
Volume 46

Number 3 *The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians' Direct Participation in Hostilities*

pp.891-938

The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians' Direct Participation in Hostilities

Displacement Disparity: Filling the Gap of Protection for the Environmentally Displaced Person

Nicole Angeline Cudiamat

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Nicole Angeline Cudiamat, *Displacement Disparity: Filling the Gap of Protection for the Environmentally Displaced Person*, 46 Val. U. L. Rev. 891 (2012).

Available at: <https://scholar.valpo.edu/vulr/vol46/iss3/7>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Notes

DISPLACEMENT DISPARITY: FILLING THE GAP OF PROTECTION FOR THE ENVIRONMENTALLY DISPLACED PERSON

I. INTRODUCTION

“[T]oo much rubble continues to clog the streets, too many people are still living in tents, and for so many Haitians progress has not come fast enough. . . . The international community must now fulfill the pledges it has made to ensure a strong and sustained long-term effort.”¹

Even one year after the catastrophic 7.0 magnitude earthquake devastated Haiti, the country’s full recovery is still years away, if not decades.² In that single environmental disaster, it was reported that up to 230,000 people died and more than one million Haitians were left homeless.³ The world rallied together to give aid to Haiti following the quake because of its vulnerability as a poverty ridden country.⁴ Haiti is but a sole country experiencing such devastation.

Other global environmental catastrophes have been at the forefront of news in very recent history, which have resulted in the deaths of thousands of people, and the displacement of hundreds of thousands of people.⁵ Already in 2011, flooding in Brazil and Sri Lanka has resulted in great numbers of people being forced to leave their homes.⁶ Apart

¹ Press Release, Statement by President Barack Obama on the One Year Anniversary of the Earthquake in Haiti, Office of the Press Sec’y, White House (Jan. 11, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/11/statement-president-barack-obama-one-year-anniversary-earthquake-haiti>.

² *Id.*

³ *Haiti Earthquake: Key Facts*, BBC NEWS, http://news.bbc.co.uk/2/hi/in_depth/americas/2010/haiti_earthquake/default.stm (last updated Mar. 13, 2011); *see* U.N. DEVELOPMENT PROGRAMME, HAITI: 1 YEAR LATER 4 (2010), *available at* <http://www.undp.org/haiti/doc/Haiti-1YearLater-E-final-sm.pdf> (stating an estimated 222,570 people died in the Haitian Earthquake and at the height of the calamity, 2.3 million people were displaced, including 302,000 children).

⁴ U.N. DEVELOPMENT PROGRAMME, *supra* note 3, at 3.

⁵ *See infra* Part II.B (highlighting further instances of environmental disruptions that have caused mass displacement).

⁶ *See* Stuart Grudgings, *Many Still Missing in Brazil Floods; Criticism Grows*, REUTERS (Jan. 16, 2011), <http://www.reuters.com/article/idUSLNE70C00P20110116> (discussing the floods and landslides caused by rains in Brazil, resulting in the deaths of at least 564 people); Reuters, *Floods, Landslides Kill 443, Displaces Thousands in Brazil*, TRIB. LIVE NEWS (Jan. 14, 2011), <http://www.pittsburghlive.com/x/pittsburghtrib/news/nation-world/>

892 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

from natural disasters, human-induced environmental changes have also resulted in the forced displacement of people.⁷ These other environmental disruptions may not be receiving the same level of notoriety as the Haitian earthquake, though their displaced populations need aid just the same. Such displaced populations do not have their own instrument of international protection and are instead dependent on the goodwill of agencies or other countries for their recovery.

Developing a cohesive definition for the Environmentally Displaced Person (“EDP”) is the first step in devising a level of protection designed specifically to address the vulnerability of EDPs and establish legal responsibility to protect these people.⁸ This Note aims to synthesize a formal definition of the EDP by using the histories and protections of vulnerable populations, with particular focus on the refugee as a comparative framework.⁹ Because no international standard for the protection of EDPs exists, Part II.C-D examines the broader realm of vulnerable populations in order to provide insight into the purpose and mechanisms that will facilitate the creation of an internationally recognized definition of EDP.¹⁰ It is particularly necessary to examine the legal status assigned to refugees more thoroughly, as refugee populations are also displaced persons.¹¹ Part II.D extracts a common

s_718143.html (discussing the toll that torrential rain and mudslides have had on Brazil in January 2011); UN News Service, *UN: Floods Continue to Displace Thousands of People in Sri Lanka*, UN NEWS CENTRE (Jan. 12, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37257&Cr=sri+lanka&Cr1=> (stating that the number of people who have been displaced because of flooding in January 2011 is approaching one million). As of January 12, 2011, the U.N. Office for the Coordination of Humanitarian Affairs (“OCHA”) reported that some 195,919 Sri Lankan people have been displaced from their homes. *Id.*

⁷ See *infra* Part II.B (stating examples of human-induced environmental disasters).

⁸ See *infra* Part III.C (analyzing how a legal definition for the EDP would be the starting point for the development of their protection).

⁹ See *infra* Part II.A-B (discussing the varying definitions that have developed regarding the EDP, beginning with El-Hinnawi’s definition in the mid 1980s, and describing the several different conceptions of the definition of an EDP and examining evidence that a population is being forced to migrate due to environmental factors).

¹⁰ See *infra* Part II.C (discussing the international protective instruments various vulnerable populations have). Although each protected class has multiple instruments of protection at the international, regional, and national level, for the purposes of this Note, only U.N. Conventions will be examined. See *infra* Part II.C. Regional instruments, specifically in Africa and South America, following the promulgation of the U.N. Convention on the Status of Refugees will be examined because refugees, like EDPs, are displaced persons. See *infra* Part II.C.4.

¹¹ See *infra* Part II.C.1-4 (following the development of the refugee status definition from the international level to the regional level).

theme of the protection of fundamental human rights from the protective instruments of other vulnerable populations.¹²

Part III synthesizes the information presented in Part II to provide support for the protection of the EDP.¹³ First, EDPs are entitled to the same fundamental rights as women, children, and refugees.¹⁴ Next, Part III.B discusses the extreme vulnerability of EDPs, demonstrating an urgent need for protection.¹⁵ Part III.C further discusses the EDPs' inability to fit into any current protections of displaced persons.¹⁶ Part III concludes that the development of a legally recognized definition of an EDP is the basis for the development of a more comprehensive scheme of protection, as it had been for refugees.¹⁷

Part IV of this Note gathers the most important aspects for consideration when developing a definition for EDP, offers a model definition that incorporates all of these issues, and serves as a basis for providing protection to this vulnerable population.¹⁸ Finally, this Note proposes that the United Nations ("U.N.") General Assembly should be the first body to adopt this definition.¹⁹

II. HISTORICAL BACKGROUND OF THE EDP

This Part begins with a discussion of the disjointed conceptions of the EDP in recent history.²⁰ Next, evidence is provided that populations displaced by the environment exist.²¹ Subsequently, this Part examines the instruments that protect vulnerable populations—specifically women, children, and refugees—in order to give insight into the facilitation of protective measures for such populations.²² This Part pays

¹² See *infra* Part II.D (discussing the connection that the Conventions have with the protection of fundamental human rights).

¹³ See *infra* Part III (scrutinizing the problem presented by EDPs lack of protection).

¹⁴ See *infra* Part III.A (characterizing the fundamental human rights afforded to women, children, and refugees as rights deserved to be enjoyed by EDPs).

¹⁵ See *infra* Part III.B (demonstrating the urgency of protecting EDPs because of the nexus between poverty and migration).

¹⁶ See *infra* Part III.C (exhibiting the EDPs inability to be safeguarded under forced migrants' current protective instruments).

¹⁷ See *infra* Part III.D (discussing the need for an EDP definition as a starting point for EDPs' protection).

¹⁸ See *infra* Part IV.A (proposing a formal definition of an EDP).

¹⁹ See *infra* Part IV.B (arguing that the U.N. General Assembly would be the best entity to adopt the model definition first).

²⁰ See *infra* Part II.A (discussing the several different theoretical definitions of an EDP).

²¹ See *infra* Part II.B (showcasing evidence of recent natural disasters that have forced people to migrate).

²² See *infra* Part II.C (examining the different protective instruments for women, children, and refugees).

894 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

particular attention to the promulgation of the U.N. Convention on the Status Relating to Refugees and its subsequent regional instruments, as well as the definition of a refugee.²³ Finally, this Part discusses the common thread of human rights law that is written into and promoted by vulnerable populations' protective instruments.²⁴

A. *EDPs in Recent History*

Even though there are no long standing definitions regarding EDPs, the discussion regarding the persons affected by the environment has been raging for decades.²⁵ The interest in environmental change and its effect on migration has been renewed in recent years because of the increase in frequency and intensity of natural disasters.²⁶ The vulnerability of people during natural disasters does not stem from the natural occurrence itself, but rather from the combination of the event and the availability of institutional support to cope with its effects.²⁷

²³ See *infra* Part II.C.3-4 (looking into the narrowing of refugee protection from the international level to the regional level).

²⁴ See *infra* Part II.D (extracting common language that promotes and protects fundamental human rights from the three treaties and honing in on the right to life and the right to non-refoulement as particularly important).

²⁵ Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 ENVTL. L. 365, 399 (2007). For decades, environmental degradation has been approached in many different ways, including environmental law, humanitarian law, and human rights law. *Id.* at 367. Lopez contends that, despite which approach is used, current international law does not reflect recognition of the correlation between environmental degradation and human migration. *Id.*; see *infra* notes 29-40 and accompanying text (identifying different attempts to classify those displaced for environmental reasons, beginning with El-Hinnawi's definition of "environmental refugee").

²⁶ Gaim Kibreab, *Climate Change and Human Migration: A Tenuous Relationship*, 20 FORDHAM ENVTL. L. REV. 357, 369 (2009); Seteney Shami, *The Social Implications of Population Displacement and Resettlement: An Overview with a Focus on the Arab Middle East*, 27 INT'L MIGRATION REV. 4, 4 (1993); see Gregory S. McCue, Note, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT'L ENVTL. L. REV. 151, 160 (1993) (discussing the increases in natural disasters and their effects on populations). Deaths due to natural disasters have increased partially because of urbanization and population increase. *Id.*

²⁷ Anthony Oliver-Smith, *Disasters and Forced Migration in the 21st Century*, SSRN (June 11, 2006), <http://understandingkatrina.ssrn.org/Oliver-Smith/>; see HAL KANE, *THE HOUR OF DEPARTURE: FORCES THAT CREATE REFUGEES AND MIGRANTS* 9 (1995). People migrate when their society fails to meet the fundamental needs and aspirations of their citizens, such as providing a safe place to live. *Id.*; see also Lucy Rodgers, *Why Did So Many People Die in Haiti's Quake?*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/8510900.stm> (last updated Feb. 14, 2010) (comparing the earthquakes that occurred in China in May 2008, Italy in April 2009, and Haiti in January 2010). Rodgers reports that the earthquake took a bigger toll on Haiti than in other countries because its high level of poverty exacerbates Haiti's vulnerability to all natural disasters. *Id.*; see also Kibreab, *supra* note 26, at 375-77 (discussing the function of climate change and vulnerability to the social impact of natural

This vulnerability has fueled the conversation about the need for a protected class with actionable rights.²⁸

The “environmental refugee” was the first term used to define EDPs and it was coined in 1985 by U.N. Environmental Programme researcher, Essam El-Hinnawi.²⁹ His definition includes people displaced from their habitat because of “environmental disruption” caused by either natural or man-made disasters.³⁰ El-Hinnawi further categorized environmental refugees into three types: (1) people temporarily displaced because of disasters; (2) people permanently displaced because of drastic environmental changes; and (3) those who migrate because of gradual deterioration of the environment.³¹

There is some support for the idea that El-Hinnawi’s term actually falls under the descriptive definition of the internally displaced person (“IDP”).³² The definition of an IDP incorporates people displaced by natural or man-made disasters, as well as those forced to relocate, but who remain within their countries of origin.³³ This may be more

occurrences); McCue, *supra* note 26, at 160 (discussing the impact that poverty has on the ability of a country to cope with a natural disaster). Conversely, developed countries are more likely to be able to support themselves following a natural disaster because they have the proper infrastructure to cope. *Id.*

²⁸ See *infra* notes 29–40 (reviewing previous attempts to classify the EDP).

²⁹ Diane C. Bates, *Environmental Refugees? Classifying Human Migrations Caused by Environmental Change*, 23 *POPULATION & ENV’T* 465, 466 (2002).

³⁰ *Id.* Bates states:

[P]eople who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By ‘environmental disruption’ in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.

Id. (alteration in original). Apart from these subcategories, El-Hinnawi did not include any further criteria for distinction of environmental refugees, leading to much criticism of his definition as being overly vague. *Id.*

³¹ *Id.* at 469; see JODI L. JACOBSON, *ENVIRONMENTAL REFUGEES: A YARDSTICK OF HABITABILITY* 37–38 (1998) (discussing the three different categories of EDPs).

³² LAURA WESTRA, *ENVIRONMENTAL JUSTICE AND THE RIGHTS OF ECOLOGICAL REFUGEES* 3 (2009) (discussing the potential application of the definition of IDP to those displaced by environmental factors).

³³ Kibreab, *supra* note 26, at 395. The definition of an IDP is as follows:

[P]ersons who has [sic] been forced or obliged to flee or to leave their homes or places of habitual residence in particular as a result of, or in order to avoid the effects of, armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and *who have not crossed an internationally recognized state border.*

896 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

appropriate to describe people who have been displaced by environmental issues because it includes provisions for natural or man-made disasters.³⁴ On the other hand, this definition removes connotations of persecution and loss of protection that the assignment of refugee status tends to give, and is limited to displacement within a single nation-state.³⁵ The U.N. High Commissioner on Refugees (“UNHCR”) has been careful to exclude the term refugee from its definition of the EDP, which the UNHCR defines as those “who are displaced from or who feel obliged to leave their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events.”³⁶

Id. (emphasis omitted) (emphasis added). Because IDPs do not cross state borders, they are dependent on national institutions to safeguard their rights. See Marcus Cox & Christopher Harland, *Internationalized Legal Structures and the Protection of Internally Displaced Persons*, in HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM-SEEKERS, AND INTERNALLY DISPLACED PERSONS: A GUIDE TO INTERNATIONAL MECHANISMS AND PROCEDURES 521, 521 (Joan Fitzpatrick ed., 2002). International mechanisms of protection are limited only to the supervision of relief programs. *Id.*; see also INTER-AGENCY STANDING COMM., HANDBOOK FOR THE PROTECTION OF INTERNALLY DISPLACED PERSONS 7-16 (2010) [hereinafter IDP HANDBOOK], available at <http://www.unhcr.org/refworld/docid/4790cbc02.html> (documenting the fundamental aspects of the protection of internally displaced persons); McCue, *supra* note 26, at 175-76 (discussing the relationship between the international community and the IDP). The international community is also less willing to commit to the protection of IDPs because it would interfere with the regulation of the internal affairs of states, a practice that violates the principle of state sovereignty. *Id.* at 175.

³⁴ See Kibreab, *supra* note 26, at 395. An overwhelming majority of displacements for environmental reasons are internal, so categorizing EDPs as IDPs would encompass a great amount of EDPs, though not all. *Id.*; Lopez, *supra* note 25, at 387. Unfortunately, the definition of an IDP is only descriptive and does not endow IDPs with a particular status that bestows obligations upon states. *Id.*

³⁵ See Kibreab, *supra* note 26, at 395. Kibreab questions the need to define EDPs as refugees, stating it is not necessary to use the term refugee in order to realize the grave situation EDPs often face. *Id.* He makes the distinction between EDPs based on the fact that EDPs are not in peril because the government has not targeted them directly. *Id.* Regardless, the inclusion of the environment in the definition of an IDP demonstrates recognition of the need to protect all EDPs. *Id.*

³⁶ CAMILLO BOANO, ROGER ZETTER & TIM MORRIS, ENVIRONMENTALLY DISPLACED PEOPLE: UNDERSTANDING THE LINKAGES BETWEEN ENVIRONMENTAL CHANGE, LIVELIHOODS AND FORCED MIGRATION 8 (2008) (emphasis omitted), available at http://reliefweb.int/sites/reliefweb.int/files/resources/B7C55BA48CEDE152C12574890048B3F8-rsc_Nov2008.pdf. The UNHCR excluded the use of the term refugee to avoid confusion of EDPs with people who are necessarily relocated outside of their own country. *Id.* at 7-8. It attempted to completely separate environmental causes from persecution or conflict causes of migration. *Id.* at 8; see OLIVIA DUN, FRANÇOIS GEMENNE & ROBERT STOJANOV, ENVIRONMENTALLY DISPLACED PERSONS: WORKING DEFINITIONS FOR THE EACH-FOR PROJECT n.3 (2007), available at http://www.each-for.eu/documents/Environmentally_Displaced_Persons_-_Working_Definitions.pdf (presenting a definition by Jeff Crisp, a Special Advisor on Policy and Evaluation, at a presentation given at “Environmental

Conversely, it is precisely the use of the word refugee that raises public awareness of people who are displaced from their habitats because of environmental issues.³⁷ Former U.N. Development Programme official David Barker defined environmental refugees as people “whose movement is caused by a combination of environmental and political and/or who are unable or unwilling to avail themselves of the protection of their own countries in dealing with the impacts of environmental disruptions.”³⁸ Norman Myers, a renowned environmentalist who has studied population displacement and the environment for decades, devised a definition of environmental refugees as “people who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with the associated problems of population pressures and profound poverty.”³⁹ Most recently, Laura Westra created the term “ecological refugee[]” to include previous definitions of environmental refugees, climate refugees, and other categories of displaced persons, including those fleeing various industrial and chemical hazards.⁴⁰ These are just a few examples of the

Refugees: the Forgotten Migrants” Discussion at the U.N. Headquarters in May 2007). See generally *History of UNHCR*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646cbc.html> (last visited Apr. 11, 2012) (summarizing the history and the function of the UNHCR).

³⁷ See Kibreab, *supra* note 26, at 395 (“The reasons most well-meaning advocacy groups and some scholars mainly apply the term ‘refugee’ to environmentally displaced persons is to highlight their plight and to raise public awareness.”).

³⁸ *Id.* at 383–84 (internal quotation marks omitted).

³⁹ See Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, 357 PHIL. TRANSACTIONS ROYAL SOC’Y BIOLOGICAL SCI. 609, 609 (2001), available at <http://rstb.royalsocietypublishing.org/content/357/1420/609.full.pdf+html> (explaining that there is a large population of people that relocate because they can no longer sustain a secure livelihood in their homelands).

⁴⁰ WESTRA, *supra* note 32, at xviii (internal quotation marks omitted). The term “ecological refugee” intends to encompass causes of migration that may not be purely environmental or climate related. *Id.* Laura Westra is Professor Emerita at University of Windsor, PhD in Law at Osgoode Hall Law School and Adjunct Professor of Social Science at York University, Canada. Her research and publications (twenty books and contributions to over eighty journals and books) focus on environmental justice and the protection of indigenous peoples’ rights. *Id.* at xii. Another scholar, Tracey King, has drawn a clear distinction between EDPs and environmental migrants. Tracey King, Note, *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 GEO. INT’L ENVTL. L. REV. 543, 554–55 (2006). She states that environmental migrants are people who migrate proactively, in anticipation of detrimental changes to the environment and the presence of better opportunities elsewhere, whereas EDPs are people who might migrate reactively, that is in response to environmental changes and because of the immediate necessity to escape danger. *Id.* at 555. King primarily regards environmental migrants as people who voluntarily migrate, and EDPs as those who had little time and choice. *Id.* For the purposes of this Note, the Author does not make a distinction between people who

898 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

differing viewpoints throughout the world regarding the definition of an EDP.

One of the greatest criticisms of the cause for the EDP/environmental refugee/ecological refugee is that no group of individuals actually fits within the aforementioned definitions; this is because the migration of people tends to be multi-causal.⁴¹ Studies regarding the migration of people from Bangladesh into India have shown that twelve to seventeen million people have been displaced due to environmental scarcity.⁴² It has also been documented that the migration was due to additional factors such as land inheritance, the standard of living in India, and the encouragement of migration by politicians.⁴³ Environmental factors tend to be closely linked to economic, social, and political factors, making it difficult to isolate populations as being displaced through purely environmental means.⁴⁴

voluntarily or involuntarily migrate, so long as the changes in environment are a prevailing reason for migration.

⁴¹ Richard Black, *Environmental Refugees: Myth or Reality?* 2-3 (UNHCR, Working Paper No. 34, 2001), available at <http://www.unhcr.org/3ae6a0d00.html>; see Shami, *supra* note 26, at 5 (discussing how multiple factors tend to contribute to migration); see also Kibreab, *supra* note 26, at 388. This difficulty in separating environmental causes of migration is compounded by the disagreement in the academic and legal world as to what constitutes an environmental refugee. *Id.* But see David Keane, Note, *The Environmental Causes and Consequence of Migration: A Search for the Meaning of "Environmental Refugees,"* 16 GEO. INT'L ENVTL. L. REV. 209, 221 (2004). Even though migration can be multi-causal, there is a consensus among scholars on at least three main reasons for environmental migration: natural disasters, industrial accidents, and armed conflicts. *Id.* at 211-14.

⁴² See Keane, *supra* note 41, at 221 (referencing the migration of the Bangladeshi people); see also KANE, *supra* note 27, at 29 (discussing the Bangladeshi migration into India because of "acute land hunger").

⁴³ Keane, *supra* note 41, at 221; see KANE, *supra* note 27 (showing the effects that environmental scarcity had on the Bangladeshi people); Thomas F. Homer-Dixon, *Environmental Scarcities and Violent Conflict: Evidence from Cases*, 19 INT'L SECURITY 5, 23 (1994) (discussing a more detailed account of the conflict between Bangladesh and neighboring India). The land inheritance practice divided cropland into to smaller plots every generation. *Id.* Water was also so strictly controlled that the land's agricultural output was limited and kept poorer people from reaping the benefits of the most fertile soil in the world. *Id.* This caused between twelve and seventeen million Bangladeshi people to migrate into neighboring India. *Id.* at 22. The large scale migration had many consequences for India including the alteration of land distribution and economic relations. *Id.* The flux also sparked serious conflict between religious and ethnic groups in the areas because of the disruption of political power. See Keane, *supra* note 41, at 221. In another case, over eight million rural Brazilians were found to have been forced to migrate to urban areas in the 1960s and 1970s because of drought. *Id.* Researchers also concluded that the rural migrants in Brazil were forced to relocate because of poverty. *Id.*

⁴⁴ See BOANO ET AL., *supra* note 36, at 9 (discussing how multi-causality is important to the explanation of environmentally-induced migrations); Rodgers, *supra* note 27 (discussing how Haiti's densely populated capital near the epicenter of the January 2010 earthquake greatly exacerbated Haiti's loss); Andrew E. Shacknove, *Who Is a Refugee?* 95

B. Evidence of Populations Affected by Environmental Situations

Regardless of the inability to give a concrete definition of an EDP, few would argue that people whose livelihoods have been threatened or eliminated by environmental issues do not merit material and technical assistance.⁴⁵ The environmentally displaced fall into three categories: those temporarily displaced because of disasters, those permanently displaced because of drastic environmental changes, and those who migrate because of gradual deterioration of the environment.⁴⁶ Natural and man-made disasters, as well as environmental and ecological damage, have been increasing exponentially in recent years and environmental refugees have become the largest class of displaced persons in the world.⁴⁷ Human-induced environmental changes can turn a normal, natural occurrence into a catastrophe that forces people to relocate.⁴⁸

Natural disasters can temporarily force people to relocate.⁴⁹ Millions of people have been affected in the last two years alone.⁵⁰ In August 2010, fourteen million people in Pakistan's Khyber Pakhtunkhwa,

ETHICS 274, 279 (1985) (stating the effects of natural disasters are often exacerbated by social policies and institutions, or lack thereof). Even though there was a food shortage, starvation during the Great Bengal Famine in the 1940s was caused by the hoarding and misdistribution of aid, not by drought. *Id.* at 280. The state had not fulfilled its duty to the Bengali people; unfortunately, because the food shortage originally occurred as a result of natural occurrences (drought), the government could not be held responsible. *Id.*; see also McCue, *supra* note 26, at 156 (discussing the difficulties in isolating a single cause of migration). McCue also points out that environmental degradation itself is also multi-causal. *Id.* If environmental destruction that results in displacement is brought about by war, such migrants may be able to fall under the international definition for refugee and receive subsequent protection. *Id.*; see also *infra* note 192 (examining the potential for some EDPs to claim environmental degradation as a form of persecution under the 1951 Refugee Convention).

⁴⁵ Kibreab, *supra* note 26, at 395.

⁴⁶ See *supra* note 31 and accompanying text (discussing the three different categories of EDPs).

⁴⁷ WESTRA, *supra* note 32, at 80. For example, over 1.4 billion people were killed and over 3.9 trillion were affected in the Asia-Pacific Region between 1972 and 2002. *Id.*; see JACOBSON, *supra* note 31, at 37 (discussing the evolution of the environmental refugee into the largest population of displaced people in the world).

⁴⁸ JACOBSON, *supra* note 31, at 17. Warmer climates and higher sea levels make tropical storms more frequent thus contributing to more natural disasters. *Id.* at 35; see *infra* notes 49–67 and accompanying text (highlighting the consequences that environmental changes have on people's ability to remain in their homes).

⁴⁹ See *supra* note 31 and accompanying text (discussing the three ways people are displaced because of environmental issues, one being displacement during times of natural disasters).

⁵⁰ See *infra* notes 51–54 and accompanying text (examining instances where natural disasters have forcibly displaced people).

900 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

Punjab, and Sindh provinces were affected by the worst flooding that Pakistan has experienced in its history.⁵¹ Later that month, heavy rains in Niger caused massive flooding and resulted in the displacement of almost 200,000 people.⁵² The flooding aggravated an already grave food crisis Niger was facing because of the failed harvest of the past year.⁵³ As previously described, floods in Brazil and Sri Lanka have forced people to leave their homes in 2011.⁵⁴

Not all environmental disasters are naturally occurring. In September 2010, about two million people in Northern Nigeria were displaced as a result of severe flooding.⁵⁵ Unlike in Pakistan and Niger, the massive flooding was caused by the government opening the gates on the Challawa and Tiga dams.⁵⁶ In the following weeks, months, and maybe even years, these populations will be working to recover from these disasters at the mercy of aid donated by the rest of the world.⁵⁷ In

⁵¹ Adam Mynott, *Pakistan Floods 'Hit 14m People'*, BBC NEWS (Aug. 6, 2010), <http://www.bbc.co.uk/news/world-south-asia-10896849>; see also Salman Masood, *Floods in Pakistan Kill at Least 800*, N.Y. TIMES, Aug. 1, 2010, at A6 (discussing the death toll in Pakistan following the floods of the summer of 2010).

⁵² *Niger River Floods Destroying Homes and Crops*, BBC NEWS (Aug. 10, 2010), <http://www.bbc.co.uk/news/world-africa-10929144>; *Niger: Almost 200,000 Displaced by Floods*, IRIN HUMANITARIAN NEWS & ANALYSIS (Aug. 27, 2010), available at <http://www.irinnews.org/Report.aspx?ReportID=90318>.

⁵³ *Niger: Almost 200,000 Displaced*, *supra* note 52; see Mike Thomson, *Niger's Silent Crisis*, BBC NEWS (June 21, 2010), http://news.bbc.co.uk/1/hi/today/newsid_8751000/8751252.stm (discussing the food crisis Niger experienced before the flooding).

⁵⁴ See *supra* note 6 (citing to the incidents of flooding in Brazil and Sri Lanka in January 2011).

⁵⁵ *Northern Nigeria Flooding 'Displaces Two Million'*, BBC NEWS (Sept. 24, 2010), <http://www.bbc.co.uk/news/world-africa-11409167>; see Jon Gambrell, *Flooding in Nigeria Worsens Food Shortage*, MSNBC (Sept. 28, 2010), http://www.msnbc.msn.com/id/39384099/ns/world_news-africa/ (discussing the impact that the floods have had on exacerbating an already existing food shortage).

⁵⁶ Gambrell, *supra* note 55; see Salisu Rabiou, *2 Million People Displaced in Northern Nigeria Flooding When Dam Gates Opened*, FOX NEWS (Sept. 24, 2010), <http://www.foxnews.com/world/2010/09/24/opened-flood-gates-dams-northern-nigeria-displace-million-people/>. Typically, the dams are opened seasonally in order to help farmers cultivate their crops. *Id.* Rainfall had increased in 2010 and consequently, the opening of the gates flooded farmers' crops and destroyed whole harvests. *Id.*

⁵⁷ See CNN Wire Staff, *Report: Aid Shortage in Pakistan Leaves Flood Victims in Limbo*, CNN NEWS (Oct. 29, 2010), <http://edition.cnn.com/2010/WORLD/asiapcf/10/29/pakistan.floods/index.html?iref=allsearch> (discussing the challenges Pakistani flood victims face as aid for relief is dwindling); Ricci Shryock, *Floods Heighten Food Crisis in Niger*, VOICE AMERICA NEWS (Aug. 24, 2010), <http://www.voanews.com/english/news/africa/Floods-Heighten-Food-Crisis-in-Niger-101378004.html> (citing to the World Food Program's limitation of being able to feed only forty percent of those facing hunger in Niger because of limited funding and donations); FAMINE EARLY WARNING SYSTEMS NETWORK, NIGERIA FOOD SECURITY OUTLOOK 4 (2010-11), available at http://www.fews.net/docs/Publications/Nigeria_OL_2010_10.pdf (discussing the ability

the meantime, millions of people find themselves without homes and without an international standard of law to support them if they are unable to return to their homes.

Another environmental issue that forces people to relocate is gradual land degradation, which results in changes to their habitat that undermines their livelihood.⁵⁸ Agriculture is at the crux of developing countries and when a country exceeds its carrying capacity, more and more people are forced to leave.⁵⁹ A critical example of such a case is the Haitian boat exodus to south Florida in the late 1970s to the early 1980s.⁶⁰ That population fled both political oppression and the destruction of its agricultural economy by environmental degradation.⁶¹ The landscape of the island made the soil more vulnerable to erosion, which contributed to the demise of Haiti's agricultural economy and its food supply.⁶² The rapid growth of Haiti in its earlier years as a wealthy French and Spanish colony quickly used up the island's environmental capital.⁶³ Deforestation was a main contributor to the extreme poverty in Haiti that drove people out of the country to seek refuge and sustenance.⁶⁴

Elsewhere in the world, gradual environmental changes affect populations. Since 2005, water supplies in northern Iraq have been

of the government to provide food and non-food assistance to cover only one-third of the food needed to feed the affected). Northern Nigeria does not have a plan for the full recovery of flood victims' livelihood. *Id.*

⁵⁸ Bates, *supra* note 29, at 469; see JACOBSON, *supra* note 31, at 37-38 (discussing the three different categories of EDPs).

⁵⁹ JACOBSON, *supra* note 31, at 14. A country's carrying capacity is the ability of its ecosystem to support life. *Id.* at 5.

⁶⁰ Alex Stepick III, *The Refugees Nobody Wants: Haitians in Miami*, in *MIAMI NOW!: IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE* 57 (Guillermo J. Grenier & Alex Stepick III, eds., 1992). Between 50,000 and 70,000 Haitian people arrived in southern Florida between 1977 and 1981, making the 720-mile trip in small boats crammed with twenty to thirty people. *Id.* at 57-58.

⁶¹ Myers, *supra* note 39, at 610; see Mark Kane, *U.S. Refugee Law Adrift: The Hard Lessons of the Haitian Boat Exodus*, 23 SW. U. L. REV. 151, 157-61 (1993) (discussing the Haitian exodus to the United States because of a military coup, and its effect on U.S. refugee law).

⁶² Myers, *supra* note 39, at 610; see Homer-Dixon, *supra* note 43, at 33 (discussing the effects of deforestation on Haiti's land). The steepness of the land worsens erosion that is brought about by deforestation. *Id.* The U.N. has estimated that at least fifty percent of the soil of the country is no longer suitable for farming. *Id.*

⁶³ ETHAN GOFFMAN, ENVIRONMENTAL REFUGEES: HOW MANY, HOW BAD? 10 (2006), available at <http://www.csa.com/discoveryguides/refugee/review.pdf>; see Homer-Dixon, *supra* note 43, at 33 (discussing the breakdown of the Haitian environment following its colonization). When the Spanish and French first arrived, Haiti contained abundant forests; now fewer than two percent of those forests remain. *Id.* The agricultural output per capita of Haiti experienced a ten percent decline in the 1980s alone. *Id.* at 34.

⁶⁴ GOFFMAN, *supra* note 63, at 10. The Haitian boat people, as a result of land degradation and the government's inaction, fall under the general concept of "environmental refugee." *Id.*

902 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

dwindling.⁶⁵ A recent U.N. Educational, Scientific and Cultural Organization (“UNESCO”) report states that the onset of drought in 2005 and the overexploitation of groundwater by modern pumped wells have resulted in seventy percent of the karez water systems in northern Iraq drying up.⁶⁶ Communities that have been affected by the drying up of the karez have experienced a seventy percent decrease in population because people must migrate to find new sources of water.⁶⁷

These examples demonstrate the existence of only a few of the numerous populations in the world that have been displaced by environmental factors. These populations lack an internationally recognized legal standard that would protect their security. In order to determine how to best develop a protective mechanism for this vulnerable population, one must examine the conventions regarding other vulnerable populations (specifically women, children, and refugees) to discern what values the U.N. was attempting to preserve by protecting these populations.⁶⁸ From this, one can identify core values that embody the EDPs’ plight and synthesize a definition that can serve as a basis for the implementation of protection.⁶⁹

C. Vulnerable Populations with International Protective Instruments

A study of other protective measures implemented for vulnerable populations is useful in making an argument for the protection of EDPs.

⁶⁵ NGO COORDINATION COMMITTEE IN IRAQ, WATER SCARCITY IN THE LAND OF TWO ANCIENT RIVERS (2010), available at <http://reliefweb.int/node/362880>. Inhabitants of the area have used a system of underground aqueducts—called *karez*—for hundreds of years as their main source of water for irrigation and consumption. *Id.*

⁶⁶ U.N. EDUC., SCIENTIFIC & CULTURAL ORG., WATER SHORTAGE FUELING DISPLACEMENT OF PEOPLE IN NORTHERN IRAQ (2009), available at <http://reliefweb.int/node/328751>.

⁶⁷ *Id.*; see Martin Chulov, *Water Shortage Threatens Two Million People in Southern Iraq*, GUARDIAN (Aug. 26, 2009), <http://www.guardian.co.uk/world/2009/aug/26/water-shortage-threat-iraq> (stating that up to 300,000 people have been displaced because of the water shortage). In addition to the aforementioned reasons, Michel Prieur, Director of the Interdisciplinary Centre of Research on Environmental, Planning and Urban Law in France, discusses another way that EDPs are created. Michael Prieur, *Draft Convention on the International Status of Environmentally-Displaced Persons*, 42/43 URB. LAW. 247, 250 (2011). He discusses that migration can also result indirectly from the effects of attempting to combat climate change, specifically measures set up by the Kyoto Protocol that call for reforestation of certain regions. *Id.* This is a unique facet of the EDP analysis that does not appear in other places apart from Prieur’s ruminations; consequently, this Note will continue to focus on people who are directly displaced as a result of environmental stressors, not as a result of environmental treaties.

⁶⁸ See *infra* Part II.C (examining the protective conventions for women, children, and refugees).

⁶⁹ See *infra* Part III.A (discussing how the three conventions share a common theme of human rights, and how this framework should be applied to developing protection for EDPs).

The lengths taken to implement instruments to protect these vulnerable populations can be analogized to the current state of the need to protect EDPs.⁷⁰ First, Part III.C.1–C.2 discusses the distinctive protective instruments for women and children.⁷¹ Then, Part III.C.3 examines the protective instrument for refugees and the internationally recognized definition of refugee.⁷² Finally, Part III.C.4 outlines the subsequent regional instruments that developed following the promulgation of the Convention on Status of the Refugee.⁷³

1. Convention on the Elimination of All Forms of Discrimination Against Women

Unlike EDPs, women have a distinct place in history as a protected class that predates both that of children and refugees.⁷⁴ One of the major developments in the protection of women as a vulnerable class is the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).⁷⁵ Its history begins with the Declaration on the Elimination of Discrimination against Women (“DEDAW”), which proclaims the rights afforded women to ensure the equality of men and women.⁷⁶ The U.N. Declaration of Human Rights (“UDHR”) and the U.N. Charter also emphasize these principles of nondiscrimination.⁷⁷

⁷⁰ See *infra* Part III.A (studying the common theme of human rights that emerges from the three conventions, and how this framework should be applied to developing protection for EDPs).

⁷¹ See *infra* Part II.C.1–2 (examining the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child (“CRC”).

⁷² See *infra* Part II.C.3 (discussing the 1951 Refugee Convention and its Protocol).

⁷³ See *infra* Part II.C.4 (examining regional refugee conventions).

⁷⁴ See Office of the U.N. High Commissioner for Human Rights, Convention on the Elimination of Discrimination Against Women, Introduction, (Dec. 18, 1979), available at <http://www2.ohchr.org/english/law/cedaw.htm>. The U.N. Commission on the Status of Women, whose role is to be active in the promotion of gender equality and women’s rights, was established in 1946. *Id.*; see *infra* notes 80–102 and accompanying text (discussing the origins of child and refugee protection).

⁷⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

⁷⁶ See G.A. Res. 2263 (XXI), U.N. Doc. A/RES/2263 (Nov. 7, 1967). The importance of fundamental human rights, principles of nondiscrimination, and the equal rights of men and women are considered to be paramount principles in the release of the Declaration. *Id.* at pmb1. The DEDAW declared that discrimination against women is “incompatible with human dignity and with the welfare of the family and society.” *Id.* It also highlights the importance of the contribution that women make to social, political, and cultural life which is integral to the development of a country; for those reasons, the General Assembly outlined measures to eliminate discrimination against women. *Id.* See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15 (7th ed. 2008); *Functions and Powers of the General Assembly*, GEN. ASSEMBLY U.N., <http://www.un.org/en/ga/about/background.shtml> (last visited Jan. 28, 2011) (highlighting the origins and structure of the

904 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

The General Assembly enacted the CEDAW to put into operation the principles of equality and anti-discrimination set forth in the DEDAW, the UDHR, and the U.N. Charter.⁷⁸ Such measures implemented to achieve those aims are the abolishment of discriminatory laws, the promotion of women in the political, social, economic, and cultural fields, and the protection of women through the suppression of trafficking and exploitation through prostitution.⁷⁹ The implementation of these provisions, among many others, sought to protect women from discrimination.

2. Convention on the Rights of the Child (“CRC”)

The international community has also recognized children as a population in need of protection; children’s most comprehensive international instrument is the CRC.⁸⁰ The protection of children’s rights had been enumerated in other international documents, though as a subset of a greater realm of human rights; the CRC is the first to

U.N. General Assembly). When resolutions to the U.N. General Assembly concern “general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions.” BROWNLEE, *supra*. If a resolution addresses principles within the U.N. Charter, then that resolution may have a direct legal effect on member states as an authoritative interpretation of the laws under the U.N. Charter. *Id.*

⁷⁷ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810, at 71 (Dec. 10, 1948) [hereinafter UDHR]. Article 7 specifies the universal right to the equal protection of the law without discrimination. *Id.* at art. 7; U.N. Charter, June 26, 1945, 1 U.N.T.S. XVI [hereinafter U.N. Charter]. The principle of equality between women and men is specified in the Preamble, though the theme of equal rights for all runs through the whole of the Charter. U.N. Charter, *supra*, at pmbl., art. 1, ¶ 2, art. 55, art. 76, ¶ d; see International Convention on Civil and Political Rights, art. 3, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (outlining states’ responsibility to ensure the equal right of men and women to enjoy all civil and political rights within the convention); see also BROWNLEE, *supra* note 76, at 572 (discussing the standard of nondiscrimination as a legal principle within international law).

⁷⁸ CEDAW, *supra* note 75, at pmbl.

⁷⁹ See *id.* at art. 2(b) (requiring states to “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”). *Id.* States must also take all appropriate measures “to en sure [sic] the full development and advancement of women” in political, social, economic, and cultural fields. *Id.* at art. 3. States must suppress all forms of sexual exploitation of women. *Id.* at art. 6. The CEDAW is also concerned with women’s participation in government, including the women’s vote and involvement in leadership roles in government at both the national level and the international level as representatives of their countries. *Id.* at arts. 7–8.

⁸⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

recognize the rights of a child separately.⁸¹ Like for women, the U.N. issued a Declaration of the Rights of the Child to enumerate what rights a child should be afforded and for what reason.⁸² In the Preamble, the General Assembly makes note of its commitment to the promotion of fundamental human rights as enumerated by the U.N. Charter.⁸³ Children need special legal protection and safeguards because of their physical and mental immaturity.⁸⁴

Because of their vulnerability, the General Assembly enumerated ten rights that all children have that nations must observe.⁸⁵ The CRC is the

⁸¹ UNICEF, THE STATE OF THE WORLD'S CHILDREN (SPECIAL EDITION): CELEBRATING 20 YEARS OF THE CONVENTION ON THE RIGHTS OF A CHILD 5 (2009), available at http://eyeonkids.ca/docs/files/sowc_spec_ed_crc_main_report_en_090409.pdf; see UDHR, *supra* note 77, at art. 25 (stating the child is mentioned in article 25 of U.N. Declaration of Human Rights). Children have been addressed by U.N. General Assembly resolutions in the past, though only through cursory inclusion in declarations. *Id.*; see also G.A. Res. 3318(XXIX), U.N. Doc A/RES/3318(XXIX) (Dec. 14, 1974) (outlining the need to protect both women and children in armed conflict); G.A. Res. 41/85, U.N. Doc. A/RES/41/85 (Dec. 3, 1986) (declaring the need to protect children with specific regards to adoption and foster placement).

⁸² Declaration on the Rights of the Child, G.A. Res 1386(XIV), UN Doc. A/4354 (Nov. 20, 1959) [hereinafter DRC]. The DRC is the first U.N. declaration on the rights of a child. Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 162 (1998). However, the DRC is predated by the League of Nations instrument, the Declaration of Geneva. *Id.* The Declaration of Geneva is significant in that it is the first treaty to establish the general idea of human rights. *Id.* The DRC is different from the Declaration of Geneva in that it officiates the child's need for special protection, as opposed to being a general declaration. *Id.* at 163. Additionally, the DRC makes children the responsibility of nation-states as opposed to simply "men and women of all [states]." *Id.* at 162 (internal quotation marks omitted).

⁸³ See DRC, *supra* note 82, at pmb. ("[T]he peoples of the [U.N.] have . . . reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom.").

⁸⁴ *Id.*; see CRC, *supra* note 80 ("[T]he growth and well-being of all . . . members [of that family is important, but] particularly children, should be afforded the necessary protection and assistance so that [they] can fully assume [their] responsibilities within the community."). The CRC identifies rights that need to be observed so that children's interests can be protected, including the right to inherent life and survival, the right to develop to the fullest, the right to be protected from harmful influences, abuse, and exploitation, and the right to participate fully in family, cultural, and social life. *Id.*

⁸⁵ DRC, *supra* note 82, at princ. 1-10. Principles one through six focus more on the treatment of children, with the emphasis on nondiscrimination in article one. *Id.* at princ. 1-6. The best interests of the child will be the first consideration in their protection. *Id.* at princ. 2. Children are entitled to free primary school education. *Id.* at princ. 7. Children are also among the first to receive protection and relief in aid situations. *Id.* at princ. 8. Children are also protected from "all forms of neglect, cruelty and exploitation." *Id.* at princ. 9. Children must also be raised in "a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood . . ." *Id.* at princ. 10; see Rochelle D.

906 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

codification of these rights.⁸⁶ The CRC includes four core principles: (1) nondiscrimination; (2) best interests of the child; (3) right to life, survival, and development; and (4) respect for the view of a child.⁸⁷ In addition to stating children's physical and mental immaturity as reasons for their needed protection, the Preamble of the CRC also states that the family is a fundamental component of society and the natural environment.⁸⁸

3. Convention and Protocol Relating to the Status of Refugees

The 1951 U.N. Convention on the Status of the Refugee and its 1967 Protocol constitute the premier international documents regarding the protection of refugees.⁸⁹ Its history began with the founding of the International Refugee Organization ("IRO").⁹⁰ The organization was meant to be a temporary agency that dealt with the immediate needs of refugees following World War II, and its termination was set for June

Jackson, *The War over Children's Rights: And Justice for All? Equalizing the Rights of Children*, 5 BUFF. HUM. RTS. L. REV. 223, 235-37 (1999). The DRC principles tend to focus on the economic, social, and cultural rights of children. *Id.* at 236. The CRC is a more detailed and comprehensive expansion of children's rights and also includes more provisions for civil and political rights. *Id.* at 236-37.

⁸⁶ See UNICEF, *supra* note 81, at 6. Following the DRC, the movement for children's rights was spearheaded by non-governmental organizations ("NGOs"), such as UNICEF. *Id.*; Cris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 13 (Jonathan Todres, Mark E. Wojcik & Cris R. Revaz, eds. 2006). It was not until 1978, when the Polish delegate to the U.N. submitted a proposal for a convention on the rights of a child, that any drafting of hard law solely regarding children's rights took place. *Id.* The initiative of the Polish delegate induced governments, NGOs, intergovernmental organizations, and specialized agencies to draft conventions; the draft convention of children's rights provided much of the content for the CRC and was integral in establishing children's right to be heard. *Id.*; see also Jackson, *supra* note 85, at 242 (discussing the development of the CRC).

⁸⁷ UNICEF, *supra* note 81, at 6.

⁸⁸ CRC, *supra* note 80, at pmb1.

⁸⁹ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. Collectively, they will be known throughout the document as "the Refugee Convention."

⁹⁰ U.N. HIGH COMM'R FOR REFUGEES, AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF REFUGEES 6 (Aug. 1, 2005), available at <http://www.unhcr.org/3ae6bd5a0.pdf> [hereinafter UNHCR INTRODUCTION]; see *id.* at 3-9 (discussing a history of refugee protection from the League of Nations to the 1951 Convention and its Protocol). Soon after World War II, the U.N. was faced with the reality that millions of Europeans were displaced as a result of the war and found it important to be able to identify and distinguish those who needed genuine aid from war criminals. G.A. Res. 8(I), U.N. Doc. A/RES/8(1) (Feb. 12, 1946). The Economic and Social Council of the U.N. ("ECOSOC") addressed the matter of creating a means to facilitate the care of and early return of displaced persons to their countries of origin. *Id.* ¶ (c)(iii).

1950.⁹¹ In consideration of an Economic and Social Council of the U.N. (“ECOSOC”) resolution, the U.N. General Assembly established a High Commissioner’s Office for Refugees (now, the UNHCR) on January 1, 1951, in order to discharge the responsibilities of IRO.⁹² The UNHCR was tasked with the promotion of international conventions and other agreements with the goal of improving the situation and securing the protection of refugees.⁹³

On December 14, 1950, the General Assembly issued a Draft Convention Relating to the Status of Refugees, containing the definition of a refugee and conditions where protection of an identified refugee would cease to apply.⁹⁴ Following several revisions, the General Assembly convened a Conference of Plenipotentiaries in Geneva—

⁹¹ See ECOSOC Res. 248 (IX)-A-B, U.N. Doc. E/245/Rev.1 (Aug. 6, 1946) (discussing the temporary status of the IRO); Constitution of the International Refugee Organization, G.A. Res. 62(I), U.N. Doc. A/RES/62(I)-I (Dec. 15, 1946). The IRO was established in 1946 to return persons to their countries of origin; in the event return is not possible, the IRO smoothed the process of reestablishment in a different country. *Id.* The Constitution of the IRO also includes a basic definition of refugee:

[P]ersons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of [N]azi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.

Id.; see ECOSOC Res. 248, *supra*, at sec. (IX)-A-B. As the termination deadline approached, it became apparent that there were still excess amounts of people who had not been returned to their home countries nor absorbed into the communities of their new home countries. *Id.* The East-West cultural divide in Europe post-World War II contributed to suspicion and criticism of the IRO. See UNHCR INTRODUCTION, *supra* note 90, at 4. Many Eastern countries disparaged the IROs resettlement activities as partisan toward the West. *Id.* This situation, in addition to IROs limited budget (only a few countries contributed to its budget) led to its eventual downfall. *Id.*

⁹² G.A. Res. 319(IV), U.N. Doc. A/RES/319(IV) (Dec. 3, 1949). The ECOSOC was the body that proposed the creation of a permanent high commissioner’s office within the U.N. to replace the IRO and to continue to address the problem of statelessness post-World War II. ECOSOC Res. 248, *supra* note 91, at sec. (IX)-A. The resolution also contained the first contemplation of creating a convention on the international status of refugees. *Id.* at sec. (IX)-B.

⁹³ G.A. Res. 319(IV), *supra* note 92, at Annex. In December 1950, the General Assembly called upon state governments to cooperate with the UNHCR in its mission by ratifying international conventions that provide protection for refugees, working with the Commissioner to reduce the number of refugees, admitting people seeking asylum in its territories, assisting with the voluntary repatriating of refugees or their assimilation. G.A. Res. 428(V), U.N. Doc. A/RES/428(V) (Dec. 14, 1950). Additionally, the UNHCR called for states to provide travel documents for refugees to facilitate their resettlement into their country. *Id.*

⁹⁴ See G.A. Res. 429(V), *supra* note 93, at sec. (V) (containing the entire text of the draft convention).

908 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

delegates authorized to act at his or her discretion on behalf of a sovereign ruler – where its final text was approved.⁹⁵

The language of the Preamble was drafted to reiterate that the U.N. was concerned with refugees receiving as many fundamental rights and freedoms as possible.⁹⁶ The Preamble also made note of the reality of the burden of extending the scope of protection, and it called for international cooperation in order to mitigate the burden.⁹⁷ The final paragraph in the Preamble acknowledges the UNHCR's responsibility for supervising the conventions to protect refugees and calls for states to coordinate with the UNHCR in order to achieve the Convention's aims.⁹⁸

The Convention itself contains three main provisions: (1) the definition of a refugee; (2) her rights and duties in the country she is

⁹⁵ See *id.* ¶ 1. The conference was called to complete the drafting of a convention on the Status of Refugees. *Id.* The Secretary-General was to invite all governments around the world regardless of membership in the U.N. *Id.* ¶ 4; *Definition of Plenipotentiaries*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/plenipotentiary?region=us> (last visited Oct. 17, 2011); UNHCR, *Introductory Note to CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES* (2010), <http://www.unhcr.org/3b66c2aa10.html>; see also THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 10-11 (1951) [hereinafter TRAVAUX PRÉPARATOIRES]. Dr. Weis was an integral part of the work that went into the preparation of the Refugee Convention. This book, published by the UNHCR, is a collection of the “travaux préparatoires” – official records of the negotiations in the drafting of conventions – and commentary offered by Dr. Weis regarding the works; in addition, pages ten through eleven contain more detailed summary of the background of the draft convention prior to the conference in Geneva. *Id.*

⁹⁶ 1951 Convention, *supra* note 89, at pmb1. (“[H]uman beings shall enjoy fundamental rights and freedoms without discrimination.”). The Preamble implies that the Convention was designed to protect rights and freedoms under the U.N. Charter and UDHR as well as all rights proclaimed to belong to all human beings. TRAVAUX PRÉPARATOIRES, *supra* note 95, at 32; see Jane McAdam, *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection*, in FORCED MIGRATION, HUMAN RIGHTS AND SECURITY 264, 272 (Jane McAdam ed., 2008) (“The framers’ [of the 1951 Convention] unambiguous reference in the Preamble of the 1951 Convention to the Universal Declaration of Human Rights indicates a desire for the refugee definition to evolve in tandem with human rights principles.”) (quoting MARK R. VON STERNBERG, *THE GROUNDS OF REFUGEE PROTECTION IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: CANADIAN AND UNITED STATES CASE LAW COMPARED* 314 (2002)); Joan Fitzpatrick, *The Human Rights of Refugees, Asylum-Seekers, and Internally Displaced Persons: A Basic Introduction*, in HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM-SEEKERS, AND INTERNALLY DISPLACED PERSONS, *supra* note 33, at 8-13 (explaining the right to life, the right to physical integrity, the right to personal liberty, and the right to free movement as specific rights important to refugees).

⁹⁷ 1951 Convention, *supra* note 89, at pmb1. It was essential to attempt to prevent potential tensions between states in the interest of solving a problem of international scope and nature. *Id.*

⁹⁸ *Id.* (“[T]he [UNHCR] is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of [s]tates with the High Commissioner.”).

taking refuge in; and (3) implementation of the Convention from an administrative and diplomatic standpoint.⁹⁹ It outlines states' responsibilities to refugees, such as the application of provisions of the Convention without discrimination as to race, religion, or country of origin; the treatment of refugees in the state; the principle of non-refoulement; and the state's cooperation with the UNHCR.¹⁰⁰ The Convention's definition of a refugee makes the application of the provisions and the protection of refugee persons possible.

The definition of a refugee is as follows:

[A]ny person who . . . owing to [a] 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁰¹

⁹⁹ U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 12 (1992) [hereinafter UNHCR HANDBOOK], available at <http://www.unhcr.org/3d58e13b4.html>.

¹⁰⁰ 1951 Convention, *supra* note 89, at arts. 12–34. Articles twelve through seventeen regard a refugee's juridical status within the state, including right to association and access to courts' provisions. *Id.* at arts. 12–17. Articles seventeen through nineteen regard the refugee's right to gainful employment. *Id.* at arts. 17–19. Articles twenty to twenty-four deal with welfare, including provisions regarding educational opportunities. *Id.* at arts. 20–24. Articles twenty-five to thirty-four lay out administrative measures for the state to take to assist in the refugee situation including the granting of freedom of movement within the state and the furnishing of travel documents. *Id.* at arts. 25–34. The principle of non-refoulement is the prohibition of returning (refouling) a refugee to his country of origin where his life or freedom would be threatened on account of his race, religion, nationality, or membership of a particular social group or political opinion. *Id.* at art. 33. States must cooperate with UNHCR in the exercise of its functions and facilitate its task of supervising the proper implementation of the Convention. *Id.* at art. 35; see McAdam, *supra* note 96, at 273 (discussing the principle of non-refoulement as an embodiment of the international legal duty to protect refugees); see also UNHCR INTRODUCTION, *supra* note 90, at 26–27 (summarizing the main provisions in the 1951 Convention).

¹⁰¹ 1967 Protocol, *supra* note 89, at art. 2. See generally Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, in INTERNATIONAL REFUGEE LAW 209, 212 (Hélène Lambert, ed., 2010) (discussing the development of the refugee definition from the 1951 Convention to the 1967 Protocol). The 1951 Convention originally intended to protect Europeans displaced by events in World War II, stating the Convention only applied to people affected by events prior to January 1, 1951. *Id.* Additionally, the UNHCR was to be

910 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

The definition still embraces the key principles of the 1951 Convention definition of refugee, but removed the time and place restraint, effectively extending the scope of refugee protection.¹⁰²

reviewed in December 1953 to determine whether the office should be continued, contributing to the evidence that the Convention provisions were meant to be specific to a population and time. See G.A. Res. 319(IV)A, *supra* note 92, ¶ 5 (founding the UNHCR and explaining its probatory status); G.A. Res. 2198(XXI), UN Doc. A/RES/2198(XXI) (Dec. 16, 1966) (calling for a Protocol for adoption in 1966). There was increasing recognition of the notion that the 1951 Convention should become the universal international instrument on the protection of refugees. G.A. Res. 2198(XXI), U.N. Doc. A/RES/2198(XXI) (Dec. 16, 1966); see TRAVAUX PRÉPARATOIRES, *supra* note 95, at 4.

[It is] the hope that the Convention would have value as an example exceeding its contractual scope that all nations would be guided by it in granting as far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention [for] the treatment for which it provides.

Id. (internal quotation marks omitted). At the conception of the 1951 definition, the full ramifications of the war had not yet been realized; populations of persons were still being displaced after January 1, 1951, but as a result of pre-1951 events. Fitzpatrick, *supra*, at 213. Additionally, the General Assembly took measures to extend the UNHCR's protection of persons to people outside of Europe in recognition of the emergence of new refugee situations. *Id.* at 214, n.22. The General Assembly recognized that it was "desirable that equal status should be enjoyed by all refugees covered by the definition in the [1951] Convention." *Id.* The General Assembly also acknowledged the "increasing number and scope of refugee problems in Africa and in other regions of the world" and requested that the UNHCR continue to provide protection to these populations despite their definition outside the scope of the original Convention. See G.A. Res. 2197(XXI), *supra*. The 1967 Protocol was drafted to serve the remaining displaced people and fully incorporated the 1951 Convention's key provisions. *Id.*

¹⁰² See Shacknove, *supra* note 44, at 275 (discussing the theoretical basis of for the definition of refugee). The basis for the definition of refugee consists of four components:

- a) a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society;
- b) in the case of the refugee, this bond has been severed;
- c) persecution and alienage are always the physical manifestations of this severed bond; and
- d) these manifestations are the necessary and sufficient conditions for determining refugeehood.

Id. (footnotes omitted). Compare 1951 Convention, *supra* note 89, at art. 1 (defining the term "refugee" to only include people affected by events prior to January 1, 1951), with 1967 Protocol, *supra* note 89, at art. 1, ¶ 2 (removing the date restriction from the 1951 refugee definition and making it applicable to all people affected by a well-founded fear of persecution). The identical language of the 1951 Convention was not reproduced in the 1967 Protocol, but rather the validity of the definition was acknowledged and additional language added. *Id.*

4. Post-Convention Relating to the Status of Refugees—Regional Instruments

The 1951 Convention and its Protocol were the first stage in the protection of refugees throughout the world; they helped governments create their own agreements to protect refugees.¹⁰³ Since then, regional conventions have adopted protective instruments for refugees. Two major instruments that specifically define the term refugee are the Office of African Unity (“OAU”) Convention Governing the Specific Aspects of Refugee Problems in Africa and the Organization of American States (“OAS”) Cartagena Declaration on Refugees.¹⁰⁴

Not long after the implementation of the 1967 Protocol, the OAU (now the African Union) expanded the original definition of refugee.¹⁰⁵ The final definition of refugee includes additional language providing protection for people relocated because of disturbances springing from aggression, occupation, or domination in their countries of origin.¹⁰⁶ At the time, there were massive conflicts throughout Africa that

¹⁰³ TRAVAUX PRÉPARATOIRES, *supra* note 95, at 15. This language was originally going to be included in the final paragraph of the Preamble in the 1951 Convention. *Id.* However, the Canadian representative at the drafting opposed the inclusion of the language, stating it unduly broadens the scope of the 1951 Convention (as its original intent was to protect Europeans). *Id.* at 18. The U.K. representative opposed similar language in the Preamble, as he felt it went beyond a general statement regarding the text of the Convention. *Id.* at 29.

¹⁰⁴ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention]; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1 (Nov. 22, 1984) [hereinafter Cartagena Declaration].

¹⁰⁵ See OAU Convention, *supra* note 104, at art. 1(2) (redefining the word “refugee” to conform to the needs of Africa). The OAU is a regional organization that was established to promote Unity of African states and to better the lives of African people. *Id.*; see George Okoth-Obbo, *Thirty Years of the OAU Refugee Convention: Achievements, Prospects and Challenges*, 20 REFUGEE SURV. Q. 80, 110 (1999) (stating a draft convention for the protection of African refugees had been in the works prior to the 1967 Protocol, with one of its specific interests being the elaboration of the refugee definition provided in the 1951 Convention). The OAU desired to institute its own definition that would remove the date-line restriction, thereby increasing the scope of the definition to refugees in Africa. *Id.* After the adoption of the 1967 Protocol, this was no longer necessary and the OAU turned its focus to drafting a definition that would govern the African aspects of the refugee situation. *Id.*

¹⁰⁶ OAU Convention, *supra* note 104, at art. 1(2). The final definition of refugee reads as follows:

The term “Refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Id.

912 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

necessitated the expansion of the original 1951 Convention definition and tailoring to the state of the African continent.¹⁰⁷ Tailoring the 1951 Convention definition allowed for the greater protection of the refugee masses in Africa at that time.¹⁰⁸

Similarly, in 1984, the OAS adopted a convention containing the definition of a refugee.¹⁰⁹ The OAS was keenly aware that special attention had to be paid to the evolving refugee situation in Central America and that problems relating to refugees in the region could only be remedied through coordination and harmonization among states.¹¹⁰ The collaboration between the separate institutions of asylum in the Americas and the UNHCR needed to be strengthened by creating a

¹⁰⁷ See Okoth-Obbo, *supra* note 105, at 112. Africa suffered “from massive abuses of human rights, civil strife and conflicts and war” that justified the expansion of the original 1951 definition. *Id.*; *The Cartagena Declaration: A Decade of Progress*, UNHCR REFUGEES MAG. (Mar. 1, 1995), available at <http://www.unhcr.org/3b5427e84.html>. People at that time were becoming refugees as a result of decolonization, the conflicts over national liberation, and the formation of new states. *Id.*; Emmanuel Opoku-Awuku, *Refugee Movements in Africa and the OAU Convention on Refugees*, 39 J. AFR. L. 79, 80 (1995). Additionally, Tanzania, Uganda, and Zaire experienced a massive influx of Rwandese refugees in 1961. *Id.*

¹⁰⁸ See Okoth-Obbo, *supra* note 105, at 112 (discussing how the narrowing of the 1951 Convention definition was necessary to meet the needs of Africa); Opoku-Awuku, *supra* note 107, at 81. The OAU Convention was to “recognize[] the [U.N.] Convention as ‘the basic and universal instrument relating to the status of refugees,’” being the complementary regional instrument in Africa. *Id.* The OAU Convention was meant to supplement the 1951 Convention, not supersede it. *Id.*

¹⁰⁹ Cartagena Declaration, *supra* note 104. The OAS is a regional institution that focuses on promoting human rights and that is comprised of states from the American continents. *The Inter-American Human Rights System*, HREA.ORG, http://www.hrea.org/index.php?base_id=150#resources (last visited Apr. 11, 2012).

¹¹⁰ Cartagena Declaration, *supra* note 104, at sec. I; see Leonardo Franco & Jorge Santistevan de Noriega, *Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America*, in MEMOIR OF THE TWENTIETH ANNIVERSARY OF THE CARTAGENA DECLARATION ON REFUGEES: 1984–2004, at 61, 66 (2005). Because of political instability in the region, the process of granting asylum had been a practice in the Americas even prior to adopting the Cartagena Declaration. *Id.*; Antonio Fortín, *Doctrinal Review of the Broader Refugee Definition Contained in the Cartagena Declaration*, in MEMOIR OF THE TWENTIETH ANNIVERSARY, *supra*, at 255, 260. El Salvador, Guatemala, and Nicaragua in particular were subject to wars, civil conflicts, violence, and political upheaval in the 1980s, which resulted in an unprecedented mass displacement of people. *Id.* However, different parties participated in the separate instruments, demonstrating a difficulty in implementation of the regional protections; conversely, most Latin American countries ratified the 1951 Convention and its Protocol. Franco & Santistevan de Noriega, *supra*, at 295; see Fortín, *supra*, at 263–64 (listing sixteen Inter-American instruments containing provisions on asylum); see also Francisco Galindo-Vélez, *Asylum in Latin America: Use of Regional Systems to Reinforce the United Nations System for the Protection of Refugees*, in MEMOIR OF THE TWENTIETH ANNIVERSARY, *supra*, at 215, 230 (discussing the different Conventions in Latin America governing refugees and asylum).

refugee concept that could be universally applied in the region.¹¹¹ The increase in the flow of refugees in Central America necessitated an expansion of the definition from the Refugee Convention.¹¹² Like in the OAU Convention, the language met the specific needs of the refugee situation in South America.¹¹³ Severe crises occurred throughout South America in the 1970s and resulted in the mass displacement of nearly two million people in the region.¹¹⁴ This definition serves to protect these people who do not fall within the 1951 Convention definition, but who have still experienced upheaval as a result of turbulent circumstances not of their own doing.¹¹⁵

Both the OAU Convention and the Cartagena Declaration are instruments that were developed after the Refugee Convention in order to accommodate the needs of the refugees within their region.¹¹⁶ The

¹¹¹ Jaime Ruiz de Santiago, *The Cartagena Declaration Legal Nature and Historical Importance*, in MEMOIR OF THE TWENTIETH ANNIVERSARY, *supra* note 110, at 291, 298. The 1951 Convention adopted the universal terminology regarding refugees. *Id.* The provisions in the 1951 Convention requiring the regions and states to cooperate with the UNHCR served as a starting point for Central America's adoption of a uniform system of refugee and asylum. *Id.*

¹¹² Cartagena Declaration, *supra* note 104, at sec. III, ¶ 3. The OAS looked to the OAU's expansion of the definition of refugee as precedent for their enlargement of the concept. *Id.* The text of the convention reads as follows:

[T]he definition or concept of a refugee . . . is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Id.

¹¹³ *The Cartagena Declaration: A Decade of Progress*, *supra* note 107. People in the Americas, like in Africa around the time of the OAU Convention, were not being displaced due to persecution, but because of dangers resulting from the armed conflicts. Fortín, *supra* note 110, at 261.

¹¹⁴ See *supra* note 110 and accompanying text (discussing the reason for the migration of people in the Americas). Because of the conflicts in El Salvador, Guatemala, and Nicaragua, about two million people were displaced—some internally and others who fled to other Central American countries as well as to the United States and Canada. Fortín, *supra* note 110, at 260; see also *The Cartagena Declaration: A Decade of Progress*, *supra* note 107 (discussing the expansion of the definition of refugee to include “people threatened by generalized violence, foreign aggression and internal conflicts—and, most remarkably, to those fleeing ‘massive violation of human rights’”).

¹¹⁵ *The Cartagena Declaration: A Decade of Progress*, *supra* note 107; see also Fortín, *supra* note 110, at 261. Those fleeing their homes because of armed conflict lack the essential element of direct persecution under the 1951 Convention. *Id.* The expanded definition under the Cartagena Declaration served to harbor these people. *Id.*

¹¹⁶ See *supra* Part II.C.4 (discussing the implementation of the OAU Convention and Cartagena Declaration post-1951 Convention).

914 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

1951 Convention definition is the primary document where all permutations of refugee protection begin, as the CEDAW and the CRC are for women and children, respectively.¹¹⁷ All three conventions share a common feature that binds them together as instruments that protect vulnerable populations: the recognition of the need to protect fundamental human rights.¹¹⁸

D. Fundamental Human Rights in Existing Protective Instruments

The CEDAW, CRC, and Refugee Convention were promulgated in recognition of the universality of certain human rights that stem from the U.N. Charter and the Universal Declaration of Human Rights, as well as the vulnerability of their respective populations.¹¹⁹ The UDHR contains provisions regarding respect for fundamental human rights.¹²⁰ The UDHR is a call to all people and nations to promote respect for the inherent dignity and the equal rights of all members of the human

¹¹⁷ See *supra* Part II.C.1-3 (discussing the major protective instruments for women, children, and refugees).

¹¹⁸ See *infra* Part II.D (examining common elements of fundamental human rights afforded in the 1951 Convention, CEDAW, and CRC).

¹¹⁹ Compare 1951 Convention, *supra* note 89, at pmb. (“[T]he Charter of the [U.N.] and the [UDHR] . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.”), with CEDAW, *supra* note 75, at pmb. (“Noting that the Charter of the [U.N.] reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, Noting that the [UDHR] affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex . . .”), and CRC, *supra* note 80, at pmb. (“Considering that, in accordance with the principles proclaimed in the Charter of the [U.N.], recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Bearing in mind that the peoples of the [U.N.] have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, . . . Recognizing that the [U.N.] has, in the [UDHR] . . . proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, . . . Recalling that, in the [UDHR], the [U.N.] has proclaimed that childhood is entitled to special care and assistance . . .”).

¹²⁰ See *infra* notes 121-22 and accompanying text (citing to the provisions within the UDHR regarding fundamental human rights). Unlike the U.N. Charter, the UDHR is a non-binding instrument. See BROWNIE, *supra* note 76, at 559. While the UDHR is a non-binding instrument, it is significant because it serves to interpret the binding provisions in the U.N. Charter. *Id.* Moreover, the UDHR was the first step in the promulgation of the formal treaties to protect substantive human rights. *Id.* at 565. What resulted from the UDHR were two Covenants and a Protocol: the International Convention on Economic, Social, and Cultural Rights; the International Covenant on Civil and Political Rights; and an optional protocol. *Id.* Formal binding instruments, such as the U.N. Charter and other conventions, are often codifications of principles from a non-binding instrument. *Id.* at 559.

race.¹²¹ All fundamental rights and freedoms set forth in the UDHR must be enjoyed without discrimination regarding “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹²² The 1951 Convention, the CEDAW, and the CRC are all embodiments of the faith in fundamental human rights set forth by the UDHR and were promulgated to promote these human rights in their respective vulnerable populations.¹²³

The right to life is particularly paramount to human rights and is recognized as a principle of customary international law and in many international treaties.¹²⁴ The UDHR and the ICCPR explicitly state the right to life.¹²⁵ This right is one of the few that is so important that it is non-derogable under any circumstances.¹²⁶ The right to life is also characterized as a protection from the arbitrary deprivation of life.¹²⁷ It also articulates a positive obligation to the protection of life and the

¹²¹ UDHR, *supra* note 77, at pmb1.

¹²² *Id.* at art. 2.

¹²³ 1951 Convention, *supra* note 89, at pmb1.; CEDAW, *supra* note 75, at pmb1.; CRC, *supra* note 80, at pmb1. All three of these conventions include explicit references to the language in the U.N. Charter and the UDHR. *See supra* note 119 (comparing the text of the three conventions). Similarly, the U.N. Charter provides a reference point for human rights. BROWNLEE, *supra* note 76, at 555. The principles within the Charter have been used as a concrete basis for considerations of humanity that serve as the foundation for public policy. *Id.* at 27. The Preamble includes the purposes for why the Charter was implemented:

[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and . . . to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security

U.N. Charter, *supra* note 77, at pmb1. Article one of the Charter defines one of the purposes of the U.N. as the “promoti[on] and encourage[ment] [of] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.* at art. 1(3).

¹²⁴ *See* Fitzpatrick, *supra* note 96, at 9 (explaining the recognition of the right to life as customary international law and as a part of universal human rights treaties). Customary international law develops in an evolutionary matter, not through treaty ratification. *Id.* at 18. In order for a principle to become customary law, there must be evidence that states have conformed to a rule out of a sense of obligation that is non-legal in nature, and that state practice of this rule is widespread and consistent. *Id.*

¹²⁵ UDHR, *supra* note 77, at art. 3 (“Everyone has the right to life, liberty and the security of person.”); ICCPR, *supra* note 77, at art. 6(1) (“Every human being has the inherent right to life. . . . No one shall be arbitrarily deprived of his life.”).

¹²⁶ *See* ICCPR, *supra* note 77, at art. 4(2) (highlighting article six of the convention as one of the non-derogable rights of the convention). Additional rights that are non-derogable include rights under articles seven, eight (paragraphs one and two), eleven, fifteen, sixteen, and eighteen. *Id.*

¹²⁷ *Id.* at art. 6(1) (“No one shall be arbitrarily deprived of his life.”).

916 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

ability of people to survive.¹²⁸ Recently, it has been determined that the state is responsible for “provid[ing] effective deterrence against threats to the right to life.”¹²⁹ The right to physical integrity is also directly related to the right to life, in that one cannot have life without physical integrity.¹³⁰ The right to life, in conjunction with the right of non-refoulement, is particularly significant to refugees, as a forcibly displaced class, and the 1951 Convention sought to ensure that this right was preserved and protected.¹³¹

III. PROTECTING EDPs AND THEIR RIGHTS

The fundamental human rights of EDPs must be protected. Past efforts to reconcile a comprehensive definition for the EDPs have not been met with success, even though there is evidence of a population

¹²⁸ WESTRA, *supra* note 32, at 145. Some commentators have stated that the right to life includes the ability to survive and reach one’s full life expectancy, as well as the right to be free from serious environmental harm that would endanger life. *Id.* This characterization is new and does not have an extensive legal history. *Id.*

¹²⁹ *Id.* (citing to Oneryildiz v. Turkey, App. No. 48939/99 Eur. Ct. H.R. (2004)). In that case, a man lost his house and nine members of his family to a lethal methane explosion and the court found that the state breached its positive obligation to the man’s right to life. *Id.* The European Court of Human Rights expressed that the rights to health and physical integrity are closely related to the right to life. *Id.* at 147 (citing to Guerra v. Italy, App. No. 14967/89 Eur. Ct. H.R. (1998)). In that case, a chemical factory was releasing highly toxic substances into the air. *Id.* at 146. Citizens, concerned with the effects that the toxins would have on their health, filed a complaint with the European Human Rights Commission alleging the factory was violating their right to life. *Id.* The court found that when a government subjects its citizens to dangers that put their health and physical integrity at risk, they have violated their citizens’ rights to life, as prescribed by international law. *Id.* The same court found that health problems caused by contamination arising from tanneries and waste treatment constituted a violation of everyone’s right to life and physical integrity. *Id.* at 148 (citing to Lopez-Ostra v. Spain, App. No. 16798/90 Eur. Ct. H.R. (1994)).

¹³⁰ See WESTRA, *supra* note 32, at 146–48 (discussing cases where the right to life and physical integrity have been recognized as a right to be protected by law). The prohibition against refoulement is another means by which the right to life is recognized as specific to those displaced from their homes. See also McAdam, *supra* note 96, at 273 (explaining refoulement as a provision that implicitly respects and enforces the right to life). This principle represents the positive international legal duty to protect refugees and serves to protect this population from being subject to threats to its life and physical integrity. *Id.* McAdam, while noting the importance of human rights law and non-refoulement, feels that on their own, they are inadequate to provide substantive protection to refugees. See also *id.* at 268–70 (discussing the gap between the international standard of compliance with human rights law and the domestic obligation to implement the standard). Even though the language in the Refugee Convention mimics that in universal human rights treaties, it is not redundant. *Id.* at 269. The language in the Refugee Convention is what legitimates that coordination between refugee law and human rights law. *Id.*

¹³¹ See *supra* note 130 (discussing the principle of non-refoulement in the 1951 Convention).

migrating because of environmental stressors.¹³² The promulgations of the CEDAW, CRC, and Refugee Convention occurred through recognition of the need to protect the fundamental rights of a vulnerable class of people.¹³³ EDPs are an at-risk population, whose fundamental rights must also be protected. This Part first discusses EDPs' strong connection to the rights afforded to refugees and IDPs—particularly the right to life—because they are likewise a vulnerable population that is forced to relocate.¹³⁴ Then, EDPs are established as a bona fide vulnerable population who, like women, children, and refugees at the conception of their protective instruments, urgently need protection.¹³⁵ Next, the current protections afforded to people who are forced to migrate, including protections for IDPs and refugees, are examined and critiqued for their inadequacy in providing protection to populations migrating for environmental causes.¹³⁶ Finally, this Part discusses other attempts at addressing the EDP issue and how an independent legal definition for the EDP is necessary in order to provide protection for these people.¹³⁷

A. The Lack of Protection for the Fundamental Rights of EDPs

EDPs are entitled basic human rights simply by being members of the human race.¹³⁸ The CEDAW, CRC, and Refugee Convention make an explicit connection between the importance of fundamental human rights outlined in the U.N. Charter and the UDHR and the purpose of the conventions: to propagate these rights.¹³⁹ Also, by making the unambiguous reference in the Preamble of the 1951 Convention to the UDHR, the drafters of the 1951 Convention indicated a desire for the

¹³² See *supra* Part II.A–B (discussing previous efforts to classify EDPs and highlighting the existence of an environmentally displaced population).

¹³³ See *supra* Part II.C–D (outlining the development of the CEDAW, CRC, and 1951 Convention, and discussing the common thread of human rights protection that binds the three conventions).

¹³⁴ See *infra* Part III.A (stating that the fundamental human rights afforded to women, children, and refugees should be afforded to EDPs).

¹³⁵ See *infra* Part III.B (examining the extreme vulnerability of EDPs as evidence of the need for their protection).

¹³⁶ See *infra* Part III.C (discussing the inadequacy of current instruments in protecting EDPs).

¹³⁷ See *infra* Part III.C–D (discussing other scholars' proposed solutions, and demonstrating the need for a legal definition of EDPs).

¹³⁸ See *supra* notes 120–22 (discussing the application of fundamental human rights to all persons).

¹³⁹ See *supra* Part II.D (comparing the language of the separate conventions and the manifestation of fundamental rights within those conventions).

918 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

refugee definition to evolve in tandem with human rights principles.¹⁴⁰ EDPs share a particularly strong connection to the rights afforded to refugees and IDPs since they too are a population that is forcibly displaced from their homes.¹⁴¹ EDPs are not only being displaced from their homes, they are being denied the same fundamental human rights that are simultaneously protected under the CEDAW, CRC, and the 1951 Convention.¹⁴² The promotion of human rights binds the three conventions together as manifestations of considerations of humanity.¹⁴³ EDPs are also entitled to the protection of their fundamental human rights as everyday members of humanity.¹⁴⁴

The right to life is a central tenet of international law and is of particular concern to refugees, IDPs, and EDPs.¹⁴⁵ Like EDPs, refugees and IDPs often flee from their homes or countries of origin because of life-threatening danger.¹⁴⁶ People leaving for environmental reasons are leaving specifically because their homes are either temporarily or permanently uninhabitable.¹⁴⁷ Even after they leave, they may be subject to threats to their physical health and deprivation of basic subsistence

¹⁴⁰ See *supra* note 133 (discussing how the framers of the 1951 Convention intended for the definition to be in stride with human rights principles). TRAVAUX PRÉPARATOIRES, *supra* note 95, at 32. The preamble was intended to convey that refugees are entitled "to all those fundamental rights and freedoms which have been proclaimed for all human beings." *Id.*

¹⁴¹ See *supra* note 101 and accompanying text (defining a refugee that is fleeing from his home because of persecution and is unable to return to it because of that danger); see also IDP HANDBOOK, *supra* note 33, at 8 (stating that a critical aspect of the IDP definition is defining that person as someone who involuntarily departs from his home because it would not be safe to remain); Kibreab, *supra* note 26, at 394 (arguing that people migrate because of environmental stressors, regardless of severity). They migrate because their homes have become hazardous for human living or resources have been severely depleted. *Id.*; *supra* notes 29–40 (discussing the environmental refugee as a person who is forced to leave because environmental disruption jeopardizes his existence or quality of life).

¹⁴² KANE, *supra* note 27, at 26. People who have no choice but to leave their home or perish because of natural disasters and famine do not qualify for protection as refugees, but still have the same needs as refugees. *Id.* at 25–26.

¹⁴³ See *supra* note 123 (discussing the principles within the U.N. Charter as considerations of humanity that are the foundation for public policy). Upholding the principles of the U.N. Charter, which are goals of all three conventions: the CEDAW, the CRC, and the 1951 Convention and its Protocol. *Id.*

¹⁴⁴ See *supra* note 138 and accompanying text (discussing the application of fundamental human rights to all persons).

¹⁴⁵ See *supra* notes 124–31 and accompanying text (highlighting the importance of the right to life and its presence in customary international treaties).

¹⁴⁶ Fitzpatrick, *supra* note 96, at 8; see Lopez, *supra* note 25, at 406–07 (arguing that the recognition of the right to life in so many instruments demonstrates the implied obligation of countries to protect EDPs). However, this inference does not in itself create a positive obligation for countries that is enforceable. *Id.* at 406.

¹⁴⁷ See *supra* notes 146–49 (discussing the common reasons IDPs, refugees, and EDPs migrate).

needs.¹⁴⁸ EDPs' right to physical integrity is also directly related to the right to life, in that one cannot have life without physical integrity.¹⁴⁹ In conjunction with the right to life, EDPs maintain the right to be free from such threats and deprivations, especially since environmental causes are out of their control.¹⁵⁰ EDPs are being deprived of the right to life that is protected for refugees and IDPs because EDPs have the same needs as refugees and IDPs, but do not have the same protection.¹⁵¹ As a fundamental human right, EDPs are also due this right to life.

B. Recognition of the Need to Protect Vulnerable Populations

In addition to being due fundamental human rights, the EDP needs protection as a vulnerable population under a similar schema as the protection of women, children, and refugees.¹⁵² There was a well-recognized need for the protection of these populations at the time these conventions were implemented.¹⁵³ In order to exemplify the considerations of humanity in the U.N. Charter and the UDHR, each convention outlines the justification for why each population is entitled to special care.¹⁵⁴ Women merit special care because equality between men's and women's rights is vital in all aspects of society, as dictated by the U.N. Charter and the UDHR.¹⁵⁵ Children in the CRC garner special

¹⁴⁸ Fitzpatrick, *supra* note 96, at 9.

¹⁴⁹ See *supra* note 130 (discussing the right to physical integrity and the concept of non-refoulement as acknowledgments of positive obligation to protect the right to life).

¹⁵⁰ UDHR, *supra* note 77, at art. 25, ¶ 1. The UDHR states that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Id.

¹⁵¹ KANE, *supra* note 27, at 26. People who do not relocate for reasons other than persecution still have the same needs as refugees, but can find no protection under international refugee law. *Id.*

¹⁵² See *infra* notes 154-73 and accompanying text (explaining why the EDP population is vulnerable).

¹⁵³ See *supra* Part II.C (discussing the motivations for the enactment of the CEDAW, the CRC, and the 1951 Convention).

¹⁵⁴ See *supra* Part II.C (discussing why women, children, and refugees need special protection).

¹⁵⁵ CEDAW, *supra* note 75, at pmb1.

[T]he Charter of the [U.N.] reaffirms faith in fundamental human rights . . . in the equal rights of men and women . . . the [UDHR] affirms . . . that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.

920 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

protection because of their physical and mental immaturities and because childhood deserves special care and assistance according to the UDHR.¹⁵⁶ The 1951 Convention alludes to the affirmation of fundamental human rights and equality as a principle that necessitates the Convention.¹⁵⁷ There is no direct reference to the right to asylum, as outlined in article fourteen of the UDHR.¹⁵⁸ Although, by virtue of being outlined in the UDHR, this amounts to a fundamental right, and the 1951 Convention serves to codify that consideration of humanity.¹⁵⁹ Similarly, there is a current need for the protection of the EDP population. A population's vulnerability becomes evident when the link between that population's environment—in a broader, non-ecological sense—and the social forces and institutions that support the population is broken.¹⁶⁰ There is undisputed evidence that people are being displaced for environmental reasons.¹⁶¹

Id.

¹⁵⁶ CRC, *supra* note 80, at pmb. "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'" *Id.*

¹⁵⁷ 1951 Convention, *supra* note 89, at pmb. ("[H]uman beings shall enjoy fundamental rights and freedoms without discrimination.").

¹⁵⁸ UDHR, *supra* note 77, at art. 14(1). "Everyone has the right to seek and to enjoy in other countries asylum from persecution." *Id.*

¹⁵⁹ *Id.* at art. 2. "Everyone is entitled to all the rights and freedoms set forth in this Declaration . . ." *Id.*

¹⁶⁰ Oliver-Smith, *supra* note 27. Oliver-Smith states:

The concept of vulnerability links the relationship that people have with their environment to social forces and institutions and the cultural values that sustain or contest them. Vulnerability refers to the totality of relationships in a given social situation producing the formation of a condition that, in combination with environmental forces, produces a disaster.

Id.

¹⁶¹ See *supra* Part II.B (highlighting the existence of populations that are being displaced because of environmental reasons). Many have speculated about the number of people who have been environmentally displaced. See WESTRA, *supra* note 32, at 4 (citing to a Christian aid report estimating that one billion people will migrate between now and 2050, and a separate report stating that the number of migrants increases by about three million people every year); Myers, *supra* note 39, at 609 (describing the environmental refugee population to have been at least twenty-five million in 1995, and doubling by 2010). On the contrary, the multi-causal nature of migration makes it difficult to pinpoint a population that is migrating specifically because of environmental causes, consequently making this one of the most heavily criticized aspects of establishing a concrete definition for EDPs. See *supra* notes 41–44 and accompanying text. Richard Black is heavily critical of the limited ability to demonstrate an exclusive linkage between migration and environment. See Black, *supra* note 41, at 2–3 (discussing the multitude of reasons that people migrate, of which environmental reasons are a mere correlate, not cause). A distinction between environmental refugees can only "be sustained at the level of proximate causes of flight."

Poverty and the EDP have a very closely linked relationship, whether the environmental change is natural or man-made.¹⁶² EDPs are a vulnerable population in need of protection precisely because of the lack of institutional support available to help mitigate the effects of natural disasters.¹⁶³ The increase in the frequency of natural disasters demonstrates the vital need to protect the growing number of people being displaced by such disasters.¹⁶⁴ Such occurrences tend to disproportionately affect the poorest people in the world because these people lack the infrastructure and means to cope with the effects of natural occurrences.¹⁶⁵ Tragically, these poor people often live on land that is inherently more susceptible to being affected by natural occurrences, such as floodplains, because they cannot afford to live in a less at-risk area.¹⁶⁶

Famine is another tie that binds EDPs and poverty, showing that the need for protecting EDPs is even more critical.¹⁶⁷ Developed countries

Id. at 13. However, this Note does not attempt to illustrate the need to protect these populations by demonstrating the magnitude of people who are being displaced, which is subject to much speculation because of many factors, specifically the multi-causal aspect of migration. Rather, this Note acknowledges that people are being displaced by environmental stressors, whether an aspect or sole case, and that the displaced population's vulnerability comes from their inability to cope with the effects of such environmental stressors. *See infra* notes 162-73 and accompanying text (discussing the vulnerability of EDPs); *see also* Kibreab, *supra* note 26, at 390 (discussing how, even in the absence of accurate figures to determine who is an EDP, it should still be remembered that "sudden onset climate events" displace large numbers of people).

¹⁶² *See supra* notes 41-44 and accompanying text (discussing the multifaceted nature of the migration).

¹⁶³ *See supra* note 27 and accompanying text (describing the vulnerability of people as stemming from a lack of institutional support to cope with the effects of natural disasters).

¹⁶⁴ Kibreab, *supra* note 26, at 374. Africa, in particular, has difficulty in adapting to environmental changes because of the extreme level of poverty, and the consistent recurrence of natural disasters like drought and flood. *Id.*; *see* Rodgers, *supra* note 27 (discussing how Haiti's extreme level of poverty exacerbated its vulnerability to natural disasters).

¹⁶⁵ WESTRA, *supra* note 32, at 5; *see supra* note 27 and accompanying text (examining the relationship poverty has with the inability of governments to cope with environmental stressors).

¹⁶⁶ *See, e.g.,* KANE, *supra* note 27, at 29 (stating that many Bangladeshis live downstream from the Himalayan mountains, on land that is greatly susceptible to flooding, because they cannot afford to live anywhere else). *See generally supra* notes 42-43 and accompanying text (discussing the Bangladeshi movement into India).

¹⁶⁷ This is again refuted by claims that the multi-causal nature of migration makes it impossible to single out environment as a cause of migration. *See* Black, *supra* note 41, at 4-7 (refuting the existence of desertification, the process caused by drought and over-cultivation of soil, which has resulted in famine). It has been examined that in Haiti, the link between environmental deterioration and migration is remote and is often more linked to political and economic reasons. *Id.* at 5. The multi-causal nature of migration is undeniable, but this should not be a hindrance to addressing environmental issues in

922 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

with high levels of public health and education are more resilient to causes of refugee and migrant outflows, such as famine.¹⁶⁸ Conversely, third-world countries get hit the hardest by environmental issues like famine because agriculture tends to be the heart of their economies.¹⁶⁹ When this is the case, people are forced to leave their countries simply because those lands have reached and exceeded their carrying capacities.¹⁷⁰ While a shortage of food is an effect of drought, it is the mismanagement of aid distribution that creates famine.¹⁷¹ The inability of national governments to provide support to their people during a famine enhances the vulnerability of the EDP population that is forced to relocate because of a shortage of food.¹⁷² EDPs currently do not hold an internationally recognized legal status that enables their protection as vulnerable people, nor do they fit within the current classifications of forcibly displaced populations – refugees and IDPs.¹⁷³

C. *Inadequacies in Current Protection*

EDPs are entitled to the same fundamental human rights that are afforded to all, particularly the refugee and the IDP.¹⁷⁴ EDPs often are forced to leave their homes for the same reasons as refugees and IDPs: they have lost their homes, no longer have access to food or water, and/or have lost access to their livelihoods.¹⁷⁵ Unfortunately, current instruments protecting displaced persons are inadequate to meet the

migration. See Kibreab, *supra* note 26, at 394 (“[T]he environment must be factored in as one of the diverse elements that drive migration.”); Myers, *supra* note 39, at 610 (discussing how people who migrate from outright poverty are often driven by root factors of environmental stressors, making the environmental aspect of their migration as important as any other factor that contributes to their poverty).

¹⁶⁸ KANE, *supra* note 27, at 10–11.

¹⁶⁹ JACOBSON, *supra* note 31, at 8–9; see, e.g., *supra* notes 59–64 (describing Haiti’s predominantly agricultural economy and its collapse following the exploitation of the land).

¹⁷⁰ See, e.g., text to notes 58–67 (highlighting the Haitian exodus to the United States in the late 1970s, as well as the recent water shortages in Iraq); see *supra* note 59 and accompanying text (regarding how Haiti had exceeded its carrying capacity).

¹⁷¹ See Shacknove, *supra* note 44, at 279. The Great Bengal Famine was caused by hoarding the misdistribution of aid, not by the drought alone. *Id.*

¹⁷² See *supra* note 170 and accompanying text (discussing the land’s inability to sustain the growth of food and therefore the need to migrate).

¹⁷³ See *infra* Part III.C (examining the EDPs inability to fit within current protective measures for forcibly displaced persons).

¹⁷⁴ See *supra* Part III.A (discussing EDPs’ entitlement to the same fundamental rights afforded to other vulnerable populations).

¹⁷⁵ See *supra* notes 146–49 (discussing the common reasons IDPs, refugees, and EDPs migrate).

needs of the EDPs.¹⁷⁶ EDPs do not fall within the same category as IDPs. IDPs are people displaced by natural or man-made disasters, as well as those forced to relocate but who remain within their countries of origin.¹⁷⁷ This classification may be more suitable for EDPs because it includes provisions for natural or man-made disasters.¹⁷⁸ Nonetheless, protection for IDPs is inadequate to cover EDPs because protection is only extended to those displaced within the borders of their country.¹⁷⁹ By its very nature, the protection of IDP rights is limited to national legislation operating under the auspices of international law.¹⁸⁰ Additionally, the definition of IDP is descriptive rather than legal and provides no means of international protection.¹⁸¹ International protection of the IDP is unnecessary because the responsibility falls squarely on the shoulders of the nation the IDP is moving within.¹⁸²

¹⁷⁶ See *infra* notes 177–206 and accompanying text (arguing that EDPs do not fall within any current international instruments).

¹⁷⁷ See *supra* note 33 and accompanying text (discussing the formal definition of an IDP).

¹⁷⁸ See *supra* note 33 and accompanying text (discussing the inclusion of natural and man-made disasters in the definition of IDP).

¹⁷⁹ See *supra* note 33 and accompanying text (defining an IDP as a person who is forced to relocate within its borders). Black points to a 1994 study of the Senegal River Valley in Mali that showed there was actually a decline in migration during the drought of the mid-1980s. Black, *supra* note 41, at 7. The decline was due to the initial investment that it takes to migrate outside of the country; rather than migrate, people circulated within the country for a period of less than six months throughout the drought. *Id.*

¹⁸⁰ Cox & Harland, *supra* note 33, at 521.

¹⁸¹ IDP HANDBOOK, *supra* note 33, at 8. The weakened state of domestic legal structures is what often prompts IDPs to move, leaving the international community with little to do but observe the lack of effective remedies for human rights violations occurring within these countries. See Cox & Harland, *supra* note 33, at 521 (discussing the need for international institutions in order to enforce international human rights standards for IDPs); Fitzpatrick, *supra* note 96, at 5 (discussing how the UNHCR has become more involved in the protection of IDPs, however, state sovereignty prevents the UNHCR from fully assuring the safety and fundamental rights of IDPs.) See generally Cox & Harland, *supra* note 33, at 528–38 (proposing institutional models for the further protection of IDPs).

¹⁸² See Cox & Harland, *supra* note 33, 528–38. Protection is unnecessary because unlike refugees, who need special legal status, IDPs are “entitled to all the rights and guarantees as citizens and other habitual residents of a particular State.” IDP HANDBOOK, *supra* note 33, at 8; see also WESTRA, *supra* note 32, at 13 (stating that the responsibility of protection remains with the states and “the international community may provide help only ‘in consultation and coordination with the concerned [s]tate’”); McCue, *supra* note 26, at 176 (discussing the unwillingness of the international community to support IDPs). McCue contends that the international system lacks in the protection of IDPs because it is unwilling to breach the veil of state sovereignty with regards to the protection of people within its borders. *Id.* Even with the OAU expansion of the refugee definition, the OAU was careful to expand protection of refugees, but only to the extent that such regulations would not interfere with states’ sovereignty. *Id.*; WESTRA, *supra* note 32, at 9–10 (noting that the protection of state sovereignty is often at odds with the principles of the protection of fundamental human rights and international cooperation).

924 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

Greater consideration has been given to the incorporation of EDPs into the refugee classification, terming them environmental refugees.¹⁸³ Unlike IDPs, refugees are afforded an official legal status that allows for their protection by international entities.¹⁸⁴ However, refugees today are unlike the refugees at the conception of the original definition; people are fleeing from persecution in larger numbers and for different reasons.¹⁸⁵ Similarly, EDPs are not people that the 1967 Protocol conceived of being protected.

Central to the definition of a refugee under the Refugee Convention is that he has a “well founded fear of being persecuted” for being a part of a particular classification of people.¹⁸⁶ The fear of persecution is a subjective measure of the individual’s experience, but the actual persecution must exist objectively.¹⁸⁷ The five grounds for persecution listed in the definition of refugee include only a nexus to civil and/or political status.¹⁸⁸

¹⁸³ See *supra* notes 29–31 and accompanying text (documenting the first use of the term “environmental refugee”); *supra* notes 39–40 and accompanying text (discussing Myers’ and Westra’s explanation of environmental and ecological refugees).

¹⁸⁴ See *supra* text to note 101 (giving the definition of a refugee under the 1951 Convention).

¹⁸⁵ KANE, *supra* note 27, at 31. In fact, less than two decades after the signing of the 1951 Convention, refugees were already substantially different, prompting the need for the expanded definition in the 1967 Protocol. *Id.*; see *supra* note 101 (explaining the prompt for the 1967 Protocol). There is some support for the expansion of the refugee definition in order to encompass more than civil and political persecution. See Kibreab, *supra* note 26, at 398 (“Coercive circumstances even when not perpetrated by a state or a state’s agents are said to be sufficient grounds for ‘refugee’ status.”). The use of the term refugee would serve to bypass the issue concerning the multi-causality and the difficulties in separating politically, environmentally, and economically motivated reasons for relocating, since it serves as an all encompassing “short-cut response to situations of mass displacement.” *Id.* at 399.

¹⁸⁶ See *supra* note 99, ¶ 34 and accompanying text (citing directly to the definition of “refugee” as amended in the 1967 Protocol).

¹⁸⁷ See UNHCR HANDBOOK, *supra* note 99, ¶¶ 37–38. With regards to the term “well-founded fear of being persecuted,” it must manifest as a subjective frame of mind that is supported by an objective situation. *Id.* ¶ 34; see also WESTRA, *supra* note 32, at 17 (discussing the requirements for persecution under the Refugee Convention). More aptly put, a well-founded fear of persecution is shown by establishing two components: (1) the existence of an individual’s subjective fear and (2) factual grounds regarding the individual’s situation that would serve as evidence of an objectively well-founded fear, i.e., would another person in the same situation feel fear? *Id.*

¹⁸⁸ WESTRA, *supra* note 32, at 15; see 1967 Protocol, *supra* note 89, at art. 2 (stating that the five reasons covered for persecution are race, religion, nationality, membership of a particular social group, or political opinion).

Conceptually, persecution requires a persecutor, that is, someone who is imposing the harm.¹⁸⁹ EDPs relocate because remaining would result in the environment causing them harm, implying that the environment is the persecuting agent.¹⁹⁰ While EDPs are relocating because of changes to their environment, it cannot be said that the environment is responsible for its own sudden or gradual demise; environmental changes that force people to relocate result from naturally occurring events or from man-made action.¹⁹¹ By this analysis, EDPs' plight does not merit protection under the 1951 Convention and its Protocol because there is no persecuting agent.¹⁹² Also, people who move because of man-made or natural disasters are not specifically targeted by their government, something required under the Refugee Convention.¹⁹³ Additionally, the environment cannot fall under one of the five reasons for persecution.¹⁹⁴

Certain EDPs may be able to find protection under an implicit interpretation of persecution.¹⁹⁵ According to the UNHCR, there is no universal definition of persecution.¹⁹⁶ A state's actions can amount to persecution where "acts of environmental destruction, such as [sic] poisoning of wells, the burning of crops, or the draining of marshlands are methods purposefully used to persecute, intimidate or displace a particular population."¹⁹⁷ This is a way of viewing the state's failure to

¹⁸⁹ WESTRA, *supra* note 32, at 14. Persecution is primarily viewed as government acting against individuals. *Id.* at 152; *see supra* note 35 (regarding Kibreab's discussion of persecuting agents as the defining way to distinguish EDPs from refugees).

¹⁹⁰ Kibreab, *supra* note 26, at 385.

¹⁹¹ *See supra* Part II.B (discussing evidence that a population exists that is forced to migrate because of environmental reasons).

¹⁹² *See* McCue, *supra* note 26, at 156 (discussing the multi-causality of environmental degradation). If the environmental degradation causing migration is brought about by war, there is potential for receiving protection under the 1951 Refugee Convention definition. *Id.*; *see also infra* notes 197-98 and accompanying text (contending that other intentional acts by the government to destroy the environment may be considered to be persecution under the Refugee Convention).

¹⁹³ Kibreab, *supra* note 26, at 395.

¹⁹⁴ *See supra* note 188 (listing the five reasons for persecution under the 1967 Protocol).

¹⁹⁵ *See infra* notes 197-98 and accompanying text (discussing ways that government damage to the environment can be construed as persecution).

¹⁹⁶ UNHCR HANDBOOK, *supra* note 99, ¶ 51; *see* Lopez, *supra* note 25, at 378 (discussing the purposefully ambiguous nature of the word "persecution"). It has been universally recognized that the drafters of the 1951 Refugee Convention intended to leave the term vague because of the difficulty in enumerating all the potential forms persecution may take. *Id.* From this, environmental harm might be considered persecutory under the provisions in the handbook. *Id.*

¹⁹⁷ WESTRA, *supra* note 32, at 181 (quoting Dana Zarthner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 13 COL. J. INT'L L. & POL'Y 1, 22 (2002)) (internal quotation marks omitted).

926 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

provide protection for political oppression that manifests itself as environmental damage.¹⁹⁸ Furthermore, this provides a link between environmental changes, those responsible for them, and the changes being used as means of political persecution, thereby invoking the refugee definition.¹⁹⁹

This is suitable to protect only a small portion of the population that is forced to relocate for environmental reasons. While being displaced because of changes to the environment, these changes can come about for several reasons including natural disasters, man-made problems, or gradual land degradation.²⁰⁰ None of those reasons fall under this very narrow application of the Refugee Convention.²⁰¹ Man-made environmental problems undoubtedly can occur without the element of political persecution, and in fact in some cases the problems can arise while the government is attempting to help its population.²⁰² Naturally occurring disasters, even when exacerbated by land degradation perpetuated by people, cannot by any stretch of the imagination be conceived as political oppression. Hence, the protections afforded to refugees under the Refugee Convention remain unavailable to the EDP.

Regional instruments that protect refugees may offer protection to EDPs. The OAU Convention and the Cartagena Declaration both interpret the 1967 Protocol definition of refugee more liberally.²⁰³ But even the expanded definitions that were implemented for those regions do not explicitly make reference to environmental causes of migration.²⁰⁴

¹⁹⁸ See Kibreab, *supra* note 26, at 385 (characterizing environmental destruction by the government as an instrument of persecution). Under this analysis, the government is directly persecuting the EDP and may be entitled to protection under the 1951 Refugee Convention. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See *supra* Part II.B (examining the different ways the environment can change and still force people to migrate); see also Lopez, *supra* note 25, at 381 (discussing the difficulties in protecting EDPs under the 1951 Refugee Convention definition). Even if EDPs could be considered Convention refugees, this situation would create a massive influx of definitional refugees that would far exceed the international community's capacity to support refugees. *Id.*

²⁰¹ See *supra* notes 197-99 and accompanying text (characterizing the government as persecuting people through harming the environment).

²⁰² See *supra* notes 55-56 and accompanying text (discussing flooding in Northern Nigeria in September 2010 that happened when the government opened up the literal floodgates—something done annually to control water levels—resulting in millions of people being displaced from their homes); see also KANE, *supra* note 27, at 28-29 (explaining how public works projects, implemented to better the lives of citizens, contribute greatly to environmental damage and degradation that has, in some cases, forced people to relocate).

²⁰³ WESTRA, *supra* note 32, at 20; see *supra* Part II.C.4 (discussing the implementation of both conventions following the 1951 Convention).

²⁰⁴ See *supra* note 106 (stating the definition language in the OAU Convention); *supra* note 112 (stating the definition language in the Cartagena Declaration). *But see* McCue, *supra*

Moreover, while the regional instruments could be construed to protect the needs of EDPs, these protections would be limited to within the regions that the OAU and Cartagena Declaration encompass.²⁰⁵ Finding no place under current protections for people who are forced to migrate, EDPs are left with no international protective measures.²⁰⁶ Their protection must begin with an internationally recognized legal status of their own.

D. Previous Attempts at Developing Solutions

Current international instruments are inadequate to meet the needs of the EDP, and other scholars have attempted to devise their own creative and sometimes complex solutions to address the plight of the EDP. Tracey King posits that the creation of an international body to specifically address EDPs would be an appropriate solution to this issue.²⁰⁷ The International Coordinating Mechanism for Environmental Displacement (“ICMED”) is a cooperative effort from various international organizations that focuses on various issues that accompany environmental migration.²⁰⁸ King hopes to include the UN Environmental Programme, the UN Development Programme, the International Office of Migration, UNHCR, and the UN Office for the Coordination of Humanitarian Affairs, and hypothesizes that because the mechanism includes existing organizations, the international

note 26, at 174 (postulating that refugees may be able to qualify under the OAU and Cartagena Convention definitions). McCue points out that both convention definitions include people fleeing from “events seriously disturbing the public order” or other circumstances which have seriously disturbed public order. *Id.* (internal quotation marks omitted). Under this language, the concept of persecution is broadened and environmental degradation serious enough to result in migration could be construed to constitute events that disturb public order. *Id.* EDPs might thus be able to seek protection under these means. *Id.*

²⁰⁵ See OAU Convention, *supra* note 104, at pmb1. (describing how the aim of the Convention is to apply the provisions of the Refugee Convention to refugees in Africa); Cartagena Declaration, *supra* note 104, at ¶¶ (k)-(l) (describing the cooperation of the international community in the assistance of Central American refugees).

²⁰⁶ See *supra* notes 174–206 and accompanying text (showing the inability of current protections for forcibly displaced persons to encompass those impacted by environmental changes).

²⁰⁷ See King, *supra* note 40, at 559–64 (outlining the specific entities involved in an internationally coordinated body created to address environmental displacement).

²⁰⁸ *Id.* at 559. The international mechanism would not create a new organization, but capitalize on the strengths of existing organizations to address separate, but related, issues like “prevention, preparedness, mitigation, rehabilitation, and resettlement in order to effectively address environmental displacement.” *Id.*

928 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

community would not need to contribute funding beyond what is needed for the administrative costs of coordination.²⁰⁹

Such a mechanism would fail to fully address the needs of EDPs because even though it is designed to tackle separate issues, it lacks the strength of a concerted effort to definitively address the needs of EDPs. Though each separate organization may be equipped and trained to handle EDP issues, only a portion of their time and resources would be allocated to EDPs. In reality, such a coordinated effort would need the involvement of the entire international community to meet its financial needs. The ICMED does not require nations to be accountable for the protection of EDPs or involve a commitment by the entire international community. Gregory McCue and Michael Prieur have both put forward proposals for a separate convention on the protection of EDPs in order to establish the commitment of the international community to helping this vulnerable population.²¹⁰

McCue discusses the adoption of an international convention from an international environmental law standpoint.²¹¹ His convention would outline the duties of countries to prevent environmental disasters, minimize the damage of environmental disasters, provide notification information prior to an impending environmental disaster, and compensate for injuries sustained during such a disaster.²¹² The convention would then include states' responsibilities for addressing "the migratory effects of environmental events" as a part of its main objectives.²¹³ In spite of McCue's interest in including environmental migrations in this convention, his aim is to gain wider acceptance of the aforementioned environmental law principles by tying them together with a topic more closely linked to human rights thereby making the convention more attractive to adopt than an environmental one.²¹⁴ The

²⁰⁹ See *id.* at 560 (developing each organization's role in addressing EDP migration, including which strengths would specifically contribute to the cooperation mechanism).

²¹⁰ See *infra* notes 211-18 and accompanying text (discussing the two viewpoints that McCue and Prieur take in synthesizing an international convention for the protection of EDPs).

²¹¹ See McCue, *supra* note 26, at 179-87 (outlining which detailed principles of international environmental law should be used in the creation of an international instrument to address forced environmental migration).

²¹² *Id.* at 180.

²¹³ *Id.*

²¹⁴ *Id.* McCue has specifically stated that "another broadly-based international convention will have the added benefit of increasing the credibility of those [international environmental law] norms and hastening their acceptance as binding norms of international law." *Id.* Prieur also acknowledges that the international community will not favor a new environmental convention because of the plentiful amount of environmental agreements. Prieur, *supra* note 67, at 248; see also *supra* Part III.A (framing the EDP problem as a human rights problem).

convention would largely focus on principles regarding the prevention of environmental disasters and efforts to minimize damage of a future disaster through the development of contingency plans to implement in the event of natural disasters, while only offering some guidance on assistance afterward.

Such a convention misses the mark on addressing the issues of people who are forced to migrate because of environmental stressors. It seems to focus only on those environmental problems where there is an environmental disaster; however, in reality, people may migrate because of many reasons relating to the environment, not all of which are sudden and considered to be natural disasters.²¹⁵ Also, it adds EDP issues only as a portion of the convention and appears to minimize the impact that environmental migration has on the people itself. Though the convention McCue theorizes would be useful in addressing the environmental aspects of migration before they occur, it lacks the focus on human rights that is necessary to fully comprehend and address the plight of the EDP.

Prieur's Draft Convention on the International Status of Environmentally Displaced Persons places the EDP directly in the limelight in a convention that exclusively addresses their needs following migration.²¹⁶ This draft convention enumerates the rights of EDPs, including the rights to receive assistance, shelter, care, family, education, and work.²¹⁷ It also requires states to develop domestic law procedures that recognize the official legal status of the EDP and calls for the creation of a world agency to address the EDP issues and the implementation of the draft convention.²¹⁸ Such a comprehensive mechanism for the international protection of EDPs is the ultimate goal in protecting such a vulnerable population, and Prieur and his

²¹⁵ See *supra* Part II.B (examining the many ways people are forced to move because of the environment).

²¹⁶ See INTERNATIONAL CENTRE OF COMPARATIVE ENVIRONMENTAL LAW, DRAFT CONVENTION ON THE INTERNATIONAL STATUS OF ENVIRONMENTALLY-DISPLACED PERSONS, [http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons%20\(second%20version\).pdf](http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons%20(second%20version).pdf) (last visited Apr. 11, 2012) [hereinafter DRAFT CONVENTION] (full text of the draft convention discussed below).

²¹⁷ Prieur, *supra* note 67, at 255. The convention comes complete with its own definition of EDP—"individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence." *Id.* at 254 (internal quotation marks omitted).

²¹⁸ *Id.* at 255. The World Agency for Environmentally-Displaced Persons would be an agency of the U.N. complete with a board of directors, scientific council, and Secretariat to oversee the implementation of the draft convention. DRAFT CONVENTION, *supra* note 216, at art. 21; see *id.* (describing the establishment of the agency and its duties).

colleagues took care to include all the necessary elements when drafting an international convention. However, the development of a convention takes an initial step that is too far advanced to begin the protection of EDPs.

Prieur has stated that after the first draft of the convention was published in 2008, it was disseminated to governments and international and non-governmental organizations.²¹⁹ As of the date of this publication, no one has adopted the convention. The problems of the EDP, though age-old, have not been addressed by the international community—through the U.N.—and it will take many steps to get to a convention that countries will sign onto. Although the ultimate goal of Prieur's draft convention was to protect the EDPs, it is too advanced a step for the international community to accept. The movement toward protecting EDPs should start with an international agreement on the legal definition of an EDP; then, the community should follow up by developing its own convention.²²⁰

E. Need for Independent Legal Status

EDPs do not have a home in both the literal sense and in the international protection sense. The entitlement to fundamental rights, their vulnerability, and the lack of protection is what prompted the creation of protective measures for women, children, and refugees.²²¹ The fundamental human rights of EDPs are not being protected, especially rights akin to those of refugees, with whom the EDP shares a particular bond as a displaced person.²²² Throughout the world, there has been an overall increase in occurrences, natural or man-made, that have resulted in environmental changes that force people to migrate.²²³ Because changes in the environment, drastic or gradual, disproportionately affect the poorest of people, EDPs are an extremely vulnerable population.²²⁴ They do not neatly fall within the current protections for those who are forcibly displaced from their homes, even

²¹⁹ Prieur, *supra* note 67, at 248.

²²⁰ See *infra* Part IV (giving a model definition for EDP and discussing the need for the General Assembly of the U.N. to adopt the definition before proceeding with the development of an international convention).

²²¹ See *supra* Part II.A–C (discussing reasons and ways each vulnerable population achieved a level of protection).

²²² See *supra* Part III.A (comparing the fundamental rights afforded to other vulnerable populations but not EDPs).

²²³ See *supra* Part II.B (explaining the presence of a population that is being displaced for environmental reasons and the increase in such events that lead to displacement).

²²⁴ See *supra* Part III.B (discussing the link between poverty and environmental migration).

though they are suffering the same relocation and are being deprived of the same rights as refugees and IDPs.²²⁵ All of these factors regarding the current situation of the EDP collectively speak to the urgent need for the development of a protective measure for them.

Creating a definition for EDPs will effectively address the aforementioned gap between EDP rights and the protection of those rights. A definitive legal status is important because it would serve to define the rights and resources to which EDPs are entitled, the obligations of states that are sending EDPs and receiving them, and the responsibilities of inter-governmental and nongovernmental organizations to EDPs.²²⁶ One can comparatively look to the progress in refugee law that the refugee definition has facilitated since its inception and view the cultivating of a legally recognized status for EDPs as a starting point for a greater movement toward the protection of the EDP.²²⁷ An immediate consequence to the 1951 Convention was that it established states' obligations towards protecting refugees in light of their vulnerability.²²⁸ The 1951 Convention also fixed governance mechanisms to oversee the facilitation of the Convention.²²⁹

Of course, none of this is pertinent without first clearly identifying what population is being protected, thus the refugee definition was key.²³⁰ All of the protective mechanisms were conceived for refugee security only after the term refugee was defined.²³¹ Likewise, EDPs cannot have any of their rights protected unless they are a legally identified population. As mentioned earlier, they are a vulnerable

²²⁵ See *supra* Part III.C (examining the lack of protection afforded to EDPs under refugee and IDP systems).

²²⁶ See Kibreab, *supra* note 26, at 400 ("Long-term solutions are also determined by the kind of category [to which] a displaced person belongs.").

²²⁷ See *supra* Part II.C.3-4 (following the establishment of refugee status at the international and regional levels).

²²⁸ See *supra* note 100 and accompanying text (outlining states' responsibilities to refugees).

²²⁹ See 1951 Convention, *supra* note 89, at art. 35 (explaining states' obligations to cooperate with UNHCR); *id.* at art. 36 (requiring states' cooperation with the U.N. Secretary-General in ensuring the compliance of their national legislation with the treaty); *id.* at art. 38 (explaining that the settlement of disputes under the Convention falls under the jurisdiction of the International Court of Justice).

²³⁰ See *supra* Part II.C.3-4 (discussing the evolution of protective instruments for the refugee and how the need to modify the definition led to the development of regional instruments); *supra* Part II.A (examining the inability of scholars and scientists to come up with a singular, cohesive definition for EDPs, making the development of a model definition the very first step toward the creation of protection).

²³¹ See *generally* 1951 Convention, *supra* note 89 (laying out the language of the Convention beginning with the definition of refugee then moving into the protective measure and governance mechanisms).

932 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

population that needs the support of the international community, and the development of their legally recognized definition will be the source for the conception of protective measures for EDPs.²³²

Regional conventions often serve to mold international laws into laws that are more relevant and culturally sensitive to the local area.²³³ Following the establishment of an international protective instrument, regional instruments were fostered regarding the refugee.²³⁴ Both the OAU Convention and the Cartagena Declaration were written in order to meet the needs of refugees and displaced persons within their regions.²³⁵ Equally, an established legal definition of the EDP will serve as a baseline definition for regional entities, like the OAU and the OAS, to modify in order to provide greater protection for the EDP within their region. From there, a more comprehensive level of institutional support can be devised for the EDP at the regional level resulting in a greater amount of protection.

Devising a legally recognized definition for the EDP is the only way to begin developing protective measures for this exceptionally at-risk group. As a vulnerable group, EDPs are entitled to have their fundamental human rights protected.²³⁶ EDPs do not fall within the current protections for forcibly displaced persons.²³⁷ The plethora of disjunctive definitions regarding people who are forcibly displaced by the environment and the international community's inability to come to a consensus reinforces the need to standardize a definition for the EDP.²³⁸ From this surplus of definitions, as well as from the needs of the EDP, one can synthesize a definition that will encompass those within the three categories of EDPs.²³⁹

²³² See *supra* Part III.B (discussing the EDP as a vulnerable population).

²³³ BROWNLIE, *supra* note 76, at 39.

²³⁴ See *supra* Part II.C.4 (regarding the OAU Convention and the Cartagena Declaration).

²³⁵ See *supra* notes 105-08 and accompanying text (highlighting the OAU's expansion of the refugee definition as an attempt to tailor it to the needs of the African people); *supra* notes 109-15 and accompanying text (characterizing the OAS's expansion of the refugee definition as a means to tailor the definition to the need of the region).

²³⁶ See *supra* Part III.B (highlighting the need for EDPs' fundamental human rights to be protected).

²³⁷ See *supra* Part III.C (demonstrating the inability of current protective measures for forcibly displaced persons to encompass EDPs).

²³⁸ See *supra* Part II.A (highlighting previous attempts to classify EDPs).

²³⁹ See *supra* text accompanying note 31 (discussing the three categories of environmental displacement).

IV. A MODEL DEFINITION FOR EDPs

As discussed in Part III, EDPs' entitlement to fundamental human rights and their extreme vulnerability demonstrates the need to develop an independent legal status.²⁴⁰ EDPs are unable to derive protection from existing international instruments.²⁴¹ Consequently, this Part proposes a definition of EDP.²⁴² Its adoption by the U.N. General Assembly must be the foundation for the protection of EDPs.²⁴³

A. *EDP: A Model Definition*

In the conception of an EDP definition, many factors need to be considered regarding its scope including EDPs' identification as "displaced persons" as opposed to "refugees," the nature of the displacement (whether natural or man-induced, sudden or gradual), the recognition of fundamental human rights, and the vulnerability of the EDP population. All the aforementioned factors were taken into consideration in the drafting of the following model definition for an EDP:

The term "environmentally displaced person" shall apply to any person who, as a result of a natural disaster, gradual environmental changes, and/or human-induced environmental stressor that threatens his life or physical integrity, is forced to relocate elsewhere because of the incident, and is unable to seek aid from the country where he has relocated to, or the country of his nationality, if the relocation is internal.²⁴⁴

To begin, it is necessary to identify EDPs as "displaced persons," as opposed to using the term "refugee" to characterize their displacement. Essam El-Hinnawi, David Barker, Norman Myers, and Laura Westra all used the word "refugee" in their definitions of people displaced by environmental causes.²⁴⁵ Nonetheless, by definition, refugees are

²⁴⁰ See *supra* Part III.A-B (analyzing the EDPs entitlement to and lack of protection).

²⁴¹ See *supra* Part III.C (highlighting inadequacies in protection for EDPs under current instruments).

²⁴² See *infra* Part IV.A (identifying a model definition of the EDP).

²⁴³ See *infra* Part IV.B (arguing that the adoption of the definition by the U.N. General Assembly would be the first step in the development of a protective regime for EDPs).

²⁴⁴ This is the proposed model definition that the Author of this Note synthesized in an effort to encompass EDPs.

²⁴⁵ See *supra* notes 29-40 and accompanying text (discussing El-Hinnawi's, Barker's, Myers', and Westra's definitions of environmental/ecological refugee).

persons who are displaced outside of their countries of origin.²⁴⁶ While it is true that people may be forced to leave their countries, many people are displaced within their countries due to natural or man-made disasters.²⁴⁷ By using the term “displaced persons” as opposed to “refugee,” it becomes implicitly inclusive of both people who leave the country and IDPs, effectively encompassing all people who have been displaced by environmental causes. Since the protection of IDPs’ rights is currently limited to national legislation, including the IDP in the definition helps to further guarantee protection at the international level when their home countries are unable or unwilling to provide aid.²⁴⁸

Though the proposed definition of an EDP rejects the use of the term “refugee,” there is some support for extending the current definition of refugee to include people who must relocate because of environmental causes.²⁴⁹ The expansion of the current refugee definition would give EDPs protection under the 1951 Refugee Convention and its Protocol. This Note instead devises an independent legal definition for EDPs so that EDPs may establish the need to protect their rights as a distinct population, as opposed to being a mere addition to the refugee regime of protection. The implementation of EDPs’ own unique definition will lead to the development of a comprehensive system of protection that is exclusive to the EDP population, not merely an enlargement of already existing protection.²⁵⁰

The proposed definition includes people who are affected as a result of natural disasters—which often occur suddenly—and gradual environmental changes. Previous incarnations of the definition have included provisions for both types of environmental changes.²⁵¹ Myers’ definition includes a list of specific causes of environmental problems including drought, erosion, desertification, and deforestation.²⁵² The

²⁴⁶ See *supra* note 101 and accompanying text (stating the legal definition of a “refugee” as appearing in the 1951 Refugee Convention).

²⁴⁷ See *supra* note 33 and accompanying text (discussing the formal definition of IDP).

²⁴⁸ See *supra* notes 180–82 and accompanying text (describing the protection of IDPs as limited to the mechanisms of national legislation). See *generally supra* notes 244–47 and accompanying text (discussing the addition of the clause “when their home countries are unable or unwilling to provide aid” to this Note’s proposed definition).

²⁴⁹ See *supra* notes 183–85 and accompanying text (discussing the potential expansion of the term refugee).

²⁵⁰ See *supra* Part III.D (asserting that the creation of a definition for EDPs will be the first step in the creation of a greater system of protection); *infra* Part IV.B (arguing that the U.N. General Assembly should first adopt this model definition thereby establishing it as a principle of international law).

²⁵¹ See *supra* notes 29–40 and accompanying text (discussing El-Hinnawi’s, Barker’s, Myers’, and Westra’s definitions of environmental/ecological refugee).

²⁵² See *supra* note 39 and accompanying text (stating Myers’ definition for the environmental refugee).

proposed definition for an EDP does not denote specific disasters so as not to impliedly limit protection to only people who have suffered because of those environmental causes. Additionally, this proposed definition includes a provision for human-initiated environmental disruption. There is significant evidence that human-triggered environmental degradation or disasters contribute to the relocation of people.²⁵³ The inclusion of responsibility for human-induced environmental stressors is important in order to encompass all causes of damage to the environment that result in displacement.

The right to life is part of the doctrine of fundamental human rights, and the EDP is entitled to have this right protected.²⁵⁴ Environmental issues resulting in the threat of life or physical integrity, and ultimately to fundamental human rights, must be present to qualify as an EDP. Including protection of the right to life broadens the definition to people who are in actual or imminent life-threatening danger as well as those suffering from threats to their health and/or the deprivation of basic sustenance needs. The specific inclusion of the right to life in the definition of the EDP is an acknowledgement of the international community's responsibility to the protection of life and the ability of people to survive.²⁵⁵

One of the greatest encumbrances to developing a definition specific to the EDP is what tends to be the multi-causal nature of migration.²⁵⁶ The proposed definition addresses this issue by not seeking to isolate environmental stressors as the sole cause for the migration of people, but rather as one of potentially several reasons. The language of the proposed definition does not state that environmental reasons must be *the* singular cause of relocation, but rather *a* cause of relocation.²⁵⁷ By making this distinction, the proposed definition does not require that an environmental stressor is the sole or primary reason for displacement, but simply one driving force of potentially several.

The inclusion of the last clause in the proposed definition of an EDP is integral to demonstrating the vulnerability of the EDP. Of the previously conceived definitions of environmental refugee, only David

²⁵³ See *supra* notes 55–67 and accompanying text (highlighting examples of human activities that have contributed to environmental disruption that resulted in the need to relocate).

²⁵⁴ See *supra* Part III.A (discussing the EDP's lack of and entitlement to the protection of fundamental human rights).

²⁵⁵ See *supra* notes 124–31 and accompanying text (discussing the different manifestations of the obligation to the right to life).

²⁵⁶ See *supra* notes 41–44 (citing to the multi-causal nature of migration making the isolation of environmental causes nearly impossible).

²⁵⁷ See *supra* note 244 and accompanying text (providing the model definition of EDP).

Barker's contains a clause stating that an environmental refugee is one who is "unable or unwilling to avail themselves of the protection of their own countries in dealing with the impacts of environmental disruptions."²⁵⁸ As stated previously, a large factor contributing to the vulnerability of EDPs is the lack of institutional support in the wake of an environmental disruption.²⁵⁹ Poverty, famine, and weak government infrastructures are also tied to the vulnerability of the EDP.²⁶⁰ When a person is unable to seek aid from his own government, he is truly vulnerable.²⁶¹ Therefore, the inclusion of this final clause helps to truly exemplify the vulnerability of the EDP and the need for his protection.

B. Adoption of Model Definition by the U.N. General Assembly

The model definition of an EDP should be proposed to and adopted by the General Assembly. The General Assembly is one of the principal organs of the U.N. and the only one that equally represents all 192 member states.²⁶² It is the main deliberative body of the U.N. and each member state has one vote when issues come up before it.²⁶³ Part of its duties is to promote the development of international law and the realization of human rights throughout the world.²⁶⁴ The acceptance of a principle by a majority of member states serves as evidence of a worldwide agreement regarding the necessity of the law.²⁶⁵ The promulgations of the CEDAW, CRC, and 1951 Refugee Convention were all preceded by General Assembly resolutions that recognized the need for the protection of women, children, and refugees.²⁶⁶

The model definition reconciles all of the previous attempts to classify an EDP into a single, authoritative definition that the General Assembly would be more receptive to adopting.²⁶⁷ The General

²⁵⁸ See *supra* note 38 and accompanying text (quoting Barker's definition for environmental refugee).

²⁵⁹ See *supra* Part III.C (discussing the particular vulnerability of the EDP).

²⁶⁰ See *supra* text accompanying notes 162-73 (discussing the relationship between the vulnerability of EDPs, poverty, and famine).

²⁶¹ See *supra* note 160 and accompanying text (stating that vulnerability comes from the lack of social and institutional support).

²⁶² See Functions and Powers of the General Assembly, *supra* note 76 (outlining the individual responsibilities of the U.N. General Assembly).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See *supra* note 76 (examining the effect that a General Assembly resolution has on the development of international law).

²⁶⁶ See *supra* Part II.C (following the development of the CEDAW, the CRC, and the 1951 Refugee Convention from General Assembly Resolutions).

²⁶⁷ See *supra* Part IV.A (synthesizing an authoritative model definition of an EDP from previous attempts).

Assembly's approval of the above model definition of an EDP would be the first global acknowledgement of the necessity to protect this vulnerable population. Moreover, because the issue of the protection of EDPs concerns principles that are enshrined in the U.N. Charter—fundamental human rights, namely the right to life—then the General Assembly's approval of the definition would have a direct legal effect.²⁶⁸ The definition would be recognized as an authoritative interpretation and application of the principles of the U.N. Charter, thereby creating an obligation for member states to further address the plight of the EDP and seek remedy for it. From there, the development of a convention and the establishment of organizations to protect EDPs can spring forth, and the protection of this population can begin.

V. CONCLUSION

The Haitian people, though suffering disastrous loss as a result of the earthquake, have the pledged support of the international community to help them on the road to recovery. However, other populations that have suffered displacement from their homes at the mercy of the environment do not have the same support from the international community. The creation of a legally recognized definition of EDPs is integral to establishing a specific level of protection for them. Establishing the EDP as a vulnerable class of persons will ensure that all people who suffer from mass displacement because of the environment can be protected. Their protection will no longer have to require the notoriety of a massively catastrophic event like the Haitian earthquake to move the international community to pledge their support.

Ultimately, the definition this Note proposes is the first step toward the protection of the EDPs. Protective instruments for women, children, and refugees established their status as vulnerable populations. The recognition of the need for their protection is what led to the implementation of conventions solidifying the international community's commitment to their protection. Reconciling the previous attempts to categorize EDPs into a single, comprehensive classification is the starting point for the development of a complete system of protection for EDPs. Following the acceptance of the proposed definition by the U.N. General Assembly—evidence of international adoption of the term—one hopes that the progression of the development of a protective regime will take the same course as that of women, children, and

²⁶⁸ See *supra* note 76 (arguing that if a resolution addresses principles within the U.N. Charter, then that resolution may have a direct legal effect on member states, as an authoritative interpretation of the laws under the U.N. Charter).

938 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

refugees, and development of a larger international instrument will result. This process must first begin with the establishment of a legally recognized definition of an EDP.

Nicole Angeline Cudiamat*

* J.D., Valparaiso University School of Law (2011); M.A. Psychology, Valparaiso University Graduate School (2011); B.A. Legal Studies & Psychology, University of Illinois at Springfield. I would like to thank Kathryn Kintzele, Director of North American Global Responsibilities at the Center for Humans and Nature, for steering me toward this important topic and for her continuing guidance throughout the Note-writing process. I would also like to thank my law review mentor Brian Borchert, who consistently pushed me to do my best and helped me refine my Note into what it is today. Finally, I am grateful for the support my family and friends have given me throughout my time in law school, especially my favourite Michael Minnis. The madness that was law school was tempered by everyone's love, kind words, and reality checks.