C. § 1254(a) (stating that the attorney general may withdraw TPS when an immigrant is not in fact eligible, has not remained continuously in the United States, or if the immigrant fails to register each year).

⁵⁷ DeGenaro, *supra* note 17, at 1018.

cause a permanent inability to EDRs to return to their homeland because the land is no longer physically habitable or agriculture cannot be produced for food growth purposes.⁵⁸

Further complicating TPS and its application to EDRs are the restrictions and ineligibility grounds that apply to TPS applicants. EDR numbers could reach the millions and the influx of people could be perceived as a danger to the security of the United States.⁵⁹ TPS would not be sufficient protection in U.S. immigration laws for environmentally displaced refugees.⁶⁰ DHS extended the TPS status for earthquake disasters several times over 14 years, for example, in 2001 there were a series of severe earthquakes which made it too difficult for El Salvador to allow the return of 212,000 nationals from the U.S.⁶¹ At some point the United States has to recognize the permanence of natural disaster and grant permanent EDR status to prevent administrative burden of continuously renewing TPS to people whose return to their homeland is impossible in their lifetimes because of the magnitude of the natural disaster. The administrative burden on the United States is unnecessary and a better solution would be to extend the refugee definition and encompass these victims in the quota systems that apply to asylum applications without any adverse implications to international relations.⁶² This is the quandary that the EDR definition proposed in this Paper offers to resolve. Furthermore, the “. . . environmental disaster category [of TPS] requires the occurrence of an environmental disaster ‘resulting in a substantial, but temporary disruption’ of living conditions . . . “ creating an issue where the plight of islands do not allow for temporary relocation and a permanent status is required.⁶³ In order to distinguish a way for these victims to obtain a permanent status for environmentally displaced refugees, the temporary protection that TPS offers will not suffice.

2. Refugee: INA Section 207

Domestically the question gets raised as to who is a refugee and states do have the authority to decide.⁶⁴ Under INA § 207(a), which was added to the INA by the Refugee Act of 1980 to supplement the definition of

⁵⁸ *Id.* at 992.

⁵⁹ *Id.* at 997.

⁶⁰ DeGenaro, *supra* note 17, at 1021.

⁶¹ DeGenaro, *supra* note 17, at 1017.

⁶² *Id.*

⁶³ Ari Weitzhandler, *Temporary Protected Status: The Congressional Response To The Plight Of Salvadorian Aliens*, 64 U. COLO. L. REV. 249, 266 (1993) (quoting Immigration and Nationality Act, § 244a(b)(1)(B)).

⁶⁴ GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 426-27 (3d ed. 2007).

refugee, the President in consultation with Congress decides how many refugees will be admitted each year.⁶⁵ In the case of an emergency, or where the President may believe an emergency exists, INA § 207(b) provides a way to increase the numbers if when determined by the President that a situation is necessary.⁶⁶ INA 207(c) describes the admission requirements of refugees and their families.⁶⁷ INA Section 207(c) states:

(1) Subject to numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible except as otherwise provided under paragraph (3) as an immigrant under this Act.⁶⁸

Qualifying spouses or children will be admitted to the United States under the same refugee status as the applicant that has been admitted.⁶⁹ The term "refugee" in the INA applies to a refugee that is outside of the United States, usually at a refugee camp, applying to gain refugee protection and seek shelter in the United States.⁷⁰ Refugees are eligible for adjustment of status to permanent residence after one year as long as they are not inadmissible or deportable.⁷¹ A refugee is generally granted access to the United States based on the refugee definition in the INA when they are outside of their country of origin.⁷² Applying a refugee status to EDRs would afford these victims protections in the United States under the INA.

3. Asylum: INA Section 208

Section 208 of the INA applies to asylum seekers who are within the borders of United States, and are applying for asylum.⁷³ Asylum may be granted for noncitizens that are in the United States lawfully or unlawfully, however, like their documents must, generally, be filed within one year of

⁶⁵ STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, 910-11 (6th ed. 2015).

⁶⁶ *Id.*

⁶⁷ *Id.* at 884.

⁶⁸ INA § 207(c)(1), 8 U.S.C. 1157 (2012).

⁶⁹ Legomsky, *supra* note 65, at 884.

⁷⁰ *Id.* at 871.

⁷¹ *Id.* at 917.

⁷² *Id.* at 892.

⁷³ INA § 208(a)(1), 8 U.S.C. § 1158 (2012).

arrival to the United States, unless an exception exists.⁷⁴ Any noncitizen may apply for asylum but if a safe third country exists where the Attorney General may remove the asylum seeker to that safe third party country.⁷⁵ Asylum will not be afforded to a refugee if a previous application was denied.⁷⁶ Asylees application are subject to many conditions before granting asylum status including that the asylee must show that he is a refugee within the INA definition 101(a)(42), he has good moral character, and does not fit the following past wrongdoing criteria:

(i) the alien has ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; (v) the alien is described in subclause [inadmissible or deportable as a terrorist or relating to terrorist activity]; or (vi) the alien was firmly resettled in another country prior to the arrival in the United States.⁷⁷

Asylum seekers do not receive protection for environmentally displaced migration purposes. In Part IV of this Paper, the additional 207A section of the INA will be expanded to include EDRs and provide a definition that is consistent with the restrictions of applying for asylum for cohesive to include EDRs.⁷⁸

III. EDRS REPRESENT A HUMANITARIAN CRISIS

Victims of climate change and environmental disasters displaced from their home countries without any protections from other countries

⁷⁴ *Id at* § 208(a)(2)(B).

⁷⁵ *Id at* § 208(a)(2)(A).

⁷⁶ *Id at* § 208(a)(2)(C).

⁷⁷ *Id. at* § 208(b)(2)(A).

⁷⁸ *See infra* Part IV Section B for a thorough understanding of 207A proposal to the INA.

represent a humanitarian crisis.⁷⁹ This Part II, will be precedes in three Sections. Section A will discuss the terminology that should be used in the proposed INA amendment for these victims, as EDRs.⁸⁰ Section A uses a narrow lens to formulate a domestic definition in the INA to refer to victims displaced by environmental catastrophes, or climate change. The proposed definition, EDRs, results from the synthesizes of many of the terms used today and combines them to propose this new definition.⁸¹ Section B highlights the threats these displaced victims are experiencing, and Section C discusses the potential liability and the claims against the United States.⁸² These sections support the finding of a humanitarian crisis by describing the terminology, national threats, and potential liabilities that accompany the real threat of displacement of EDRs.

A. Definition of an Environmentally Displaced Refugee (EDR)

Scientists, politicians, climate change activists, climate change skeptics and scholars alike have used several different terms for climate refugees including, but not limited to: climate refugees, environmentally displaced people, environmental migrants, environmental refugees, environmentally displaced persons, or climate change migrants.⁸³ The difficulty with the terminology involves the status of the people it is referring to as well as the plight of internal victims within their homelands and external victims that have to remove themselves from their homelands because of climate induced migration.⁸⁴ The term “refugee” is defined by international law as giving rights to those persecuted to seek sanctuary from their homelands and enter a new country.⁸⁵ The term “climate refugees” has been used more readily today, but the narrow version of this terminology does not give effect to those migrants that are forced to be displaced from their home country due to natural disasters and not

⁷⁹ Naser-Hall, *supra* note 15, at 290.

⁸⁰ See *infra* Part II, Section A for a thorough analysis of environmentally displaced refugees.

⁸¹ *Id.*

⁸² See DeGenaro, *supra* note 17, at 1002 (“Additionally, the Asian Development Bank noted that tropical cyclones and storm-tide swells have displaced people in Fiji, Kiribati, the Marshall Islands, the Solomon Islands, and the Federated States of Micronesia, all countries whose citizens also tend to migrate to the United States.”).

⁸³ See Phillip Dane Warren, *Forced Migration After Paris COP21: Evaluating “The Climate Change Displacement Coordination Facility,”* 116 COLUM. L. REV. 2103, 2110-2112 (2016).

⁸⁴ See Chirala, *supra* note 4, at 373-377 (contrasting environmentally refugees’ emergence with internally displaced people).

⁸⁵ Bush, *supra* note 4, at 554.

particularly climate change problems.⁸⁶ However, climate change leads to natural disaster; therefore, the definition should be broader to encompass individuals that are forced to leave their home because of any serious threat of environmental event.⁸⁷

Confusion over the terminology exists for individuals who are forced to migrate from their home region but may be able to stay within their home country and only be burdened by internal homeland displacement.⁸⁸ It is difficult to represent oneself as a refugee within one's own homeland, because it is incumbent upon state sovereignty to provide for a nation's "internally displaced people."⁸⁹ "Internally displaced people" deserve recognition but should not be considered when formulating a narrow definition for United States protection as it applies to "refugee status."⁹⁰ Another argument arises when climate induced migrants are labeled refugees because scholars debate that it may undermine international law's definition of refugee by broadening the reach of the refugee umbrella.⁹¹ One proposed way to correct this problem may be to apply a refugee definition to only those people who are environmentally forced to migrate from their homelands and seek refuge in another country.⁹² These are the people covered by the EDR definition proposed in this Paper for inclusion in the INA. This way, EDR terminology does not get confused with internal versus external migration displacement. A diplomatic term for the INA to refer to these refugees could be environmentally displaced refugees ("EDRs"). EDR terminology does not cross the barrier to confuse internal and external migrated displacement.

"Environmentally displaced persons" is a term coined by the United Nations to refer to people who were displaced by the serious threat or actual events based on environmental or climatic disasters.⁹³ The term "environmental refugees" was introduced by the United Nations

⁸⁶ See Compton, *supra* note 2, at 364 (discussing climate refugees as a narrow term that defined a particular subset of environmental refugees that were relocating specifically due to climate change reasons).

⁸⁷ *Id.*

⁸⁸ See Chirala, *supra* note 4, at 375-77.

⁸⁹ See Bonnie Docherty & Tyler Giannini, *Confronting A Rising Tide: A Proposal For A Convention On Climate Change Refugees*, 33 HARV. ENVTL. REV. 349, 369 (2009).

⁹⁰ *Id.* at 360.

⁹¹ Compton, *supra* note 2, at 368-71.

⁹² Bush, *supra* note 4, at 569; see *infra* Part IV Section B that establishes the qualifying events for a refugee, including the financial restrictions of the applicant's home country to provide relief to the victim.

⁹³ See Vikram Odedra Kolmannskog, *Norwegian Refugee Council, Future Floods of Refugees: A comment on Climate Change, Conflict and Forced Migration* 13-20, at 9 (2008), available at http://www.nrc.no/arch/_img/9268480.pdf.

Environment Programme (“UNEP”).⁹⁴ The “environmental refugees” definition reads: “. . . 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 jeopardizes their existence and/or seriously affected the quality of their life.”⁹⁵ Environmentally displaced people who are internally displaced, within their homelands, would not fit under the international definition of refugee and should thus be referred to in a way that their country chooses to categorize them to address responsibility by their own government.⁹⁶ The narrow proposal in this Paper combines the terms: “environmentally displaced persons,” and “environmental refugees,” to refer to individuals who are externally displaced from their homeland, or country of origin, as “environmentally displaced refugees,” (“EDRs”). This EDR terminology shows the importance of the environmental displacement as well as the status of the victim in need of relief that the refugee status would offer.

B. *Threats of Forced Environmental Displacement to Nations*

“Unpredictable climate, increased frequency of natural disasters, and rising sea levels are forcing people throughout the world in vulnerable regions to leave their homes in search of safer ground.”⁹⁷ The main culprits of climate change disasters that will defile nations and give rise to mass migration across international borders are severe sea level rise, floods and droughts.⁹⁸ In the world of nations, the most vulnerable to climate change are Small Island Nations because they will be detrimentally affected by sea level rise (due to low sea-level of most islands) which will lead to internal and external displacements. Some populations will have to move from the outer regions of the country to inner parts of the country where as other entire populations will have to retreat from the entire nation.⁹⁹ For example, the government of the Island Nation of Kiribati went to the

⁹⁴ Trudy Sumiko Rebert, *The Rising Flood?: Environmental Refugees in a Political Ecology Perspective*, 5 (2006), available at <https://www.macalester.edu/academics/geography/courses/coursepages/rebert.pdf>.

⁹⁵ Sumundu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT’L L.J. 607, 619-20 (2009).

⁹⁶ Bush, *supra* note 4, at 572.

⁹⁷ Randall S. Abate, *Doing Well by Doing Good? A New Normative Perspective on Corporate Social Responsibility: Article Corporate Responsibility And Climate Justice: A Proposal For a Polluter- Financed Relocation Fund For Federally Recognized Tribes Imperiled By Climate Change*, 25 FORDHAM ENVTL. L. REV. 10, 10 (2013).

⁹⁸ Docherty, *supra* note 89, at 355 (“Three categories of climate change effects--rising sea levels; an increasing quantity and intensity of storms; and drought, desertification, and water shortages--are expected to contribute most to migration flows.”).

⁹⁹ *See generally*, CLIMATE JUSTICE, *supra* note 6, at 299-303 (discussing the realistic threat of retreat for island nations).

extreme measure of purchasing land from a neighboring island (Fiji - with mountainous terrain and higher sea-level) in order to give their displaced citizens somewhere to go.¹⁰⁰

There are 52 island nations that the United Nations (UN) identifies as countries that face specific environmental vulnerabilities.¹⁰¹ Small Island Nations like Tuvalu, have already experienced victims of environmental disaster that seek asylum from the climate change impacts they are experiencing from violent storms, sea level rise, and flooding.¹⁰² For example, a man from Kiribati and his wife migrated to New Zealand and sought asylum for environmental displacement as refugees, but were denied relief, and had to return to the island of Kiribati.¹⁰³ Another family from Tuvalu sought environmentally based asylum in New Zealand and, on appeal, the court granted him asylum on other causes but made a statement to the following effect: “impacts of natural disasters can, in general terms, be a humanitarian circumstance.”¹⁰⁴ This shows that in New Zealand the courts have made statements to recognize the humanitarian effects of environmental disasters.¹⁰⁵ The island of Tuvalu is already experiencing agriculture deficiencies from the salinity of the soil from the flooding and sea level rise.¹⁰⁶ While the first and second assessment reports of the IPCC were inconclusive to determine whether humans caused global warming and climate change, the third assessment provides that a significant amount of global warming over the last 50 years is due to greenhouse gas emissions, which are released by humans.¹⁰⁷

In fifty years, the citizens of the small island nation of
Tuvalu will likely face a tragic ending to their pictorial

¹⁰⁰ Laurence Caramel, ‘Besieged by the rising tides of climate change, Kiribati buys land in Fiji’, *The Guardian* (July 1, 2014), available at <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu> (last visited April 27, 2017).

¹⁰¹ CLIMATE JUSTICE, *supra* note 6, at 302 (citing UN-OHRLLS, Small Island Developing States: Small Islands BIG (GER) States (2011), available at <http://unohrlls.org/custom-content/uploads/2013/08/SIDS-Small-Islands-Bigger-Stakes.pdf>).

¹⁰² Cole Mellino, *Meet the World’s First Climate Refugees*, ECOWATCH, (Jan. 5, 2016), <http://www.ecowatch.com/meet-the-worlds-first-climate-refugees-1882143026.html>.

¹⁰³ LIBRARY OF CONGRESS, New Zealand: ‘Climate Change Refugee’ Case Overview, (last visited April 27 2017), <http://www.loc.gov/law/help/climate-change-refugee/new-zealand.php?loclr=bloglaw>.

¹⁰⁴ Refugee Appeal No. 501370-371 (N.Z. I.P.T. 2014).

¹⁰⁵ *Id.*; see *infra* Part IV that will have United States identify these individuals as EDRs protected under the domestic refugee definition.

¹⁰⁶ Moya K. Maso, *Tuvalu: Flooding, Global Warming, and Media Coverage*, MKM RESEARCH, (2017) <http://www.moyak.com/papers/tuvalu-climate-change.html>.

¹⁰⁷ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Climate Change 2001: The Scientific Basis*, IPCC, (2001), https://www.ipcc.ch/ipccreports/tar/wg1/pdf/WGI_TAR_full_report.pdf.

way of life. Some scientists predict that the island, home to more than 11,000 people, will sink into the ocean by the year 2054 due to the adverse effects of global warming. Tuvalu may become the first populated island to be swallowed by the ocean. In 1999, the unpopulated islands of Tebua Tarawa and Abanuea were already engulfed by the Pacific Ocean.¹⁰⁸

These island communities that face extreme burdens due to sea level rise are inhabited with indigenous people that do not possess the financial or technological resources to migrate, or mitigate climate change on their own.¹⁰⁹ Furthermore, these communities are not a part of developed nations and have done little to nothing to contribute to these catastrophes.¹¹⁰ Besides islands, other nations are also experiencing climate change to the degree of forced migration. In Africa, many countries like Kenya and Nairobi are experiencing desertification caused by droughts that are negatively impacting the agriculture production to a degree of starvation for the citizens.¹¹¹ These droughts are causing people to migrate internally and externally.¹¹² The impact of these migrations could lead to war and conflict between countries over natural resources because as the agriculture depletion is affected so is the ability to feed nations.¹¹³

C. United States Potential Liability for EDRs

The lack of international protections and relief for low lying nations has led to a lack of assistance from developed countries to provide relief, either temporarily or permanently for the victims displaced by climate and environmental catastrophes.¹¹⁴ The problem is being witnessed by nations

¹⁰⁸ Rebecca Elizabeth Jacobs, *Treading Deep waters: Substantive Law Issues In Tuvalu's Threat To Sue The United States In The International Court Of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 103-104 (2005).

¹⁰⁹ See generally CLIMATE CHANGE AND INDIGENOUS PEOPLES, *supra* note 8 (generally discussing in part 1 the commonality among unique indigenous communities and the disproportionate burdens they face in regard to climate change).

¹¹⁰ See Keith W. Rizzardi, CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES, 189-194 (Randall S. Abate ed. 2016) (describing sea level rise impacts on Florida and the viability of a retreat option).

¹¹¹ Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, 357 PHIL. TRANS. R. SOC. LOND. B. 609, 609 (2001).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Tiffany T.V. Duong, *When Islands Drown: The Plight of "Climate Change Refugees" And Recourse To International Human Rights Law*, 31 U. PA. J. INT'L L. 1239, 1244 (2010).

around the globe.¹¹⁵ This Part will discuss the potential liability to the developed nations if they continue to do little to nothing to mitigate or provide relief for environmentally displaced refugees.¹¹⁶ Some scholars have reasoned that the liability for taking care of these EDRs should fall upon the nations that are experiencing the environmental threat or event that caused the displacement.¹¹⁷ On the other hand, other scholars argue that because developed nations are the cause of climate change and the effects that are majorly contributing to the impacts of climate change, they should be responsible for the victims that are forced to be displaced.¹¹⁸ While legal and moral obligations exist other potential liabilities may pose a risk to these nations, including the United State in the future.¹¹⁹

The United States Supreme Court has recognized that international law may be imposed upon U.S. jurisdiction as customary law under limited circumstances.¹²⁰ It is possible that the lack of protection for individuals displaced by environmental disaster who seek to enter the United States, as refugees or obtain asylum status as asylees within the United States, pose a claim in International Criminal Court (ICC) as a crime against humanity.¹²¹ International criminal court is a court that the international community uses to hold individuals liable for crimes of genocide, war, aggression or crimes against humanity that was committed because of the significance of those crimes.¹²²

The ICC is not a part of the United Nations and is not designed to replace international courts.¹²³ The ICC includes 120 nations who ratified the treaty and are all under the jurisdiction of the Rome Statute which gives the ICC jurisdiction in these cases.¹²⁴ In response to war crimes, genocide

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Compton, *supra* note 2, at 377.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Mara Theophila, "Moral Monsters" Under The Bed: Holding Corporations Accountable For Violations Of The Alien Tort Statute After *Kiobel V. Royal Dutch Petroleum Company*, 79 FORDHAM L. REV. 2859, 2869 (2011) (discussing the sources of international law that may be considered by the United States).

¹²¹ See CITY U. OF LONDON, The Refugee Crisis And International Law: Are Australian Agents And Corporate Actors Committing Crimes Against Humanity?, (Feb. 13, 2017, 6:00 PM), <http://www.city.ac.uk/events/2017/february/the-refugee-crisis-and-international-criminal-law-are-australian-agents-and-corporate-actors-committing-crimes-against-humanity>.

¹²² See generally ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90 (1998) (article 5 discussing the jurisdiction of the ICC; article 7 discussing crimes against humanity), available at <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx>.

¹²³ *Id.*

¹²⁴ *Id.*

and extermination of civilizations, crimes against humanity have been defined, albeit broadly, by the American draft to include a definition that states:

CRIMES AGAINST HUMANITY: namely. Murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, *before or during the war*; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the *domestic law* of the country where perpetrated.¹²⁵

The ICC's jurisdiction is an international source but, as the definition states, the acts do not have to be in violation of domestic law.¹²⁶ Inadequate and declining environmental conditions pose a significant threat to human civilizations and further to those humans rights to life, health, water, land and food.¹²⁷ It is detrimental when nations with the means and ability to provide protection for displaced civilizations do not provide them refuge in their countries because the international refugee definition does not provide protection.

Crimes against humanity claims are not always clear, and may involve national or private policies.¹²⁸ Crimes against humanity resulted from the lack of response from the international community to hold individuals liable for war crimes in times that war between different State nations was not present, and the national government was in fact committing crimes against its own people.¹²⁹ Crimes against humanity have been a measure in international court tribunals as acts that "shocked the conscience of mankind."¹³⁰ A potential crimes against humanity claim brought under the ICC may exist when these nations intend to deport individuals who are facing environmental disaster when they return to their homeland because that of the threat to their lives.¹³¹ The crimes against humanity statute

¹²⁵ Matthew Lippman, *International Law and Human Rights: Crimes Against Humanity*, 17 B.C. THIRD WORD L.J. 171, 187 (1997) (emphasis added).

¹²⁶ *Id.*

¹²⁷ UNEP& COLUMBIA LAW SCHOOL, *Climate Change And Human Rights* 12 (2015), http://apps.unep.org/publications/index.php?option=com_pub&task=download&file=011917_en (last visited Jan. 1, 2019).

¹²⁸ Charles Chernor Jalloh, *Article: What Makes A Crime Against Humanity A Crime Against Humanity*,

28 AM. U. INT'L L. REV. 381, 409 (2013).

¹²⁹ *Id.* at 394.

¹³⁰ *Id.* at 404.

¹³¹ Lippman, *supra* note 125, at 194 (discussing the intent element involved with crimes against humanity).

designates a prohibited list of acts *before or during war*, and the individuals claims, whom are facing forced displacement from climate impacts, are the product of a humankind's war with natural resources.¹³² Here, global carbon emissions are depleting natural resources because of the lack of adaptation and mitigation policies resulting in humankind's war on the environment.¹³³

International claims against developed nations for climate change is not a novel idea. For example, in 2005, Tuvalu island state threatened to file a claim against the U.S. for rejecting the Kyoto Protocol which if accepted would create liability for nations to mitigate climate change by enacting mitigation policy endeavors.¹³⁴ Tuvalu sought to bring a claim under the International Court of Justice against the United States for damages to the country for future relief, as a sinking nation, susceptible to climate change and the lack of developed nation mitigation to the issue.¹³⁵ Scholars articulated that Tuvalu would not likely succeed because the United States climate change mitigation would be outweighed by the financial burden.¹³⁶ Jurisdictional complications exist as well because the United States would likely not submit to jurisdiction of the International Court of Justice since it is not bound by the Kyoto Protocol.¹³⁷

However, crimes against humanity may be a creative approach to this type of international claim against the United States. Where noncitizens in the United States seek discretionary relief in the form of asylum under the grounds that their homeland is inhabitable and livelihood threatened, and are deported, a crime against humanity may exist to those individuals where there is a war between mankind and the environment.¹³⁸ Although this claim may be subject to the "multiplicity of victim" requirement that crimes against humanity now requires.¹³⁹ Perhaps, an entire nation, like

¹³² Peter Lehner, *Environment, Law, And Nonprofits: How NGOS Shape Our Laws, Health, And Communities*, 26 PACE ENVTL. L. REV. 19, 25-26 (2009) (describing "And the work of environmental NGOs continues to the present. In the last eight years, for example, the Bush Administration has waged an unprecedented **war on the environment**. This is a non-partisan statement; this is simple fact. Environmental NGOs, very often NRDC and Earth Justice, but others as well, sometimes accompanied by other entities such as states, have had repeatedly to sue EPA and other federal agencies to overturn efforts to promulgate new regulations weakening the Clean Air Act, the Clean Water Act, the Endangered Species Act . . .").

¹³³ *Id.* at 25.

¹³⁴ Jacobs, *supra* note 108, at 103.

¹³⁵ *Id.* at 105.

¹³⁶ *Id.* at 115.

¹³⁷ *Id.*

¹³⁸ *But see* Jalloh, *supra* note 128, at 404 (stating that the multiplicity of victim's requirement makes the claim unlikely to succeed in individual cases that do not involve a broader criminal scheme).

¹³⁹ Jacobs, *supra* note 108 at 111-118.

that of Tuvalu, may be able to fulfill the multiplicity requirement if the sea level rises and the island as a whole is seeking refugee protection and is further denied that protection.¹⁴⁰ “Crimes against humanity” has an expounding and changing basis that we have seen over a slow evolution since its inception.¹⁴¹ As environmental disasters worsen, increasing populations suffer from the negative effects of climate change by death or displacement, and with scientists and climate change experts alike showing human interference as the cause of climate change, crimes against humanity claims may further develop to provide relief for victims plagued by climate change.¹⁴²

IV. PROGRESSION OF ENVIRONMENTAL LAW AFFECTING CLIMATE CHANGE SINCE THE UNHCR

The following Section III will discuss international treaties and the United States laws that affect climate change. Specifically, Part A encompasses the Montreal Protocol, UNFCCC and the Kyoto Protocol that have advanced in international law since the International refugee definition was negotiated at the UNHCR. Part B proceeds to distinguish the United States ratification of the Paris Agreement. The goal of this Section provides developments in International environmental law and the United States as a party to those developments since the United States Refugee Act of 1980.

A. *International Treaties*

Climate change mitigation impacted international law in the first major way through a stratospheric ozone depletion treaty called the Montreal Protocol.¹⁴³ Sometime in the 1980’s the international community started to see thinning of the Antarctic ozone layer.¹⁴⁴ The Montreal Protocol worked to address the international elimination of harmful ozone depletion.¹⁴⁵ The Montreal Protocol works as an assessment tool and binding treaty to eliminate harmful hydro fluorocarbons from the atmosphere.¹⁴⁶ The United Nations Environmental Program handles the

¹⁴⁰ *Id.*

¹⁴¹ Jalloh, *supra* note 128, at 405.

¹⁴² See CLIMATE JUSTICE, *supra* note 6, at 299-306.

¹⁴³ DeGenaro, *supra* note 17, at 1031.

¹⁴⁴ Elspeth Faiman Hans, Note, *The Montreal Protocol in U.S. Domestic Law: A “Bottom Up” Approach To The Development Of Global Administrative Law*, 45 N.Y.U. J. INT’L L. & POL’Y. 827, 835 (2013).

¹⁴⁵ DeGenaro, *supra* note 17, at 1031-32.

¹⁴⁶ Hans, *supra* note 130, at 836.

administrative side on the treaty.¹⁴⁷ Congress accepted the Montreal Protocol and strongly encouraged the treaties disposition.¹⁴⁸ In response to the Montreal Protocol Congress enacted the Clean Air Act.¹⁴⁹

Internationally, the strong framework of the Montreal Protocol and the necessity to combat climate change lead to two modeled International tools for the fight against climate change: the United Nations Convention on Climate Change (UNFCCC) and the Kyoto Protocol.¹⁵⁰ The UNFCCC was ratified in 1994 and created to respond to climate change.¹⁵¹ Article 4.2 of the treaty has obligatory language for its parties to peacefully mitigate climate change, especially among the developed nations, and provide for the reduction of carbon emissions in the atmosphere.¹⁵² The parties to the UNFCCC ratified an agreement to clearly define the carbon emission limits and targets for the obligated parties under a mechanism called the Kyoto Protocol.¹⁵³ Although most of the worlds countries have accepted the UNFCCC, the Kyoto Protocol clearly defines those countries obligations, which has not been as universally accepted.¹⁵⁴ For example, the United States is a party to the UNFCCC but not the Kyoto Protocol which could be argued as giving the UNFCCC mitigation obligations less effect now that the Kyoto Protocol has been established.¹⁵⁵ Under the Kyoto Protocol, and managed with the intention to create a mechanism for the developed nations to provide resourceful assistance to developing nations, the Green Climate Fund was initiated.¹⁵⁶ The Green Climate Fund allows for the international community to provide financial assistance to the mitigation and adaptation efforts of climate change impacts.¹⁵⁷ However, developed nations are not obliged to utilize the green climate funds for their displaced victims, developing nations may utilize the funds.¹⁵⁸ The international environmental movement accepting climate change may be a slow progression but the keyword in this case is progression.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 837.

¹⁴⁹ *Id.*

¹⁵⁰ DeGenaro *supra* note 17, at 1031.

¹⁵¹ See CLIMATE CHANGE AND INDIGENOUS PEOPLES, *supra* note 8, at 412.

¹⁵² *Id.* at 428.

¹⁵³ *Id.* at 429.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See generally Laura Drummond, Note, *UNFCCC Green Climate Fund Created*, 11 SUSTAINABLE DEV. L & POL'Y. 69 (2011) (explaining the compliance with Article 11 of the UNFCCC to promote mitigation and adaptation of climate change developing to developed nations).

¹⁵⁷ Chirala, *supra* note 85, at 367.

¹⁵⁸ *Id.*

B. *The United States And The Paris Agreement*

The United States is a party to the UNFCCC; however, the U.S. signed the Kyoto Protocol in 1998 but has never ratified the Protocol, which it does not hold any force in the United States.¹⁵⁹ A huge climate change win for the U.S. was in 2016 when China and the U.S. ratified the Paris Agreement.¹⁶⁰ The Paris Agreement is a legally binding treaty under the UNFCCC that applies mitigation and adaptation efforts of both developing and developed nations to a legally binding international treaty.¹⁶¹ The Paris agreement has articles that addresses the parties: legal and procedural obligations to reduce GHG emissions with given targets; implementation measures; administrative effects of the agreement; the progression of the agreements measures; overall targets and many provisions related to the expectations in ways that the agreement (and its parties) serve to apply mechanisms to reduce climate change globally.¹⁶² In application to the human rights aspect of the Paris Agreement and how it can be tied to the United States progression on climate change would be addressed in the preamble of the treaty which states:

Parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality, empowerment of women, and intergenerational equity.¹⁶³

This human rights level-based portion of the preamble does provide hope that the United States is progressing with international law to combat climate change.¹⁶⁴

¹⁵⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 10, *opened for signature* Mar. 16, 1998, 2303 U.N.T.S. 148 (entered into force Feb. 16, 2005).

¹⁶⁰ See United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/109.pdf> [hereinafter Paris Agreement].

¹⁶¹ See Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J INT'L L. 288, 290 (2016).

¹⁶² *Id.* at 291.

¹⁶³ Paris Agreement, *supra* note 160, at pmbl., para. 7.

¹⁶⁴ Bodansky, *supra* note 161, at 313.

V. PROPOSAL TO PROVIDE REFUGEE STATUS FOR EDRs IN THE UNITED STATES

The next Section is a two-part proposal to add environmentally displaced persons to the Immigration and Nationality Act, defined as, “environmentally displaced refugees” (“EDRs” or “EDR”). Part-one of the proposal elaborates on the new category of refugee and describes the language the INA would use in order to fit that category into the existing refugee definition in the INA. Part-two of the proposal specifically adds a section (207A) to the INA in order to provide a supplement to the new EDR definition. Part-two will catalog limits, and qualifying events, for individuals to meet the new category that the EDR definition status applies. Part C provides a brief rationale that gives reasons leading up to the applicability of a new EDR category to the refugee definition in the INA.

A. *Part-One: Proposed Amendment To The Refugee Definition in The INA*

Currently, the well-founded fear and persecution requirement of the refugee definition in the INA does not include an “environmentally displaced refugee.”¹⁶⁵ By proposing to add language to the INA under the refugee definition to include an “environmentally displaced refugee” this would allow “environmentally displaced refugees” to become a category of refugee protected in the INA. This addition to the INA would allow for the United States to provide relief and recognize “environmentally displaced refugees” without adversely broadening the refugee definition. The current refugee definition in the INA under 101(a)(42) states the following:

(42) The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality,

¹⁶⁵ DeGenaro, *supra* note 17, at 1014 (“It is difficult to argue that scarce resources, degraded economic and environmental conditions, or even increased political turmoil resulting from climate change, meet the standards of persecution as defined by the statute. Even if an asylum-seeker can prove persecution, she must also be able to show that it was “on account of race, religion, nationality, membership in a particular social group, or political opinion”).

membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.¹⁶⁶

In order to domestically identify environmentally displaced people as refugees the INA should explicitly state that, environmentally displaced people are refugees, and further define them as, EDRs. The proposed Part C addition, as described above, would be inserted to the INA as 101(a)(42)(C): or (C) in such special circumstances, and in accordance with §207A of this Act [8 U.S.C.A. §1157]) the term "refugee" should include an "environmentally displaced refugee" who shall be considered to be any person inside or outside of this country, including a person having no domicile or nationality, and who faces a well-founded threat of the inability to return to ones country of origin because of a severe lack of food, water, or land, that resulted from an environmental catastrophe, which may be the result of climate change, and creating a completely uninhabitable country of origin or last country of domicile for the person, and that their original domicile does not possess the financial resources or

¹⁶⁶ INA § 101(a)(42), 8 U.S.C. § 1101 (2012 & Supp. II 2015).

legislation necessary to internally relocate the migrant within their original country of domicile, and then the environmentally displaced persons shall be deemed to have been the victim of persecution from the inability of the domicile country to provide relief to the individual and qualifies this person as being of a category, defined as “environmentally displaced refugees,” and who will be considered a refugee for all purposes of relief under this Act.

B. Part-Two: Proposal to Add a Section, 207A To The INA To Supplement EDR

In addition to the amended definition, a section will be needed in the INA to discuss the specifics of attaining an EDR status for refugees and asylees refugee relief in the United States. This proposed section should fit within the INA as the following: *207A Environmentally Displaced Refugees (EDR) Annual Admission and Requirements [8 U.S.C.A. § 1157b]*. Although section 208, asylum procedure, would still apply for these EDRs, 207A would serve to provide depth into what qualifies an EDR, additional relief once EDR status is maintained, and an additional maximum quota system. Section *207A(a)* would address the annual number of admitted EDRs, which shall not exceed ten thousand refugees, which is justified by humanitarian concerns.¹⁶⁷ Section *207A(b)* will give the President the discretion to increase the annual quota system for severe climate changes due to humanitarian concerns.

The last section, *207A(c)*, would discuss the conditions for granting EDR status and how that status can be affected. This last section provide the courts and individuals with a specific list of qualifying environmental disasters and threats that would provide for EDR status for victims.¹⁶⁸ For example, a list of qualifying factors to apply for EDR relief under the definition proposal, *101(a)(42)(C)* may include the following: an environmental catastrophe has to occur; the environmental disaster must have resulted in the applicant’s country of origin becoming completely uninhabitable due to a severe lack of food, water or land; the domicile country does not possess the financial resources to relocate the individual within the borders of its country; and the person seeking relief is not inadmissible or deportable under the INA. Proposed section *207A(c)* may require an additional 101 definitions in the INA for the term “completely uninhabitable country of origin.”¹⁶⁹ Section *207A(c)* may further suggest

¹⁶⁷ UNITED NATIONS STATISTICS DIVISION: WORLD STATISTICS POCKETBOOK, *Tuvalu*, (2013), <http://data.un.org/CountryProfile.aspx?cname=Tuvalu> (showing a statistical report of the population of Tuvalu is 9,876 people).

¹⁶⁸ DeGenaro, *supra* note 17, at 1046.

¹⁶⁹ *Id.*

that once an EDR status is granted the EDR is eligible to apply for legal permanent residence status, which is different from asylum, because this would provide a way for individuals to obtain permanent residence when faced with an EDR qualifying situation.¹⁷⁰ The limitations of this section would be imposed by sections 207 and 208 of the INA unless 207A otherwise provides.

This EDR definition is narrow enough to allow individuals of countries, like low-lying island nations, to qualify in cases of sea-level rise or otherwise to obtain refugee status.¹⁷¹ The applicability of these conditions to obtain EDR status protects the United States from humanitarian liabilities because it provides a way for international victims to seek refuge from environmental displacement within the United States without the threat of deportation.¹⁷² The proposed section helps the United States remain a beacon for hope and provides a route for change on the international refugee status.¹⁷³

C. *Rationale for the Factors that Contributed to the Definition Amendment of Refugees*

Since the definition of refugee was coined at the Convention in 1951, international environmental law with regards to climate change has slowly progressed. From the 1980's Montreal Protocol to the U.S. ratification of the 2016 Paris Agreement, the UNFCCC has been a pillar of progression in this arena.¹⁷⁴ The Paris Agreement is a star for progress that further suggests domestic progress for the victims that climate change encroaches.¹⁷⁵ It may be argued that internationally the community has not applied refugee protections to EDR's, however, the fact remains that the U.S. has a front row seat to negotiations at the international level and may

¹⁷⁰ See Yineth Sanchez, "Help Me, I Can't Go Home" – Alternative Remedies For Colombian Victims Of Violence Who Do Not Qualify For Political Asylum In The United States, 21 ILSA J. INT'L & COMP. L. 453, 493 (2015).

¹⁷¹ See, e.g., U.N. Office for the Coordinator of Humanitarian Affairs, U.N. Country Team in Kenya, Kenya Drought Response Situation Report No. 1, at 1 (April 13, 2017), (summarizing that over 2.6 million people are experiencing food shortages as a result of the droughts in Kenya).

¹⁷² See generally Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (1998).

¹⁷³ See, e.g., The White House Office of the Press Secretary, *The United States and India – Moving Forward Together on Climate Change, Clean Energy, Energy Security, and the Environment*, <https://obamawhitehouse.archives.gov/the-press-office/2016/06/07/fact-sheet-united-states-and-india---moving-forward-together-climate> (June 7, 2016) (exemplifying the United States as a global leader on climate change when it moves forward with India to advance clean energy).

¹⁷⁴ *Id.*

¹⁷⁵ Bodansky, *supra* note 161, at 290.

provide a catalyst mechanism for international protection of environmentally displaced refugees.¹⁷⁶ Domestically, the U.S. has added language to provide refugee status for those not covered under the UNHCR, when it amended the provision to provide for those facing persecution in the form of family planning, a political opinion claim.¹⁷⁷

The definition of “persecution” within the UNHCR and Refugee Act of 1980, does not extend to environmental harm (although displaced persons could claim that environmental harms have threatened their lives, or that environmental harm represented “other prejudicial actions or threats” to them in order to be considered a persecuted person for the purposes of claiming refugee status).¹⁷⁸ Under this proposed addition to the refugee definition in the INA, persecution is established when the country of origin does not have the financial resources to aid the victim in displacement. Persecution is further validated by a “well-founded threat” which creates a separate category for threats of environmental harms. The term-of-art “well-founded threat” abridges the “well-founded fear” of persecution to apply protection to EDRs.¹⁷⁹

VI. CONCLUSION

The number of EDR’s is growing.¹⁸⁰ International protections under the UNHCR Refugee Convention of 1951 do not exist.¹⁸¹ Also, domestic policy in the United States to permanently protect EDR’s, does not exist. A solution is required in order to provide environmentally displaced refugees, and the political system around undocumented immigrants, refugees, relief.¹⁸² The two-part proposal this paper offers is a domestic solution to this quandary. The new EDR category creates a path for undocumented immigrants to join United States governance and become legal permanent residents. A change in domestic policy in the United States may provide humanitarian identification to these EDR victims as well and may lead to acceptance at future international conventions.

¹⁷⁶ See generally, Kathleen Newland, *Impact of U.S. Refugee Policies on U.S. Foreign Policy: A Case of the Tail Wagging the Dog?*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, <http://carnegieendowment.org/1995/01/01/impact-of-u.s.refugee-policies-on-u.s.-foreign-policy-case-of-tail-wagging-dog/3vqt> (last visited Feb. 23, 2017).

¹⁷⁷ INA §101(a)(42)(B), 8 U.S.C. § 1101 (2012).

¹⁷⁸ Christopher M. Kozoll, *Poisoning The Well: Persecution, The Environment, and Refugee Status*, 15 COLO. J. INT’L ENVTL. L. & POLICY 271, 282-283 (2004).

¹⁷⁹ *Id.*

¹⁸⁰ DeGenaro, *supra* note 17, at 1047.

¹⁸¹ *Id.*

¹⁸² *Id.*

Nevertheless, it is one small step to keep up with the ever-changing evolution that humankind requires.