

ENVIRONMENTAL DEGRADATION
AND HUMAN RIGHTS ABUSES:
DOES THE REFUGEE CONVENTION CONFER
PROTECTION TO ENVIRONMENTAL REFUGEES?

ROCCA SALCEDO MESA*

ABSTRACT

The article deals with the impact of the multinational companies in the indigenous territories, situation that is creating a new kind of casualty —the environmental refugee—. The development of the multinational companies highly contribute to the violation, inter alia, of the right to life and health of vulnerable social groups. Environmental displacement affects millions of people and is likely to affect many more in the near future. They have no official status and no official protection. The International Community should respond to the humanitarian concerns of environmentally refugees, and the threat posed by the indiscriminate actions of the transnational Companies. This article questions the absence of non-relief development assistance for environmental refugees and consequently it is

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* Abogada de la Universidad Externado de Colombia, especialista en derecho de familia de la Pontificia Universidad Javeriana, máster en derecho público e internacional de la Universidad de Melbourne, Australia. Actualmente es abogada investigadora del Departamento de Derecho Internacional de la Universidad de Melbourne. Contacto: r.salcedomesa@pgrad.unimelb.edu.au - roccasalcedo@hotmail.com

the obligation of the international community to substantively extend the definition of refugee to one that encompasses those displaced for environmental reasons. The contemporary challenge is to interpret the refugee's definition in a suitable way that accommodates or include current refugee flows. This paper argues that according to the Vienna Convention, an evolutionary approach for interpretation of the Refugee Convention, should be necessary to protect new kind of refugees and therefore fulfill the objectives and purposes of the Convention.

Key words: environmental refugees; international legal instruments; multinational companies; new interpretation of the Refugee Convention; Refugee Convention.

DEGRADACIÓN AMBIENTAL Y ABUSOS DE LOS DERECHOS HUMANOS: ¿CONFIERE LA CONVENCIÓN DE REFUGIADOS PROTECCIÓN A LOS REFUGIADOS AMBIENTALES?

RESUMEN

El impacto de las compañías multinacionales en los territorios indígenas está generando una nueva categoría de víctimas, los refugiados ambientales. Los involuntarios movimientos migratorios por causa de la degradación del medio ambiente están afectando diariamente a millones de personas alrededor del mundo. El acelerado desarrollo de las compañías transnacionales ocasiona la significativa violación de derechos fundamentales, tales como los derechos a la vida y la salud, de uno de los grupos más vulnerables en la sociedad, los indígenas. Los refugiados ambientales no tienen un estatus oficialmente reconocido, y por ende carecen de protección legal. Este artículo cuestiona el vacío legislativo y por ende la falta de protección a la que se ven

enfrentados los refugiados ambientales que son víctimas de la indiscriminada intervención de las empresas multinacionales. Es obligación de la Comunidad Internacional extender la definición acerca del concepto que se tiene de refugiado, para así contemplar y proteger a los indígenas que se ven afectados por la amenazante intervención de las compañías multinacionales en sus resguardos. Es menester, para aquellos que defendemos los derechos humanos, clamar por una interpretación que, de conformidad con la Convención de Viena, se adapte a las circunstancias actuales y que efectivamente sea un instrumento legislativo que se adecue y defienda los derechos de las víctimas que cruzan fronteras en busca de estabilidad, tal como lo proclaman los objetivos y propósitos que linearon la filosofía de la Convención sobre el Estatuto de los Refugiados.

Palabras clave: compañías multinacionales; Convención sobre el Estatuto de los Refugiados; instrumentos y mecanismos legales de protección; nueva interpretación de la Convención sobre el Estatuto de los Refugiados; refugiados ambientales.

INTRODUCTION

The twenty-first century should bring new challenges to the traditional view and interpretation that the Refugee Convention had arisen. International law was originally concerned with the eradication of war as a means of resolving disputes between sovereign states. Given the proximity in time of the Holocaust and the experience of many atrocities committed during the Second World War, the Refugee Convention was adopted to protect only those persons who become refugees as result of events occurring before January 1951. Later, due to the existence of new refugee situations, the States Parties adopted the 1967 Protocol without any geographic limitation. The absence of any reference to ecological constraints in the Charter of the United Nations, the Universal

Declaration of Human Rights (DHR) 1948 and the Refugee Convention (RC) 1951 is hardly surprising. The DHR and the Refugee Convention were adopted in a historical context of the world where the environmental destruction and concomitant human rights violations were not contemplated as a whole with intrinsic and reciprocal connection.

The environment is the most recent concern of international law, although many past conflicts were essentially “environmental” insofar as they involved disputes over land or other resources¹. It was only with the emergence of the environmental movement in the 1960s that it became essential to protect the fundamental human rights due to the significant proliferation of violation of rights caused by environmental conflicts. Thus, in 1972 at the United Nations Conference on Human Environment (Stockholm), emerged the idea that an acceptable environment might constitute a precondition for the enjoyment of certain human rights: “[M]an has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits life of dignity and well being”².

According to Klaus Topfer, chief executive of the United Nations Environment Program, the “[s]wollen ranks of environmental refugees could double to 50 million in just eight years time. That is an increase of 8,500 a day”³. In 1998, for the first time in recorded history, natural disasters displaced more people than did wars or other conflicts. Thereby, The World Bank estimated that in 1998 there were 25 million persons that had been displaced due to the degradation of their environment, higher than the number of refugees due to wars. Additionally, the United Kingdom Red Cross estimated that more than half –58%– of the world’s 43 million refugees are in fact environmentally displaced. In other words, almost one in every 250 persons on our planet⁴.

1 Christopher Miller, *Environmental Rights: Critical Perspective*, vol. 1, USA, Poutledge Publisher, 1998, pp. 153-218.

2 Ibidem, p. 213.

3 United Nations Report 2004, Refugee Department, <http://www.unhcr.org>

4 Mark Townsend, “Environmental Refugees”, *The Ecologist Magazine*, USA, 1992, p. 28, <http://www.theecologist.org>

An estimated 135 million people live in areas affected by desertification, and some experts predict that up to 100 million of them could be displaced in the next twenty years⁵. Although the number of people migrating for environmental reasons is difficult to calculate, Norman Myers, an Oxford University ecologist, estimated in 1996 that twenty-five million people were environmentally displaced, compared to twenty-three million displaced by civil war and persecution. He further predicted that the number of environmentally displaced persons would double by 2010 and dramatically increase when the effects of global warming will be more significant, leading to as many as 150 million environmentally displaced persons by 2050. Environmental degradation may be an underlying cause of migration.

Global human impact on the environment is creating a new kind of casualty —the environmental refugee—. Environmentally induced movements may be either temporary, with the possibility of return, or permanent, without the possibility of return and the necessity to resettle in another area. Environmental damage can be categorized by two basic criteria. The first category is comprised by the movements of people resulting from the gradual deterioration of the environment, or environmental stress. This classification applies mainly to victims of natural disasters, such as earthquakes and volcanoes; massive storms, such as hurricanes; and environmental accidents, such as Chernobyl. The resulting damage is severe, but the land and people's lives can usually be reestablished after clean up and rebuilding. The second category of environmental refugees is usually associated with human caused permanent environmental changes and policy implementation. Examples are dams, deforestation, desertification and the human actions of the multinational companies which generate environmental degradation. In other words, natural disasters may be created or exacerbated by human activities. As humans degrade natural resources, ecosystems are less able to respond to ordinary pressure. This type

5 Jean Lambert, "The Environment and Migration: What Response", *Chicago Law Journal*, February 2002, p. 320.

of environmental refugee is displaced by massive changes in the environment that render it practically unviable for human survival. Consequently, people are involuntarily forced to leave for survival, due to the action of the industrial development⁶.

This paper focuses on refugees who are victims of the environmental degradation caused exclusively by the industrialization of companies that exploit the natural resources and destroy the environment. Environmental degradation places a strain on surrounding communities of developing countries, who are influenced and forced to move by both the decreasing quality of life in their current location, and the irreversible damage and degradation of the environment (caused by the multinational companies). Consequently, the indigenous communities are forced to flee without any governmental protection, support and compensation. Without international recognition, the environmental refugee crises could turn into major sources of global instability.

This transformation process is often described as globalization or the post-industrial era. This process may ultimately be as consequential as the two previous waves in human socio-economic development: from hunter-gatherer to agricultural societies, and then from the agricultural to industrial societies⁷. In an era of increased globalization, transnational corporations (“TNCs”) have grown in number and in power. A significant portion of modern economic development occurs through TNCs that, in an effort to maximize profit, move to developing countries. TNCs “[h]ave increased the rate of man-made environmental destruction and concomitant harm to humans”⁸.

6 Ruth E. Baker, “Determination of Environmental Refugees: Cases for Inclusion and Expansion”, *Macalester Environmental Review* No. 18, Macalester College Environmental Studies Program, September 18 2001, pp. 20-56,
<http://www.macalester.edu/environmentalstudies/MacEnvReview/index.htm>

7 United Nations, Global Ministerial Environment Forum: Report 23, Governing Council of the United Nations Environment Programme, USA, 2000, pp. 8-17,
<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43&ArticleID=28&l>

8 Alison Shinsato, “Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria”, *Northwestern University*

Under current international law, TNCs are not liable for environmental destruction or the concomitant human rights abuses. International human rights law, environmental law, and economic law do not provide an avenue of legal redress for victims of environmental destruction. Therefore, environmental harm to individuals is not a cause of action under current international law; such harm must be connected to a substantive right and this requirement leads courts and commissions into an undefined area of law.

The aim in this essay is to explore a new interpretation of the Refugee Convention 1951 and its 1967 Protocol according to the context and problems of the new century. I will argue that the Refugee Convention should recognize and protect the environmental refugees who have a well founded fear due to the persecution of states or/and non-state actors that ruined environment and lead to oppression of individuals. Over the last decade, the world community is realizing the importance of the link between human rights and the environment to achieve the full enjoyment of the human rights. Few are the issues of major concern in the international agenda as the ones composed by human rights and the environment. They constitute a common denominator dealt in the course of World Conferences during the last decade of the century; which gave rise to the United Nations Conference on Environment and Development (Rio de Janeiro 1992), the II Universal Conference on Human Rights (Vienna 1993), the International Conference on Population and Development (Cairo 1994), and the II Conference on Human Settlements (Habitat II, Istanbul 1996)⁹.

This essay focuses on the Amazon Jungle (Colombia, Peru, Venezuela, and Brazil) as a specific example of environmental destruction and concomitant human rights violations caused by oil and

Journal of International Human Rights, Chicago, 2005, pp. 1-16.
<http://www.law.northwestern.edu/journals/jihr/v4/n1/14>

9 Permanent Council of the Organization of the American State, "A New Development Strategy for the Americas: A Human Rights and the Environment Perspective", Center for Human Rights and Environment, Argentina, 2002, pp. 5-17, <http://www.oas.org/consejo/cajp/docs/cp09473e04.doc>

hydroelectric TNCs. This model is used to describe an environmental human rights problem and the elements required by the Refugee Convention to recognize a refugee status. Within this context, this paper outlines the development of environmental human rights and current legal mechanisms available to address violations of these rights. Indeed, this essay suggests that a broad and holistic interpretation of the Refugee Convention, under the purposes and objectives of the Convention and the Protocol would eventually protect a particular social group who are victims of the persecution of the multinational companies and the omission of their governments. Hence, the paper challenges the conventional problems that environmental refugees face and the violation of fundamental human rights. Additionally, this essay underscores the importance to create legal parameters in the application of an effective protection for those environmental refugees with the recommendation to create a uniform, consistent and coherent international legal system for the accountability of the TNCs. The adoption of stricter universal standards of corporate liability and concomitant penalties will encourage corporations to adopt more sustainable business practices and thereby reduce human rights violations perpetrated through environmental destruction.

Part one provides a description of the case study and a general overview of the environmental problems and the impact on the fundamental human rights. This section illustrates by examples the social problems posed by environmental degradation which lead to human rights violations. I will address the relationship between development, human rights, and the environment. Thereby, I will present some aspects of environmental degradation and their impact on the enjoyment and exercise of human rights. Part two presents the international legal framework that recognizes and protects the rights of the environmental refugees. I will review the legal status of the environmental refugees and the international treaties that protect the fundamental human rights, reflecting world recognition of the links between human rights and environment. I will demonstrate the interrelationship between fundamental human rights and environmental protection. Finally, part three analyses the situation, protection and rights of the environmental refugees

under the Refugee Convention and its Protocol. In this section I will examine the key elements that the Refugee Convention requires for the protection and recognition of the refugee status. I will discuss how the people affected by environmental disasters provoked and exacerbated by multinational companies fulfill the legal requirements of the Refugee Convention and the Protocol¹⁰.

I. CASE STUDY

The Amazon Region, located in South America, is oil-rich and oil-reliant. It is one of the largest natural resources and oil producer in the Organization of Petroleum Exporting Countries (“OPEC”) and the largest in America. After decades of political instability, the Latin American countries depend strongly on its oil industry: the oil sector accounts for 25% of the GDP, 96% of foreign exchange earnings, and about 65% of budgetary revenues. Petroleum and petroleum products make up 95% of export commodities¹¹. Exported oil has been the main source of revenue since 1960 for most of the South American Government’s. The agricultural sector on the other hand has declined reciprocally, and this region, once a large exporter of food, now imports food to feed its rapidly growing population¹².

The Latin American oil industry is dominated by three main joint-venture operations managed by TNCs: Shell (Netherlands/U.K.), Mobil (U.S.), and Chevron-Texaco (U.S.). Under the Colombian, Brazilian and Ecuadorian Constitutions, the government is the owner of all non-renewable resources. Therefore, the above TNCs are in partnership with the South American Government’s National

10 Baker, “Determination of Environmental Refugees: Cases for Inclusion and Expansion”, cit., pp. 20-56.

11 Karin Taylor Berardo, “The Influence of Globalization on Land Tenure and Resource Management in Neoliberal Latin America”, *Cultural Environments and Development Debates*, Center for Latin America Studies, The University of Chicago, 1998, pp. 14-43.

12 Nancy Birdsall, “Efficiency and equity in social spending: How and why governments misbehave”, Vol. 274, World Bank, Washington DC, 1990, pp. 33-48.

Petroleum Companies¹³. For example, in Colombia, ECOPETROL is the national industry of petroleum. In 1969, to attract and to retain the foreign technology to facilitate the extraction process, the Colombian government signed several agreements where multinationals and ECOPETROL would divide the expenses of present and preceding explorations¹⁴. Also, in Ecuador, Texaco Company began the exploration for oil in 1964, becoming the first company to discover commercial quantities. Texaco's joint venture with Petroecuador, in which the U.S. company was an operating partner, set the standards for operations in the region. Additionally, in the decade of the 1960s the Government of Brazil approved a plan of exploitation of the vast natural resources and the development of the Amazon region, which attracted many multinational companies and independent prospectors. For example, the pipelines were constructed by OCP (Oleoducto de Crudos Pesados) Ltd., a consortium of seven multinational corporations, including U.S.-based Occidental Petroleum, Kerr McGee, Alberta Energy of Canada, Agip Oil Company of Italy, Repsol YPF of Spain, Pérez Compac S.A., and Techint of Argentina¹⁵. In addition, with the purpose to facilitate the exploitation of natural resources the governments of Brazil, Ecuador, Colombia and Venezuela entered into agreements to pursue the construction of a highway through the culturally and biologically rich Amazon Region.

The Amazon Region is the largest national park in South America and a UNESCO World Cultural, Natural Heritage and Biosphere Reserve. In addition, the Amazon Region is home to substantial populations of indigenous people (98% of the population of the region) such as Sarayaku in Colombia, Yanomami in Brazil and the Huaorani in Ecuador. For over four decades, Indigenous communities have been displaced and witnessed multinational oil companies destruction of the Amazon and their ancestral lands in

13 Ibidem, p. 11.

14 Ibidem, pp. 12-36.

15 Inter-American Commission on Human Rights, Resolution No. 12/85, case No. 7615 Brazil, Organization of American States, USA, 1985, pp. 3-46, <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>

search of the country's vast petroleum resources. The TNCs and the construction of the highway threatens the unique ecosystems of the Amazon and the human rights and integrity of the lives and lifestyles of the region's indigenous populations.

A. THE IMPACT OF ENVIRONMENTAL DEGRADATION ON THE INDIGENOUS COMMUNITIES IN THE AMAZON REGION: SERIOUS HARM

The impact of oil pollution on the Amazon Region environment and its inhabitants is severe. Oil pollution from gas flaring, oil spills, hydrocarbon crust left after oil spill "cleanups" as well as acid rain, unlined waste pits, and waste from expatriate employee communities contribute not only to the destruction of the ecosystem, but also threatens the life, health and dignity of the indigenous communities¹⁶.

Natural gas flaring negatively impacts the environment and the local inhabitants. The flares are very loud, dangerously hot, and burn twenty-four hours a day, thereby depriving the surrounding area of natural night, emit thick smoke and greenhouse gases, and smell noxious. Also oil companies have left dead rivers, road-scarred forests, polluted air, and daily discharges of millions of gallons of toxic waste in their wake that are affecting the daily lives of the communities in the area¹⁷. According to Judith Kimerling, from 1972 until it left Ecuador in 1992, Texaco intentionally dumped more than 19 billion gallons of toxic wastewaters into the region and was responsible for 16.8 million gallons of crude oil spilling from the main pipeline into the forest¹⁸. In some streams, the level of oil chemicals like hydrocarbon concentrations were higher than 280 times the permitted levels in the European Community. The

16 Permanent Council of the Organization of the American State, "A New Development strategy for the Americas': A Human Rights and the Environment Perspective", cit., pp. 5-17.

17 Ibidem, p. 18.

18 Karin Taylor Berardo, "The Influence of Globalization on Land Tenure and Resource Management in Neoliberal Latin America", *Cultural Environments and Development Debates*, Center for Latin America Studies, The University of Chicago, 1998, pp. 14-43.

report alleges that these actions contaminated both the soil and the groundwater of the communities in the area and continue to threaten the economic and cultural bases of Indigenous peoples' survival.

The indigenous communities that have been living in proximity to oil fields seem to have increased risk of residents developing health problems. For example, indigenous suffer from respiratory diseases caused by the smoke and fumes as well as hearing loss caused by the continuous noise. Alpha and radioactivity discharged via the pipeline generate radioactive contamination and the high radiation is the greatest contributor of various forms of cancer. Then electromagnetic fields in the vicinity of high-voltage power cables were alleged to give rise to an enhanced risk of leukaemia. Also, the nitrates can react with certain compounds in food to produce nitrites and nitroso compounds, some of which are carcinogenic. Gas flaring also contributes to acid rain which poisons drinking water, stunts crop growth, damages the ecosystem, and increases the rate of housing deterioration. Oil pollution of water has extensive implications: first, oil in the water coats the breathing roots of mangroves and kills the trees, an essential element of the wetland ecosystem; second, the pollution makes the water non-potable and, because there is no piped water, the only option is to import potable water at great cost or to consume the polluted water. When the indigenous communities were no longer able to consume water from wells in their land, the local authority supplied them with drinking water. The oil film in the water also prevents natural aeration, killing the organisms below the film and reducing the fish population. Fish that ingest the oil become poisonous to humans. The inhabitants of the Amazon Region have shown higher rates of respiratory ailments, skin rashes, tumors, gastrointestinal problems, and malnourishment, due to protein deficiency that has resulted from the pollution¹⁹.

19 International Human Dimension Project Report No. 12, "Global Environmental Change and Industrial Transformation Research: Global Environmental Change and the Human Dimensions", *Berlin Conference on the Human Dimensions of Global Environmental Change*, Berlin, 1999, pp. 8-29, www.ihdpit.org/index.php?option=com_content&task=view&id=22&Itemid=45 - 28k

The massive penetration of outsiders into the area has had devastating physical and psychological consequences for the indigenous people in the Amazon Region. It has caused the break-up of their age-old social organization; it has introduced prostitution among the women, something that was unknown; and it has resulted in many deaths, threats to human health and human mortality. In other words, population suffers increased mortality and morbidity caused by epidemics, tuberculosis, measles, venereal diseases, and other diseases related to the oil pollution. The destruction of the environment in the Amazon affects the rights of local inhabitants who rely on the sites or surrounding areas for subsistence and spiritual value. Indigenous groups depend on the rainforest ecosystem of their traditional lands for food, water, herbal medicine, rattan, and other essential materials for their way of life and economic sustenance. Displacement created new health problems for refugees. People who subsisted on the river or in the hills for many generations encountered problems learning how to subsist off their new lands. Also, they encountered new health risks that traditional healers were not able to address. Moreover, the flora and fauna were different and the traditional medicines could not be properly made. In some cases, the refugees from the Amazon area, resettled in Bolivia or Argentina, and suffered severe health problems from the drastic move and change of environment. The indigenous people have been the unwilling hosts of aggressive oil development in the Amazon Jungle which caused thousands of tribal groups to cross borders, without any compensation or governmental protection. For this reason South American oil industry has been criticized by the International Community and NGOs for its poor environmental practices and the resulting environmental destruction and hazardous practices that significant affect fundamental human rights.

II. INTERNATIONAL HUMAN RIGHTS: A FRAMEWORK FOR ENVIRONMENTAL CLAIMS

The 1951 Convention Relating to the Status of Refugees (Refugee Convention), as amended by the 1967 Protocol, defines a refugee as²⁰:

“any 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”.

Thus, asylum applicants must show that (1) they have a well-founded fear of persecution, (2) the persecution is based on one of the protected grounds, (3) they are outside the country of their nationality, and (4) they are unable or unwilling to avail themselves of the protection of their own state.

The Refugee Convention's definition of a refugee reflects the priorities of the era in which it was ratified; just after World War II and the Cold War, the international community was primarily concerned about European refugees escaping political persecution at the hands of the state. As a result, central to the definition of a refugee are the first requirement of persecution, and second for a particular reason.

The Refugee Convention and its Protocol were approved in a specific historical and geographical moment when environmental rights were not a priority under the protection of the Convention, but also environmental degradation was not linked with human rights. Moreover, terms such as globalization, multinational companies, industrial development, and toxic wastes are new concepts that generate a significant harm in human beings. The Refugee Convention did not encompass environmental refugees, and did not provide any explicit protection to the strife of people unable to survive in their own land due to the destruction of their

20 *Convention relating to the Status of Refugees*, opened for signature 1951, 189 U.N. T.S. 150, art. 1 (2) (entered into force April 22 1954).

environment in the hands of non state actors; and the incompetence and unwillingness of their States.

The term “Environmental refugees” was first introduced in a 1984 International Institute for Environment and Development briefing document. The term was later popularized by El-Hinnawi in a 1985 United Nations Environment Programme publication titled “environmental refugees”. According to El-Hinnawi environmental refugees are: “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life”. Many ecologists and environmentalists have promoted the use of the term and its incorporation into international law in an effort to attract attention to the devastating environmental problems faced by many people in developing countries²¹.

To explain further, El-Hinnawi defines an “environmental disruption” to encompass all types of ecosystem agitation, including industrial accidents; chemical or biological changes in the environment or essential resources that render the area useless; economic development programs; inappropriate processing, and deposit of toxic waste²². More recently, legal scholars such as Myers and Kent have described environmental refugees as “[p]ersons who no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope”²³.

The Refugee Convention of 1951 and its 1967 Protocol do not provide a literal, concrete or explicit protection for the environmental refugees. Some legal scholars argue that environmental refugees are legally unprotected because the Refugee Convention and the Protocol do not contemplate their protection. However, according to the Vienna Convention it is essential for the correct understanding

21 UNEP, Environmental Refugees Report, 1985, <http://www.unhcr.org>

22 Baker, “Determination of Environmental Refugees: Cases for Inclusion and Expansion”, *cit.*, pp. 20-56.

23 Richard Black, “Environmental refugees: myth or reality?”, University of Sussex Press No. 34, <http://www.unhcr.org> United Kingdom, March 2001, pp. 10-17.

of Conventions and Treaties to interpret the international legal instrument based on its own objectives and purposes. Hence, the Preamble of the Refugee Convention 1951 enacted that: “human beings shall enjoy fundamental rights and freedoms without discrimination”. In other words, the objective of the Refugee Convention is to protect the fundamental human rights and freedoms of people that must flee from their countries, due to the violation of those rights. The Convention is an international commitment to the equal enjoyment of fundamental human rights. Persecution entails the sustained or systematic failure of state protection in relation to one or more of the core entitlements recognised by the international community²⁴. Additionally, as guarantee for the protection of human rights, the Refugee Convention contemplated a wide range of international legal instruments where the legislator commanded to revise and consolidate previous legislation (U.N. Charter and the Universal Declaration of Human Rights) and new international agreements.

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) are generally regarded as the most important human rights instruments. The UDHR occupies a commanding place in human rights law; although it belongs to customary international law. These legal instruments attempt the universalization of civil and political rights, the basic freedoms on which Western liberal democracies are founded²⁵.

The body of international human rights law and specifically the Refugee Convention does not effectively and directly protect against human rights violations which result from environmental

24 Minister for Immigration and Multicultural Affairs, S395/2002 v Minister for Immigration and Multicultural Affairs, Appeal from the Federal Court of Australia, http://www.australianmigrationspecialists.com.au/cases/immigration_cases.php?id=1813 Australia, 2003, pp. 28-47.

25 Jeffrey L. Blackman, “State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law”, *Michigan Journal of International Law* 1996, University of Michigan Law School, pp. 23-36.

degradation, because it has not evolved to keep pace with the rapid advance of economic globalization and the privatization of resources. As a result, human rights violations stemming from environmental destruction by TNCs are not addressed in current international human rights law²⁶.

Many of the basic human rights instruments address the importance of putting legal force behind human rights principles by providing explicitly for the right to a legal remedy for violations of other fundamental rights. The right to a remedy guarantees that victims of human rights violations can initiate and rely on meaningful enforcement measures. The right to an adequate remedy means the right to make use of existing enforcement mechanisms, and where those mechanisms prove inadequate, to have the government establish and implement new mechanisms. Due to environmental injustices cannot be addressed directly in international human rights law, fundamental human rights such as the right to life, the right to health, and the right to an adequate standard of living can be used instead. In other words, when environmental rights are not protected by binding legal instruments, the protection of those rights should be protected indirectly through the protection of fundamental human rights that have been violated as a consequence of the environmental detriment.

A. FUNDAMENTAL HUMAN RIGHTS

The right to life and the right to health, norms of *jus cogens*, are considered universally as fundamental and inalienable rights. They impose on the States duties related to the environment, in the form of omissions, since states shall restrain themselves from taking actions that lead to environmental degradation which puts at risk the life and health of people; as well in the form of action, given that the States shall ensure decent living conditions, implying at

26 Shinsato, "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria", cit., pp. 1-16.

least access to clean water, a healthy atmosphere, and adequate food supplies²⁷.

1. The right to life and the right to health

The human rights to life and to health are protected in the UDHR, the ICCPR, and the ICESCR. Environmental rights are linked to the right to life, health, and to the State's obligation to secure environmental protection. The right to the protection of life and health are guaranteed under the most important international legal instruments. One of the main purposes of the UDHR is to promote better standards of living and therefore protect this fundamental right pursuant to article 3²⁸. In addition article 6 of the ICCPR protect by law, the inherent right to life²⁹. On the other hand, the right of health and specifically the right of mental and physical health are protected in: art 25 UDHR; the ICCPR which protected public health, and articles 11 and 12 of the ICESCR³⁰. But most important, article 12, 2 (b) connected the right to health with the improvement of the environment. In fact, all the international Treaties, Conventions and Agreements related to human rights have been enacted to protect the most fundamental of all the rights, life. Also, The Convention on the Rights of the Child, in force since the year 1990, has consecrated the right of children to live in a healthy environment. The State Parties committed themselves –*inter alia*—: Art. 24 to “attack diseases and malnutrition in the framework of primary health care through, among other things, the application of available technology and the provision of appropriate food and clean water, taking into account the dangers and risks of the

27 Permanent Council of the Organization of the American State, “A New Development strategy for the Americas’: A Human Rights and the Environment Perspective”, cit., pp. 5-17.

28 Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948, arts. 3, 25.

29 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 2200A (XXI), arts. 6, 27 (entered into force 23 March 1976).

30 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 2200A (XXI), arts. 11, 12 (entered into force 3 January 1976).

contamination of the environment”; as well as: Art. 29 to “Educate children to respect the natural environment”.

The right to life represents the most basic human rights doctrine, the essential and non-derogable prerequisite to the enjoyment of all other rights. Environmental problems that endanger life —directly or indirectly— threaten this core right. “[H]umans need ‘air to breathe, water to drink, food to eat, and a habitable climate’, elements of a healthy environment, to enjoy the rights to life which is guaranteed under international human rights law”³¹. The right to life “includes the right to enjoyment of pollution free water and air for full enjoyment of life”. As stated by human rights scholar B.G. Ramcharan, “[T]hreats to the environment or serious environmental hazards may threaten the lives of large groups of people directly; the connection between the right to life and the environment is an obvious one”³².

Environment must be safe for a human being, as a condition for the fulfilment of the right to life and health. Environment can cause hazards for human life and health. Therefore, the human right to a healthy environment is actually the right of an individual to demand a safe and dignified life³³.

Pursuant to the obligations of the ICCPR and ICESCR, States shall be bound to take measures to ensure public hygiene and health, and ensure the creation of all necessary conditions to increase the quality of life³⁴. It is essential for the complete enjoyment of the right to life, the legal protection of the rights to health and well-being. Furthermore, The U.N. Draft Principles on Human Rights and the Environment, even though are not binding but provide legal guide, considered that: “[A]ll persons have the right to a secure, healthy and ecological sound environment”³⁵. The rights

31 Shinsato, “Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria”, cit., pp. 1-16.

32 Ibidem, 27.

33 Deimann and Bernard Dyssli, “Environmental Rights: Law, Litigation and Access to Justice”, Vol. 1, European Environmental Law, Cameron May Ltd, 1995, p. 35.

34 Ibidem, p. 180.

35 Ibidem, p. 240.

of a secure and healthy environment are universal, interdependent and indivisible. Moreover, in many occasions the U.N. General Assembly has asserted that “[a]ll individuals are entitled to live in an environment adequate for their health and well-being”³⁶. Also, the U.N. World Health Organization has also devoted substantial attention to the need to protect the environment in order to protect human health. Additionally, the 1972 Stockholm Conference of the United Nations on the Environment and the 1992 U.N. Conference on the Environment and Development which emerged with the Declaration of Rio de Janeiro (Brazil) in 1992 provided that human well being is a central point in the efforts aimed at ensuring sustainable development. People have a right to a healthy and fruitful life in harmony with nature. These principles express the essential linkage between a healthy environment and humankind. It means that “nature shall be respected and its essential processes shall not be impaired”³⁷. Preservation of air, soil, water, sea-ice, flora, and fauna, as well as the essential processes and areas necessary to maintain biological diversity and ecosystems matters not simply because of the inherent value of natural systems, but also because those systems are absolutely necessary for humankind to survive³⁸. Disruption of an ecosystem or natural system could produce health- and life-threatening results for humans.

The Vienna Declaration specifically recognizes that “illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone”³⁹. In other words, all persons have the right to freedom from pollution, environmental degradation and activities that

36 Inter-American Commission on Human Rights, Resolution No. 12/85. Case No. 7615 Brazil, Organization of American States, <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>, USA, 1985, pp. 3-46.

37 Deimann & Bernard Dyssli, “Environmental Rights: Law, Litigation and Access to Justice”, Vol. 1, European Environmental Law, Cameron May Ltd., 1995, pp. 220-343.

38 Ibidem, p. 187.

39 Permanent Council of the Organization of the American State, “‘A New Development strategy for the Americas’: A Human Rights and the Environment Perspective”, cit., pp. 5-17.

adversely affects the environment; threaten life, health, livelihood, well being or sustainable development.

The 1988 Protocol of the American Convention on Human Rights included articles which confer rights to “live in a healthy environment and to have access to basic public services”. Consequently, a case illustrating a successful regional example in which the Inter-American Commission on Human Rights recognized the right to a clean environment for the Yanomami Indians of Brazil⁴⁰. The Inter-American Commission relied on this connection between environmental conditions and human health in the Yanomami case (1985). The Commission found that environmental consequences of road construction in rainforest areas inhabited by indigenous people violated the right to health and wellbeing, citing in particular the following articles of the American Declaration of the Rights and Duties of Man: Article I (Right to Life, Liberty, and Personal Security); Article II (Right to Equality before the Law); Article III (Right to Religious Freedom and Worship); Article XI (Right to the Preservation of Health and to Well-being); Article XII (Right to Education); Article XVII (Right to Recognition of Juridical Personality and of Civil Rights); and Article XXIII (Right to Property)⁴¹.

2. The right to an adequate standard of living/quality of life: food and housing

Pursuant to article 25 of the UDHR, and article 11 of the ICESCR: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. The ICESCR article 11 (2) further specifies “the fundamental right of everyone to be free from hunger”. Furthermore, Regional human rights instruments such as the African Charter and the

40 Shinsato, “Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria”, cit., pp. 1-16.

41 Inter-American Commission on Human Rights, Resolution No. 12/85. Case No. 7615 Brazil, Organization of American States, <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> USA, 1985, pp. 3-46.

Organization of American States recognize the right to food as well — as an element of the right to health⁴². For example, the 27th May of 2002 The African Commission on Human and People Rights (OAU) found the Federal Republic of Nigeria in violation of the African Charter on Human and Peoples' Rights because the Nigerian Government did not protect the community from pollutants caused by the oil operations in Nigeria which lead directly to the contamination of food resources and decreased the fish and agricultural harvests. In turn, this leads to increased rates of malnourishment and starvation. In addition other fundamental rights were violated such as: the infringement of cultural human rights protected under the UDHR and the ICESCR based on the destruction of their subsistence lifestyle; the infringement of the right to self-determination protected by the ICCPR which gives man the right to “freely dispose of their natural wealth and resources”; and the infringement of the right to an adequate standard of living/ quality of life on the basis that environmental destruction affects quality of life⁴³.

The UDHR and the ICESCR include the right to housing among the requisites of the right to an adequate standard of living. All persons have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment. This principle reflects the environmental dimension of the right to adequate housing, which includes shelter and housing security, as well as housing in an environment free of health hazards. Moreover, The UN Committee on Economic, Social and Cultural Rights has issued a General Comment that gives the Committee's definitive interpretation of the right to housing. General Comment No. 4 includes the provision that “[h]ousing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants”⁴⁴.

42 Ibidem.

43 Federal Republic of Nigeria v. Ogoni Community ACHPR/COMM/A044, African Commission on Human and Peoples' Rights, www.achpr.org Gambia, 2000, pp. 24-76.

44 Ibidem.

3. *Right to dispose of the natural resources and information*

Pursuant to Articles 1 and 2 of the ICCPR and ICESCR: “[A]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”. In other words, the international legal instruments enhanced: first, the principle of “Equitable Benefit” when it is necessary to balance competing demands on natural resources⁴⁵; second, protected the religious and cultural connection between indigenous people and their land (Art. 27 ICCPR); and third, protected the natural resources of the indigenous’ land as their own means of subsistence.

Indigenous people have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence. Indigenous people have right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources of subsistence.

This principle protects the special relationship between indigenous people and the natural environment they inhabit. It honors the cultural importance of the ways indigenous peoples interact with their natural environment. The principle expresses several distinct and important components of environmental protection—control over use of the environment; subsistence security; and protection against environmental harm. These elements combine to support indigenous peoples’ self-determination and to safeguard their right to culture, pursuant to articles 1 and 27 ICCPR⁴⁶, and Article 1 No. 1 ICESCR⁴⁷.

45 Ingrid Macklein, “Disaster Creating Refugees: Talk of the Town, Global News South Africa Intelligence Wire, Financial Times Information Limited”, *Philippine Daily Inquirer*, Philippine, 2006, pp. 5-11.

46 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 2200A (XXI), arts. 6, 27 (entered into force 23 March 1976).

47 International Covenant on Economic, Social and Cultural Rights, opened for signature

As the UN Indigenous Peoples Declaration No. 14 explains, indigenous peoples' right to self-determination encompasses the right to "maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities". This in turn includes the right to manage traditional lands and other natural resources. Also, the Declaration enacted that: "[I]ndigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation". The U.N. Indigenous Peoples Declaration was created precisely because indigenous people require special attention from the states in which they live and from the international community. In addition, the International Labour Organisation Convention No. 169, adopted in 1989, similarly protected and responded to the reality that in many parts of the world indigenous people are unable to enjoy their fundamental human rights to the same degree as the rest of the populations of the States in which they live⁴⁸.

The protections of these rights are also enacted in the Rio Declaration, principle 22: "[I]ndigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development⁴⁹.

16 December 1966, 2200A (XXI), arts. 11, 12 (entered into force 3 January 1976).

48 Karin Taylor Berardo, "The Influence of Globalization on Land Tenure and Resource Management in Neoliberal Latin America", *Cultural Environments and Development Debates*, Center for Latin America Studies, The University of Chicago, 1998, pp. 14-43.

49 John Swaigen, "Environmental Rights in Canada", *Canadian Environmental Law Research Foundation*, Vol. 18, Toronto, 1995, pp. 65-150.

Furthermore, indigenous people have the right to participate in decisions that affect their environment. All persons, without distinction, have the right to information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making. Moreover, indigenous persons have the right to participate effectively in decisions and to negotiate their eviction and the right, if evicted, to timely and adequate restitution, compensation and/or appropriate and sufficient accommodation or land. All persons have the right to be informed about activities that caused exposition to hazardous materials and providing opportunities for individuals to be heard and participate in the decisions that affect their communities.

Some international environmental instruments effectuate this right by imposing obligations to keep the public informed of environmental hazards and to issue warnings in the event of environmental emergencies such as nuclear accidents. Violations of the right to information can have severe consequences, particularly in the context of development projects, where governments or private actors may have powerful economic incentives to hide information about environmental hazards. For example, the U.N. Human Rights Committee found that expropriation of the Canadian Lubicon Lake Band's land for oil and gas exploitation failed to keep the public informed about the environmental impacts of the project. That failure interfered with the ability of affected people and communities to take appropriate action—whether it would have been political action or voluntary relocation—in response to environmental danger⁵⁰. In addition, the project infringed the band's right to enjoy its culture, as guaranteed by article 27 of the ICCPR because it threatened the way of life and culture of the group. The U.N. Committee argued that: “[E]veryone has the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health,

50 Ibidem, p. 147.

livelihood, recreational, spiritual or other purposes. This includes ecologically sound access to nature. Everyone has the right to preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area”⁵¹.

Other jurisdictions have approached and protected the violations of human rights due to the degradation of the environment by non-state actors or by State’s policies. For example, on February 15, 1994, the Ontario Government proclaimed the Environmental Bill of Rights with the purpose to increase government accountability for its environmental decisions. The Ontario Government also improved the access to the Court for those residents seeking to protect the environment. The Bill has granted to the people of Ontario the right to a healthy and sustainable environment, and made the Ontario Government the trustee of the environment for the benefit of present and future generations. To enforce environmental rights recognized under the Bill, individuals were permitted to commence legal actions in the court towards persons responsible for contamination or degradation of the environment, the tolerable level of harm to be decided by the court⁵². Also, the 1970 Michigan Environmental Protection Act authorizes citizen actions against the state or any person, including corporations, “[f]or the protection of the air, water and other natural resources and the public trust” from “pollution, impairment or destruction”⁵³.

The absence of international legal recognition of this right objectively slows down the process of securing the human right to a healthy environment in national legislation and leads to the unjustified divergence as regard to the understanding and interpretation of the right⁵⁴. To ensure the human right to a safe

51 Macklein, “Disaster Creating Refugees: Talk of the Town, Global News South Africa Intelligence Wire, Financial Times Information Limited”, cit., pp. 5-11.

52 Deimann & Bernard Dyssli, “Environmental Rights: Law, Litigation and Access to Justice”, Vol. 1, European Environmental Law, Cameron May Ltd., 1995, pp. 220-343.

53 Ibidem, p. 20.

54 Ibidem, p. 36.

environment it is necessary to incorporate this right in domestic legislation, and adopt domestic policies that protect human rights.

The concept of the human right to the healthy environment is better reflected today in domestic legislation than in international law⁵⁵. The new Constitution of Ukraine, Russian Federation, and Republic of Kazakhstan in article 11 provide that:

“[e]veryone shall have the right to the environment that is ecologically safe for life and health”⁵⁶. The Latin American hemisphere has a vast tradition of human rights defence. However, the development of environmental law on a regional scale already presents a considerable number of weaknesses especially in relation to its enforcement and liability to be demanded. The Protocol of San Salvador⁵⁷ enacted the right to a healthy environment and a number of countries in the region introduced prescriptions related to environmental management into their constitutions, recognizing in their domestic law the link between human rights and the environment. Nevertheless, apart from the impacts of environmental degradation on the human rights, the environmental degradation has important political connotations in the Latin America context, which will increase in the future. Latin America and the Caribbean are considered as: “The region with the highest level of ecological surplus in the world, with 3.93 surface units per person, due to its high natural biological availability (6.39 units)”⁵⁸. Therefore, the continent’s economic development mainly depends on its natural resources. But, the irrational exploitation of non-renewable resources, the scarce or lack of control over environmental variables of production and consumption, export of environmental charges from industrialized countries to developing countries, transport of toxic substances, export of chemical products declared as toxic by industrialized countries, reduction of environmental standards by multinational corporations and the imposition of dual standards, are examples of the detriment produced to natural resources and the people of the American States⁵⁹.

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- 55 Karin Taylor Berardo, “The Influence of Globalization on Land Tenure and Resource Management in Neoliberal Latin America”, *Cultural Environments and Development Debates*, Center for Latin America Studies, The University of Chicago, 1998, pp. 14-43.
- 56 Deimann & Bernard Dyssli, “Environmental Rights: Law, Litigation and Access to Justice”, Vol. 1, *European Environmental Law*, Cameron May Ltd., 1995, pp. 220-343.
- 57 The Protocol of San Salvador was enforced in November 16, 1999.
- 58 Permanent Council of the Organization of the American State, “A New Development strategy for the Americas’: A Human Rights and the Environment Perspective”, cit., pp. 5-17.
- 59 Christopher Miller, “Environmental Rights: Critical Perspective”, Vol. 1, USA,

The consequences of environmental degradation on the human rights, its great impact on the development of the region, and the damaging effects of this degradation particularly suffered by the poor and minority groups, extend like a shadow over all the underdeveloped states of the American continent⁶⁰. Hence, nations would be in a process of reconsidering the relationship between economy, ecology and human rights⁶¹.

Current international human rights law, environmental law, and economic law do not provide an avenue of legal redress for victims of environmental destruction. Environmental harm to individuals is not a cause of action under current international law; such harm must be connected to a substantive human right and this requirement leads courts and commissions into an undefined area of law; it should be necessary a flexible interpretation of the international legal instruments enacted to protect fundamental human rights. Furthermore, the international community has assumed the commitment to ensure the fulfillment of human rights and the respect for the environment. The dynamic nature of human rights demands the continuous evolution of international laws to maintain relevance in a rapidly changing world. The increase in environmental destruction and concomitant human rights violations requires that human rights law be extended to include environmental protections as a way to improve people's lives through preservation of the environment⁶².

III. REFUGEE STATUS: KEY ELEMENTS

According to some legal scholars, the definition of refugee should not be expanded to include those migrating for environmental

Poutledge Publisher, 1998, pp. 153-218.

60 Ibidem, p. 205.

61 Karin Taylor Berardo, "The Influence of Globalization on Land Tenure and Resource Management in Neoliberal Latin America", *Cultural Environments and Development Debates*, Center for Latin America Studies, The University of Chicago, 1998, pp. 14-43.

62 Shinsato, "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria", cit., pp. 1-16.

reasons because such an expansion would weaken and dilute the definition and the current protection for refugees. The United Nations High Commissioner for Refugees (UNHCR), operates on a limited budget, and the organization fears that such an expansion would strain its already limited resources; as such resources would necessarily be dedicated to protect a larger number of people. The definition is unlikely to be extended, because the status quo is entrenched and there is no international consensus for change⁶³. In fact, most receiving countries would prefer to restrict the refugee definition rather than expand it. Developed countries fear a flood of refugees and hesitate to commit more funds to refugee protection in developing countries⁶⁴. Moreover, the international community and state governments have created and developed institutions and practices based on the current definition of a refugee.

The current legal definition of “refugee” would not cover someone who was forced to move for environmental reasons, as it refers to someone who is fleeing persecution, for a variety of possible reasons, and cannot be guaranteed safety in his or her own country⁶⁵. There has been ongoing debate within the United Nations about the protection of environmental refugees under the Convention’s grounds. In 2000 the U.N. decided it should not change the law to include those fleeing natural disaster. Their key argument was that environmental refugees were of a cyclical kind. Natural disasters came and went. Those who flee tend to return, or should return, when the disaster subsides, according to the argument. Therefore, it would be extremely difficult to come up with a clear definition of an “environmental refugee”. There is no clear agent of persecution, although some problems are traceable to a specific company or government policy. Subsequently, one definition of a refugee is if a person has a genuine fear of being persecuted for membership of a particular social group or class, which in the present case is persecuted by the state and/or the multinational

63 Trace King, “Environmental Displacement: Coordinating Efforts to Find Solutions”, *Georgetown International Environmental Law Review*, Vol. 18, 2006, p. 554.

64 *Ibidem*, p. 557.

65 Lambert, “The Environment and Migration: What Response”, *cit.*, p. 320.

companies⁶⁶. Then follow the questions whether the applicant has a fear, whether the fear is well founded, and if it is, whether it is for a Convention reason.

The definition of “refugee” in Art 1A(2) of the Convention contains four key elements: (1) the applicant must be outside his or her country of nationality; (2) the applicant must fear “persecution”; (3) the applicant must fear such persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”; and (4) the applicant must have a “well-founded” fear of persecution for one of the Convention reasons⁶⁷.

The Refugees Convention falls short of affording protection to every victim of discrimination or abuse of human right, in cases where environmental refugees fulfill the Convention’s requirements, it must be necessary to bring international protection to those victims. Environmental refugees should have international protection, when they demonstrate the presence of a clear agent of persecution such, as the TNCs or the State, who are perpetuating indiscriminant activities that degraded the environment, and directly affect inter alias, the right to life and health of specific social groups, and as a result increased mortality rates in the region, resulting directly from pollution aggravated illnesses and malnutrition; it would be the obligation of the international community to provide protection of those environmental refugees that cross borders under the Refugee Convention grounds⁶⁸.

The issues raise two questions respecting the construction and application of the Convention definition. First, the criteria to be applied in order to determine whether the appellant was a member of a particular social group; and, secondly, whether the appellant could be considered to have a well-founded fear of being persecuted⁶⁹.

66 Ahmed Tanveer, “Should there be Environmental Refugees?”, <http://www.counter-currents.org/cc-ahmad241004.htm> Australia, 2004, p. 17.

67 VBAO v Minister for Immigration and Multicultural and Indigenous Affairs, High Court of Australia, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=publisher&skip=0&publisher=AUS_H Australia, 2006, pp. 30-54.

68 Shinsato, “Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria”, pp. 1-16.

69 Lambert, “The Environment and Migration: What Response”, cit., p. 320.

A. MEMBERS OF A PARTICULAR SOCIAL GROUP: “INDIGENOUS PEOPLE FROM THE AMAZON REGION IN CONFLICT WITH THE INTERVENTION OF THE TRANSNATIONAL COMPANIES IN THEIR TERRITORIES”

A particular social group is a collection of persons who share certain characteristics or elements, other than their risk of being persecuted, and which unites them and enables them to be set apart from society at large⁷⁰. According to Honourable Per Gleeson CJ, Gummow and Kirby JJ, A group will be a “particular social group” under Art. 1A (2) of the Convention if it meets three requirements. “[F]irst, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large”⁷¹. Honourable Dawson J stated: “[T]he word ‘particular’ in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group”⁷². Therefore, the existence of a particular social group requires that the group be distinguished or set apart from society at large⁷³. However, there was no requirement that society recognizes or perceives the existence of a particular social group before such a group could exist. “[D]efining the group widely increases the ease of establishing membership of that group and, to that extent, of fulfilling a requirement of the Convention definition. However, the wider the definition of the ‘group’ propounded, the

70 James Hathaway & Michelle Foster, “Membership of a particular Social Group”, Discussion Paper No. 4, International Association of Refugee Law Judges, Auckland, New Zealand, 2002, p. 490.

71 Applicant S v MIMA, High Court of Australia 217 CLR 387, <http://www.austlii.edu.au/au/cases/cth/HCA/2004/25.html> Australia, 2004, pp. 17-53.

72 Applicant S v MIMA, High Court of Australia 217 CLR 387, <http://www.austlii.edu.au/au/cases/cth/HCA/2004/25.html> Australia, 2004, p. 53.

73 Minister for Immigration and Multicultural Affairs, S395/2002 v Minister for Immigration and Multicultural Affairs, Appeal from the Federal Court of Australia, http://www.australianmigrationspecialists.com.au/cases/immigration_cases.php?id=1813 Australia, 2003, pp. 28-47.

more difficult it may be for the applicant to show that the suggested fear is one of 'persecution' which is 'well-founded' and exists 'for reasons of' membership of that social group"⁷⁴.

Certain groups in society sometimes require extra protection, either because of physical or mental vulnerability, socioeconomic or political status or some combination thereof⁷⁵. In the context of environmental human rights, such groups include women, children, indigenous people, disabled people, and other minorities. Minority groups may lack the political power to protect themselves against sometimes tyrannical majority will and it's made them vulnerable. A particular social group might be created by a combination of cultural, social, religious and legal norms even if a society did not perceive the existence of the group. Indigenous people have been recognized as part of distinct and recognizable minority groups within the society, and therefore the international legal instruments provide special protection and mechanisms. The UDHR protect the rights of minority groups from tyranny and oppression; article 27 ICCPR and article 15 (1 and 2), protect the vulnerable groups of the society. Under international law, indigenous people have the right to control their lands, territories and natural resources and to maintain their traditional way of life. Indigenous people have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water and other resources⁷⁶. Ruth Baker describe the environmental indigenous problem as: "Their own governments victimize them: they are usually poor, foraging societies, they receive little or no compensation, and they have no means to defend themselves - so they need the protection of refugee status. Their own governments directly persecute them because of many reasons: some would claim

74 *Dranichnikov v Minister for Immigration & Multicultural Affairs*, High Court of Australia ALD 321; 77 ALJR 1088; 197 ALR 389; 2003 WL 21019628, <http://www.austlii.edu.au/au/cases/cth/HCA/2003/26.html> Australia, 2003, pp. 38-56.

73 ALD 321; 77 ALJR 1088; 197 ALR 389; 2003 WL 21019628; 2003, ALMD.

75 *Applicant S v MIMA*, High Court of Australia 217 CLR 387, <http://www.austlii.edu.au/au/cases/cth/HCA/2004/25.html> Australia (2004), pp. 17-53.

76 Swaigen, "Environmental Rights in Canada", *cit.*, pp. 65-150.

race, class, subsistence means, or simply because they are at the bottom of the power structure⁷⁷.

In South America the indigenous groups have been subject of discrimination and victims of the undefended legal system. The native titles of the indigenous people of the Amazon Region have not been recognized due to the economical benefits that the region represents for the States. The tribe communities live in rural areas of the Amazon, where the land represents a religion connection with their ancestors and the only source of survivable⁷⁸. The intersection of refugees and environmental problems occurs at many levels, from the environmental stresses that may contribute to refugee flows to the environmental stresses that result from refugee flows and settlements. Like other vulnerable groups, these indigenous communities suffer disproportionately from environmental harms, caused by the TNCs exploitation of the natural resources, and the tolerance behavior of the governments, who are unwilling to provide protection.

Moreover, as an example of the legal and political status of the indigenous people in South America, for example the Statute of the Indians in Brazil (Law 6001, 1973) enacted that: “[t]he Indians are considered relatively incompetent to perform certain acts and are placed under administrative guardianship for their protection”⁷⁹. The protection of their lands is based on “legal” agreements between the government and the tribes. The agreements expire every 5 years and therefore the Government of Brazil has the right: “[T]o intervene in the areas inhabited by Indians, to expropriate property, and to move them for exceptional reasons (Article 20), among them: to carry out public works of interest to national development, for the exploitation of resources of the subsoil belonging to the Federal State that are of great

77 Baker, “Determination of Environmental Refugees: Cases for Inclusion and Expansion”, cit., pp. 20-56.

78 Julian Evans, “Regional Worlds: Cultural Environments & Development Debates”, *Center for Latin America Studies*, Vol. 10, University of Chicago, 1992, p. 534.

79 *Yanomani v Brazil* Inter-American Commission on Human Rights, Resolution No. 12/85. Case No. 7615 Brazil, Organization of American States, <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> USA 1985, pp. 3-46.

interest for security and national development, and national security requirements”⁸⁰. In addition, the right to property and equality before the law, for example, is affected by the disproportionate way in which some sectors of the population bear an unequal burden of environmental degradation – what is referred to as “environmental discrimination”. Conversely, to provide one group with a clean environment by imposing environmentally disruptive projects on another group would render environmental human rights a fiction for the latter group and, by extension, for the entire society. This principle applies the basic human rights norm of nondiscrimination to environmental issues. A law of general application is capable of being implemented or enforced in a discriminatory manner⁸¹. In conclusion, these indigenous communities were persecuted against and exploited by their own governments. Their persecution is not only from geographical location, but also their race, class, and way of life. They had no power to fight their governments, and no means to ask for aid from other nations⁸².

Consequently, the legal and political actions that indigenous communities have to claim for the protection of their rights are almost inexistence. In these circumstances, it might be correct to conclude that indigenous people of the Amazon Region constituted a “particular social group” for the purpose of the Convention. The combination of legal and social factors (or norms) prevalent in the community indicate that the indigenous people of the Amazon Region constitute a particular social group, distinguishable from the rest of the community. Indigenous groups in South America exist independently of the persecution that they suffer⁸³.

80 Yanomani v Brazil Inter-American Commission on Human Rights, Resolution No. 12/85. Case No. 7615 Brazil, Organization of American States, <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> USA, 1985, pp. 3-46.

81 Applicant S v MIMA, High Court of Australia 217 CLR 387, <http://www.austlii.edu.au/au/cases/cth/HCA/2004/25.html> Australia, 2004, pp. 17-53.

82 Dranichnikov v Minister for Immigration & Multicultural Affairs, High Court of Australia ALD 321; 77 ALJR 1088; 197 ALR 389; 2003 WL 21019628, <http://www.austlii.edu.au/au/cases/cth/HCA/2003/26.html> Australia, 2003, pp. 38-56.

83 Applicant S v MIMA, High Court of Australia 217 CLR 387, <http://www.austlii.edu.au/au/cases/cth/HCA/2004/25.html>, Australia, 2004, pp. 17-53.

B. WELL-FOUNDED FEAR

A well-founded fear comprehends the demonstration of “fear” understood as a forward-looking expectation of risk⁸⁴. Fear is clearly an entirely subjective state experienced by the person who is afraid. However, evidence should be provided to demonstrate the fear of risk of an objective situation. Because the risk of persecution will never be measurable, decision makers should evaluate the evidence. Relevant past persecution is directly relevant to the determination of the well founded fear. Also, the asylum applicant may seek to prove well-founded fear of future persecution by demonstrating that they suffered past persecution. The right to a freedom of fear is protected under the ICESCR (Preamble).

The exploitation of natural resources by the TNC in the Amazon Region affects the indigenous communities that for thousands of years are living there⁸⁵. The systematic degradation of the environment by the industrial development of the multinational affects significantly the ecosystem that is vital for the survival of the tribe communities of the area. The indigenous people are losing their source of sustenance, their homes, their safety, and their lands. Indigenous people have been forced to leave their traditional habitat “because of a marked environmental disruption” that jeopardized their existence and/or seriously affected the quality of their life⁸⁶. They are environmental refugees because their environment, for one reason or another, cannot sustain them any longer. Thus they must move environments. Especially for indigenous people, this is an extremely difficult achievement. For people who live off the land, a change in the ecosystem can mean starvation, deprivation of their subsistence methods, loss of traditions and connections to other people and the land, and even extinction.

84 The Michigan Guidelines, 2005, p. 497.

85 International Human Dimension Project Report No. 12, “Global Environmental Change and Industrial Transformation Research: Global Environmental Change and the Human Dimensions”, cit., pp. 8-29.

86 Molly Conisbee & Andrew Simons, “Environmental Refugees: The Case for Recognition”, Vol. 1, New Economic Foundation, Chicago, 2005, p. 117.

In fact, the effects provoked by the TNC generated objective harm in the rights of the indigenous population of the Amazon Region and therefore a sufficient foundation for fear. The indigenous' well-founded fear is based on: the significant physical and mental harm, the economic hardship that threatens the community capacity to subsist, the threats to the rights to life and health⁸⁷, and the tolerance and frequent reluctance of the authorities to provide protection and legal guarantees⁸⁸. As a result of the situation, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, special Rapporteur called the attention of South American countries and specifically noted that it is the rights of indigenous peoples to compensation for damage to their lands and cited the Rio Declaration as an illustration of the right to remedies for environmental damage, "which may affect a range of human rights, notably the right to life and the right to a standard of living adequate for health and well-being"⁸⁹. That statement echoes the more expansive statement of environmental rights from the 1972 United Nations Conference on the Human Environment, at Stockholm: "[M]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations"⁹⁰.

In addition, the fears of persecution of the indigenous people arise because the claimant has a well-founded fear that the degree of protection given by the country of origin against the persecution at the hands of non state actors will be inadequate⁹¹. Indigenous

87 VBAO v Minister for Immigration and Multicultural and Indigenous Affairs, High Court of Australia, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=publisher&skip=0&publisher=AUS_H Australia, 2006, pp. 30-54.

88 Ibidem, pp. 30-54.

89 Julian Evans, "Regional Worlds: Cultural Environments & Development Debates", *Center for Latin America Studies*, Vol. 10, University of Chicago, 1992, p. 534.

90 McKlain, "Disaster Creating Refugees: Talk of the Town, Global News South Africa Intelligence Wire, Financial Times Information Limited", cit., pp. 5-11.

91 Horvath v Secretary of State for the Home Department 489, UK House of Lords, <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd021017/yoga-2.htm> United Kingdom, 2000, pp. 56-78.

community will suffer persecution in the hands of the TNCs because the States' protection is not being sufficient and it is ineffective⁹². It has to be shown that the authorities fail to take measures within the scope of their powers which could reasonable be considered as past persecution. For example, the Government of Brazil was founded responsible for having failed to take timely and effective measures to protect the human rights of the Yanomamis indigenous. In addition, in May 1998, the U.N. Committee on Economic, Social and Cultural Rights Report "note[d] with alarm the extent of the devastation that oil exploration has done to the environment and quality of life in areas such as Ogoniland where oil has been discovered and extracted without due regard to the health and well-being of the people and their environment", and recommended that "[t]he rights of minority and ethnic communities – including the Ogony people – should be respected and full redress should be provided for the violations of the rights set forth in the Covenant that they have suffered"⁹³. Consequently, this relevance evidence of past persecution is the directly well founded fear of these indigenous⁹⁴.

C. PERSECUTION

The term "persecution" is not defined neither in the Refugee Convention (RC) 1951, nor in any other international instrument. From article 33 of the RC, "it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular ground is always persecution. Other serious violations of human rights –for the same reasons– would also constitute persecution. However, States have a wide margin of appreciation in interpreting this fundamental concept which

92 Horvath v Secretary of State for the Home Department 489, UK House of Lords, <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd021017/yoga-2.htm> United Kingdom, 2000, pp. 56-78.

93 Shinsato, "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria", cit., pp. 1-16.

94 Black, "Environmental refugees: myth or reality?", cit., pp. 10-17.

is reflected in the inconsistent jurisprudence in that respect⁹⁵. Persecution is normally related to action by the authorities of the country. However, the systematic violation of fundamental human rights may also emanate from non-state actors; it can be considered as persecution when the State: concerns, condones, tolerates or the authorities refuse or are unable, or unwilling to offer effective protection. In the case study of this essay, the persecution is related to non- state agents (TNCs) and the systematic omission from the state to provide effective remedies and protection.

1. Non-State agents: Transnational Companies (TNCs)

Globalization can positively transform societies by promoting economic growth and increasing the standard of living. However, globalization can also negatively impact societies through environmental degradation and resulting human rights violations. Many populations are victims of environmental degradation due to global industrialization and the exploitation of developing countries by TNCs seeking cost-effective investments. The Amazon Region has been exploited for many years by TNCs companies, such as Shell, Mobile and Texaco, which produce oil that contributes 10% of the world's carbon emissions causing climate changes and significant violation of human rights. United Nations report documents that transnational corporations generate more than half of greenhouse gases emitted by the industrial sectors with the greatest impact on global warming and human beings. Former U.N. Secretary General Kofi Annan remarked: “[H]uman activities are changing the natural balance of the Earth, interfering as never before with the atmosphere, the oceans, polar icecaps, the forest cover and the natural pillars that make our world a livable home”⁹⁶.

Regrettably, the people most adversely affected by these actions are the indigenous people who survive from the resources of the land. The indiscriminate action of the TNCs not only caused

95 Gill Goodwin, “The Refugee in International Law”, 2.a ed., USA, Oxford University Press, 1996, p. 204.

96 Ibidem, p. 210.

environmental degradation, but also an increase mortality of those indigenous people who seek protection due to the devastation of their lands and resources. Conversely, the Amazon region is rich in oil and abundant in natural resources. The subsequent exploitation of these natural resources by TNCs implicate the construction of infrastructure and highways which passed through the indigenous territories. However, the project failed in recognizing the impact on resource sustainability and social dynamics. There is increasing evidence that industrialization in the developing world carries with it a significant risk of humanitarian and environmental disasters.

Affected indigenous are marginalized into deepening impoverishment both in the long and short term. Corporate rights trump human rights by destroying critical resources for livelihood and ecological sustainability. The U.N. High Commission for Refugees (UNHCR) estimates that 20% of (recognized) refugees are victims of the TNCs, from which 18% are vulnerable groups⁹⁷. The subsistence indigenous people in South America are fragile because they are marginalizing groups without effective legal protection from their countries, who are subject to special judicial system. The intervention of TNC in the indigenous' territories, represent an unbalanced power structure, which serves as a form of oppression⁹⁸. Indigenous people of the Amazon Region are powerless in the face of the tremendous financial and political clout the TNCs wield, and moreover, the current body of international law fails to provide victims with an adequate legal remedy against TNCs. Conversely, TNCs are economic and political powerful, with a significant influence in the international arena. For example, when some Latin America NGOs and human rights solicitors attempted to demand Chevron in 1998, the demands were not address, among other issues, because of the political influence of the U.S. President George Bush and Condoleezza Rice who, at the time, were executive and director, respectively of the oil firm Chevron. Consequently, the

97 Baker, "Determination of Environmental Refugees: Cases for Inclusion and Expansion", cit., pp. 20-56.

98 Ibidem, p. 76.

environmental destruction caused by the oil TNCs and its effects on human health were not addressed, and plaintiffs had no alternative legal recourse through which to pursue such a claim⁹⁹.

A large percentage of TNCs are based in wealthy developed countries but invest in developing countries, such as South America, where the environmental laws are less stringent, with lower environmental standards¹⁰⁰. The lack of accurate legislation and control, make the American territory a “paradise of contamination”. Often, the group subsidiaries are incorporated under the laws of the state in which it conducts business. A subsidiary corporation of a TNC is a national of the nation in which it is incorporated, and subject to the environmental and social standards of the country in which they are headquartered in affiliated companies abroad. Consequently, among the attractions to TNCs of the Amazon Region are the lax of environmental regulations and the indifferent amounts to tolerance of human rights violations. TNCs routinely deny responsibility for the knock-on effects of their operations, because the South American governments are involved in their agreements that provide significant profits, and because human rights and environmental protections can be safely ignored as they are not legally mandated concerns¹⁰¹. Unfortunately, companies are getting significant profits from this degradation, and some have been accused of intentionally forcing migration so that they may deforest and develop more land, and increase their profits¹⁰². The enormous power of TNCs is further enhanced by their ability to relocate and thus to avoid environmental and human rights restrictions on their activities. The economic power and portability of TNCs make it especially important to establish universal standards to constrain their conduct and to ensure that relevant national and international

99 Shinsato, “Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria”, cit., pp. 1-16.

100 Ibidem, p. 18.

101 Baker, “Determination of Environmental Refugees: Cases for Inclusion and Expansion”, cit., pp. 20-56.

102 International Human Dimension Project Report No. 12, “Global Environmental Change and Industrial Transformation Research: Global Environmental Change and the Human Dimension”, cit.

authorities have sufficient power and authority to enforce those standards¹⁰³.

2. Persecution by State actor

In the present case, the persecution consist of two elements, the criminal conduct of non state actors (TNC), and the toleration or condonation of such conduct by the state, resulting in the withholding of protection which the victims are entitle to expect¹⁰⁴. If there is a persecutor of a person or a group of people, who is a “non-state agent of persecution”, then the failure of the state to intervene to protect the victim may be relevant to whether the victim’s fear of continuing persecution is well founded. Consequently, the failure results from the State’s tolerance or condonation of the persecution, or the result of the inability to do anything about it¹⁰⁵. The persecution in the Amazon Region of the indigenous communities result from the combined effect of the conduct of private individuals’ actors (TNC) and the state agents. The state omissions to provide protection, and therefore tolerate the infliction of a serious harm, make the state responsible for such harm¹⁰⁶.

Poor nations turn TNCs to encourage international investment in expectations of improving the local economy. In turn, TNCs are attracted to the opportunity to lower production costs through lenient environmental standards and cheap labor. The indiscriminate development represents economic interests for the states and TNCs. However, globalization created powerful non-state actors that may violate human rights in ways that were not contemplated under domestic laws and international law. Also, governments of developing countries are often reluctant to restrain the activities of

103 Mcklain, “Disaster Creating Refugees: Talk of the Town, Global News South Africa Intelligence Wire, Financial Times Information Limited”, cit., pp. 5-11.

104 MIMA v Khawar and others, High Court of Australia, 2002, pp. 14, 31.

105 Ibidem, p. 38.

106 United Nations, Global Ministerial Environment Forum: Report 23, Governing Council of the United Nations Environment Programme, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43&ArticleID=28&l=USA>, 2000, pp. 8-17.

TNCs for fear of economic losses¹⁰⁷. Consequently, the intentions of the persecutors (TNC and governments) are the economic benefits through the exploitation of natural resources. From the perspective of those responsible for discriminatory treatment, the persecution might in fact be motivated by an intention to confer a benefit¹⁰⁸.

The complicity of the State in the harm inflicted to the indigenous people in the Amazon region, it may readily be characterized as persecution, and identified as the reason that thousands of indigenous are outside the country of nationality¹⁰⁹. The South American's governments gave permission to the TNC to exploit the Amazon Region, without the fulfilment of the environmental legal requirements and with no monitor of the operations; causing environmentally harm and the mortality and threaten to the life and health of significant tribes in the region.

The governments' persecution implies a failure by the state to make protection available against the unfair treatment or violence which the indigenous population suffer at the hands of the TNCs. The governments are unable and reluctant to suppress the activities of the perpetrators due to the economic benefits that these investments generate to the nation¹¹⁰. The States omissions have made them responsible for the human rights violations perpetrated to the indigenous tribes¹¹¹. Those countries have not yet developed adequate legal actions to cope with such disasters. It is generally recognized that the primary responsibility for prevention, preparedness and response to various types of emergencies belongs to national governments, who have the responsibility to protect their citizens¹¹². Many environmental problems are a direct result of government policy that does not require basic health and

107 Shinsato, "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria", cit., pp. 1-16.

108 Applicant S v MIMA, High Court of Australia 217 CLR 387, <http://www.austlii.edu.au/au/cases/cth/HCA/2004/25.html> Australia, 2004, pp. 17-53.

109 MIMA v Khawar and others, High Court of Australia, 2002, pp. 14- 31.

110 MIMA v Respondents, Australian Law Reports S152, 2004, ALR 487.

111 MIMA v Respondents, Australian Law Reports S152, 2004, ALR 487.

112 Global Environmental Change and Industrial Transformation Research, IHDP Report No. 12, Part I.

environmental studies¹¹³. Moreover, South American states do not have the appropriate safety measures and standards procedures to regulate the actions of TNC in their territories. While application and enforcement of environmental regulations by the host country is in the best interest of the citizens subsisting on the land, the Colombian, Ecuadorian and Brazilian policies are rarely enforced, and the regulations are usually simply ignored. South American countries, which has relied on the oil TNCs as its main source of revenue since 1974 and which typically holds a 70% share of the joint venture interest with the transnational oil companies, likely fears that the enforcement of environmental regulations curbing the activities of the oil industry would reduce government revenue and may cause oil TNCs to flee from the Amazon. In Brazil, for example, where we see deforestation as the direct result of government policy concerning land use and the displacement of people. Or the struggle of the Ogoni people in Nigeria, whose environment has been seriously and irreparably damaged by an unholy alliance of their own government and the oil company Shell¹¹⁴.

The interventions of the TNCs in the territories of the indigenous people were not informed to the tribes or aboriginal communities, and therefore did not take into account their consent. In addition, the governments failed to inform the community about the exposition to hazardous materials relating to oil production that significantly threat the health. Therefore, indigenous lost the opportunities at least to migrate in time preventing any risk in their health. Due to the lack of reliable information on the character of the disaster, the governments violated the universal right to a free access to information, and the right to the dissemination of such information. Hiding and distortion of such information by the state is an omission that constitutes persecution. Furthermore, when eviction occurs, the victims have the right to remediation. This includes returning

113 United Nations, Global Ministerial Environment Forum: Report 23, Governing Council of the United Nations Environment Programme, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43&ArticleID=28&1> USA, 2000, pp. 8-17.

114 Lambert, "The Environment and Migration: What Response", *cit.*, p. 320.

to their homes when is possible or, compensation¹¹⁵, but there are unreliable methods for calculating damages resulting from environmental pollution. In terms of international environmental law, the Rio Declaration calls on states to “develop national law regarding liability and compensation for the victims of pollution and other environmental damage”. Moreover, the Stockholm Declaration calls on states to develop international law along similar lines, and the World Charter for Nature provides that everyone “shall have access to means of redress when their environment has suffered damage or degradation”.

Many indigenous from the Amazon Region spent over five years in temporary shelters in Bolivia, under severe living conditions, without foreign aid by their own government and the international community. The wealthy people affected by this disaster had rebuilt their property in other cities. But the indigenous did not receive compensation and the refugee status was not recognized. Pursuant to the constitution of the South America States and their commitments under the Charter of the American States, governments have the duty to protect the fundamental human rights of all people without any distinction. In addition, under the ICCPR (Art. 2 (2)) and the ICESCR every state party should take the necessary steps and measures to achieve full realization of the basic rights. Consequently, Ecuador, Colombia, Peru and Bolivia (States Parties to the ICCPR and the ICESCR) failed to intervene and protected the fundamental rights of indigenous people of the Amazon Region by enacting mechanism to control the activities of multinational companies and to put the environment and people’s and communities’ rights first, and thus fulfill their international obligations¹¹⁶. It is evident that those countries did not take the necessary measure to prevent the natural disaster and to protect the indigenous people, and their behavior felt in to the Rejudeen

115 Baker, “Determination of Environmental Refugees: Cases for Inclusion and Expansion”, cit., pp. 20-56.

116 Permanent Council of the Organization of the American State, “A New Development strategy for the Americas”, cit., pp. 5-17.

Principles: the states concerned, condoned, tolerated the actions of the TNCs, and refused to provide adequate protection.

Due to the violation of their human rights and the lack of response by the government, some members of the Yanomami community of the Amazon Region in Brazil left their land and cross borders to Bolivia, where the government refused their refugee applications. However, those Yanomami's indigenous that remained in the Amazon Region, under inhuman conditions, submitted a petition against the Government of Brazil that was presented in the Inter-American Commission on Human Rights. On December 15 of 1980, the Commission founded the Government of Brazil in violation of their international obligations because, the massive penetration of six oil companies were carried out without prior and adequate protection for the safety and health of the Yanomami Indians. The governmental tolerance and condonation of the harm resulted in a considerable number of deaths and the harm of the physical and psychological health of the Yanomami Community and their cultural heritage. "[T]hat from the facts a liability of the Brazilian Government arises for having failed to take timely and effective measures to protect the human rights of the Yanomamis"¹¹⁷. At the national level, the lack of availability of preventive remedies that threatened individuals contributes to the States' responsibility.

The above case illustrated the recognition of Regional Commission to the persecution perpetuated by States against indigenous communities who are internal displace due to the action of non-state actor. Therefore, the same argument should be argued to address the situation of the indigenous that cross the borders seeking for the protection of the international community. For example the Inter American Commission on Human Rights is currently analyzing the Huaorani and Aguinda Case of Ecuador. The Huaorani and Aguinda indigenous community presented a case against the government of Ecuador for its omission to provide protection against

117 Yanomami v Brazil Inter-American Commission on Human Rights, Resolution No. 12/85. Case No. 7615 Brazil, Organization of American States, <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> USA, 1985, pp. 3-46.

the destruction of the environment by the Texaco oil company, and the subsequent violation to the indigenous right to life and health. Within the domestic law of Ecuador, Texaco agreed “to subject itself to the jurisdiction of Ecuador’s courts, effectively conceding that the case would go to trial somewhere”. Texaco however, interpreted the jurisdiction instructions in the narrowest way possible and agreed to litigate only the “individual damages suffered by the 70 named plaintiffs”. Thus, 99% of Texaco’s victims were left outside Ecuador’s protection and without compensation, because they are not in the country¹¹⁸. To protect the rights of Ecuadorians, including indigenous people, the government needs to monitor the impact of oil development activities on the natural resources on which the people subsist and which form the basis for their culture. On the management side, the government must preserve the forest ecosystem and make sure that oil development does not disrupt the surrounding ecosystem. Finally, the government has a duty to make sure that present inhabitants of the land can maintain their lifestyle and that they share in whatever economic benefits may flow from extracting oil from their lands, and that the ecosystem is preserved for future generations¹¹⁹. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the people concerned. This builds towards implementation of Resolution 1819 on human rights and the environment approved in the Third Plenary Session of the OAS General Assembly held on June 5, 2001 in San Jose de Costa Rica¹²⁰. Resolution 1819 emphasizes the

118 King, “Environmental Displacement: Coordinating Efforts to Find Solutions”, cit., pp. 550-554.

119 Mcklain, “Disaster Creating Refugees: Talk of the Town, Global News South Africa Intelligence Wire, Financial Times Information Limited”, cit., pp. 15-19.

120 OAS/Ser.PAG/RES. 1819 (XXXI-O/01), AG. San José de Costa Rica, June 5, 2001. This document has a copy of the Resolution attached.

importance of studying the linkages between the environment and human rights. In addition, the United Nations Special Rapporteur on Human Rights and Environment prepared an important report called (The Ksentini Report), which offered a theoretical, thematic, and practical framework to address the linkages between human rights and the environment¹²¹.

Furthermore, States have legal obligations under the general principle of *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another). In the international context, this principle means states must refrain from acts that would cause injury to persons or property located in the territory of another state. The *sic utere* principle received perhaps its most celebrated application to the environmental context in the Trail Smelter arbitration of 1938 between the United States and Canada. The Trail Smelter case arose because of emissions of sulphur dioxide into the atmosphere by a Canadian corporation which caused environmental damage in the State of Washington and the citizens.

Important Regional jurisprudence has illustrated the link between human rights and environmental protection. For example: The case of *Lopez Ostra v. Spain*, decided by the European Court of Human Rights, demonstrates the application of the right to personal security and privacy in the context of environmental problems. In *Lopez Ostra*, the European Court unanimously ruled that siting a waste treatment facility a few meters from a home violated the right to privacy and family security of a family that lived near the facility. The Court found the Spanish government in violation of Article 8 of the European Convention on Human Rights because the government failed to take steps to protect the applicant and her family health from the environmental problems caused by the facility¹²². Also, the 27th May of 2002 The African Commission on Human and People Rights (OAU) found the Federal Republic of Nigeria in violation

121 Fatma Zohra Ksentini, Human Rights and Environment, U.N. *Special Rapporteur's Final Report*, <http://fletcher.tufts.edu/multi/www/1994-decl.html> United Nations Draft Declaration: Human Rights and the Environment, Geneva, 1994, pp. 23-47.

122 Swaigen, "Environmental Rights in Canada", *cit.*, pp. 65-150.

of the African Charter on Human and Peoples' Rights because the Nigeria Government did not protect the community from pollutants caused by the oil operations in Nigeria which threaten, among other rights, the life, health and self determination of the Ogony Community¹²³.

According to New Zealand Refugee Status: "(...) if a refugee claimant is at real risk of serious harm at the hands of non state actors for reasons unrelated to any of the convention grounds, but the failure of the State protection is for reason of a Convention ground, the nexus requirement is satisfied"¹²⁴. Consequently, the failure of the States of Ecuador, Colombia and Brazil to protect their indigenous communities, make the States responsible for their harm¹²⁵. Therefore, the Bolivian government should recognize the refugee status of those indigenous seeking for asylum because this particular social group (indigenous of the Amazon Region) have a well-founded fear of being persecuted by their governments' tolerance and condonation of the indiscriminate action of the multinational companies¹²⁶. The practical importance of human rights depends substantially on the extent to which they can be implemented, protected, and enforced.

CONCLUSION

The U.N. Refugee Convention exceeds its 50th anniversary. However, the nature and scope of the "international refugee regime" continues to be a matter of debate. The last decade had seen a

123 Federal Republic of Nigeria v Ogony Community ACHPR/COMM/A044, African Commission on Human and Peoples' Rights, www.achpr.org, Gambia, 2000, pp. 24-76.

124 MIMA v Khawar and others, High Court of Australia, 2002, HCA 14, 31.

125 On appeal from the Federal Court of Australia, 8 April 2003; 9 December 2003, Minister for Immigration and Multicultural Affairs, S395/2002 v Minister for Immigration and Multicultural Affairs

126 Shinsato, "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria", cit., pp 1-16.

number of arguments to extend the regime, and/or the scope of the Convention¹²⁷.

It is evident that, towards the mid 1990s, the importance of integrating basic human rights protections and environmental protections in every field of development has not yet been understood consciously, and therefore continues to be one of the areas that face significant political and economical resistance.

The link between a healthy environment and human rights is undeniable. Current international human rights law and environmental law are not able to effectively protect humans and the environment from man-made environmental destruction. Economic liberalization, the entry of multinationals into formerly closed areas of national economies and structural-adjustment policies are all instruments of social transformation. As a consequence of globalization, TNCs are one of the largest contributors to environmental destruction and violations of human rights. Under current international law, TNCs are not liable neither for environmental destruction, nor for the negative impacts that environmental degradation leads to human rights violations¹²⁸. The TNCs' systematic exploitation and degradation of the environment contribute to a large extent, to the spread of infectious diseases, which each year account for 20% and 25% of deaths all over the world. Air pollution accounts for 2.7 million to 3.0 million of deaths annually and of these, 90% are from developing countries¹²⁹.

Consequently, TNCs highly contribute to the violation of the right to life and health of vulnerable social groups. Humanitarian concerns demand some response to the plight of environmentally refugees, who are powerless and vulnerable in comparison to the TNCs. Multinationals and their struggle for domination are the responsible for the suffering and forced flee of thousand of people.

127 Black, "Environmental refugees: myth or reality?", cit., pp. 10-17.

128 Mcklain, "Disaster Creating Refugees: Talk of the Town, Global News South Africa Intelligence Wire, Financial Times Information Limited", cit., pp. 5-11.

129 Permanent Council of the Organization of the American State, "A New Development Strategy for the Americas", cit., pp. 5-17.

In many ways, the developed world is directly responsible for the developing world's environmental deterioration. As the 1992 United Nations Rio Declaration on Environment and Development stated, countries have common but differentiated obligations to protect the global environment, based on their varying contributions to environmental degradation. Because developed countries have contributed a great deal to the degradation of the global environment, they have an obligation to assist developing countries in dealing with the repercussions of such deterioration¹³⁰. Developed States should provide protection to the massive migration of environmental refugees because the TNCs of those States are the main responsible for the degradation of their sources of life and environment. Deteriorating environmental conditions such as deforestation, global warming, and resource pollution compel many families to move to safer locations. The brunt of the impact is felt in many of the poorest nations, where governments and individuals have few resources to respond to environmental damage and the consequential migration.

Environmental displacement affects millions of people and is likely to affect many more in the near future. There are a large and rapidly increasing number of people around the world who are being forced to leave their homes. They have no official status and no official protection, and very little chance of being able to return due to the irreversible damage. It is essential to respond to the decline in our environment and the threat posed by the indiscriminate action of the TNCs¹³¹.

This article questions the absence of non-relief development assistance for environmental refugees and consequently it is the obligation of the international community to substantively extend the definition of refugee to one that encompasses those displaced for environmental reasons. It would be necessary to increase the

130 Julian Evans, "Regional Worlds: Cultural Environments & Development Debates", *Center for Latin America Studies*, Vol. 10, University of Chicago, 1992, p. 534.

131 Suhrke Astri, "Environmental degradation and population flows", *Journal of International Affairs*, Vol. 47, Columbia University School of International Public Affairs, 1997, pp. 47-96.

awareness on the existing relationship between environmental degradation and human rights abuses; this approach would bring a direct influence on the well-being and development in the protection of peoples' rights¹³².

The beginning of a new century affords significant opportunity to reflect on the future path of global environmental policy. Environmental refugees represent an important group of interest to many policy-makers at international level: as a significant group of migrants, deserving of the world's attention¹³³. The contemporary challenge is to interpret the refugee's definition in a suitable way that accommodates or include current refugee flows. According to the Vienna Convention, an evolutionary approach for interpretation of the Refugee Convention, would be compulsory for the completely fulfillment of the objectives and purposes of the Convention; moreover, the Refugee Convention encourage the consideration of other international instruments with the aim to protect eventual violation of fundamental human rights. Furthermore, the possibility of creating or recognizing a right does not depend upon whether law is positive. The universal philosophy of law declares that legislation should be useful to human being necessities. The law should serve and help to protect human rights. Due to the complex situation that humankind is dealing, in which the new mechanisms of violations of rights have a faster development than the evolution of the law, it would be the responsibility of those who apply the law to provide an effective and fair application of the legislation. The dynamic nature of human rights demands the continuous evolution of international laws to maintain relevance in a rapidly changing world.

Subsequently, it could be argued that the legal structures are already in place to address these problems, and that there is no lack of legal devices. The purpose of the Refugee Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to

132 Permanent Council of the Organization of the American State, "A New Development strategy for the Americas", cit., pp. 5-17.

133 Black, "Environmental refugees: myth or reality?", cit., pp. 10-17.

inflict, or are powerless to prevent, that persecution. Hence, as soon as a person demonstrates: 1) that cross international borders, 2) because he or she is a member of a particular social group called “people (indigenous) affected by the indiscriminate industrial development of TNCs and/or States in their lands”, 3) which it is the cause of a well founded fear, and 4) directly it is created by the persecution of non-state actor or/and the state; their refugee status must be granted, and therefore the international community is under the obligation to provide effective protection¹³⁴. However, the experience in the human rights field shows that State Parties of the Refugee Convention are not willing to incorporate this humanitarian approach, even though violations of human rights are obvious. Regrettably environmental refugees seek protection in develop countries which have political and economical interests in the TNCs, which significantly contribute to the economies and industrial development of the first world nations. Consequently, it would be essential concrete legal solutions and precise government responses.

The human rights system would be forced to address environmental issues, which would permit the extension of human rights protection and would give rise to concrete solutions for cases of abuses¹³⁵. Environmental degradation is a worldwide phenomenon that provokes significant human conflicts. Global problems require global responsibility. Climate change is a reality. Increasing numbers of people fleeing from the degradation of the environment is a reality. However, this is not mirrored under international law and the impoverished nations which are most affected will continue to suffer. For these reasons, the international community has a moral obligation to provide humanitarian assistance to these bona fides refugees¹³⁶.

134 Michael R. Anderson, “Human Rights Approaches to Environmental Protection”, Vol. 3, Oxford University Press, 1996, pp. 1-4, 21-23.

135 Permanent Council of the Organization of the American State, “*A New Development strategy for the Americas*”, cit., pp. 5-17.

136 Ivor Jackson, “The Refugee and Human Rights: The Refugee Concept in Group Situation”, *International Journal on Minority and Groups Rights*, Vol. 3, South Africa Brill Academic Publishers 1999, pp. 64-65.

The major challenge that emerged from the Ksentini Report is to ensure that the High Commission for Human Rights is able to complement its task to protect and promote the human rights with the work of the United Nations Environmental Program (UNEP). In this sense, it is necessary that both institutions analyze their agendas respectively and seek common points for collaboration¹³⁷. Ksentini Report concluded: “[T]here is now a universal awareness of the widespread, serious and complex character of environmental problems, which call for adequate action at the national, regional and international levels”. Refugee status is based on a need for, and leads to, the provision of surrogate international protection where there is no protection available in the claimant’s country of nationality. Since the 1972 Stockholm Declaration on the Human Environment, a large number of national, regional, and international instruments have been drawn up that stress “the intrinsic link that exists between the preservation of the environment, development and the promotion of human rights. It is vital to recognize the reciprocal relationship between human rights and the environment—that environmental damage affects enjoyment of human rights and that human rights affect environmental”.

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137 Ibidem, p. 140.

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