

THE PLIGHT OF “ENVIRONMENTAL REFUGEES”*

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Abstract

Among many challenges faced by modern society, global warming and climate change have – if not the most – profound impact as it affects mankind as a whole. Farming communities around the world suffer dying crops and failed harvest due to unpredictable weathers, and cities report unprecedented temperature during summer. One of the most discussed is how the rising global temperature affects the ice caps in the North and South Pole. Compared to data from a hundred years ago, it is shown that the ice formation in the North Pole has decreased in mass and takes longer time to reform in the winter. Scientists predict that if the ice in Greenland melted, the sea level would rise up to seven meters, drowning many coastal cities and low-lying islands. Large States could afford to evacuate their citizens to the mainland, however such is luxury that small, archipelagic States do not possess. The paper seeks to examine whether the international community is prepared in terms of legal instrument should such event occur, and what protection can be granted to people who have lost their homes to the sea.

Intisari

Di antara banyak tantangan yang dihadapi oleh masyarakat modern, pemanasan global dan perubahan iklim memberikan - jika bukan yang paling - dampak yang mendalam karena mempengaruhi umat manusia secara keseluruhan. Masyarakat pertanian di seluruh dunia menderita tanaman mati dan gagal panen karena cuaca yang tak terduga, dan kota-kota melaporkan suhu yang belum pernah terjadi sebelumnya selama musim panas. Salah satu yang paling sering dibahas adalah bagaimana meningkatnya temperatur global bisa mempengaruhi lapisan es di Kutub Utara dan Selatan. Dibandingkan dengan data dari seratus tahun yang lalu, terlihat bahwa pembentukan es di Kutub Utara mengalami penurunan massa dan membutuhkan waktu lebih lama untuk pulih di musim dingin. Para ilmuwan memprediksi bahwa jika es di Greenland mencair, permukaan laut akan naik sampai tujuh meter, banyak kota pesisir yang akan tenggelam dan dataran pulau-pulau menjadi rendah. Negara besar mampu untuk mengevakuasi warga mereka ke daratan utama, namun itu adalah kemewahan yang negara kepulauan tidak memiliki. Jurnal ini bertujuan untuk menguji apakah masyarakat internasional, siap dari segi instrumen hukum, dan perlindungan apa yang dapat diberikan kepada orang-orang yang telah kehilangan rumah mereka yang tertelan laut.

Keywords: refugee, international law, environment, climate change, global warming.

Kata Kunci: pengungsi, hukum internasional, lingkungan, perubahan iklim, pemanasan global.

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Recently, the international community has been particularly concerned about the fate of the people of Tuvalu, an archipelagic nation located in the Pacific Ocean halfway between Hawaii and Australia. The people of Tuvalu have battled with harsh conditions since the first settlers colonized the islands, from sandy soil unsuited for crops to severe tropical storms. Yet the biggest challenge is man-made; rising sea levels have slowly consumed the outer edges of the low-lying islands they call home and show no sign of receding.

Concerned with the fate of his people and nation, the Prime Minister has requested environmental refugee status for its citizens from both Australia and New Zealand. Neither responded to the plea. Much to the indignation of Tuvaluans, Australia firmly refuses granting the status of refugees to the displaced Tuvaluans. The response from New Zealand is much kinder as announced in 2001, New Zealand provides a quota of 75 Tuvaluans to apply for permanent residency in New Zealand under *Pacific Access Category*.⁶⁶ However considering that Tuvalu has the population of 11,000,⁶⁷ at the rate of 75 Tuvaluans a year it would take 140 years before the current of people of Tuvalu can secure themselves. Scientists have predicted that the Tuvaluan islands will be submerged in 50 to 90 years' time.⁶⁸ Studies show that sea levels in western Pacific are rising at

about four times the global average,⁶⁹ making finding a solution is even more of a necessity.

The plight of the people of Tuvalu is shared across the Pacific and Caribbean. Rising sea level due to increase of carbon dioxide in the atmosphere following heavy use of fossil fuel – a phenomenon popularly known as “global warming” – threatens to inundate and completely submerge low-lying islands that millions in the Pacific and the Caribbean call home. Severe tropical storms further complicate the matter; in March 2015, Vanuatu was ravaged by Cyclone Pam.⁷⁰ Almost half of its population was displaced and islands on the edge of its territory were rendered uninhabitable. Kiribati's President Anote Tong predicted that his country – home to about 103,000 people – will start to disappear by 2030.⁷¹ Faced with the prospect of losing the very land they stand on, these people find themselves migrating in the thousands, an event known as “environmental migration”, or Environmentally Displaced People (EDPs).⁷²

⁶⁶ "Government announces Pacific access scheme". Mark Gosche, Pacific Island Affairs Minister (NZ). 20 December 2001. Retrieved on 20 November 2015.

⁶⁷ "Tuvalu: Millennium Development Goal Acceleration Framework – Improving Quality of Education" (PDF). Ministry of Education and Sports, and Ministry of Finance and Economic Development from the Government of Tuvalu; and the United Nations System in the Pacific Islands. Retrieved on 20 November 2015.

⁶⁸ Patel, S. S. (2006). "A sinking feeling". *Nature* 440 (7085): 734–736. doi:10.1038/440734a. PMID 16598226.

⁶⁹ UNEP News Centre. (2014, 5 June). Sea-Level Rise in Small Island Nations - Up to Four Times the Global Average - to Cost US\$ Trillions in Annual Economic Loss and Impede Future Development: Shift to Green Policies and Investment Critical. Retrieved on 20 November 2015.

⁷⁰ Rkaina, S. (2015, 17 March). Cyclone Pam: Vanuatu death toll hits 24 as 3,300 people displaced by 'monster' storm. *Mirror*. Retrieved on 20 November 2015 from <http://www.mirror.co.uk/news/world-news/cyclone-pam-vanuatu-death-toll-5347338>.

⁷¹ Statement by H.E President Anote Tong, 69th UNGA, New York, 26 September 2014. Retrieved on 20 November from http://www.un.org/en/ga/69/meetings/gadebate/pdf/KI_en.pdf.

⁷² Science for Environment Policy (2015) Migration in response to environmental change Thematic Issue 51. Issue produced for the European Commission DG Environment by the Science Communication Unit, UWE, Bristol. Available at: <http://ec.europa.eu/science-environment-policy>.

The United Nations (UN) defines “disaster” as “a serious disruption of the functioning of a society, causing widespread human, material, or environmental losses which exceed the ability “of affected society to [cope] using only its own resources.”⁷³ Severe drought, violent storms and stifling summer heat have all been attributed to the changing climate. Numerous environmental disasters have indiscriminately touched all continents with devastating effects. Various political, economic, or social factors can cause environmental disasters, which are far-reaching and inextricably linked to growth and development. However, history has repeatedly shown that the environment itself can also be a source of disaster.⁷⁴

Over the past forty years, scientists have approached the issue of environmental degradation from different perspectives and with different rules and procedures. The body of international environmental law sets forth a variety of norms aimed at preventing, reducing, and remedying the multiple aspects of environmental degradation, and environmental degradation ultimately lead to environmental disasters. In contrast, humanitarian law and human rights law consider environmental degradation from an anthropocentric point of view, addressing the adverse effects of environmental degradation on human beings. While migration to escape an environment temporarily or permanently disrupted is a critical aspect of the issue, the current international legal regime

disregards the correlation between environmental degradation and human migration.

The importance of the issue of environmentally-induced migration has been highlighted by scientists, which provoked much debate among legal academics. The seminal event in the development of a comprehensive study on the problems related to environmentally-induced migration was a 1985 United Nations Environment Programme paper on environmental refugees. The term “environmental refugee” appeared for the first time in 1992 in the report of the IOM and RPG. The definition adopted by the organization in 2008 characterizes them as: “persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad”.

The expression “environmental refugees,” though widely used for the past twenty years, is mistakenly applied. Despite being colloquially known as “refugees”, EDPs often find themselves stranded in foreign land without the benefit of persons granted such designation. Common understanding applies the term “refugee” to any person who has been forced to involuntarily leave their home, for reasons of war, persecution by the government or natural disaster. With such definition in mind, it is not difficult to conclude that EDPs are refugees. However, in Legalese, EDPs are, in fact, not “refugees”.

Although the term has seen use since late 17th century, it was not until the middle of 20th that the international community came into agreement on the definition of “refugee”. After the Second World War,

⁷³ University of Wisconsin. Disaster Management Centre., *An Overview of Disaster Management 14* (Intertext Training Servs. ed., 2d ed. 1992), available at <http://www.undmtp.org/english/Overview/overview.pdf>.

⁷⁴ Anthony H. Richmond, *The Environment and Refugees: Theoretical and Policy Issues* at 1, 5, U.N. Doc. ST/ESA/SER.N/39, U.N. Sales No. E.95.XIII.17 (1995).

as the refugee problem had not been solved, the need was felt for a new international instrument to define the legal status of refugees. Instead of *ad hoc* agreements adopted in relation to specific refugee situations, there was a call for an instrument containing a general definition of who was to be considered a refugee.⁷⁵ The Convention relating to the Status of Refugees was adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951, and entered into force on 21 April 1954.⁷⁶

The definition of “refugee” is found within Article 1 of the 1951 Refugee Convention, amended by the 1967 Protocol:

“A 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.”⁷⁷

A person claiming to be a refugee, under the provision of the 1951 Convention, must therefore exhibit characteristics provided by the aforementioned article, namely: 1) Well-founded fear of persecution due to certain

reasons, 2) outside the country of his nationality, and 3) unable or unwilling to request protection from the country of nationality. The *travaux préparatoires* of the 1951 Refugee Convention, and affirmed in the 2010 UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, emphasize the need for a manifestation of “well-founded fear of being persecuted”, without which application for the status of refugee will not be granted. Grammatical deconstruction provides further insight to the establishment of the criterion; there must be an active act of persecution that results in well-founded fear.

Although international sources lack a universally agreed definition of ‘persecution’,⁷⁸ however ‘ordinary meaning’ may be gleaned from several sources. In most cases, the active act of persecution is performed by the government, or other parties within the State. Well-founded fear of being persecuted is easily established in such cases, which would ease the process of applying for the status of refugee. However, EDPs do not enjoy the same privilege. EDPs migrate across international borders due to environmental reasons, lacking the critical characteristic of refugees, namely, well-founded fear of being persecuted, simply because persecution does not exist.

The Committee, in the drafting of the 1951 Refugee Convention, assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The

⁷⁵ UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3.

⁷⁶ United Nations Treaty Registry. Retrieved on 20 November 2015.

⁷⁷ United Nations Convention relating to the Status of Refugee, Article 1. United Nations, Treaty Series, vol. 189, p. 137.

⁷⁸ UN High Commissioner for Refugees (UNHCR), Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37), October 1997.

expression “owing to well-founded fear of being persecuted” – for the reasons stated – by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated.

Therein lies the reason why the legal status of EDPs lies in a precarious situation. Since the 1951 Refugee Convention remains the most ratified convention of its kind, legal framework of most states follow the definition set forth by the Convention. Majority of States do not acknowledge ‘refugees’ beyond the scope provided by the Convention, thus denying legal protection to EDPs. Denied of being classified as refugees, EDPs often find themselves designated and treated as illegal migrants, which is no less incorrect as migrant implies that the people have crossed international border voluntarily. Neither do they enjoy protection nor have their basic rights fulfilled; millions end up in slums with deplorable living condition.

However, the Convention itself does allow some room of interpretation. There is an increasing call from the international community – States, organizations and scholars alike – to widen the perceived narrow interpretation of the Convention, particularly towards those who do not traditionally qualify under the mainstream interpretation of ‘refugee’. The conference that adopted the Refugee Convention immediately adopted a recommendation and attached it to the Final Act, urging states to extend refugee benefits to individuals not qualifying under the narrow terms of the Refugee Convention:

“The Conference expresses 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.”⁷⁹

This statement could be interpreted to acknowledge, or possibly even express *opinio juris*, that a complementary definition would develop under customary international law. Many authors have attempted to argue that just such a definition under customary international law has arisen. Some have argued that the prevailing restrictive reading of the term “refugee” in the Convention is incorrect, disregards usage of the term prior to the Convention and is not supported by the *travaux préparatoires*.

Another indication of the supposed flexible nature of the Convention manifest in the lack of definitions in the Convention, particularly on ‘persecution’. Such may be construed to imply As stated by Professor Atle Grahl-Madsen:

“The term ‘persecution’ has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.”

Some have even argued that the Refugee Convention is merely one in a collection of human rights instruments that must be read as a whole so that the protections described by the Refugee Convention apply to any person who enjoys some form of *non-refoulement* from any human rights instrument. For example,

⁷⁹ Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.19 (1951).

Maria-Teresa Gil-Bazo argues that “in addition to refugees within the meaning of the Geneva Convention, there are other categories of individuals that have a right to protection under international law and accordingly, they are ‘refugees’ in a broader sense.”⁸⁰

As provided by Article 31 of Vienna Convention on Law of Treaties:

*“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*⁸¹

The 1951 Refugee Convention, at its core, is a human rights treaty. In general, human rights treaties possess the purpose of advancing human rights, especially belonging to those of vulnerable groups. In its second Advisory Opinion, the Inter-American Court in 1982 explained this special feature of the human rights instruments with clarity, emphasizing that:

“Modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various

*obligations, not in relation to other states, but towards all individuals within their jurisdiction.”*⁸²

The European Commission of Human Rights applied the same approach in the case of *Austria v. Italy*:

*“[T]he obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.”*⁸³

This specific human rights-centered interpretation is also apparent in the jurisprudence of the European Court of Human Rights. In *Wemhoff v. Federal Republic of Germany*, the ECHR noted that because the Convention is a ‘law-making treaty, it is [...] necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties’.⁸⁴

Interest in expanding the definition of refugee is further evidenced by the growing number of regional instruments. Both Africa and Central America recognized that the 1951 Convention was not adequate to cover the massive flows of refugees in their regions. The 1984 Cartagena Declaration and the 1969

⁸⁰ UN High Commissioner for Refugees (UNHCR), *Asylum in the practice of Latin American and African states*, 1 January 2013, ISSN 1020-7473.

⁸¹ Vienna Convention on Law of Treaties, Article 31. United Nations, Treaty Series, vol. 1155, p. 331.

⁸² The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Article 74 and 75), IACHR, Series A, No. 1, at paragraph 29 (Advisory opinion at the request of the Inter-American Commission of Human Rights).

⁸³ *Austria v. Italy*, no. 788/60, decision of the Commission of 11 January 1961, Yearbook 4, p. 116).

⁸⁴ *Wemhoff v. Germany*, 2122/64, Council of Europe: European Court of Human Rights, 25 April 1968.

Organization for African Unity (OAU) Convention expanded the definition of a refugee to include people compelled to leave their country due to events that have “seriously disturbed public order”. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa adopted a regional treaty based on the Convention, adding to the definition that a refugee is:

“Any person compelled to leave his/her country 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.”

In 1984, a group of Latin American governments adopted the Cartagena Declaration, which similar to the OAU Convention, added more objectivity based on significant consideration to the 1951 Convention. The Cartagena Declaration determine that a 'refugee' includes:

“Persons who flee their countries because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

Examples show that there are indeed changes in contemporary international law on the definition of refugee. The author opines that one must not concern himself only with the letter of the law, but its spirit as well. The author argues that the current refugee regime is too restrictive and disregards the plight of others who are in “refugee-like situation”; deprived of the same basic rights as “refugee”, but cannot enjoy protection due to semantics.

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