

# WHEN ISLANDS DROWN: THE PLIGHT OF “CLIMATE CHANGE REFUGEES” AND RECOURSE TO INTERNATIONAL HUMAN RIGHTS LAW

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## 1. INTRODUCTION

The age-old fantasy of escaping to a tropical island may be coming to an end: with global warming and climate change threatening to raise the oceans, literally, many islands do not stand a chance. For Tuvalu (formerly known as the Ellice Islands), a small island nation in the Southern Pacific, the dangers of the future are already looming, with threats of displacement, fear, and loss. In fifty years, “Tuvalu[ans] will likely face a tragic ending to their pictorial way of life.”<sup>1</sup> Some scientists predict that Tuvalu may become the first populated island to be swallowed by the ocean.<sup>2</sup> If and when that happens, the island’s more than 11,000 inhabitants will need more than just a dry place to go; they will need a new land on which to re-create their nation and their lives.

In response to their seemingly impending doom, Tuvalu has taken some drastic and necessary international measures. Fighting back against the injustice of literally losing their home out from under their feet, the islanders contemplated litigation against those

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<sup>1</sup> Rebecca Elizabeth Jacobs, Comment, *Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue The United States in the International Court of Justice*, 14 PAC. RIM L. & POL’Y J. 103, 103 (2005).

<sup>2</sup> See *id.* at 103–04 (“Some scientists predict that the island . . . will sink into the ocean by the year 2054 due to the adverse effects of global warming.”). Several unpopulated islands have been engulfed already by the Pacific Ocean. *Id.* at 104.

countries that they feel are shirking responsibility for their greenhouse gas ("GHG") emissions by not signing onto the Kyoto Protocol.<sup>3</sup> Additionally, a former Prime Minister of Tuvalu made numerous international pleas, asking nearby Australia and New Zealand to grant refugee status to the island's thousands of inhabitants.<sup>4</sup> These short-term actions and "solutions" have been rather ineffective, and Tuvalu is still sinking into the Pacific.

This comment explores the use of the existing refugee regime to accommodate Tuvaluans and similarly placed "climate change refugees" and then suggests international human rights law as an effective catalyst to urge expansion of the refugee regime. Section 2 examines the basics of climate change as a scientific phenomenon and explains why Tuvalu finds itself in its current plight. Section 3 surveys the current international refugee regime, with the curious and potentially harmful distinction between a "refugee," as internationally defined, and a "climate change refugee," as the people of Tuvalu have been described. Section 4 argues for the use of human rights law as a more effective vehicle than refugee law to offer the island nation redress. It begins with an enumeration of some of the universal human rights that Tuvaluans *should* enjoy and which are being infringed by climate change. Section 5 advocates for expansion of the legal definition of a refugee based on human rights claims to include climate change victims. Finally, Section 6 concludes with a demand for future regime changes. The human rights arena creates obligations that mandate international actions to save Tuvaluans and future "climate change refugees."

## 2. CLIMATE CHANGE

By 2007, even corporate media giant Rupert Murdoch recognized that "[c]limate change poses clear, catastrophic threats"

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<sup>3</sup> See *id.* at 104–05 (describing the Tuvaluan Prime Minister's announcement that the nation would bring suit in the International Court of Justice against nations refusing to enter into the Pact). In the end, Tuvalu did not sue the United States or Australia as threatened because the jurisdictional and standing concerns proved to be too high. See Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG. 267, 279 (2007) ("The central reason for this standstill is jurisdictional.").

<sup>4</sup> See Jacobs, *supra* note 1, at 107 n.30 and accompanying text (describing the Tuvaluan Prime Minister's request for environmental refugee status for his citizens); *All Things Considered: Tuvalu* (National Public Radio broadcast Nov. 15, 2001), <http://www.npr.org/templates/story/story.php?storyId=1133294> (last visited Apr. 9, 2010) [hereinafter NPR] (reporting that New Zealand has agreed to accept 60 Tuvaluans per year as environmental refugees).

and further stated, "[w]e may not agree on the extent, but we certainly can't afford the risk of inaction."<sup>5</sup> Nevertheless, governments continue to question the source and extent of damages that climate change will produce in the following decades. And while the Western world debates the causes, liabilities, and effects of climate change, the developing world has already begun to experience the devastations of such environmental phenomena: floods, typhoons, and droughts of catastrophic proportions impact millions around the globe annually. In fact, the conclusions of many scientists show that climate change has already had a significant impact on humans and the environment.<sup>6</sup> One hundred fifty thousand have lost their lives,<sup>7</sup> many more have lost their homes,<sup>8</sup> and over five million people—most of whom live in the poorest nations—have become sick with serious illnesses (such as malaria) that spread more quickly due to global warming.<sup>9</sup>

Climate change will invariably affect all countries to some degree, but its impacts are predicted to fall largely and disproportionately on the developing world. Smaller island nations will likely be the hardest hit, as they will literally shrink in size until they are engulfed completely by the oceans that surround them. Current national and international "inactions"—whether in waiting to establish legal causation, abstaining from global treaties to curtail GHG emissions, or refusing to acknowledge contribution, and thus liability for emissions—stagnate international momentum, which, in turn, will likely contribute to widespread destruction and loss on Tuvalu and other small island nations.

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<sup>5</sup> Rupert Murdoch, Chairman and Chief Executive Officer, News Corp., Address to his Employees (May 9, 2007), available at <http://www.wbcds.org/plugins/DocSearch/details.asp?type=DocDet&ObjectId=MjQ2MTg>.

<sup>6</sup> Derald J. Hay, *Post-Kyoto Stress Disorder: How the United States Can Influence International Climate Change Policy*, 15 MO. ENVTL. L. & POL'Y REV. 493, 493 (2008).

<sup>7</sup> See *id.* (describing the effects of climate change thus far).

<sup>8</sup> See Michael G. Faure & Andre Nollkaemper, *International Liability as an Instrument to Prevent and Compensate for Climate Change*, 43 STAN. J. INT'L L. 123, 124 (2007) (discussing the plight of the island nation of Tuvalu); Jacobs, *supra* note 1, at 103–04 (parsing through Tuvalu's potential legal claims for climate change liability against the United States).

<sup>9</sup> Hay, *supra* note 6, at 493.

### 2.1. *The Science Behind the Global Meltdown*

Global warming is an environmental phenomenon that will affect global ecosystems in countless and unknown ways. A major effect presently discussed is the rise of sea levels due to melting glaciers and ice caps.<sup>10</sup> Until roughly twenty to twenty-five years ago, it was thought that major ice sheets were relatively stable, melting predictably and slowly over centuries at the very least.<sup>11</sup> However, with accelerated melting and complete disintegration of once-stable ice shelves, it has become clear that the changes in the atmosphere and global temperatures threaten the entire Antarctic ice shelf.<sup>12</sup> Antarctica and Greenland hold ninety-eight to ninety-nine percent of the world's freshwater ice, and both show signs of severe melting at an alarming pace.<sup>13</sup> In fact, the United Nations Environment Programme estimated that a total meltdown of the Greenland ice sheet would trigger an estimated seven-meter rise in sea levels.<sup>14</sup> Even a twenty percent melting in Greenland and five percent melting of the Antarctic ice sheet would result in a four or five meter sea level rise.<sup>15</sup> Once this happens, small islands will disappear, landmasses will shrink, and oceans will grow. Sir David King, Science Advisor for the British Government, commented that when this occurs, "[t]he Maps of the world will have to be redrawn."<sup>16</sup> This ominous message does not bode well for Tuvalu, an island whose highest point is only five meters above

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<sup>10</sup> See WORLD VISION, PLANET PREPARE: PREPARING COASTAL COMMUNITIES IN ASIA FOR FUTURE CATASTROPHES: ASIA PACIFIC DISASTER REPORT 14 (2008), available at [http://www.wvasiapacific.org/downloads/PlanetPrepare\\_LowRes.pdf](http://www.wvasiapacific.org/downloads/PlanetPrepare_LowRes.pdf) (describing the affects of melting ice caps); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE ("IPCC"), CLIMATE CHANGE 2007: SYNTHESIS REPORT 30-54 (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf) [hereinafter SYNTHESIS REPORT] (examining observed changes in the global climate, the causes of these observed changes, and the possible future impact of these changes).

<sup>11</sup> WORLD VISION, *supra* note 10, at 15.

<sup>12</sup> See *id.* (describing how quickly the ice shelves are disintegrating).

<sup>13</sup> *Id.* at 14. See SYNTHESIS REPORT, *supra* note 10, at 45 (projecting increased ice flow from Greenland and Antarctica at the rates observed for 1993-2003).

<sup>14</sup> WORLD VISION, *supra* note 10, at 14. Accord SYNTHESIS REPORT, *supra* note 10, at 47 (discussing how projected ice sheet contraction will "continue to contribute to sea level rise"). For an extensive list of projected rises in sea level and surface temperatures, see *id.* at 45 tbl.3.1.

<sup>15</sup> WORLD VISION, *supra* note 10, at 14.

<sup>16</sup> *Id.*

sea level.<sup>17</sup> In fact, most of the twenty-six square kilometer island nation is less than a meter above sea level.<sup>18</sup> Moreover, since scientists have predicted a one-meter sea level rise, it is clear why Tuvaluans are justifiably worried—the ocean is drowning their home.

### 2.2. *Climate Change is Specialized Legal Risk*

As nations point fingers and blame each other, nothing is being done to help victims mitigate or adapt to the effects of climate change. The islanders have not been successful in securing any form of relief or rescue, whether preventative or humanitarian. Three characteristics of climate change, which make it unlike any other type of environmental disaster that the world has faced to date, may explain why this is.

First, as it is a prospective disaster, present day preparations and remedies may appear excessive or unnecessary. The lack of consensus regarding the mere existence and scientific causes of climate change often supports denials of help to climate change victims.

Secondly, since climate change entails transboundary pollution, the global nature of the cause means that prevention cannot be effective if undertaken by isolated parties or nations. Any serious efforts to curtail emissions or to change behaviors cannot be truly successful without implicating the entire world.

Finally, climate change has a built-in disparate impact: those countries producing the most harmful GHGs are usually the least affected by climate change disasters, while those producing the least seem to bear the greater brunt of global warming harms. Moreover, the victims of climate change, often small islands or poor nations, are frequently in the worst position to adapt and mitigate the damages.

#### 2.2.1. *Future-Based/Scientific Uncertainty*

Unlike most other environmental harms, climate change liability is almost entirely future-based. Tuvalu will have to

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<sup>17</sup> See Jacobs, *supra* note 1, at 107 (describing the island's topography); Jason D. Söderblom, *Climate Change: National & Regional Security Threat Multiplier for Australia*, SECURITY SOLUTIONS Mar.-Apr. 2008, at 60, available at <http://ssrn.com/abstract=1101961> (examining some of the dangers which Tuvalu faces due to climate change).

<sup>18</sup> Söderblom, *supra* note 17, at 60.

prepare for a future harm caused by past, current, and future emissions around the globe. The fact that the harm has not yet happened means that victim-states will have to prove not only causation, but some degree of certainty about exactly how much land will be flooded, how severe a tropical storm will be, or how many people might die. This unrealistic necessity will make pinning responsibility on other nations difficult.

Moreover, the lack of international consensus on the causes and effects of climate change is exploited by countries hoping to avoid liability. The United States, for instance, has cited "scientific uncertainty" as a rationale for non-participation in the Kyoto Protocol<sup>19</sup> and for not committing financial resources to fight global warming.<sup>20</sup> States and companies, mostly Western, use this uncertainty surrounding the *exact* causes and effects of climate change to cloud the issue and to avoid responsibility for their contributions. However, the balance of science shows that it is indeed anthropogenic emissions that are responsible for the exacerbated effects of climate change.<sup>21</sup>

#### 2.2.2. Joint Liability: The "Global" Excuse

The global nature of climate change is often manipulated to skirt liability.<sup>22</sup> A key tenet of environmental regulation is that those responsible for harming the environment should bear the cost of protecting it.<sup>23</sup> This "polluter pays" principle is challenged

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<sup>19</sup> See, e.g., Hay, *supra* note 6, at 504 (describing how President Bush cited three reasons for the administration's view that Kyoto was a failure, including "scientific uncertainty regarding the threat of climate change.").

<sup>20</sup> See, e.g., Laurie Goering, *Global Warming Can Be Reduced, But at What Cost?*, SEATTLE TIMES, May 21, 2007, at A1 ("Bush administration officials argued that the same aggressive effort [the U.N. advocated to hold GHG emissions in check] would throw the world's economy into recession.").

<sup>21</sup> See SYNTHESIS REPORT, *supra* note 10, at 39 ("Most of the observed increase in global average temperatures since the mid-20<sup>th</sup> century is *very likely* due to the observed increase in anthropogenic GHG concentrations."); see also Jacobs, *supra* note 1, at 110 ("The [IPCC's] Third Report also concluded that 'most of [the] observed warming over [the] last fifty years [was] likely due to increases in [GHG] concentrations due to human activities.'").

<sup>22</sup> See Faure & Nollkaemper, *supra* note 8, at 133-34 (examining how a victim may, in some circumstances, determine venue in climate change cases).

<sup>23</sup> This principle was recognized internationally in the 1992 Rio Declaration on Environment and Development. J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 470 (1999) (citing Conference on Environment and Development, June 3-14, 1992, Rio

in the arena of climate change liability by the fact that each and every country, including "climate victims" like Tuvalu, is guilty to some degree of contributing to GHG emissions. Should they all pay? If not, should any? Because climate change is not an isolated, past action perpetrated by a discrete set of individuals but rather a set of probable harms and damages having effect hundreds if not thousands of miles from the locations of emissions, victims of the natural disasters related to climate change have a hard time placing fault on any guilty parties. After all, we are all "guilty."

Additionally, since it is the aggregate of GHGs in the atmosphere causing polar ice caps and glaciers to melt, which in turn causes the ocean levels to rise all around the world, it is impossible to say how much pollution from any one entity caused the specific harm suffered thousands of miles away.

The argument, from the perspective of the developed nations, is that they cannot be held completely responsible for causing climate change since even the smallest island nations put some carbon dioxide into the atmosphere. Thus, since everyone shares this "joint liability" for the damages of global warming and since everyone will feel *some* effects due to climate change, it is unfair for the developing nations to demand that only the developed nations cease emitting.<sup>24</sup>

### 2.2.3. *Disparate Impacts Harm the Developing World*

Finally, the disparate impact of climate change combined with high adaptation costs perhaps best explains why the industrialized world seems to be dragging its feet.<sup>25</sup> The Intergovernmental Panel on Climate Change<sup>26</sup> has detailed that climate change will have different impacts on various regions. These impacts mean that:

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*Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (June 13, 1992), reprinted in 31 I.L.M. 876).

<sup>24</sup> This rationale was a crucial part of why the United States refused to sign the Kyoto Protocol, which set binding emissions reduction targets for Annex B countries (mostly the developed world) while leaving the emissions of the developing world (i.e. China and India, whose combined emissions rival those of developed nations) largely unregulated.

<sup>25</sup> See Hay, *supra* note 6, at 506 ("[C]limate change will have a differentiated impact on various regions.").

<sup>26</sup> The Intergovernmental Panel on Climate Change (IPCC) is an intergovernmental scientific body comprised of governments, scientists, and the people, as represented by the United Nations Body; thus, the IPCC report detailing climate change's predicted disparate impact can be considered authoritative and scientifically based. See Intergovernmental Panel on Climate

“Many of those who will be most harmed by climate change have contributed little to causing the problem.” Furthermore, “those that are most vulnerable to climate change are often least able to pay for adaptation measures needed to protect them from climate change impacts.” Therefore [lesser developed countries] will be unable to implement programs for irrigation in the case of drought, dikes in the event of flooding, or HVAC systems to prevent heat stroke.<sup>27</sup>

Contrast this state of affairs with that of the United States or another developed nation continuing to burn fossil fuels at an alarming rate with no signs of slowing down, and it becomes clear just how disparate climate change effects can be. The primary contributors tend to be the least affected.<sup>28</sup> Not coincidentally, they are also best able to respond financially to climate-related crises.<sup>29</sup> The fact that these nations feel far fewer disastrous effects from climate change, coupled with their superior ability to adapt to any changes felt, creates their false belief that climate change will not happen anytime soon, that it is a vague and uncertain issue for the future, and that it is not serious. Their distance from the disasters that are already occurring in Tuvalu and other danger zones allows an intellectual and moral distancing from responsibility and any sense of urgency. The damage to nations like Tuvalu remains a negative externality that no one can or is willing to pay for. These disparate impacts, coupled with the justifications of scientific uncertainty and joint liability, bolster international inertia.

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Change, Organization, <http://www.ipcc.ch/organization/organization.htm> (last visited Apr. 10, 2010) (describing the IPCC's function).

<sup>27</sup> Hay, *supra* note 6, at 506 (internal citations omitted).

<sup>28</sup> The top ten GHG-emitting countries, in order, are: the United States, China, the EU-25, Russia, India, Japan, Germany, Brazil, Canada, and the U.K. See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 663 (3d ed. 2007) (listing the top GHG emitting countries' carbon equivalent emissions for six GHGs); accord Hay, *supra* note 6, at 506-07 (arguing that the United States and other developed nations are the least threatened by adverse climate change impacts).

<sup>29</sup> See *id.* at 506-07 (describing the United States' superior position to mitigate and adapt to climate change).



### 2.3. *The Climate Forecast for Tuvalu*

Faced with economic justifications and international inertia, Tuvalu continues to feel the ever-increasing effects of climate change. For centuries, the islanders adapted to scarce resources and fierce tropical storms that struck the island once or twice per decade.<sup>30</sup> However, the change in climate and atmosphere caused these same devastating storms to strike seven times in the 1990s.<sup>31</sup> Additionally, high tides and floods that traditionally occurred once per year now frequently batter the island from November through March, leaving Tuvaluans worried what the future holds for them. As the island nation struggles to survive the physical rise of water and the damage of storms, rising floodwaters have increased the salt water table,<sup>32</sup> exacerbating the already difficult agricultural situation on the island.<sup>33</sup> These floodwaters, or "king tides," wash over the island's main roads and croplands, compounding the food and freshwater scarcities.<sup>34</sup> As food becomes scarce, health problems such as diabetes and hunger will increase.<sup>35</sup> Stagnating

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<sup>30</sup> See HOLLEY RALSTON ET AL., CLIMATE CHANGE CHALLENGES TUVALU 7 (Germanwatch Climate Responsibility Campaign ed., 2004), available at <http://www.germanwatch.org/download/klak/fb-tuv-e.pdf> ("Tuvalu has always had to fight with extreme weather events like storm surges and floods."); Jacobs, *supra* note 1, at 105–06 (describing the history of Tuvalu's inhabitants and how they have dealt with extreme weather). "During the fiercest of these storms, the inhabitants would protect themselves from being blown into the Pacific by tying themselves to coconut palms, hoping the wind was not forceful enough to take the rooted trees as well." *Id.* at 106.

<sup>31</sup> See Jacobs, *supra* note 1, at 106 (describing the multiplication in intensity and number of natural disasters befalling Tuvalu because of global warming).

<sup>32</sup> See *id.* (discussing the negative impact that rising water has had on island agriculture).

<sup>33</sup> See *id.* at 106–07 (explaining how sandy soil makes island agriculture difficult and how global warming effects amplify this difficulty).

<sup>34</sup> See Söderblom, *supra* note 17, at 60 (describing the damage "king tides" have caused in Tuvalu); SYNTHESIS REPORT, *supra* note 10, at 49 (discussing the exacerbating effects of climate change on freshwater availability); RALSTON ET AL., *supra* note 30, at 10 ("A great threat to food security is the rising sea level, which leads to salinization of the soil and ground water."); FRIENDS OF THE EARTH, A CITIZEN'S GUIDE TO CLIMATE REFUGEES sec. 2 (2007), available at <http://www.foe.org.au/resources/publications/climate-justice/CitizensGuide.pdf> ("Saltwater intrusion reduces the land's productive capabilities. It has already affected communal crop gardens on six of Tuvalu's eight islands.").

<sup>35</sup> See Söderblom, *supra* note 17, at 62 (describing the increases in disease that accompany global warming); SYNTHESIS REPORT, *supra* note 10, at 48, 51, 53 (predicting health problems that global climate change may cause); FRIENDS OF THE EARTH, *supra* note 34, sec. 2 (describing the increase in vector and waterborne diseases accompanying warmer temperatures).

water, variability in temperature, moisture, and solar radiation will increase the frequency and seriousness of epidemics of serious diseases such as malaria and dengue.<sup>36</sup> Thus, the Tuvaluans are faced with the harsh reality that “the future of [their] island above water is rather grim.”<sup>37</sup> In addition, even if they were somehow able to stop the ocean from rising and engulfing their nation, they would still face impossible challenges to their way of life.

Faced with an international stalemate of preventative inaction, the Tuvaluans recognize how few options remain for them as a people. They “have conceded defeat in their battle with the rising sea. They will abandon their homeland.”<sup>38</sup> The only problem for these so-called “climate change refugees” is finding a new land to call home.

### 3. “CLIMATE CHANGE REFUGEES”: A CONCEPT IN THE MAKING

Tuvalu’s chosen plan of action, international migration of the entire nation, depends largely on their receiving refuge elsewhere. While, as mentioned above,<sup>39</sup> they have requested environmental refugee status from New Zealand and Australia, they have not found a satisfactory or sufficient solution.<sup>40</sup> This is mainly because, while they are popularly coined “environmental refugees” and “climate change refugees” because they flee from very terrible events that threaten their human rights and lives, they do not qualify under the traditional legal definition of a “refugee.” Thus, “climate change refugee” is actually an international misnomer, with potentially dire consequences for Tuvalu.

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<sup>36</sup> See Söderblom, *supra* note 17, at 62 (discussing how climate change will affect food production and cause associated health problems); RALSTON ET AL., *supra* note 30, at 13 (linking the warming climate to increasing prevalence of insect-borne and water-borne diseases on numerous tropical islands).

<sup>37</sup> Jacobs, *supra* note 1, at 106.

<sup>38</sup> NPR, *supra* note 4; *see id.* (“The Pacific island nation of Tuvalu is slowly sinking beneath the sea, the Prime Minister is worried, and the citizens have a choice to make: they can watch as the beaches disappear or they can leave.”).

<sup>39</sup> *See supra* note 4 and accompanying text.

<sup>40</sup> Under the Pacific Access Category immigration program, New Zealand has agreed to accept seventy-five Tuvaluans a year who meet specific immigration categories. FRIENDS OF THE EARTH, *supra* note 34, at 6. Australia, on the other hand, has refused to accept any environmental refugees from Tuvalu. *Id.*

### 3.1. *The Traditional Refugee Definition Does Not Include Environmental Displacement*

The definition of a refugee was set out in the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention" or "Convention").<sup>41</sup> Over fifty years later, this definition has been adopted, often verbatim, by most countries implementing their refugee statutes.<sup>42</sup> The definition requires (i) a fear, (ii) that is well-founded, (iii) of persecution (iv) based on reasons of race, religion, nationality, membership in a particular social group, or political opinion.<sup>43</sup>

Only if those strict requirements set forth in the definition are met, especially regarding persecution based on one of the five allowable grounds, will those fleeing be afforded refuge in a host country. However, for those who meet the definition laid out in the Refugee Convention, the specific and legal protections are extensive. Those who can meet the standards of being a refugee under the Convention's definition are first protected from being forced to return to homelands from which they flee, and, more importantly, allowed to resettle and establish new lives in host countries.<sup>44</sup> While this may seem potentially fruitful for Tuvalu, they do not meet the definition. "Environment" and "climate change" are not one of the five accepted grounds, and Tuvaluans do not count as "refugees" under the Convention definition.<sup>45</sup>

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<sup>41</sup> Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (1954) [hereinafter Refugee Convention] (entered into force Apr. 22, 1954), available at <http://www2.ohchr.org/english/law/refugees.htm>.

<sup>42</sup> See Jessica B. Cooper, Student Article, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 480 (1998) [hereinafter Cooper] (describing how the U.N. definition of a "refugee" remains the "functional core of international refugee jurisprudence").

<sup>43</sup> Refugee Convention, *supra* note 41, art. 1.

<sup>44</sup> Cooper, *supra* note 42, at 481.

<sup>45</sup> For a discussion on why environmentally displaced persons should not count under the traditional refugee definition and laws as they stand see Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 Iowa L. Rev. 1107, 1113 (2009). "[E]nvironmental migrants are unlikely to benefit from the definition of refugee and [there are] dangers in construing the law to allow [them] to fall under the pre-existing refugee definition." *Id.*

Scholars who comment on this disconnect explain, “[u]nfortunately, the refugee definition is a product of its time.”<sup>46</sup> Negotiated and adopted in the tragic aftermath of WWII, the Refugee Convention seemed to limit itself to those events that had just happened: it reflected Western notions of rights and needs as seen from a Western perspective after World War II.<sup>47</sup> Moreover, this limited scope<sup>48</sup> “was intended to distribute the European refugee burden without any binding obligation to reciprocate by way of the establishment of rights for, or the provision of assistance to, non-European refugees.”<sup>49</sup> And while temporal and geographic limitations were eliminated fifteen years later in the Protocol Relating to the Status of Refugees,<sup>50</sup> the implications of the initial Eurocentric definition of refugee still has lasting consequences for the modern so-called “climate change refugee.”

Because the 1967 Protocol included no review of the substantive content of the definition,<sup>51</sup> the narrowness of the five enumerated categories was not and has not since been reviewed. As Musalo et al. conclude: “This means that most Third World refugees remain *de facto* excluded, as their flight is more often prompted by natural disaster, war, or broadly based political and economic turmoil than by ‘persecution,’ at least as that term is understood in the Western context.”<sup>52</sup> Also excluded from the list of permissible reasons for fleeing are environmental concerns, including climate change. For Tuvaluans and many other modern day “refugees,” the Refugee Convention, as it currently stands, provides no protection or hope for remedy. Climate change refugees simply are not “refugees” in the legal sense.

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<sup>46</sup> Cooper, *supra* note 42, at 482; *see also* Moberg, *supra* note 45, at 1128 (describing the refugee definition as unchanged since its promulgation in 1951).

<sup>47</sup> Cooper, *supra* note 42, at 482.

<sup>48</sup> *See* KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 36 (3d ed. 2007) (describing the limits on the refugee definition).

<sup>49</sup> *Id.*

<sup>50</sup> Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (1967) (entered into force Oct. 4, 1967), *available at* <http://www2.ohchr.org/english/law/protocolrefugees.htm>.

<sup>51</sup> *See* MUSALO ET AL., *supra* note 48, at 36 (discussing the elimination of the restrictive requirement that a refugee’s claim relate to an event in pre-1951 Europe; extending protection to refugees from other parts of the world).

<sup>52</sup> *Id.*

### 3.2. *What is a "Climate Change Refugee"?*

Regardless of whether they fit the legal definition of a Convention Refugee, Tuvaluans and other similarly displaced persons have been forced to move from their homes and traditional ways of life due wholly or in part to environmental reasons. The environmental events prompting these displacements range from flood to famine, industrial disasters to deforestation. Often, the causes are interlinked and multi-faceted, making it even harder for the environmental refugees to pinpoint the exact causes forcing them to flee to safer areas.

The number of environmentally displaced persons worldwide has been estimated to be 25 million.<sup>53</sup> This number has been further projected to rise to 150 million by the year 2050.<sup>54</sup> The sheer number of persons who fall into this misnomer refugee category prompts a reevaluation of what international legal avenues are available to someone society has deemed a climate change refugee but to whom the law refuses to grant the protections of being a Convention refugee.

### 3.3. *Putting Aside the "Refugee" Misnomer*

The exclusion from the protections and securities afforded under the Refugee Convention means that even though Tuvaluans have compelling reasons for leaving for new lands to reestablish their nation and their home, they do not have the right to do so. Tuvaluans are searching for permission to relocate their entire nation piece-mail to different countries, sacrificing their human rights to life, health, food and water, culture, self-determination, and property. Notwithstanding the fact that these rights are all protected through international human rights laws, they will be infringed upon once the waters close in over Tuvalu.

States like Tuvalu—threatened with the death of their nation at the hands of climate change—are left with this list of human rights that will be violated once they lose their land, but no recourse or redress under international refugee law. So what can other states in similar positions do, aside from beg for environmental asylum and divide their nation? Recourse to international human rights

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<sup>53</sup> Dana Zartner Falstrom, *Perspective: Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 13 COLO. J. INT'L ENVTL. L. & POL'Y B. 1, 4 (2002).

<sup>54</sup> *Id.*

law indicates potentially positive results for future Tuvalu. Climate-change-related human rights abuses cannot and should not be overlooked simply because the persecutor is “natural” or because environment is not explicitly one of the five enumerated categories granted protection under the Refugee Convention. Since the passing of the Convention—at a time when global warming sounded more pleasant than threatening and when islanders on Tuvalu never could imagine losing their entire existence—the number of environmentally displaced persons has spiked. The modern-day phenomenon of drowning islands and flooded nations requires a reassertion of the basic human rights that all peoples share and the taking of accountability for the infringement of those rights by emitting nations.

Rather than continuing to call Tuvaluans “climate change refugees”, and thereby cementing them into a legal regime that presently does not provide them with an appropriate or adequate remedy for their situation, we should put aside the misnomer for now and focus instead on arguing something more legally enforceable: the infringement of the universal and basic human rights of Tuvaluans as environmentally displaced persons (“EDP”).<sup>55</sup>

#### 4. A LEGAL LIFESAVER: THE HUMAN RIGHTS LENS

As Tuvalu’s pleas for relocation and attempts at litigation have fallen short of a workable solution for a drowning nation, the island should focus on human rights as a potential next step.

##### 4.1. *Why the Human Rights Approach is Necessary*

The European governments adopted “a refugee definition which reflected their political objectives and values, and focused more on the protection of civil and political rights, than economic, cultural or social rights.”<sup>56</sup> However, their success does not reflect a universal consensus that those latter rights do not merit

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<sup>55</sup> The use of the term “environmentally displaced person” rather than “climate change refugee” removes the problematic issue of dependence upon narrowly interpreted international refugee law for recourse. Rather than waste time arguing a tentative position under the Refugee Convention, Tuvalu and other states can then focus on their infringed human rights and the obligations created from those rights in order to find liability for climate change and its environmental effects.

<sup>56</sup> MUSALO ET AL., *supra* note 48, at 367.

protection for refugee populations; rather, it merely demonstrates how the current definition is insufficient to cover the broad range of human experiences and fears of persecution. The rights that were largely ignored in the original definition are universally protected. These include, *inter alia*, the rights to life, health, food/water, livelihood, culture, privacy and home life, and property.

Human rights and the environment are intertwined, as both mutually rely on each other: Many of the aforementioned rights are extremely sensitive to environmental degradation,<sup>57</sup> and environmental protection is beginning to depend upon the protection of human rights law. In Tuvalu's case in particular, the U.N. Human Rights Committee has stated:

Tuvalu on its own is incapable of fully protecting the wide range of rights and freedoms directly implicated by climate change; even though those rights are guaranteed under national and international law. This is because the ultimate cause of climate change originates far beyond the borders of the country and far beyond its effective control. Thus, the international community, in particular the major emitting countries of the developed world, must themselves also take responsibility for promoting and protecting the human rights of Tuvaluans by arresting their dangerous interference with the global climate system.<sup>58</sup>

Because Tuvalu cannot protect the human rights of its citizens from being violated by global warming, the major emitters of GHGs are required, under the human rights framework, to proactively protect these rights by curtailing their own emissions and warming-inducing activities.

#### 4.2. *Why the Human Rights Approach is Appropriate*

Human rights are inextricably linked with climate change issues precisely because climate change is a human problem with

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<sup>57</sup> See HUNTER ET AL., *supra* note 28, at 1366 (explaining the interplay between human rights and the environment).

<sup>58</sup> Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439, 465 (2009) (quoting the Human Rights Committee).

human consequences and dilemmas.<sup>59</sup> Furthermore, any strategy “to deal with climate change, whether in terms of adaptation or mitigation, must incorporate the consequences for humans, as individuals and communities, and the human rights framework is the most effective way to do so.”<sup>60</sup>

#### 4.3. *Why the Human Rights Approach Works*

The human rights approach to climate change works because it emphasizes the legal rights guaranteed by international human rights documents universally ratified and enforceable against emitting states. Indeed, human rights treaty bodies can progressively issue rights in the face of climate change or on the obligations of states charged with responsibility to uphold the rights of others.<sup>61</sup> Where global warming seems like a purely scientific problem, international human rights law imposes obligations on emitting States to address human vulnerabilities to climate change.<sup>62</sup> This human rights perspective shifts the focus of the legal enforcement mechanisms more directly onto the individuals affected by climate change. Furthermore, “human rights also introduce an accountability framework that is an essential element of the promotion and protection of human rights

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<sup>59</sup> See *Introduction to HUMAN RIGHTS AND FORCED DISPLACEMENT* ix (Anne F. Bayefsky & Joan Fitzpatrick eds., 2000).

Human rights considerations are central across the spectrum of the refugee problem, from departure, through refuge, to solutions. Violations of human rights are a major cause of forced displacement . . . . Human rights considerations are key to the realization of long-term solutions to the problems of forced displacement. Implementation of human rights standards is inseparable from the overall goal of conflict-resolution and peace. Invoking the language of human rights and available international remedies for human rights violations can help the victims of forced displacement.

*Id.*

<sup>60</sup> Kyung-wha Kang, Deputy High Comm’r for Human Rights, Office of the U.N. High Comm’r for Human Rights, Address at the Conference of the Parties to the UNFCCC and its Kyoto Protocol (Dec. 14, 2007), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/013DC0FAA475EC87C12573B10074796A?opendocument>

<sup>61</sup> See *id.* at 465–66 (describing the role that human rights treaty bodies play in an analytical and advocacy sense in the growing climate change regime).

<sup>62</sup> See Kyung-wha Kang, *supra* note 60 (examining the obligations which international human rights law imposes on states that are relevant to addressing human vulnerabilities to climate change).



itself, by holding governments, the duty-bearers accountable to reducing the vulnerability . . . to global warming and assisting them in adapting to the consequences."<sup>63</sup> Thus, the human rights approach to climate change provides a "framework" wherein obligations to protect human rights are enforceable against governments.

#### 4.4. *Protected Rights Imperiled by Climate Change*

For Tuvalu, human rights may represent a last avenue towards some sort of remedy. The United States and Australia, as well as many other developed nations who emit GHGs, have ratified most of the foundational human rights documents, including the Universal Declaration on Human Rights ("Universal Declaration"),<sup>64</sup> the International Covenant on Civil and Political Rights ("ICCPR"),<sup>65</sup> and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").<sup>66</sup> These documents give rise to international legal obligations that Tuvaluans and other environmentally displaced persons could use to advocate their position against emitters. The rights enumerated below are most pertinent to Tuvalu.

##### 4.4.1. *Right to Life*

The right to life is the most important human right: "without it, no other rights would make sense,"<sup>67</sup> and it is considered a peremptory norm of international law.<sup>68</sup> Thus, no derogation is permitted—even in times of emergency—and it can only be

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<sup>63</sup> *Id.*

<sup>64</sup> Universal Declaration of Human Rights, G.A. Res. 217A, ¶ 1, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

<sup>65</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR].

<sup>66</sup> International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR].

<sup>67</sup> HUNTER ET AL., *supra* note 28, at 1373.

<sup>68</sup> See, e.g., Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 35, 45 (2008) (describing the right to life as the most fundamental of all rights).

modified by a subsequent norm of general international law having the same character.<sup>69</sup> The right to life is universal and obligatory, enshrined explicitly or implicitly in every international human rights instrument.<sup>70</sup>

Due to increased risks of hurricanes, flooding, air pollution, vector-borne diseases, famine, and heat waves, climate change threatens the right to life of people all over the world.<sup>71</sup> Tuvaluans can argue that they are “facing extinction,” and that they have become “endangered because of climate change,”<sup>72</sup> because the rising oceans will completely drown their nation and make it impossible for them to continue their indigenous way of life.

#### 4.4.2. *Right to Health*

Article 25 of the Universal Declaration guarantees 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 . . . .”<sup>73</sup> Similarly, the ICESCR recognizes the human right to health as the “right of everyone to the enjoyment of the highest attainable standard of

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<sup>69</sup> See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (defining a peremptory or *jus cogens* norm).

<sup>70</sup> See HUNTER ET AL., *supra* note 28, at 1373–74 (listing the human rights instruments containing the right to life). Among them are the Universal Declaration, Article 3; the ICCPR, Article 6; the Inter-American Convention, Article 4; the American Convention on Human Rights, Article 4; the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3; and the African Charter on Human and Peoples’ Rights, Article 4. *Id.*

<sup>71</sup> See, e.g., Atapattu, *supra* note 68, at 46 (“[A]s a result of climate change, the right to life of people all over the world will be at risk due to increased incidence of hurricanes, cyclones, flooding, heat waves, increased air pollution, and vector borne diseases.”); notes 32–42 and accompanying text (describing the devastating potential effects of climate change on Tuvalu).

<sup>72</sup> These arguments are borrowed from a petition submitted by the Inuit peoples against GHG emitters in the United States. Atapattu, *supra* note 68, at 46. The Inuit are facing a similar fate as the Tuvaluans; their homes on the Arctic ice are melting due to rising global temperatures. See *id.* at 55–58 (discussing the rights argued for by the Inuit Petition); Sheila Watt-Cloutier, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), available at [http://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf) (arguing that the United States is the largest contributor to the climate change problem, which is adversely affecting every aspect of Inuit life).

<sup>73</sup> Universal Declaration, *supra* note 64, art. 25.

physical and mental health."<sup>74</sup> The right to health and well-being<sup>75</sup> is closely associated with rights to food, adequate living conditions, and safe and healthy working conditions.<sup>76</sup> Climate change also poses serious health consequences, such as "premature death, serious illness, and the spread of disease."<sup>77</sup> Furthermore, threats to the food supply, natural disasters, infectious diseases, sea-level rise, changes in precipitation patterns, and increased incidences of extreme weather events will impair the right to health.<sup>78</sup> This right could be instrumental to Tuvalu's argument that even if climate change does not engulf its islands, it will destroy all chances of healthy life that would remain: the islands would be uninhabitable due to salt-water invasion, crop poisoning, flooding, storms, and disease.<sup>79</sup>

#### 4.4.3. *Right to Food and Water*

Also intertwined with the rights to life and health is the right to food and water. Article 25 of the Universal Declaration and Article 11 of the ICESCR link the rights to life and health with adequate food.<sup>80</sup> Additionally, in 2002, the United Nations Human Rights Committee recognized water access as a basic human right.<sup>81</sup> For Tuvalu, these rights will be especially imperiled by the rising sea level. Pulaka, the island's main agricultural food source, is a slow-

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<sup>74</sup> ICESCR, *supra* note 66, art. 12.

<sup>75</sup> See HUNTER ET AL., *supra* note 28, at 1375-76 (listing human rights instruments containing the right to health and well-being).

<sup>76</sup> See *id.* at 1375 (examining how many human rights instruments treat the right to health as closely related to the rights to food, adequate living conditions, and safe and healthy working conditions).

<sup>77</sup> Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 20 HASTINGS INT'L & COMP. L. REV. 231, 252 (2007).

<sup>78</sup> See *id.* at 253-354 (describing long-term health consequences of human-induced climate change).

<sup>79</sup> See *supra* Section 2.3 (describing the effects of climate change on Tuvalu).

<sup>80</sup> See ICESCR, *supra* note 66, art. 11 ("The States Parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food . . ."); Universal Declaration, *supra* note 64, art. 25 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food . . .").

<sup>81</sup> See U.N. Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rights [ECOSOC], 29th Sess., *General Comment No. 15: The Right to Water*, para. 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), available at [http://www2.ohchr.org/english/issues/water/docs/ICESCR\\_GC\\_15.pdf](http://www2.ohchr.org/english/issues/water/docs/ICESCR_GC_15.pdf) (discussing access to water as a basic human right).

growing tuber that has been threatened increasingly by the rising ocean level. Fresh water security is now a major problem for Tuvaluans. Frustrated farmers have seen their pulaka pits poisoned by salt water intrusions from flooding, and increasingly, the islanders have had to import their food.<sup>82</sup> Islanders will have to change their agricultural way of life and adapt to western diets in order to survive.

#### 4.4.4. *Indigenous Peoples' Right to Self-Determination and Cultural Expression*

The rights to self-determination and cultural expression are particularly important to indigenous peoples, as their way of life and very existence are often inextricably tied to their environment.<sup>83</sup> Because "[t]he survival of indigenous peoples depends upon the integrity of their environment, . . . indigenous rights [are violated] through direct and indirect harm to the people and the resources that sustain them."<sup>84</sup> In the recognition of these rights as inviolable, Tuvalu has a very strong argument against the emitting world. If global warming, as predicted, causes the sea level to rise more than the few meters necessary to completely submerge Tuvalu, the islanders lose their entire physical nation.

Yet, it does not stop there. As it turns out, when islands sink, they not only lose their land, but also the territorial waters surrounding their islands.<sup>85</sup> As one article points out, "if a country sinks in its entirety, then not only will that people lose their nation, and their seat in the United Nations General Assembly, but they also lose their territorial waters."<sup>86</sup> One would think that there are

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<sup>82</sup> See Mark Hayes, *We Are All Tuvaluans*, 12 GRIFFITH REV. 172, 180 (2007), available at [www.tuvalu.islands.com/features/GriffithReview2007/GriffithReview2007-01-05.html](http://www.tuvalu.islands.com/features/GriffithReview2007/GriffithReview2007-01-05.html) ("The effects of global warming here are not spectacular. They're creeping and insidious, weakening the already fragile fabric that enables this tiny atoll society to exist.").

<sup>83</sup> See HUNTER ET AL., *supra* note 28, at 1383–86 (providing a list of human rights instruments containing the rights to self-determination and cultural expression).

<sup>84</sup> *Id.* at 1383; see also RALSTON ET AL., *supra* note 30, at 8–11 (describing how the loss of resources that Tuvaluans depend upon for life could spell disaster for the island's people, even before the island drowns).

<sup>85</sup> See Söderblom, *supra* note 17, at 62 ("Territorial waters are determined from a country's coastline. If a coastline shifts then the Exclusive Economic Zone of a nation (generally an area of 200 nautical miles) shifts too.").

<sup>86</sup> *Id.*

surely international protections against such devastating losses, against the denial of fundamental human rights such as the right to live, to keep one's history, and to have a future. Such protections do exist. When the ocean drowns Tuvalu, the loss of sovereignty and statelessness caused by climate change will violate Tuvalu's rights of self-determination.

Article 22 of the Universal Declaration exemplifies the interplay of self-determination and cultural expression:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>87</sup>

Additionally, other international treaties support these basic human rights: article 1 of the ICESCR protects the right of self-determination, and articles 15 of the ICESCR and 27 of the ICCPR guarantee the right to enjoy one's own culture.<sup>88</sup>

Thus, the loss of the islands will signal the loss of the Tuvaluan history and way of life. Forced to move to a "mainland," Tuvaluans will be faced with new industrialized societies and economic hardships. Their agricultural and subsistence based way of life will, most likely, be lost forever. This would violate the "dignity" and "free development" of the Tuvalu peoples, because they would no longer be able to raise their children as they wish, to live in conjunction with the land and sea as they have always done, and to continue to celebrate their unique history, geography, and

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<sup>87</sup> Universal Declaration, *supra* note 64, art. 22.

<sup>88</sup> See ICCPR, *supra* note 65, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise [sic] their own religion, or to use their own language."); ICESCR, *supra* note 66, art. 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); *id.* art. 15 (protecting "the right of everyone . . . to take part in cultural life"); Limon, *supra* note 58, at 455-56 ("What are the obligations of states, in the context of climate change, to respect the right of self-determination and to prevent loss of statehood?").

culture.<sup>89</sup> They would lose their right and ability to culturally express themselves as they wish.

#### 4.4.5. *Right to Property*

The right to use and enjoy property clearly covers the loss of one's entire nation. Article 17 of the Universal Declaration provides that "[e]veryone has the right to own property" and also that everyone the right not to be "arbitrarily deprived of his property."<sup>90</sup> Tuvaluans "face mass resettlement choices and destruction of culturally and historically significant lands and buildings."<sup>91</sup> Indeed, many islanders have already accepted that resettlement is the only action available, as their land will one day be underwater.

Violation of these human rights is happening or will happen soon, as the waters close in over Tuvalu. Contained within their various instruments, these rights demand that something be done. The continued emission of GHGs, which further exacerbates global warming and rising ocean levels, violates these rights and demands recourse.

#### 4.5. *Legal Recourse Under The Human Rights Lens*

Once violations of some of these basic human rights have been established, the U.N. Office of the High Commissioner for Human Rights ("OHCHR") argues that States have legal obligations to:

- (1) Refrain from interfering with the enjoyment of human rights in other countries;
- (2) Take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries;

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<sup>89</sup> See, e.g., Alexandra Berzon, *Tuvalu is Drowning*, SALON.COM, Mar. 31, 2006, <http://www.salon.com/news/feature/2006/03/31/tuvalu/print.html> (last visited Mar. 24, 2010) [hereinafter Berzon] (describing the impact climate change will have upon the Tuvaluan way of life); *All Things Considered: Tiny Island Makes Climate a Priority* (National Public Radio broadcast June 4, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10712509> (interviewing the President of Palau, a nation facing a similar fate, wherein the President laments that the children will have to move off the island and find jobs elsewhere in trades unfamiliar and unknown to them).

<sup>90</sup> Universal Declaration, *supra* note 64, art. 17.

<sup>91</sup> Aminzadeh, *supra* note 77, at 249.

- (3) Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfillment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons; and
- (4) Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.<sup>92</sup>

Thus, after establishing the violation of its human rights, Tuvalu could demand injunctive relief to prevent companies from producing products that contribute to global warming or request redress for its climate change refugees and displaced persons. The OHCHR further suggests that:

[A]ll states party that are to the ICESCR have a legal obligation through international cooperation (i.e., the [U.N. Framework Convention on Climate Change] process) to reduce emissions to levels consistent with the full enjoyment of human rights (i.e., safe levels) in all other countries (especially vulnerable countries), [and] to find adaptation measures in vulnerable countries . . . .<sup>93</sup>

The OHCHR recognizes and supports the linkage between climate change, human rights, and obligations on emitting states. Once a breach of a duty under one of the basic, universal human rights treaties has been established, it will be much easier for states like Tuvalu to demand that other states fulfill certain obligations, enjoin companies or other third parties within their jurisdictions to stop exacerbating warming effects, provide assistance and aid, including refugee asylum, and include climate policy considerations in future negotiations.

##### 5. DEMANDS TO EXPAND THE REFUGEE REGIME

The options for Tuvalu are few. While the remedy under refugee law—namely, asylum—is not perfect, it seems to be the only card Tuvalu has left to play. Sadly, international law as it

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<sup>92</sup> Office of the U.N. High Comm'r for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change, para. 86, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

<sup>93</sup> Limon, *supra* note 58, at 455.

currently stands is not adequate to protect them.<sup>94</sup> As the globe continues to warm, predictions show millions more climate change refugees will soon be fleeing their homes looking for asylum as a last resort. The needs of those countries, coupled with the human rights argument, demand a renegotiation of the Refugee Convention that considers environmental concerns. Current climate change refugees can and should insist, based on their violated human rights, on being included within the refugee framework. While critics staunchly defend the strict reading of the Refugee Convention definition, the retooling of this international definition may not be as difficult as it sounds. In fact, some scholars have already advocated for such an expansion as “no more than an easy extension of human rights policy.”<sup>95</sup> For example, Cooper argues that “since the 1951 refugee definition is heavily imbued with human rights notions, and environmental refugees are no less entitled to their basic rights and needs than their traditional counterparts, using human rights concepts to expand the refugee definition has natural appeal.”<sup>96</sup> In addition, Musalo et al. comment on how “[t]he realities of the human condition have continued to exert powerful stretching forces upon the traditional refugee definition,” underlining the need for an expanded definition and inclusiveness to “more fully respond to the broad range of individuals who flee in fear.”<sup>97</sup> Certainly, Tuvaluans will “flee in fear” if and when their homes are completely underwater. Their “reality” as climate change refugees requires a “stretching” of the traditional refugee definition.

There is support even within the current regime itself for a more expansive approach to defining who qualifies as a refugee. The framers of the Refugee Convention recognized that certain individuals not explicitly falling within the treaty’s provisions would have legitimate and compelling claims for international protection.<sup>98</sup> The participants at the drafting convention closed out

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<sup>94</sup> See Falstrom, *supra* note 53, at 2 (advocating for a new convention rather than an expansion of the Refugee Convention as a means to protect climate change refugees).

<sup>95</sup> Cooper, *supra* note 42, at 488.

<sup>96</sup> *Id.*

<sup>97</sup> MUSALO ET AL., *supra* note 48, at 54–55.

<sup>98</sup> See *id.* at 55 (describing how the participants at the drafting convention adopted the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, §IV, E).



negotiations by unanimously adopting the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, §IV, E:

The Conference, [e]xpresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.<sup>99</sup>

The framers of the Refugee Convention explicitly intended that the Convention apply beyond its explicated terms, and more as a guide for permissible migrations of refugees. They also recognized the limitations in the definition and hoped that these would be "exceeded." Potential arguments for the expansion of the refugee regime to include EDP could proceed as follows.

#### 5.1. Well-Founded Fear

Proving a well-founded fear requires establishing a situation wherein "a reasonable person in the same circumstances would fear persecution."<sup>100</sup> As numerous reports have concluded, Tuvalu will be subsumed. The islanders all fear this end to their way of life, and live with the reality of this fate every day.<sup>101</sup> This fear is indeed well founded, and no credibility hearings need be conducted. Reports from countless NGOs, scientists, policy analysts, and individuals on the ground confirm that Tuvalu will likely drown out of existence. This violates the Tuvaluans' rights to life, and, by consequence, all other human rights.

#### 5.2. Persecution

Tuvalu may encounter resistance to its application of "persecution." As traditionally read, this usually involves an act of government or perhaps outsider groups fighting the government, but not the ocean. Nevertheless, the original Refugee Convention

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<sup>99</sup> *Id.*

<sup>100</sup> Falstrom, *supra* note 53, at 9.

<sup>101</sup> See generally RALSTON ET AL., *supra* note 30 (examining the threat climate change poses to Tuvalu and the drastic impact it will have on the Tuvaluan way of life).

never defined persecution. Proponents of an expanded definition clarify that persecution can also mean the “sustained or systematic denial of basic human rights demonstrative of a failure of state protection.”<sup>102</sup> The interpretation of “persecution” as “the failure of governments to protect” will greatly help climate change refugees, who usually flee natural disasters. Moreover, with the expanded reading of persecution, it is not just the natural actors themselves that cause the harm, but also the inability of the climate change refugees’ governments to help. The governments’ inability to mitigate and adapt to climate change, both financially as well as with proper infrastructure, *does* affect only a set of people and *does* deny them their basic human rights, as protected and required by the Declaration, the Refugee Convention, and countless other international norms and documents.

### 5.3. *On the Grounds of . . .*

Indeed, while the straight definition of a refugee does not allow for environmental disturbances as a justified ground for fleeing, two regional organizations or conferences have adopted refugee definitions that expand upon the 1951 Convention framework and that could perhaps prove useful for future documents. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa allows for “events seriously disturbing public order in either part or the whole of his country of origin or nationality” as legitimate grounds for refugee status in addition to the five traditional grounds.<sup>103</sup> Similarly, Central American states adopted the Cartagena Declaration on Refugees, which also provides refuge for those fleeing “seriously disturbed public order.”<sup>104</sup> These two regional agreements recognize the validity of flight in the circumstances of generalized danger, which climate changes could be considered. As the world continues to deal with more disasters and events causing fleeing, more regions of the world should adopt these broader regional

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<sup>102</sup> MUSALO, *supra* note 48, at 231.

<sup>103</sup> Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, art. I, para. 2, June 20, 1974, 1001 U.N.T.S. 45.

<sup>104</sup> Cartagena Declaration on Refugees, sec. III.3, Nov. 22, 1984, *reprinted in* 3 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND LEGAL TEXTS CONCERNING REFUGEES AND OTHERS OF CONCERN TO UNHCR 1197 (2007).

documents allowing refuge for more than the five recognized reasons.

Even arguing under the traditional five groups, the case can be made that climate change refugees fit into this rubric. They are members of a "particular social group" who are persecuted on account of their membership. Critics of this expansion decry this application of the "social group" grounds for refugee status as "environmentally-displaced persons do not fit [in this category] because they do not have the immutable characteristic required to provide refugee status under the existing definition."<sup>105</sup> It is precisely here, though, that they do fit. I argue that EDP, such as the Tuvaluans, do indeed have "immutable characteristics"—their culture, home, and history—for which they suffer persecution. Furthermore, these universal rights (which Tuvaluans already have) will be sacrificed when the ocean overtakes their island. If Tuvalu were not a small island in the Pacific Ocean in between Australia and Hawaii, it would not be in danger of its government being unable to stop the ocean from rising too high. Its people would not fear increasing carbon emissions from around the globe ending their very way of life. They have a well-founded fear of persecution precisely because of their membership in the social group of Tuvaluans—a group of small island dwellers whose homes are in peril due to the rise in sea levels.

Based on human rights arguments and on the need to protect the rights enumerated above, the current regime should be revised to include climate change refugees. After all, a refugee is a refugee.<sup>106</sup>

## 6. CONCLUSION

For Tuvalu, the future is bleak. Tuvaluans have human rights and principles of international law in their favor, but these intangibles will not save their island from a watery death. Even though most Tuvaluans have not given up and continue to spearhead international cries to stop global warming, the island will most likely drown, save some miracle adaptation measures that might not exist and that no one is willing to pay for. What

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<sup>105</sup> Falstrom, *supra* note 53, at 11.

<sup>106</sup> See Berzon, *supra* note 89 (quoting a climate change advocate who believes "[t]hese people are being forced into a position of [sic] where they have nowhere to go, including home, and that's the definition of a refugee.").

they really need now is a dry place to call home and on which to rebuild their nation. As former Tuvaluan Prime Minister Koloa Talake heartbreakingly explained in a radio interview about his decision to abandon his home and move to New Zealand, “the only thing that [he] will bring to New Zealand is his atlas, so when [Tuvalu] finally disappears, his grandchildren or their children will still be able to see the dot on the map that once upon a time was a country called Tuvalu.”<sup>107</sup>

An important lesson to take away from the Tuvalu cause is that *Tatou ne Tuvalu Katoa*—we are all Tuvaluans.<sup>108</sup> Tuvalu may be the first “climate change nation casualty,” but it certainly will not be the last. There is a need for a new legal regime capable of handling the exodus that will occur in the future due to climate change and able to give the future Tuvalus some hope for a future. A change in the definition of refugee should be enacted internationally. Climate change refugees should be included, because they do suffer fears of economic persecution and because they do require help from the international community. A refugee is a refugee, and the legal definition of refugee should be expanded to include all those who flee their homes in fear, suffer violations to their basic human rights, and who seek asylum in order to survive.

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<sup>107</sup> NPR, *supra* note 4.

<sup>108</sup> See Hayes, *supra* note 82, at 175 (citing the phrase as “used by some environmentalists who understand that global warming and rising sea levels, while gravely threatening the existence of low-lying tropical island countries like Tuvalu, threaten us all”).