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SPOILING MOVI'S RIVER: TOWARDS RECOGNITION OF PERSECUTORY ENVIRONMENTAL HARM WITHIN THE MEANING OF THE REFUGEE CONVENTION

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INTRODUCTION

Morris Movi belongs to a small community living in a remote mountainous region of Papua New Guinea ("PNG").[1] For thousands of years, generations of his family have lived in this area, in harmony with nature. The Auga River, which runs through this land, used to provide for the majority of his people's needs. The fish, eels and prawns were so bountiful that his family never went hungry and his community was spiritually enriched when traditional names were given to the different species of fish and plant life.[2] One day, foreigners appeared on his land. They dug a massive hole in the earth—a gold mine—and told him that he would benefit from what they found. However, he did not. Instead, waste generated by the mine was pumped directly into the river, which changed colour and then, without warning, flooded. The fish became sick and died, as did members of his community who continued to drink from the river because there was no other water source. Movi's feet turned yellow from crossing the river to reach his crops on the other side.

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1. In this exercise the hypothetical refugee applicant shall be referred to as 'Movi.' This name is taken from the Oxfam Report on the Tolukuma Gold Mine. INGRID MACDONALD, OXFAM AUSTRALIA, MINING OMBUDSMAN CASE REPORT: TOLUKUMA GOLD MINE 12 (2004), http://www.oxfam.org.au/campaigns/ombudsman/2004/cases/tolukuma/docs/fullreport.pdf.

2. *Id.* at 13 (explaining the spiritual and emotional effect of river pollution from the mine on the local community).

Helicopters flying overhead transporting supplies to the mine dropped cyanide and diesel on his land. His people became desperate and turned to alcohol and other vices in their despair. This led to increased violence and social disharmony. Movi's appeals to his government and to the mine operators were ignored.[3]

Movi's predicament is based on the actual circumstances of the Yaloge, Fuyuge, Roro, Mekeo, Kuni and Tolukuma peoples, as outlined in the Oxfam Mining Ombudsman report about the impact of the Tolukuma Gold Mine ('TGM') on local communities.[4] Movi's story presents a compelling, hypothetical example of how a group might suffer from persecution through harm inflicted by environmental degradation perpetuated by mining companies.

Now imagine that out of desperation and fear of further harm, Movi manages to leave his home. He arrives on the shores of another country as a refugee and makes application for recognition of that status, pursuant to the current international standard under the *Convention Relating to the Status of Refugees*[5] and the *Protocol Relating to the Status of Refugees*[6] (collectively, the "*Convention*").

This Article extrapolates from research into the impact of the TGM in PNG. It presents an argument that an applicant fleeing the harm generated by the mine could argue in order to claim asylum under the *Convention*. This work considers what ought to occur in international jurisprudence if a member of the affected community managed to leave his home, arrive safely in a new state, and make a claim for refugee status. Through a hypothetical application of the Convention definition to a particular set of facts, this paper argues that Movi and others like him already meet the requirements of the *Convention* definition. This has broader implications for a potential new category of refugees recognised for fleeing persecution in the form of environmental degradation.[7] A 2005 report hypothesized that

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3. *Id.*

4. *See id.* at 9-25 (describing the detrimental impact of the mine on health, safety and food security).

5. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention].

6. Protocol Relating to the Status of Refugees, Dec. 16, 1966, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

7. *See generally* Convention, *supra* note 5. Other theorists have referred to this category as "environmental refugees." That term will not be used in this article

by 2010, global warming will have created approximately 50 million environmental refugees[8] and by 2050 we can expect 200 million environmental refugees due to rising sea levels alone.[9] Relevantly, development displacement stemming from economic activity, such as the development of the TGM, affects more people every year than displacement related to armed conflict and natural disasters.[10]

This Article argues that while *naturally* occurring environmental disasters are not sufficient to establish refugee status without some level of persecution and lack of government protection, *artificial* environmental harm, if sufficiently serious, can be persecutory. Whether the persecutor is the state or a third party, if the harm is inflicted upon the victim for reasons of their race, religion, nationality, membership of particular social group, or political opinion, then asylum obligations under the *Convention* might be invoked if the environmental harm engenders a well-founded fear in the applicant such that they are unable to avail themselves of the protection of their country of origin.[11] Nothing in international refugee law explicitly rejects the notion that persecution may be inflicted through environmental harm.[12] Indeed, it is possible to draw

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because it is erroneous. The *Convention* sets out who is and who is not a refugee based on whether or not they meet the requirements of the definition and whether any of the exclusion clauses apply. *See infra* Part III. The use of terms such as "environmental refugee" or "economic migrant" is unhelpful because it attempts to read supplementary exclusion clauses into the *Convention*. These shorthand terms are not valid labels under the treaty.

8. *See* David Adam, *50m Environmental Refugees by the End of the Decade, UN Warns*, THE GUARDIAN (London), Oct. 12, 2005, at 24 (citing "rising sea levels, desertification and shrinking freshwater supplies" along with the displacement of 50 million individuals as consequences of global warming).

9. *See* Norman Myers, *Environmentally-Induced Displacements: The State of the Art*, *in* Symposium, *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration* 56 GENEVA/IOM.UNHCR (1996).

10. *See* CHRISTIAN AID SOCIETY, HUMAN TIDE: THE REAL MIGRATION CRISIS 17 (May 2007) http://www.christian-aid.org.uk/Images/human_tide3__tcm15-23335.pdf (stating that while 15 million people are displaced per year due to economic activity, the total number displaced at any given time is closer to 105 million due to the time it takes those displaced to resettle).

11. *See infra* Part II.

12. *Cf.* Convention, *supra* note 5, arts. 1(A)(2), 1(C)(6) (providing race, religion, nationality and membership of particular social and political groups as reasons for persecution and explaining that a refugee can still avail him or herself of the *Convention* if he or she can invoke a compelling reason arising out of

on binding international human rights instruments that lend support to the notion that at least some of the world's environmentally displaced people fall within the settled definition of a refugee. This article, a highly fact-specific hypothetical example of a claim for refugee status under the *Convention*, sets out precisely how one group of environmentally displaced people already meet the definition.

Part I of this Article draws on available sources of investigative material concerning the effects of the TGM on local communities to set out the factual basis for the hypothetical claim. Part II examines the current legislative framework as set out in the *Convention* and argues that an evolutionary approach to the interpretation of the definition was envisaged by the drafters and is in line with accepted principles of treaty interpretation. Part III turns to an application of the facts to the key elements of the definition, beginning with the requirement that an applicant be outside her or his country of origin. Part IV examines the requirement that the refugee applicant possess a "well-founded fear of persecution." Part V argues that the hypothetical applicant is a "member of a particular social group" and Part VI explores the necessary causal connection between that group and the fear of persecution experienced by it. This Article then concludes that the applicant should be granted refugee status under the *Convention*.

I. MINING AND ITS IMPACT: THE TOLUKUMA EXPERIENCE

"For seven kilometres from the mine outfall, river life has been destroyed. No adequate course of action from the Government or from Tolkuma Gold Mine has been taken."[13]

Mine operators have an enormous impact on the lives and environments of local communities, many of whom share similar experiences despite their geographic separation. In many instances, the affected areas are often home to remote and vulnerable communities and report environmental degradation, human rights

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persecution).

13. TECHA BEAUMONT, MINERAL POLICY INSTITUTE, REPORT ON TOLUKUMA CYANIDE SPILL (2000), http://www.mpi.org.au/campaigns/cyanide/report_tolukuma/.

violations and poverty as a result of mining operations.[14] Most communities have no outlet for their grievances that frequently result in community division, costly legal actions, and, sometimes, violent conflict.[15] The TGM is presently owned by Emperor Mines Limited ("EML") but from 1999 until 2006, it was owned by DRD Gold, formerly Durban Roodeport Deep Ltd., listed on the Australian Stock Exchange.[16] Waste produced during the extraction process at the TGM is dumped "into the Auga-Angabanga River system, upon which downstream communities rely."[17]

The surrounding communities have suffered great environmental degradation due to the mine and its waste disposal practices. In 2000, a helicopter delivering supplies to the mine dropped one tonne of cyanide in the area. In 2001, community members wrote to the Oxfam Mining Ombudsman requesting assistance because local people complained of environmental pollution and its flow-on effects.[18] Locally, increased sedimentation has made the river more difficult to cross and has caused flash flooding.[19] At least one member of the community was allegedly swept away by such a flood.[20] Difficult river crossings prevent community members from

14. Oxfam Australia, *The Mining Ombudsman Project*, http://www.oxfam.org.au/campaigns/mining/ombudsman/index.html (last visited June 10, 2008) (enumerating a formal process for investigating allegations of human rights violations).

15. *Bougainville fights for freedom*, Posting of Bougainville Freedom Movement, http://www.hartford-hwp.com/archives/24/047.html (May 26, 1996, 02:52:13 EDT) (explaining that by 1996, the seventh year of conflict between the people of Bougainville and the governments of Australia and Papua New Guinea, a blockade designed to force reopening of a copper mine by depriving the people of Bougainville of humanitarian aid had cost over 10,000 lives).

16. In Australasia, DRD Gold has a 78.72% interest in EML, the current owners and operators of the TGM. EML is also listed on the Australian Stock exchange. *See* DRD Gold Limited, Corporate Profile, http://www.drd.co.za/about/profile.asp [hereinafter DRD Gold Limited]; *see also* MacDonald, *supra* note 1, at 9.

17. *See* OXFAM AUSTRALIA, MINING OMBUDSMAN: CASE UPDATES 2005 4, (Maureen Bathgate & Sarah Lowe eds., 2006) [hereinafter OXFAM CASE UPDATES, 2005] (stating that the waste tailings from the gold have negatively affected human as well as animal life).

18. *See id.* "The mine dumps over 160,000 tonnes of mine waste directly into the Auga-Angabanga River annually." *Id.*

19. *See id.*

20. *See* Macdonald, *supra* note 1, at 9.

accessing their gardens and forests used for food and building supplies. Community members attribute illness and deaths to drinking and washing in the river. Further, the river's fish stock has been depleted by the pollution, threatening the local food supply.[21] The local indigenous communities believe that these factors have led to "increased social problems, including alcoholism and violence."[22]

II. CURRENT TREATY FRAMEWORK

Refugee advocates share a common misapprehension that asylum seekers have a *right to asylum* under the current international refugee regime. In fact, there is no general "right to asylum" under international law, but Movi does have a "*right to seek* and to enjoy in other countries asylum from persecution."[23] That principle is enshrined in the foundational international human rights instrument, The Universal Declaration of Human Rights ("UDHR"), that set the political stage for the *Convention*.[24] The *Convention* remains the functional core of international refugee law.[25] It defines a refugee as 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 . . . ."[26] Importantly, the definition does not contain the words, 'having been formally recognised.' Any person who satisfies the conditions of article 1(A) (2) is a refugee irrespective of whether or not she or he has been formally recognised as such under municipal law and so

21. *See* OXFAM CASE UPDATES, 2005, *supra* note 17, at 5.

22. *See* Macdonald, *supra* note 1, at 9.

23. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), art. 14 (emphasis added) [hereinafter UDHR].

24. *See id.* art. 14.

25. *See generally* Convention, *supra* note 5. The *Convention* is enforceable in signatory states where it has been incorporated in domestic law. *Id.*

26. *See* Convention, *supra* note 5, art. 1(A)(2). The 1951 definition included both temporal and optional geographical limits which were removed by the 1967 Protocol. Omitting the words 'as a result of events occurring before 1 January 1951' and the reference to Europe, the definitions are identical. Therefore, any reference to the *Convention* in this essay is also a reference to the Protocol. *See also* 1967 Protocol, *supra* note 6, art. 1(2).

"[r]ecognition of his refugee status does not therefore make him a refugee but declares him to be one."[27]

The *Convention* definition of refugee can be broadly divided into three parts: the inclusion clauses, which set out the affirmative elements of a successful claim for refugee status;[28] the cessation clauses, which define when a person has ceased to be a refugee;[29] and the exclusion clauses, which demarcate when a person is ineligible for recognition of refugee status because of some other aspect of his or her record.[30] All three elements of the definition will be relevant to a claim for refugee status but the cessation and exclusion provisions only arise once it has been established that an applicant meets the initial requirements. This paper will focus on the inclusion clauses, as set out in article 1(A) (2), and argue that Movi meets the initial prerequisites because he is fleeing persecution in the form of environmental harm.

Importantly, the *Convention* contains a regime of rights to which a refugee is entitled once formal recognition of her or his status has been conferred. It is important to bear in mind that, in our hypothetical example, Movi seeks to access these rights granted to him under the *Convention* on the basis that he no longer has these rights in his country of origin.

A. INTERPRETATION

States and tribunals may vary in their approaches to interpretation and application of the *Convention*. However, they are all guided by binding principles of treaty interpretation set out in the Vienna Convention on the Law of Treaties, 1969 ("VCLT").[31] The VCLT

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27. *See* Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979) [hereinafter UNHCR Handbook on Procedures].

28. Convention, *supra* note 5, art. 1(A) (inclusion).

29. Convention, *supra* note 5, art. 1(C) (cessation).

30. *See* Convention, *supra* note 5, arts. 1(D), 1(E) (exclusion) (providing for the application of refugee status to persecuted individuals in the first section and disqualified persons in the final four sections). For example, if an applicant is found to have committed a serious non-political crime. *See* Convention, *supra* note 5, art. 1(F)(b).

31. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

requires treaties to be interpreted in good faith with reference to their object, purpose and context as well as to developments subsequent to their conclusion.[32] Using the principles of the VCLT, most scholars agree that the *Convention* is of a humanitarian character, albeit underscored by the practical purpose of burden sharing.[33] The preamble makes this evident by "recognizing the social and humanitarian nature of the problem of refugees" and expressing a "profound concern" for their plight.[34] The United Nations also articulates an intention to assure refugees the "widest possible exercise" of rights and freedoms enjoyed under the UDHR.[35] In *Wang v Minister for Immigration and Multicultural Affairs*, Justice Merkel of the Australian Federal Court found "the term 'refugee' in the Convention: 'is, . . . to be understood as written against the background of international human rights law, including as reflected or expressed in the [UDHR] (esp. Arts 3, 5, and 16) and the International Covenant on Civil and Political Rights (esp. Arts 7, 23).'"[36] An evolutionary approach must be adopted when interpreting the *Convention* definition and applying it to contemporary and emerging refugee flows. Precisely because of the humanitarian nature of the *Convention*, "a Court cannot endorse actions that are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights."[37] Terms such as "persecution" used in the *Convention* are inherently evolutionary and therefore only an evolutionary approach to interpretation will give effect to the intended purpose of the treaty.

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32. *Id.* art. 31.

33. Eiko R. Thielemann, *Burden Sharing: The International Politics of Refugee Protection* 2-3 (Ctr. for Comparative Immigration Studies, Working Paper No. 134, 2006) (explaining in the context of refugee law that refugee burdens in industrial states are unequal and a market-based policy driven by quotas could prove to be an equitable and effective means of creating a humanitarian international refugee law).

34. *See* Convention, *supra* note 5, pmbl.

35. *See id.*

36. Wang v. Minister for Immigration and Multicultural Affairs, (2000) F.C.A. 511 (Austl.) (citing Applicant A v. Minister for Immigration and Ethnic Affairs, (1997) 190 C.L.R. at 254 (Austl.)).

37. Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 114 (Sept. 25) (separate opinion of Vice-President Weeramantry).

B. AUTHORITATIVE CHARACTER OF THE UNHCR HANDBOOK AND UNHCR GUIDELINES AND STATEMENTS

In addition to interpretation of the *Convention* proper, there is increasing recognition that a thorough analysis and application of the *Convention* must also take into account the U.N. High Commission for Refugees ("UNHCR") handbook and guidelines.[38] In recent years, some courts, including the English High Court, have invoked Article 35(1)[39] of the *Convention* when quoting directly from various UNHCR materials:[40] "having regards to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight."[41] The interpretation of the *UNHCR Handbook on Procedures* is increasingly important to the interpretation of refugee status under the *Convention.*

III. "OUTSIDE THE COUNTRY OF HIS ORIGIN"

In order to claim protection under the *Convention*, the applicant must be, outside his or her country of origin.[42] There are no exceptions to this rule. As previously discussed, this is because the *Convention* is primarily concerned with giving rights to refugees who would otherwise have no rights as aliens and non-citizens. It follows that "[i]nternational protection cannot come into play as long as a person is within the territorial jurisdiction of his home country."[43] Thus, for the purpose of this examination, it must be

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38. Walter Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 613, 627 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

39. Convention, *supra* note 5, art. 35(1) (stating that "[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.").

40. UNHCR Handbook on Procedures, *supra* note 27, ¶ 12(iii) (including UNHCR statements regarding questions of law, or conclusions by the Executive Committee of the High Commissioner's programme).

41. R v. Uxbridge Magistrates' Court and Another, ex parte Adimi (1999) 4 All ER 520 (Q.B.) (U.K.).

42. Convention, *supra* note 5, art. 1(A)(2) (specifying those refugees who have a well founded fear of being persecuted because of race, religion, nationality, membership of a particular social group or political opinion).

43. UNHCR Handbook on Procedures, *supra* note 27, ¶ 88.

assumed that Movi has somehow managed to leave his home, travel overseas and arrive safely in another state.[44]

IV. "OWING TO A WELL-FOUNDED FEAR OF BEING PERSECUTED"

Movi must also demonstrate that he holds a "well-founded fear of being persecuted" to qualify for protection under the *Convention*.[45] This phrase lies at the heart of the refugee definition. Importantly, it incorporates both subjective and objective elements.

A. THE LAW OF A WELL-FOUNDED FEAR

On its face, the fear element is the easiest to satisfy. It is of particular significance for claimants seeking refuge from environmental harm because the standard excludes other reasons for flight. For instance, those fleeing famine or environmental disaster are excluded from the definition unless they can show that the famine was a means of persecution or they also have a "well-founded fear of persecution for one of the reasons stated."[46] Even dire, life-threatening environmental disasters do not necessarily engender a fear of persecution. It is that fear alone that is relevant to the *Convention* definition. Claims based merely on flight from environmental disaster are therefore excluded from the *Convention* at this preliminary stage. However, claimants like Movi can show a fear of persecution because their government refuses to protect them from damages caused by the mines. Unlike environmental disasters, which are outside of the government's control, allowing the mining companies to degrade the surrounding environment is directly within the control of the government.

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44. This element of the facts presented for analysis is the only part which is fictitious. All other facts pertaining to the applicant are the result of research into the TGM and its impact on local communities. *See* Macdonald, *supra* note 1. Further, questions of whether internally displaced people ought to be eligible for refugee status are not the focus of this work.

45. Convention, *supra* note 5, art. 1(A)(2).

46. UNHCR Handbook on Procedures, *supra* note 27, ¶ 39 (assuming that most people would not abandon their home and country without a compelling reason).

Next, an "ordinary meaning" approach to interpretation[47] reveals that fear, a subjective emotion, must be supported by the objective standard of being "well-founded." The incorporation of a subjective element in the definition places an emphasis on the particular state of mind, disposition and credibility of the applicant. This is combined with an objective standard requiring decision-makers to conduct a balancing exercise that gives equal weight to the state of mind of the applicant and the relevant background situation. Accordingly, the subjective fear that Movi feels cannot be considered in a vacuum, it must be supported by an objective situation. An applicant's fear is well-founded if a state party establishes "there is a significant risk that the applicant may be persecuted."[48]

Precisely what meets this evidentiary burden has been the subject of much debate. Earlier approaches involving a 'balance of probabilities test'[49] have now been largely rejected in favour of a more generous 'reasonable possibility' standard as articulated by Justice Stevens of the U.S. Supreme Court in *Immigration and Naturalization Service v Cardoza-Fonseca*:

> There is simply no room in the United Nations definition for concluding that because an applicant has a 10% chance of being . . . persecuted, that he or she has no 'well founded fear' of the event happening . . . . [S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.[50]

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47. Vienna Convention, *supra* note 31, at 340 (requiring interpretation to be done in terms of the treaty within context and in light of its purpose).

48. Colloquy, *The Michigan Guidelines on Well-founded Fear*, 26 MICH. J. INT'L L. 493, 497 (2005) [hereinafter *The Michigan Guidelines*] (clarifying that a chance or remote possibility of persecution is insufficient to establish well founded fear).

49. *See* Kwiatkowsky v. Minister of Manpower & Immigration [1982] 2 SCR 856 (Can.).

50. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1986) (quoting Immigration & Naturalization Serv. v. Stevic, 467 U.S. 407, 453 (1983)). This standard was also adopted by the Canadian Federal Court of Appeal in *Adjei v. Canada* (Minister of Employment & Immigration) [1989] 2 F.C. 680. Similarly, Professor Hathaway surmises that because the risk of persecution is impossible to definitively measure, "decision-makers should ask only whether the evidence as a whole discloses a risk of persecution which would cause a

To establish that flight based on environmental harm is flight based on a well-founded fear of persecution, Movi needs to point to more than merely generalized environmental degradation in his country of origin. He must present evidence of severe environmental harm that has the reasonable probability of posing a serious threat to him and his community, thereby inducing fear.

B. MOVI'S WELL-FOUNDED FEAR

Since the TGM commenced operating near his home in 1994, Movi has endured a number of calamities and direct threats to his life which at least show a reasonable possibility of persecution. Instead of containing its waste on land, TGM dumps contaminated mine tailings into Iwu Creek, which runs into the Auga River.[51] Substantial quantities of mine waste and rock, otherwise known as 'overburden,' are also dumped into the Auga River via failing waste dumps that erode over time.[52] TGM opted for this cost effective yet outdated practice of riverine tailings disposal even though the company was warned that the resulting high levels of sedimentation within the river would likely destroy fish habitats and food resources. Clearly, this waste disposal method alone disclosed a 'reasonable possibility' of inflicting serious harm. In practice this disposal method has destroyed food resources and access to safe drinking water. In January 2004, the Oxfam Mining Ombudsman found "genuine fear expressed" in the concerns of Movi and community members who described how their health has been damaged by TGM's dumping practices.[53] Downstream communities along the Auga River describe swollen stomachs, open sores, yellowed skin, and death related to the river.[54] An increase in illness correlates to the increased drinking of river water during the dry season, further implicating the polluted water in the sickness the community

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reasonable person in the claimant's circumstances to reject as insufficient whatever protection her state or origin is able and willing to afford her." JAMES HATHAWAY, THE LAW OF REFUGEE STATUS 80 (1991) (fearing that "decision makers may be inclined to use precise though arbitrary risk thresholds").

51. Macdonald, *supra* note 1, at 11 (noting that on a yearly basis EML discharges more than 160,000 tonnes of mine tailings into the creek).

52. *Id.*

53. *Id.* at 12.

54. *Id.* at 11 (noting also that since 2001 over fifty people have died of unexplained causes).

suffers.[55] Mercury levels in the Auga River downstream of TGM's mining operation are unacceptably high.[56] Evidently, Movi and community members now live in fear of the natural environment that is also their home because of the polluted Auga River.

Fear amongst the affected communities was also galvanized in 2000 when a helicopter transporting cyanide to the mine dropped a one-tonne bale from its load.[57] Pellets plummeted through the canopy of the PNG rainforest and landed 20 meters away from a stream.[58] Until the arrival of Greenpeace Australia and the Mineral Policy Institute, the mine operator[59] publicly claimed that recovery of the cyanide and the removal of contaminated topsoil had been completed.[60] When Greenpeace did arrive, they found no evidence of any cleanup and plenty of contamination.[61] In this cover-up, the mining company was prepared to expose local inhabitants to a dangerous and potentially life threatening chemical rather than admit any liability. In these circumstances, a reasonable person would clearly fear the actions of this company.

Moreover, Movi can point to the "reasonable possibility" that this sort of practice will continue. The amount of tailings dumped into the river rose between 2000 and 2004, to an average of 14,000 tonnes per month.[62] TGM hopes to continue to operate the mine and introduce new resources to increase capacity.[63] Increased production

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55. *Id.*

56. *Id.* (revealing Unisearch's finding that the fish contained an excess of mercury by the standards of Australia and the New Zealand Food Authority (ANZFA) and the PNG Office of Environment and Conservation similarly found unacceptably high mercury levels).

57. Beaumont, *supra* note 13 (showing that iron cyanide was found around the crash site).

58. *Id.* (indicating that enough cyanide entered the stream to raise the level of cyanide in the water to 25 times the US limit of .2ppm for drinking water).

59. DRD Gold Limited, *supra* note 16.

60. Beaumont, *supra* note 13 (documenting Dome's claim that visual inspection yielded no detectable contamination).

61. *Id.* (detailing consequences to the community downstream).

62. Macdonald, *supra* note 1, at 11 (providing figures indicating that TGM discharged 100,000 tons of tailings in 2000 and 168,000 tons in 2004).

63. *Id.* (quoting DRD Gold Limited, *supra* note 16) (indicating that "with present reserves, the mine can expect to remain operating for at least another six to eight years, but with the introduction of the new underground diamond head drill, it is hoped (and expected) that the mine could be going for at least 10 years and hopefully longer.").

will bring commensurate increases in tailings disposal and river contamination, and inevitably increases in pollution and destruction of resources on which the local communities rely.[64]

In these circumstances, it is possible to conclude that Movi has a well-founded fear of deliberate acts perpetuated by TGM which cause environmental harm. This is not a case of accidental environmental disaster and so Movi's claim cannot be dismissed at this preliminary stage. However, some courts and tribunals may take issue with the question of whether the harm Movi earnestly fears rises to the level of "persecution" as delineated under the *Convention*.

C. WHAT IS PERSECUTION?

The meaning of persecution, though a central term to determine refugee status, is not defined by the *Convention*. After more than fifty-six years, there is still no international consensus on a definition.[65] The fact that the framers of the *Convention* chose not to define the term evinces an intention to allow international refugee law to respond to new circumstances, not yet contemplated at the time of drafting. This may be in part due to an appreciation of the limitless ways in which human beings may inflict harm upon one another. The lack of an explicit definition of the term protects those who might be subjected to forms of persecution inadvertently excluded from the definition. Practically speaking, the vagueness of the definition affords states that are party to the treaty greater manoeuvrability in refugee status determination.[66]

However, there is international agreement about one aspect of persecution under the *Convention*. Under Articles 31 and 33 of the *Convention*, it is generally accepted that a threat to life or freedom on account of a *Convention* ground will always amount to persecution.[67]

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64. Macdonald, *supra* note 1, at 11 (describing the consequences for downstream communities).

65. *See, e.g.*, Cynthia A. Isaacs, Note, *The Torch Dims: The Ambiguity of Asylum and the "Well-Founded Fear of Persecution" Standard in* Sadeghi v. INS, 20 N.C. J. INT'L L. & COM. REG. 721, 721-22 (1995) (noting a vague interpretation of the term "persecution" under U.S. law).

66. *Cf.* ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, 193 (vol. 1, 1966).

67. Convention, *supra* note 5, arts. 31, 33 (forbidding a contracting state from

This interpretation of the term has found acceptance in common law jurisdictions,[68] amongst noted international refugee law scholars,[69] and in the *UNHCR Handbook on Procedures*.[70] Adopting this interpretation, Movi can demonstrate that the harm he has endured has constituted a threat to his life. The contamination of the Auga River, Movi's only source of water, poses a direct threat to his life. He must either use water containing unacceptable levels of heavy metals[71] and face risk of poisoning,[72] or he must go without water entirely. Either way, the result is a serious risk to his health and his survival.

The existence of the mine and the riverine tailings disposal method has also made the Auga River deadly in other ways. Locals have described the advent of flash flooding along the Auga River. For example, Muluvi Eleli alleges that TGM's release of mine waste that was blocking the flow of water upstream caused flash flooding that killed his daughter.[73] Movi also endured threats to his life as a result of cyanide spills in 2000 and again in 2003 when 4,000 litres of diesel fuel was dropped in transit to TGM.[74]

These avoidable accidents, coupled with the threat of drowning, poisoning, or slow starvation to which Movi is now exposed, constitute a threat to his life. This threat, however, has not yet been contemplated in the context of international refugee law. In that

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returning a refugee to a persecuting country); *see also* UNHCR Handbook on Procedures, *supra* note 30, ¶ 51 (citing Convention, *supra* note 5, art. 33).

68. *See, e.g.*, Chan v. Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, 426 (Austl.). (finding that a threat to life or freedom is generally accepted as persecution under the *Convention*).

69. *See* ATLE GRAHL-MADSEN, *supra* note 66 (acknowledging that even those who interpret persecution strictly agree that loss of life or freedom constitutes persecution).

70. UNHCR Handbook on Procedures, *supra* note 27, ¶ 51 (noting that other serious violations of human rights would constitute persecution).

71. Macdonald, *supra* note 1, at 12 (finding that "water quality investigations carried out during 2002 by PNG civil society organisation NEWG also found unacceptable levels of certain heavy metals in the Auga River").

72. *Id.* (stating that "other reports from nurses at the St. Gerard's School of Nursing documented health concerns and 19 unexplained deaths"). They claim that the skin colour of the people turned yellow before they died, possibly indicative of poisoning. *Id.*

73. *Id.* at 13.

74. *Id.* at 16 (highlighting the efforts of the people to seek compensation for physical and psychological impacts).

milieu, a threat to one's life is usually recognised as a verbal or physical threat of murder expressed by one person or group to another, acts of violence and intimidation and other forms of harassment.[75] And yet, there is nothing in the *Convention* that suggests that the threat to life endured by Movi could not also be persecution if it fulfils the other requirements of the definition.

1. Threat to Life

In support of his claim that the above examples constitute a threat to life and, therefore, persecution, Movi must draw on standards established in binding international human rights treaties. The predominant approach to the interpretation of persecution, at least in common law jurisdictions,[76] has been to equate it with violations of international human rights norms codified in binding international treaties such as the UDHR, the *International Covenant on Civil and Political Rights*[77] ("ICCPR") and the *International Covenant on Economic, Social and Cultural Rights*[78] ("ICESCR"). This approach is justified by the VCLT, which references the preamble of a treaty as revealing the treaty's context, object, and purpose.[79] In establishing the purpose of the *Convention*, the preamble highlights that "the Charter of the United Nations and [the UDHR] . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."[80] This reference to the

75. *See, e.g.*, Baballah v. Ashcroft, 367 F.3d 1067, 1076 (9th Cir. 2004) (describing severe harassment, threats, violence and discrimination against an Israeli Arab and his family that amounted to persecution); Shah v. Immigration & Naturalization Serv., 220 F.3d 1062, 1072 (9th Cir. 2000) (detailing how the applicant's politically active husband was killed and the applicant and her family were repeatedly threatened in India).

76. Michelle Foster emphasises that the "need for some objective guidance has underpinned the development of the human rights approach to interpreting the Refugee Convention, which is now dominant in the common law world, and increasingly accepted in many civil law jurisdictions as well." MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 87-88 (2007).

77. International Convention and Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR].

78. International Convention on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

79. Vienna Convention, *supra* note 31, art. 31.

80. Convention, *supra* note 5, pmbl.

UDHR is telling and instructive.[81] Indeed, the language of the *Convention* definition mimics the UDHR in "[giving] attention to five basic freedoms: freedom from persecution on account of (1) race, (2) religion, (3) nationality, (4) membership of a particular social group and (5) political opinion."[82] Therefore, as a matter of treaty interpretation, applicants and decision-makers must look towards this foundational human rights text for guidance.[83] The VCLT also requires consideration of "any relevant rules of international law applicable in the relations between the parties."[84] Since most signatory states are also parties to the U.N. General Assembly, which approved the UDHR on December 10, 1948, the UDHR should be considered a relevant rule of international law.

Importantly, the UDHR, echoed by the remaining instruments of the International Bill of Human Rights, provides that "everyone has the right to life, liberty and security of person."[85] Though originally the right to life and security was probably aimed at preventing arbitrary killing by governments, the environmental facets of the rights to life and security of the person have since been broadly recognised by noted scholars and in international jurisprudence.[86] In

81. It is fair to assume that the *Convention* would have considered rights granted under the ICCPR and ICESCR if those treaties were in existence in 1951. *Cf.* Jessica B. Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refuge Definition*, 6 N.Y.U. ENVTL. L.J. 480, 490 (1998) (arguing that the *Convention* "relied on the human rights foundation laid by the Universal Declaration").

82. Cooper, *supra* note 81, at 490 (highlighting the fact that the five freedoms protected by the refugee definition in the *Convention* are protected in several articles of the UDHR); *see also* UDHR, *supra* note 23, arts. 2, 18, 19, 20.

83. Importantly, environmental rights and the right to life are also contained in more recent binding international treaties. Fundamental rights such as the "right to the highest attainable standard of health" enshrined in the ICESCR and the right to life enshrined in the ICCPR depend on a clean and healthy environment. *See* ICCPR, *supra* note 77, art. 6, ¶ 1 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."); ICESCR, *supra* note 78, art. 12, ¶ 1 ("The State Parties . . . recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health").

84. Vienna Convention, *supra* note 31, art. 31(3)(c).

85. UDHR, *supra* note 23, art. 3.

86. *Cf.* Cooper, *supra* note 81, at 495-97 (highlighting that the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and 1984 Cartagena Declaration on Refugees expanded the refugee definition to include people fleeing internal tensions and

addition, Article 25 of the UDHR provides humans worldwide "the right to a standard of living adequate for the health and well-being of himself and of his family including food . . . the right to security in the event of unemployment . . . or other lack of livelihood in circumstances beyond his control."[87]

The comprehensive language of these provisions set "broad environmental standards and creat[e] an implicit human right to freedom from life-threatening and otherwise intolerable environmental conditions."[88] The environmental aspects of the right to life are broadly acknowledged: scholars suggest that "environmental problems that endanger life—directly or indirectly—implicate" the right to life.[89] Further, "established human rights standards which do not directly touch upon environmental issues may house an implicit relevance capable of judicial development. The right to life, for example, may be deemed to be infringed where a state fails to abate the emission of highly toxic products into supplies of drinking water."[90] Human rights scholar Professor Dinah Shelton opines that "a safe and healthy environment may be viewed either as a pre-condition to the exercise of existing rights or as inextricably intertwined with the enjoyment of" the right to life.[91]

In his opinion in the *Gabčíkovo-Nagymaros* Case, Judge Weeremantry lends support to the notion that a clean and safe environment is a prerequisite for the enjoyment of all other rights:

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civil disturbances).

87. UDHR, *supra* note 23, art. 25.

88. Cooper, *supra* note 81, at 492.

89. Neil A.F. Popović, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 515 (1996).

90. Michael Anderson, *Human Rights Approaches to Environmental Law: An Overview*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1, 7 (Alan E. Boyle & Michael R. Anderson eds., 1996).

91. Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 105 (1991).

> The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[92]

Hence, there is persuasive authority for the principle that environmental rights are a prerequisite to fundamental human rights, especially the right to life. The facts outlined above offer conclusive evidence that Movi has endured and will continue to endure serious threats to his life in the form of environmental harm. It follows then that Movi has well-founded fear of "persecution."

2. Deprivation of Economic and Social Rights

In the unlikely event that Movi failed to establish a serious threat to his life amounting to "persecution" through the above examples, he could demonstrate that his experiences amount to persecution by highlighting that his economic and social rights have been violated. It must be acknowledged that measures which are not in themselves persecutory can be combined with other factors to "produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds.'"[93] Indeed, the *UNHCR Handbook on Procedures* confirms that "other serious violations of human rights—for the same reasons—would also constitute persecution."[94]

Though an in depth discussion of "persecution" as the deprivation of socio-economic rights is beyond the scope of this Article, it is important to note that the destruction of Movi's environment could constitute a denial of his rights under both the UDHR and ICESCR. For example, article 23 of the UDHR describes the fundamental right

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92. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 91-92 (Sept. 25) (separate opinion of Vice-President Weeramantry).

93. UNHCR Handbook on Procedures, *supra* note 27, ¶ 53; *see also* Korablina v. Immigration & Naturalization Serv., 158 F.3d 1038, 1044 (9th Cir. 1998) (finding persecution where Ukrainian Jew witnessed violent attacks and suffered extortion, harassment, and threats by anti-Semitic ultra-nationalists).

94. UNHCR Handbook on Procedures, *supra* note 27, ¶ 51.

of all people to work and to "free choice of employment, to just and favourable conditions of work and to protection against unemployment."[95] Similarly, article 6(1) of the ICESCR recognises the right to work "which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts."[96] In her overview of the connection between the deprivation of economic and social rights and persecution, Professor Foster relies on US and UK authority[97] to assert that "decision-makers have recognized that there is no necessary correlation between the nature of harm . . . and the gravity of the impact upon an individual."[98] Foster points out that it is now generally accepted that cases involving an absolute denial of the right to employment "are considered sufficiently serious to warrant characterisation as persecution."[99] Pertinently, as a subsistence farmer, Movi depends entirely on the natural environment and upon the Agua River for his livelihood. Without it, he faces unemployment and slow starvation.

3. Other Social Rights

The impact of the river pollution is also felt emotionally and spiritually by the communities.[100] Arguably, where direct and specific environmental harms destroy the cultural existence of a group, this may amount to "persecution." This sort of harm must have been contemplated by Justice McHugh of Australia's High Court when he found that "measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution . . . . [P]ersecution .

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95. UDHR, *supra* note 23.

96. ICESCR, *supra* note 78.

97. *See* Dunat v. Hurney, 297 F.2d 744 (3d Cir. 1961) (finding "the denial of an opportunity to earn a livelihood . . . is the equivalent of a sentence of death by means of slow starvation") (citations omitted); Secretary of State for the Home Dep't v. Sijakovic (Unreported, U.K. IAT, Appeal No. HX-58113-2000, 1 May 2001), ¶ 16) (stating that "the harm need not result from violence or loss of liberty. An inability to earn a living or to find anywhere to live can result in destitution and at least potential damage to health and even life."); *see also* Foster, *supra* note 76, at 92

98. Foster, *supra* note 76, at 92.

99. *Id.* at 94.

100. Macdonald, *supra* note 1, at 13. "The sacred sites in the river are now covered by sediment and the aquatic life in the river is almost gone. The elders grieve for their children and grandchildren who are losing their traditions and identity." *Id.*

. . has historically taken many forms of social, political and economic discrimination."[101]

D. PERSECUTION BY WHOM? NON-STATE AGENTS OF PERSECUTION

"The nature of Persecution is changing . . ."[102]

Movi's claim involves a fear of persecution perpetuated most directly by non-state actors. Currently, it is EML, a company listed on the Australian Stock Exchange, that is polluting the Auga River and destroying the surrounding environment. Whether or not persecution carried out by non-state actors constitutes persecution as defined by the *Convention* has been the subject of debate.[103] The *UNHCR Handbook on Procedures* says that while "persecution is normally related to action by the authorities of a country . . . it may also emanate from sections of the population . . . if [the acts of persecution] are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."[104] The guideline contained in the *UNHCR Handbook on Procedures* has been accepted by most common law jurisdictions.[105]

Conversely, civil law jurisdictions have been more divided and tend to require some level of accountability of the state. Proponents of the accountability view argue that persecution is the abuse of state power and therefore only states or agents of the state can

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101. Chan v. Minister for Immigration & Ethnic Affairs (1989) 169 C.L.R. 379, ¶ 36 (Austl.).

102. Walter Kälin, *Non-State Agents of Persecution and the Inability of the State to Protect*, 15 GEO. IMMGR. L.J. 415, 415 (2001) (commenting on the increasing perpetration of persecution by non-state actors).

103. Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, *in*, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 46, 59 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

104. UNHCR Handbook on Procedures, *supra* note 27, ¶ 65.

105. *See* Edwards, *supra* note 103, at 59 n.75 (citing Minister for Immigration and Multicultural Affairs v. Ibrahim, High Court of Australia, [2000] HCA 5, 26 Oct. 2000; Zalzali v. Canada (Minister of Employment and Immigration), Canadian Federal Court of Appeal, [1991] 3 FC 605; Canada (Attorney General) v. Ward, Supreme Court of Canada, [1993] 2 SCR 689; Adan v. Sec'y of State for the Home Dep't, UK House of Lords, [1999] 1 AC 293; Horvath v. Sec'y of State for the Home Dep't, House of Lords, [2000] 3 All ER 577)) (showing acceptance of the protection view in Australia, Canada and the U.K.).

persecute.[106] An interpretation of the *Convention* based on the principles of the VCLT does not support this approach because the *Convention* does not stipulate the source or the agent of harm. The notion of persecution is qualified only by the words "for reasons of," placing an emphasis on the motivation for the persecution and remaining silent on the identity of the persecutor.[107] The principle of non-refoulement contained in the *Convention* is also silent on the role of the state.[108] Scholars have noted that "to read a requirement of State accountability into the refugee definition 'would in essence formulate an additional requirement, which was not foreseen originally and cannot be justified with reference to the actual wording of the refugee definition.'"[109]

Crucially, the definition *does* contain a reference to state protection.[110] Proponents of the view that the persecutor does not need to be the state acknowledge the necessary absence of state protection against the harm feared.[111] It follows that the requirement in the refugee definition that the applicant be unable or unwilling to avail himself of state protection is satisfied when a country of origin is unable to offer sufficient protection. In those circumstances,

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106. *See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Aug. 6, 1996, 101 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 328 (331-32, 335-36) (F.R.G.) (dismissing an asylum claim by Bosnian Muslims because, among other things, the *state* of Bosnia-Herzegovina did not persecute them); BVerwG Jan. 18, 1994, 95 BVerwGE 42 (45) (asserting that "[p]olitical persecution is fundamentally state-run persecution").

107. *See* Convention, *supra* note 5, art. 1(A)(2) ("the term 'refugee' shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . .").

108. *See* Convention, *supra* note 5, art. 33.

109. *See* Kälin, *supra* note 102, at 418 (citing GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 367 (Oxford 1996)); Ben Vermeulen et al., *Persecution by Third Parties* (University of Nijmegen, Centre for Migration Law, May 1998), *available at* http://www.ecre.org/research/nsagents.html; Volker Türk, Non-State Agents of Persecution (unpublished manuscript, on file with the Georgetown Immigration Law Journal)).

110. *See* Convention, *supra* note 5, art. 1(A)(2) ("the term 'refugee' shall apply to any person who . . . is unwilling to avail himself of the protection of that country . . .").

111. *See* Edwards, *supra* note 103, at 59-60 (highlighting that most common law countries accept that non-state actors can be persecutors, while some civil law countries require some state accountability if a non-state actor is the persecutor).

citizens will be both unable and unwilling to avail themselves of that ineffective protection.[112]

The absence of state protection is a vital element in making out a claim of *Convention* persecution.[113] In essence, "persecution equals serious harm plus the failure of state protection."[114] In *Minister for Immigration and Multicultural Affairs v. Khawar*, the High Court of Australia found the failure of State protection is the necessary "bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of consistency of the whole scheme."[115] In granting refugee status to Mrs. Khawar, a victim of domestic violence who was refused assistance by the police, the court found that a state's refusal to protect its citizen evinced not only an "inability to provide protection," but also, "alleged tolerance and condonation."[116]

1. State Complicity: Unwilling to Protect

Khawar is analogous to Movi's case where there is evidence of the state's inability *and* unwillingness to offer protection.[117] Mining and oil comprise a large part of the Papuan government's economic

112. Kälin, *supra* note 102, at 423 (asserting that the *Convention* in Article 1(A)(2) requires a refugee to have a well-founded fear of persecution and be unable to obtain state protection if he remains in his country of origin).

113. *See infra* Parts III-IV.

114. *See* Refugee Appeal No. 71427/99, [2000] N.Z.R.S.A.A. ¶ 67; *see also* Ex Parte Shah, (1999) 2 A.C. 629, 638 (U.K.H.L.) (pointing out that an applicant for asylum must prove that she cannot obtain state protection from persecution); Horvath v. Sec'y of State for the Home Dep't, (2002) 3 W.L.R. 379, 382 (U.K.H.L.) (reasoning that in a case where a person persecuted by a non-state actor raises the issue of whether his unwillingness to obtain state protection or his fear of being persecuted is sufficient to qualify for asylum).

115. Minister for Immigration & Multicultural Affairs v. Khawar [2002] H.C.A. 14. (Austl.) ¶ 19 (Gleeson, C.J.) (citing *Horvath* 3 W.L.R. at 497-98 (Lord Hope of Craighead)).

116. *Khawar*, [2002] H.C.A. 14 at ¶ 30.

117. What amounts to "protection" in the sense of sufficiency of state protection against persecution by non-state actors has not yet been fully established in relevant case law. *Compare* Edwards, *supra* note 103, at 63 (suggesting that "[c]lear and convincing confirmation of its inability to protect its citizens seems to be the standard in order to rebut the presumption that, absent a complete breakdown of State apparatus, the state is capable of protecting its citizens"), *with* Cooper, *supra* note 81, at 507 (relaxing Edwards' test and suggesting that mere government negligence can justify flight from a country of origin).

development policy, and as a result environmental protection is ancillary to economic production.[118] The PNG government has a vested economic interest in ultimately ensuring that the TGM operates efficiently, even if it must sacrifice safety. Accordingly, the government provides security assistance to the mine operators. Locals report that the TGM is flanked by members of the National Police Force.[119] Those adversely affected by the mine's activity are a small group, whose problems are a hundred kilometres away from the government in Port Moresby. The PNG government is not motivated to relinquish any economic benefits in order to protect those affected because they are members of a particular social group who do not figure prominently in government agenda. This is evinced by the sheer lack of effective regulation of the mining sector and the absence of state protection from the harm it produces.

In contrast, other governments are prepared to hold companies such as EML and DRD Gold accountable for the harm they cause. Recently, upon a Council on Ethics recommendation, the Norwegian Ministry of Finance excluded DRD Gold from the Norwegian Government Pension Fund-Global because of its activities at the TGM.[120] Norway's reaction to the activities of EML and DRD stands

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118. Colin Filer & Benedict Imbun, *A Short History Of Mineral Development Policies In Papua New Guinea* 2 (Resource Management in Asia-Pacific Program, Research School of Pacific and Asian Studies, The Australian National University, Working Paper No 55, 2004) ("[T]he mining industry currently accounts for about 50% of the country's exports and 20% of its Gross Domestic Product, while the oil industry has been contributing half as much again."). Michael Booth & Alyssa Bleck, *Mining in Papua New Guinea*, Ted Case Studies, 1996, http://www.american.edu/TED/papua.htm ("cornerstone of the Papuan government's economic development policy; environmental protection is seen as a luxury which cannot be afforded."). Despite the closure of the Bougainville mine, PNG still has a mineral dependent economy.

119. Augustine Hala, Address at the Indigenous Peoples Workshop: A Case Study on Indigenous People, Extractive Industries and the New World (April 14, 2003) at 23, *available at* http://www.forestpeoples.org/documents/prv_sector/eir/eir_internat_wshop_png_case_apr03_eng.pdf (describing measures taken to protect and isolate the valuable mines from Papua New Guinea's indigenous people).

120. Press Release, Norwegian Ministry of Finance, Mining Company Excluded from the Investment Universe of the Norwegian Government Pension Fund (Apr. 11, 2007), *available at* http://www.regjeringen.no/en/ dep/fin/Press-Center/Press-releases/2007/Mining-company-excluded-from-the-investm.html?id=462551.

DRD Gold currently owns 78.8 per cent of Emperor Mines Limited, which runs the

in stark contrast to the reaction of the PNG government, which imposes a minimal fine for contravention of the Environment Planning Act.[121]

2. State Complicity: Unable to Protect

Considering the current resources that the PNG government gives to regulate the activities of mining companies, they have shown a complete inability to protect their people. The mining industry provides a significant portion of the government's budget. PNG's inability to utilize those funds to protect its citizenry from the dangers of mining show state complicity amounting to persecution. In his overview of PNG mining policy, Colin Filer states that:

> [T]hose responsible for . . . regulating the mining and petroleum industries now operate with budgets whose real value has fallen by more than two thirds in the space of a decade, and whose staffing levels have fallen by half over the same period . . . donor-funded consultants . . . cannot readily create the conditions under which they [the policies] will be jointly implemented . . . . It is somewhat ironic that government agencies . . . which are responsible for promoting the industries that generate as much as half of the government's domestic revenues should now be dependent on loans and grants from donor agencies in order to conduct their business.[122]

Tolukuma gold mine on Papua [New] Guinea. Every day the Tolukuma mine disposes of 430 tonnes tailings into a natural river system . . . caus[ing] serious and, extensive damage to the environment and adversely affects local people's lives and health . . . [T]he company's practice of riverine disposal is in breach of international norms and . . . national environmental regulations as well. The . . . company . . . has been aware of the serious health and environmental damage its operations have caused, but despite this the company has failed to put any measures into effect aimed at reducing the damage. *Id.*

121. United Nations Economic and Social Commission for Asia and the Pacific [UNESCAP], Development Research and Policy Analysis Division, *Integrating Environmental Considerations into Economic Policy Making Process: Background Readings*, ST/ESCAP/1946, Vol. III, 1999, *available at* http://www.unescap.org/drpad/publication/integra/volume3/png/3pg03c01.htm (suggesting that Papau New Guinea's maximum 40,000 kina penalty for violating the Environmental Planning Act has not provided sufficient deterrence). Note that 40,000 P.N.G. kina is about U.S. $15,500.

122. Filer & Imbun, *supra* note 118, at 27.

This is echoed in the findings of the Development Research and Policy Analysis Division of the UN Economic and Social Commission for Asia and the Pacific when it states that:

> [the] effectiveness [of environmental monitoring] is limited by a lack of: (a) powerful or effective legislation; (b) an integrated approach to legislation, monitoring and enforcement; (c) adequate and realistic penalties; and (d) financial and human resources for monitoring and enforcing legislation.[123]

In light of the PNG governments' unwillingness and an inability to offer protection from EML, it is reasonable that Movi is unable and unwilling to avail himself of his government's protection. It is also reasonable to conclude that the PNG government would be unwilling and unable to offer effective assistance to Movi and his community, were they to attempt to relocate within PNG.

3. The Relevant Question: Does the State Protect?

While it would appear that Movi's assertion that he has a well-founded fear of persecution is strengthened more by evidence supporting the claim that the PNG government is unwilling to protect him, this is not the relevant issue for the *Convention* definition. The only significant question is whether or not state protection exists because "[i]ntention to harm on the part of the state is irrelevant."[124] This was properly expounded by the U.S. Court of Appeals for the Ninth Circuit, in *Pitcherskaia v Immigration and Naturalization Service.*[125] That case involved a claim for asylum advanced by a lesbian woman from Russia who provided evidence that many lesbians in Russia were involuntarily "treated" in psychiatric institutions whose methods included the use of electroshock

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123. United Nations Economic and Social Commission for Asia and the Pacific [UNESCAP], Development Research and Policy Analysis Division, *Integrating Environmental Considerations into Economic Policy Making Process: Background Readings*, ST/ESCAP/1946, Vol. III, 1999, *available at* http://www.unescap.org/drpad/publication/integra/volume3/png/3pg03c06.htm.

124. Hathaway, *supra* note 50, at 128.

125. Pitcherskaia v. Immigration & Naturalization Serv., 118 F.3d 641, 646-47 (9th Cir. 1997) (finding that the refugee is not required to "prove that her persecutor was motivated by a desire to punish or to inflict fear").

treatment and sedative drugs.[126] The U.S. Board of Immigration Appeals found, in error, that because the Russian authorities "intended to 'cure' her, not to punish her . . . their actions did not constitute persecution."[127] In rejecting this finding, the Ninth Circuit held that the mere fact that an agent of persecution "believes the harm he is inflicting is 'good for' his victim does not make it any less painful to victim, or, indeed, remove the conduct from the statutory definition of persecution."[128]

This reasoning is applicable in Movi's case where the ostensible purpose of the mining is economic growth that will somehow benefit PNG as a whole and where the unintended consequence is environmental harm. In these circumstances, *Pitcherskaia* provides a powerful authority for the notion that even where interference with the natural environment is engaged in for the ostensible "good of" the affected community, it may be deemed to be persecutory if that interference inflicts harm on the community.

Given that intention in relation to harm is irrelevant, the debate concerning the existence of a dichotomy between the "unable" versus the "unwilling" issue has now been deemed superfluous, at least in common law jurisdictions. Correctly, courts in both Canada and New Zealand have found that "the dichotomy is not supported by the text of the Convention or by the relevant authorities."[129] Where the local government shows inability, refugee "protection is denied to the claimant, whereas when the claimant is unwilling, he or she opts not to approach the state by reason of his or her fear on an enumerated basis."[130] State complicity in persecution is not a pre-requisite to a valid refugee claim. Therefore, the issue of whether the state is unwilling to provide protection is not a relevant consideration. The only relevant question is whether state protection is effective.

In Movi's case, it is clear that such protection does not exist, even though it should. Considering Movi's claim as a whole, it is

126. *Id.* at 644.
127. *Id.* at 645.
128. *Id.* at 648.
129. *See* Refugee Appeal No. 71427/99, [2000] N.Z.R.S.A.A. ¶ 59 (citing Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 719).
130. *Id.*

significant that the responsibility of protection from the type of harm alleged lies squarely at the feet of state. In light of the entrenched nature of environmental rights and the right to life, states charged with the duty of protecting the right to life share equally in the burden of protecting citizens from activities that cause serious environmental degradation. The following judicial pronouncements on the subject support the notion that the right to life entails a corresponding duty on the part of states to take positive measures to protect its citizens from life-threatening environmental harm. "[I]n the *Yanomami Case*, the Inter-American Commission on Human Rights found that the Brazilian government's authorization of an environmentally destructive development in the Yanomami people's territory constituted a violation of their rights to life, health, and well-being."[131] Similarly, for its part in oil production in Ogoniland, The African Commission on Human and People's Rights found the Nigerian Government to be in direct violation of the African Charter on Human and People's Rights requirement that "all people shall have the right to a general satisfactory environment favourable to their development."[132] The Commission found that this right was violated by the Nigerian government when it assisted the Nigerian National Petroleum company in exploiting oil reserves in Ogoniland while disposing toxic wastes into local waterways.[133]

V. CONVENTION GROUNDS: MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

Under the *Convention*, it is not sufficient to merely establish a well founded fear of persecution and an inability to avail oneself of the protection of one's country of origin. The persecution feared must be

131. *Yanomami Case*, Case 7615, Inter-Am. C.H.R. 24, OEA/Ser.LV/11.66, doc. 10, rev. ¶ 1 (1985)).

132. *See* FIFTEENTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS 30-44 (2001-2002), *available at* http://www.achpr.org/english/activity_reports/activity15_en.pdf [hereinafter AFRICAN COMMISSION REPORT] (finding the Nigerian government to be in violation of Articles 2, 4, 14, 16, 18(1), and 24); *see also* African Charter on Human and Peoples' Rights arts. 2, 4, 14, 16, 18(1), June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter].

133. *See* AFRICAN COMMISSION REPORT, *supra* note 132.

"for reasons of" a convention ground—in Movi's case, his Membership of a Particular Social Group ("MPSG").[134]

It is widely understood that inclusion of the social group category into the *Convention* was intended to encompass those applicants who might experience persecution on account of unforseen reasons.[135] Very little explanatory material concerning the fifth *Convention* ground exists in the drafting history, in the UNHCR guidelines, in the *travaux preparatoires*, or in the remarks of Mr. Petren of Sweden, who proffered the last minute amendment to the *Convention* definition.[136] The 2001 San Remo Expert Roundtable[137] produced some useful points of consensus, including that MPSG is to be interpreted independently of the other grounds but is not a "catch-all" ground intended to render the nexus clause or other grounds superfluous.[138] Instead, it is clear that "one or more [*Convention*] grounds may overlap" in an individual case.[139] There is no requirement that there be a voluntary associational relationship between all of the members of the group, nor is it crucial to establish "that every member of the group is at risk of persecution."[140] In addition, decision makers across most jurisdictions agree that while "persecutory action toward a group may be a relevant factor in

134. *See* Convention, *supra* note 5, art. 1(A)(2).

135. *See* Cooper, *supra* note 81, at 522 n.232 (citing *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)) ("stating that the social group category is purposefully broader than any of the other categories in order to protect against unforseen persecution").

136. United Nations General Assembly, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, Summary record of the Third Meeting, UN. Doc. A/CONF.2/SR.3 at 14. All that is recorded is the Swedish delegate's statement is as follows: "Experience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included." *Id.*

137. *Summary Conclusions: Membership of a Particular Social Group*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 312-13 (Erica Feller, Volker Türk & Frances Nicholson eds., 2003).

138. *Cf. id.*

139. *Id.*

140. *Id.* As a matter of treaty interpretation, when read in context with the other *Convention* grounds it is evident that there is no requirement of cohesion in the other grounds like political opinion or religion. *See id.*

determining the visibility of a group in a particular society,"[141] a group cannot be defined by reference only to fear of persecution.[142] This would involve circular logic, defeating the purpose of the nexus clause discussed in the next section.

A. PROTECTED CHARACTERISTICS APPROACH

The most detailed jurisprudence concerning the "social group" category emanates from common law jurisdictions. Currently, there are two key approaches to the interpretation of MPSG—the "social perception" approach discussed below and the more dominant "protected characteristics" approach. The latter, informed by the principle of *ejusdem generis*[143] has gained acceptance in the United Kingdom,[144] United States,[145] Canada,[146] and New Zealand.[147] According to *ejusdem generis*, the *Convention* is concerned with two particular social groups. The first is united by an immutable characteristic such as race or nationality. The second is united by a characteristic that is so fundamental to human dignity that one should not be asked to change it. This concept was adopted and expanded by the Supreme Court of Canada in *Ward v. Attorney General of Canada*, where the court distinguished a third category identified by groups associated by a former voluntary status. The earliest and leading authority in the U.S. is still *Matter of Acosta*,[148] which was

141. *Id.*

142. Ex Parte Shah, (1999) 2 A.C. 629, 643-46 (U.K.H.L.); *see also* Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of Membership of a Particular Social Group*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263, 267 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003) (showing that the UNHCR agrees that "persecution alone cannot determine a group where none otherwise exists") *Id.*

143. *Ejusdem generis* is Latin, meaning of the same kind, and is a principle of "that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." BLACK'S LAW DICTIONARY 556 (8th ed. 2004).

144. *See Shah*, 2 A.C. at 643-44.

145. *See* Matter of Acosta, 19 I&N Dec. 211, 212 (BIA 1985).

146. *See* Ward v. Att'y Gen. of Can., [1993] 2 S.C.R. 689 (Can.).

147. Refugee Appeal No. 1312/93 [1995] N.Z.R.S.A.A.

148. 19 I&N Dec. at 212.

recently affirmed in the case of *C.A. v U.S. Attorney General*.[149] In *Acosta*, the Bureau of Immigration Appeals states:

> 'persecution on account of [MPSG]' refers to persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or . . . it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis . . . By construing 'persecution on account of [MPSG]' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.[150]

Proponents of this approach point to its evolutionary nature as well as the "consistency in decision-making" it affords "because it relies on clear external standards of reference which are of universal applicability."[151] In meeting the burdens of this approach, Movi can point to several overlapping characteristics that establish him as a MPSG. He is a PNG national and one of a population of five thousand ethnic clan members living in one of a hundred hamlets in the affected area, downstream from the Auga River.[152] Movi's race, ethnicity, and nationality are immutable characteristics. He is also a landowner and subsistence farmer and thereby exposed to persecution through the mining companies' destruction of his land. Land ownership is so fundamental to the dignity of Movi and his indigenous community that he should not be expected to renounce it.[153]

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149. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006) (affirming Castillo-Arias v. U.S. Att'y Gen., 23 I&N Dec. 951 (BIA 2006)).

150. Castillo-Arias v. U.S. Att'y Gen., 23 I&N Dec. 951, 955 (BIA 2006).

151. James Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 INT'L J. REFUGEE L. 477, 482 (2003).

152. Hala, *supra* note 119, at 21-22.

153. Augustine Hala, a member of Tolukuma community, explains that:

> "land is our life. Land is our physical life—food and substance. Land is our social life, it is marriage, it is status, it is security, it is politics, in fact it is our only life. Tribesmen would rather die to protect their traditional land . . . . When you take our land you cut away the heart of our existence. We have

The fact of Movi's indigenousness and his reliance on the land mean that he is likely to suffer more than other people as a result of environmental harm. In the context of environmental threats to indigenous peoples, "[t]he right to life and the right to security of the person, paramount in all human rights agreements, are also at issue in the matter of indigenous communities and the environment. With threats to the environment . . . these most basic human rights of self-preservation are jeopardized."[154] In addition, Movi is poor and politically disempowered. Environmental refugees tend to belong to a "group composed of persons lacking political power to protect their own environment."[155] While this is certainly true of those people affected by the TGM, political disempowerment alone would not be sufficient to establish MPSG, though it is certainly a relevant characteristic. The Environmental Justice Movement[156] recognises environmentally disenfranchised people as a distinct social group because "environmental hazards disproportionately impact on the politically disempowered."[157]

B. SOCIAL PERCEPTION APPROACH

The "social perception" or sociological approach, which emphasises the perception of the group by the agents of persecution, was developed largely in Australia. It looks at whether members of the group share a common characteristic that sets them apart from society at large.[158] In *Applicant A v Minister for Immigration and Ethnic Affairs*, the Australian High Court declared that MPSG necessitated a group with "a common attribute and a societal perception that they stand apart."[159] It was similarly adopted by the U.S. Court of Appeals for Second Circuit's "voluntary associational

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little or no experiences of social survival detached from the land. For us, to be landless is a terrible nightmare . . . ." *Id.* at 21.

154. William Andrew Shutkin, *The Protection of Indigenous Peoples of the Earth*, 31 VA. J. INT'L L. 479, 489 (1991).

155. Cooper, *supra* note 81, at 522.

156. *Id.* at 523 n.237 (noting that the "movement first emerged in the late 1970's as the linkages between social justice and environmental protection were recognized").

157. *Id.* at 523 n.239.

158. *See generally* Applicant A v. Minister for Immigration and Ethnic Affairs, (1997) 190 C.L.R. 225, 254 (Austl.).

159. *See id.* at 91-92.

relationship" standard that also requires that the members of a social group "must be externally distinguishable."[160]

In meeting this criterion, Movi could again point to the fact he is an indigenous clan member, landowner and subsistence farmer. These attributes, which he shares with the other members of the downstream communities, mean that he occupies a distinct position in PNG society and in the international community. Despite the fact that "PNG is almost 100 [percent] indigenous, having over 800 different local tribes,"[161] the indigenous population is treated unfairly by the PNG government. This may be a "side effect of ethnocentrism among the British-trained bureaucrats who run PNG government from Port Moresby. Some government officials have publicly described local citizens as incapable of making their own decisions."[162] Much like the PNG government, EML and DRD Gold have consistently demonstrated a disregard for indigenous landowners.[163]

Proponents of the social perception approach argue that it is pragmatic in the absence of settled external standards and that it adheres most rigidly to the terms of the *Convention* because it is based on a series of dictionary definitions.[164] While this approach does, strictly speaking, adhere most rigidly to the language of the definition it does not take proper account of the object and purpose of the *Convention*. The protected characteristics approach however,

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160. *See* Gomez v. Immigration & Naturalization Serv., 947 F.2d 660, 664 (2d Cir. 1991) (explaining that "[l]ike the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete.").

161. FOREST PEOPLE'S PROGRAMME, A CASE STUDY ON INDIGENOUS PEOPLE, EXTRACTIVE INDUSTRIES AND THE WORLD BANK: PAPUA NEW GUINEA 4 (2003).

162. DAVID HYNDMAN, ANCESTRAL RAIN FOREST AND THE MOUNTAIN OF GOLD: INDIGENOUS PEOPLES AND MINING IN NEW GUINEA 85 (1994).

163. Beaumont, *supra* note 13.

> "Yet again Papua New Guinea people and their environment have suffered as a result of an Australian company's bad mining. The cyanide spill from Tolukuma highlights this company's disregard for the PNG people and their environment . . . . It is clear that operations by Australian and other overseas mining companies in Papua New Guinea are carried out in ways that are totally unacceptable in the western countries the companies are based in." *Id.*

164. Hathaway & Foster, *supra* note 151, at 484.

gives a meaning to the MPSG ground that is directly in line with the other four *Convention* grounds.

Ultimately, Aleinikoff suggests that "[o]ne should conceptualize the protected characteristics approach as the core of the social perception analysis. That is, groups that qualify under the protected characteristics approach are virtually assured recognition under the social perception test as well."[165] The UNHCR has recently attempted to take a similar middle road between the approaches:

> [A] particular social group is a group of persons who share a common characteristic other than the risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[166]

Whether or not a merger of the approaches will yield significant benefits for applicants and decision-makers is still unclear and is a matter that is beyond the scope of this Article.[167] It appears that Movi, through a combination of a number of characteristics including other *Convention* grounds, meets the requirements of both interpretive approaches for MPSG: he is a member of a group who share common characteristics such as ethnicity, nationality, poverty, vocation, disempowerment and connection to the land. These characteristics make his group distinct in the eyes of his government and in the eyes of international mining companies that regard him as inferior.

VI. "FOR REASONS OF," THE NEXUS CLAUSE

The establishment of Movi's MPSG is not sufficient to guarantee him protection under the *Convention*. An applicant who is found to

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165. Aleinikoff, *supra* note 142, at 300.

166. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 7 (May 7, 2002) [hereinafter U.N. High Comm'r for Refugees] (emphasis added).

167. *See generally* Hathaway & Foster, *supra* note 151, at 489-91 (providing an in-depth discussion of the two approaches and whether or not they ought be merged).

be outside his country of origin with a well-founded fear of "persecution" must also demonstrate that the fear of persecution is causally connected to one or more of the five *Convention* grounds, in this case, MPSG. This requirement, emanating from the words "for reasons of" in the refugee definition, effectively restricts the scope of the refugee definition such that not all victims of human rights violations are recognised as refugees.[168] The "nexus" requirement is the least understood element of the refugee definition. International jurisprudence is either silent on the issue or adopts a particular understanding of the requirement with little explanation.[169]

There are, however, several general points of consensus regarding the operation of this element of the definition. While a complete analysis of the "nexus" issue is beyond the scope of this work, a number of issues need to be contemplated where the primary persecutor is not the state. First, it is not the responsibility of the applicant to accurately identify the relevant *Convention* ground that is connected to the applicant's well-founded fear.[170] That task rests with the state assessing the claim that can find that a combination of *Convention* grounds are causally linked to the risk of persecution.[171] This is relevant to Movi's claim because in his case, a number of characteristics and *Convention* grounds combine. A risk of being persecuted can be for reasons of MPSG even if not all persons defined by that group are at risk.[172] Accordingly, just because Movi is identified as politically disempowered does not mean that all politically disempowered people need to be at risk of persecution for the nexus condition to be satisfied. It is also unnecessary for a *Convention* ground to account for the totality of risk. In Movi's case it is clear that the persecutors are not solely motivated by the fact that Movi is a MPSG. Rather, they are primarily motivated by the gold buried in his land. Nevertheless, this is not an obstacle to recognition of refugee status.

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168. *See* U.N. High Comm'r for Refugees, *supra* note 166 ¶ 20; *The Michigan Guidelines*, *supra* note 48, at 213.

169. *The Michigan Guidelines*, *supra* note 48, at 211.

170. *Id.* at 213.

171. *Id.*

172. *Id.* at 217; U.N. High Comm'r for Refugees, *supra* note 166, ¶ 31.

Entire groups may be subject to persecution[173] so severe that group membership creates a well-founded fear of persecution. Victims of environmental harm are assisted by this standard, which would allow Movi "to claim the agents of persecution target [his] entire racial or ethnic group and that [his] fear is well-founded based on the general animus as evidenced by environmental harms inflicted."[174] There is little doubt that evidence of the intentions of EML and the policies of the PNG government would provide the requisite evidence of a nexus. The more relevant question, however, is whether or not evidence of intention is required at all.[175] As discussed in Part IV, the intention of the persecutor or the state withholding protection is irrelevant. There are generally two key contentious aspects of the necessary nexus: "the relevance of intention and the standard of causation."[176]

A. THREE APPROACHES TO INTENTION

Tension exists between jurisdictions that hold that fulfilment of the nexus clause requires some evidence of the persecutor's intention and states that take a predicament-of-the-applicant based approach to interpreting the nexus clause. The former is espoused in the leading decision of *Immigration and Naturalization Service v Elias-Zacarias* where the U.S. Supreme Court held that the plain meaning of the U.S. requirement that persecution be "on account of" a *Convention* ground required evidence of the persecutor's motives. This decision, which made "motive critical,"[177] has been clarified somewhat by the U.S. Court of Appeals for the Ninth Circuit case of *Pitcherskaia*.[178] The *Pitcherskaia* court distinguished between the motive of the persecutor in inflicting harm and the motive of the persecutor in choosing a target, the latter forming the relevant issue in determining

173. But it is not a requirement that the all members of PSG are exposed to risk. U.N. High Comm'r for Refugees, *supra* note 166, ¶ 17.

174. Christopher M. Kozoll, *Poisoning the Well: Persecution, the Environment, and Refugee Status*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 271, 286 (2004).

175. Hathaway & Foster, *supra* note 151, at 461.

176. *Id.*

177. Immigration & Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478, 483 (1991) (arguing that the refugee applicant must provide some evidence, either direct or circumstantial, of the persecutor's motive).

178. Pitcherskaia v. Immigration & Naturalization Serv., 118 F.3d 641, 646-47 (9th Cir. 1997).

the nexus requirement.[179] According to this standard, Movi could simply point to evidence of where and how EML conduct their mine operations. They do not use riverine disposal methods in developed nations where the likely victims would be wealthy, elite, white and politically empowered and where governments have made riverine disposal illegal. Indeed, leading mining companies and the World Bank Group no longer support riverine tailings disposal in their projects. The method is now only used in PNG.[180]

The inaction of the PNG government in prohibiting this disposal method is relevant in an analysis of the nexus clause proffered by the House of Lords in *Shah*.[181] In *Shah*, concerning two Pakistani women threatened with violence because of an allegation of adultery, Lord Hoffman found a combination of two necessary elements were sufficient to satisfy the meaning of persecution within the *Convention* in cases involving non-state agents.[182]

> First, there is the threat of violence . . . by her husband. . . . This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to protect them . . . *because they were women.* It denied them a protection against violence which it would have given to men.[183]

The case stands for the notion that where there is a risk of being persecuted at the hands of a non-state actor, the causal link is established, whether or not the absence of state protection is *Convention* related. "Alternatively, where the risk of being

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179. *Id.* at 645.

180. *See* MARTA MIRANDA ET AL., MINING AND CRITICAL ECOSYSTEMS: MAPPING THE RISKS (World Resources Institute, 2003) 37. DRD recently acquired a twenty percent share in the Porgera Gold Mine in PNG, one of the largest gold mines in the country, which also uses the out-moded practice of riverine tailings disposal. *See id.* at 38 (noting the destruction that riverine tailings disposal creates at mining facilities in PNG, especially at the Progera Gold Mine); Press Release, DRD Gold Ltd., DRD Concludes Acquisition of 20% of Porgera JV (Nov. 24, 2003), *available at*: http://www.drdgold.com/ir/press_display.asp ?id=101&yr=2003. It should also be noted that riverine tailings disposal is the least expensive disposal option, requiring only minimal infrastructure. *See* MIRANDA ET AL., *supra* note 180, at 37-38.

181. Ex Parte Shah, (1999) 2 A.C. 629, 638 (U.K.H.L.).

182. Edwards, *supra* note 103, at 62.

183. *Shah*, 2 A.C. at 653 (emphasis added).

persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is 'established.'"[184] This bifurcated analysis is in conformity with the *Convention* that defines persecution as comprised of separate but crucial "elements, namely the risk of serious harm and failure of protection."[185]

Lord Hoffman's reasoning is illustrative when applied to Movi: the question, "why was Movi's environment destroyed?" can be answered, "because the mining company prioritizes profits above the welfare of poor, indigenous subsistence farmers who reside in a mineral rich area." However, another answer, the right answer in the context of *Convention*, would be, "his environment was ruined by a company who wanted to extract gold cheaply and who knew that he would not be protected because he is indigenous, poor and a subsistence farmer."

Movi could point to evidence outlined in Part IV in support of this claim. Useful as this evidence may be in furthering Movi's claims, it is not essential. The correct approach to intention and to the broader meaning of the nexus clause was presented by Hathaway and Foster in the form of the question: "'why is the applicant in the predicament [of being persecuted]?' rather than simply 'why does the persecutor wish to harm the applicant . . . ?'"[186] The strongest argument in favour of this approach is one based on the rules of treaty interpretation. The reference in the *Convention* to "being persecuted" in the passive voice evinces a concern for the "effect that conduct has on the person being persecuted."[187] Moreover, the object and purpose of the *Convention* is to "identif[y] those to whom surrogate international protection should be afforded, rather than attributing guilt or assigning liability to those responsible for inflicting persecution."[188] Therefore, as is the case with MPSG, the intention of the persecutor or the unhelpful state is not a relevant consideration.

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184. *See* U.N. High Comm'r for Refugees, *supra* note 166, ¶ 21.
185. Aleinikoff, *supra* note 142, at 302 (citation omitted).
186. Hathaway & Foster, *supra* note 151, at 467.
187. Minister for Immigration & Multicultural & Indigenous Affairs v. Kord [2002] F.C.A. 334 (Austl.) (Heerey, J.).
188. Hathaway & Foster, *supra* note 151, at 468.

Clearly, Movi is vulnerable to the threat of "persecution" discussed in Part IV because he is politically disempowered, poor, indigenous, and because he relies on the land for his vocation and his identity. These factors characterize him as a member of PSG *and* they cause him to fear persecution because Movi knows that he is powerless to stop the mine operation or to curtail its devastating effects.[189]

B. STANDARD OF CAUSATION

In cases involving multiple possible explanations for a person's well-founded fear of persecution, a requisite degree of connection between the fear and the *Convention* ground must be established. Precisely what constitutes the necessary standard of causation has been the subject of much debate across common law jurisdictions, most of which is unhelpful.[190] In her examination of causation, Foster considers the different approaches advanced by different jurisdictions including the "sole cause" test, the "but for" approach, the tort based approach and the "predominant cause" test.[191] Ultimately, the appropriate formulation is "a straightforward and liberal standard of causation, requiring only that the protected ground constitute a contributing cause or partial reason for the well-founded fear of persecution."[192] This is modified by the reservation that if "the *Convention* ground is remote to the point of irrelevance, refugee status need not be recognized."[193] This approach takes into consideration the humanitarian objectives of the *Convention*, its object, purpose, and context. The latter is interestingly explored by a comparison with the standard established for "well-founded fear"—that it is satisfied pursuant to evidence of "reasonable possibility."[194] An interpretation of the Convention that "requires an applicant to establish the precise causal role played by a Convention ground is

189. Relevantly, the community petition of 2000 received independent responses from both the PNG government and TGM. Both responses independently denied responsibility for the list of grievances contained in the submissions. *See* Macdonald, *supra* note 1, at 10.

190. *See generally* Michelle Foster, *Causation in Contest: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT'L L. 265 (2002).

191. For a detailed analysis of all approaches *see id.* at 269-88.

192. *Id.* at 340.

193. *Id.* at 339.

194. *See id.* at 337.

inconsistent with a proper application of the 'well founded fear' test in that it requires a degree of certainty that travels well beyond the 'likelihood' standard specified in the text.[195] The characteristics that make up Movi's MPSG contribute to his fear of persecution. He depends entirely on his land for survival and yet he is powerless to stop EML from polluting it. His powerlessness, resulting from the fact that he is a subsistence farmer and an ethnic clan member combined with the disregard shown to his community by EML, would cause Movi to fear further harm.

CONCLUSION

Movi's situation meets the criteria set out in the *Convention* definition. This Article has demonstrated that grave environmental harm can be persecutory when it is inflicted because of a devaluation of the lives of those affected. An applicant who can show deliberately inflicted, severe environmental harm in the absence of state protection will have a strong claim to refugee status pursuant to an evolutionary interpretation of the current *Convention* definition. In light of this application signatory states will be unable to ignore claims based on environmental harm by maintaining that they do not fit within the existing definition. Movi and others like him, if they are able to leave their countries of origin, are deserving of protections afforded to recognised refugees under the *Convention.*

At the commencement of this work, reference was made to the growing number of so-called "environmental refugees." Whether the argument presented in this Article could encompass this entire group is highly questionable. However, in light of the looming environmental refugee crisis, there will be increasing demands placed on international refugee law. This analysis presents a first step towards meeting those demands. It is only a beginning, but an important beginning if the *Convention* is to remain viable and relevant to contemporary refugee flows.

195. *Id.* (citations omitted).