

# CLIMATE CHANGE DISPLACEMENT AND MIGRATION: AN ANALYSIS OF THE CURRENT INTERNATIONAL LEGAL REGIME’S DEFICIENCY, PROPOSED SOLUTIONS AND A WAY FORWARD FOR AUSTRALIA

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*Recognising the likelihood of enhanced climate change related displacement in the near future, this paper seeks to critically evaluate the current international protection framework in its ability to respond to climate change-induced displacement and migration and identify existing legal gaps. Three proposed solutions to those gaps are analysed: a new international legal instrument; a protocol to the Convention Relating to the Status of Refugees or the United Nations Framework Convention on Climate Change; and enhanced pathways under existing migration schemes. It is concluded that Australia, in a position to assume regional leadership, must continue and improve upon its current regional migration efforts and further develop policy to respond proactively to climate change displacement through regional cooperation, labour mobility and new migration schemes, within a rights-based framework.*

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## I INTRODUCTION

In 2012, the Secretary-General’s report to the United Nations General Assembly on Human Rights and Migration predicted that by 2050 up to 250

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million people may be displaced, either internally or across borders, by the effects of climate change.<sup>1</sup> This represents almost four times the number of persons currently forcibly displaced worldwide.<sup>2</sup>

Low-lying island nations in the Pacific region are especially at risk of rising sea levels and erosion.<sup>3</sup> Alarming, the beginning of these effects can already be seen. In 2016, the first scientific study confirmed numerous anecdotal accounts from across the Pacific of climate change impacts. Australian researchers found that five islands had been submerged by ocean waters in the Solomon Islands, the small island nation that has seen sea levels rise in some areas as much as 10 millimetres annually since 1994.<sup>4</sup> Additionally, the Pacific Islands are especially at risk of extreme weather events that will intensify with global temperature rise.<sup>5</sup> In 2015, Cyclone Pam hit the South Pacific as a Category 5 and has since been described by experts as ‘one of the largest and most intense cyclones’ in the region’s history.<sup>6</sup> Making landfall in Vanuatu, it destroyed 90 per cent of buildings and displaced up to 70 per cent of the population.<sup>7</sup> In the wake of these developments, there is an urgent need to ensure that viable long-term solutions are in place to protect people who may be forced across international borders to survive the effects of climate change.

#### A Assumptions, Definitions and Scope of Study

At the outset, it is important to note that this paper assumes the existence of climate change and its predicted effects, which are overwhelmingly supported by scientific evidence.<sup>8</sup> It is also important to note that there is no internationally agreed definition for who will be a climate change ‘migrant’, ‘refugee’ or

<sup>1</sup> François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, UN GAOR, 67<sup>th</sup> sess, Agenda Item 70(b), UN Doc A/67/299 (13 August 2012) 7–8 [31].

<sup>2</sup> United Nations High Commissioner for Refugees, *Figures at a Glance* (2015) <<http://www.unhcr.org/en-au/figures-at-a-glance.html>> archived at <<https://perma.cc/83W7-9NE8>>.

<sup>3</sup> John Campbell and Olivia Warrick, ‘Climate Change and Migration Issues in the Pacific’ (Report, United Nations Economic and Social Commission for Asia and the Pacific, 2014) 6–7 (*‘Climate Change and Migration Issues’*).

<sup>4</sup> Mélanie Becker et al, ‘Sea Level Variations at Tropical Pacific Islands since 1950’ (2012) 80–81 *Global and Planetary Change* 85, 91, cited in Simon Albert et al, ‘Interactions between Sea-Level Rise and Wave Exposure on Reef Island Dynamics in the Solomon Islands’ (2016) 11(5) *Environmental Research Letters* 1, 1.

<sup>5</sup> *Climate Change and Migration Issues*, above n 3, 6–7.

<sup>6</sup> Angela Fritz, ‘Top Hurricane Expert: Climate Change Influenced Tropical Cyclone Pam’, *Washington Post* (online), 18 March 2015 <[https://www.washingtonpost.com/news/capital-weather-gang/wp/2015/03/18/top-hurricane-expert-climate-change-influenced-tropical-cyclone-pam/?utm\\_term=.6efb2235ea5a](https://www.washingtonpost.com/news/capital-weather-gang/wp/2015/03/18/top-hurricane-expert-climate-change-influenced-tropical-cyclone-pam/?utm_term=.6efb2235ea5a)> archived at <<https://perma.cc/983F-KZNB>>.

<sup>7</sup> ‘Cyclone Pam: 24 Confirmed Dead in Vanuatu with Fears for Many More, President Pleads for Help to Rebuild’, *ABC News* (online), 17 March 2015 <<http://www.abc.net.au/news/2015-03-16/cyclone-pam-vanuatu-24-dead-thousands-displaced/6323260>> archived at <<https://perma.cc/CUH6-7FKL>>; ‘Cyclone Pam: UN Confirms 24 Dead and 3300 Displaced in Vanuatu’, *BBC* (online), 16 March 2015 <<https://www.bbc.com/news/world-asia-31912305>> archived at <<https://perma.cc/JU3D-HZGL>>.

<sup>8</sup> See generally Vicente R Barros et al (eds), ‘Climate Change 2014: Impacts, Adaptation, and Vulnerability — Part B: Regional Aspects’ (Report, Intergovernmental Panel on Climate Change, 2014).

‘displaced person’.<sup>9</sup> Due to the nature of climate change impacts, the line between forced and voluntary migration will often be blurred, and people’s decisions to move ‘will involve a delicate mix of both elements in different proportions’.<sup>10</sup> This is especially so because of the amplifying effect that climate change will have on other existing social, economic and political pressures — such as resource scarcity, lack of economic opportunity and environmental degradation.<sup>11</sup> It is acknowledged that while there is a difference in terminology between ‘displacement’ and ‘migration’, the distinction between the two will not always be clear. As this paper is largely concerned with situations where ultimately there may be an inability to return, the term ‘displacement’ is preferred. Therefore, this paper seeks to assess law and policy as it relates to ‘climate change displacement’ and ‘climate change displaced persons’. For the reader’s understanding, although without seeking to create a rigid or exclusive definition, the author uses these phrases to refer to those who will be forced to move across international borders, compelled by reductions in the quality and availability of food and water, loss of infrastructure and habitat, as well as ‘increased exposure to ill-health, injury and even death arising from natural disasters or changes in the physical environment in situations where return is not possible’.<sup>12</sup>

Existing research on the impacts of climate change demonstrates that the vast majority of related displacement will be inside territorial borders.<sup>13</sup> However, this paper focuses on policies and procedures related to cross-border migration. The reason for this separation is that internally displaced persons are already covered by domestic legislation, international human rights law and soft law such as the United Nations’ *Guiding Principles on Internal Displacement*.<sup>14</sup> Additionally, this paper’s focus will predominately attach to migration in the Pacific region and on avenues for policy development in Australia.

## B Context

In recent years, the global community has given increasing attention to climate change displacement, despite international fora adopting different lenses and arriving at different conclusions about recommended steps forward. In 2010, the governments that met in Cancún at the 16<sup>th</sup> Session of the Conference of the Parties (‘COP16’) to the *United Nations Framework Convention on Climate Change* (‘UNFCCC’) agreed to take initial steps to, inter alia, strengthen climate

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<sup>9</sup> Chaloka Beyani, ‘Climate Change and Internal Displacement’ (Report, Brookings Institution, October 2014) 1.

<sup>10</sup> Jane McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Bloomsbury, 2010) 2.

<sup>11</sup> Jane McAdam, ‘Building International Approaches to Climate Change, Disasters, and Displacement’ (2016) 33(2) *Windsor Yearbook of Access to Justice* 1, 3.

<sup>12</sup> This language is taken from the Nansen Initiative’s definition for ‘forced migration’ in the context of disasters and climate change: Bruce Burson and Richard Bedford, ‘Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific’ (Discussion Paper, The Nansen Initiative, 9 December 2013) 6 (‘*Clusters and Hubs*’).

<sup>13</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 5.

<sup>14</sup> United Nations Commission on Human Rights, *Guiding Principles on Internal Displacement*, 54<sup>th</sup> sess, Agenda Item 9(d), UN Doc E/CN.4/1998/53/Add.2 (11 February 1998).

change mitigation efforts and help developing nations protect themselves from climate change impacts.<sup>15</sup> Importantly, under s 14(f) of the *Cancún Agreements*, COP16's outcome document, parties agreed to undertake '[m]easures to enhance understanding, coordination and cooperation with regard to climate change-induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels'.<sup>16</sup> Although not legally binding, this provision was a state-determined point of agreement on which to base future action. In 2011, following the *Cancún Agreements*, the United Nations High Commissioner for Refugees ('UNHCR') unsuccessfully attempted to persuade states to agree to the creation of a global guiding framework to address climate change displacement, but nonetheless highlighted gaps in the current international protection regime and the need for a new response.<sup>17</sup>

Building on the *Cancún Agreements*, the *Warsaw International Mechanism for Loss and Damage* ('*Warsaw International Mechanism*') was established at the 19<sup>th</sup> session of the Conference of the Parties to the *UNFCCC* ('COP19') in Warsaw, Poland in November 2013.<sup>18</sup> The *Warsaw International Mechanism* seeks to address loss and damage associated with the impacts of climate change in developing countries that are particularly at risk to its adverse effects.<sup>19</sup> Four thematic expert groups have been established to carry out the activities of the Executive Committee's workplan, one of which focuses specifically on migration, displacement and human mobility.<sup>20</sup> The expert group has established a Task Force on Displacement to develop recommendations for integrated approaches to avert, minimise and address climate change displacement.<sup>21</sup>

In June 2011, the Norwegian government convened the Nansen Conference on Climate Change and Displacement ('Nansen Conference'). This initiative was held to facilitate multidisciplinary dialogue and improve global understanding of environmental disaster and climate change displacement in the 21<sup>st</sup> century.<sup>22</sup> Following the Nansen Conference, Norway and Switzerland pledged to address the legal protection gaps regarding cross-border movement in the context of disasters and the effects of climate change, establishing the Nansen Initiative in

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<sup>15</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Sixteenth Session, Held in Cancún from 29 November to 10 December 2010*, Decision 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) 4 [11].

<sup>16</sup> *Ibid* 5 [1](f).

<sup>17</sup> Jane McAdam, 'Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013' (2014) 29(2) *Refugee* 11, 12.

<sup>18</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013*, Decision 2/CP.19, UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014) ('*Warsaw International Mechanism*').

<sup>19</sup> *Ibid* 6 [1].

<sup>20</sup> United Nations Framework Convention on Climate Change, *Executive Committee of the Warsaw International Mechanism for Loss and Damage* (2018) <<https://unfccc.int/7543>> archived at <<https://perma.cc/KV75-FUEF>>.

<sup>21</sup> United Nations Framework Convention on Climate Change, *Task Force on Displacement* (2018) <<https://unfccc.int/node/285>> archived at <<https://perma.cc/WJK2-5T8B>>.

<sup>22</sup> Norwegian Refugee Council, 'The Nansen Conference: Climate Change and Displacement in the 21<sup>st</sup> Century' (Conference Report, 5–7 June 2011) 20 ('*The Nansen Conference: Climate Change and Displacement*').

2012.<sup>23</sup> This initiative was a bottom-up, state-led consultative process that conducted extensive regional intergovernmental consultations and civil society meetings. Importantly, the Nansen Initiative did not seek to develop new legal standards, such as a convention or protocol, from the outset. Instead, it focused on building consensus among states on the principles that would underlie a protection agenda going forward.<sup>24</sup> During a Global Consultation in October 2015, 109 governmental delegations endorsed the *Agenda for the Protection of Cross-Border Displaced Persons* ('*Protection Agenda*'), which supports the integration of policies and practices by states and regional organisations into their own normative frameworks, taking into account their own individual circumstances.<sup>25</sup> This led to the launch of the Platform on Disaster Displacement at the May 2016 World Humanitarian Summit to assist the implementation of the *Protection Agenda*. Importantly, Australia is among the Platform's members.<sup>26</sup>

In recent years, we have seen a marked shift in global dialogue and scholarship away from the sensationalist idea of 'climate refugees', towards the benefits of policy targeted at development and migration. In 2017, the World Bank's publication, *Pacific Possible: Long-term Economic Opportunities and Challenges for Pacific Island Countries* ('*Pacific Possible*'), outlined that industrialised countries such as Australia have an opportunity to effectively assist their Pacific neighbours in dealing with climate change by accelerating regional development, fully exploiting economic opportunities and enabling greater regional mobility.<sup>27</sup> This shift in focus prompts the question of whether addressing climate change displacement and migration is in fact a matter for international law, regional development policy or a combination of both.

## II THE CURRENT LEGAL GAP

Human migration in the face of changing climatic conditions is not a new phenomenon. However, in the current state-centric global architecture, there is no legal mechanism for appropriately protecting people forced from their home countries by climate change. There are three categories of displaced persons that the international community largely recognises as those whom other countries have an obligation to protect: "refugees", "stateless persons", and those eligible for complementary protection'.<sup>28</sup> An analysis of these categories demonstrates their deficiency in the context of climate change displacement.

### A *Climate Change Displaced Persons as 'Refugees'*

The *Convention Relating to the Status of Refugees* ('*Refugee Convention*') codifies the customary international law principle of non-refoulement by placing

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<sup>23</sup> The Nansen Initiative, *About Us: Towards a Protection Agenda for People Displaced across Borders in the Context of Disasters and the Effects of Climate Change* <<https://www.nanseninitiative.org/secretariat/>> archived at <<https://perma.cc/3STB-KS56>>.

<sup>24</sup> Ibid.

<sup>25</sup> The Nansen Initiative, 'Global Consultation' (Conference Report, 12–13 October 2015) 8, 16.

<sup>26</sup> Platform on Disaster Displacement, *Our Architecture* <<http://disasterdisplacement.org/the-platform/our-architecture>> archived at <<https://perma.cc/DWE4-YRCX>>.

<sup>27</sup> World Bank, 'Pacific Possible: Long-Term Economic Opportunities and Challenges for Pacific Island Countries (Working Paper No 1, 1 August 2017) (*Pacific Possible*)'.

<sup>28</sup> McAdam, 'Building International Approaches to Climate Change', above n 11, 2.

an obligation on state parties to not return refugees to a territory where there is a risk of persecution. However, a person only qualifies as a refugee if very specific criteria are met. Article 1A(2) of the *Refugee Convention* defines a ‘refugee’ as:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>29</sup>

Judicial consideration has found that ‘underlying the [*Refugee Convention*] is the international community’s commitment to the assurance of basic human rights without discrimination’.<sup>30</sup> While presumably the drafters of the *Refugee Convention* did not deliberately seek to discriminate against any particular group, the *travaux préparatoires* do not make mention of migration caused by environmental disasters or changing climatic conditions. This can be attributed to the social milieu following World War II in which the *Refugee Convention* was drafted. At its inception, the idea of a refugee was conceptualised in relation to Jews who had survived genocide and Eastern Europeans fleeing from newly-instated Communist regimes. Consequently, the *Refugee Convention* itself has been a significant roadblock for persons pre-emptively moving to avoid the impacts of climate change.

There have been numerous unsuccessful refugee applications in Australia and New Zealand in which persons from Pacific Islands nations, such as Kiribati, Tonga and Tuvalu, have sought protection from climate change impacts.<sup>31</sup> These judgements demonstrate that the nature of the *Refugee Convention* renders difficult the success of such applications. For example, New Zealand decision-making bodies have ruled that climate change displaced persons are not ‘differentially at risk of harm amounting to persecution due to any one of [the] five grounds’ and that ‘all ... citizens [of the threatened states] face the same environmental and economic difficulties’ as the applicants, thus disqualifying them from protected status.<sup>32</sup>

The persecution requirement and the five *Refugee Convention* grounds on which persecution must be based are significant barriers to granting refugee status for climate change displaced persons. Two notable decisions, one from Australia and one from New Zealand, both involving applications from nationals of Kiribati, will be explored to illustrate the difficulty faced by the current international refugee protection mechanism in this context.

Applying for refugee status in Australia, the appellant in *0907346* argued that ‘in light of scientific knowledge of the impact of carbon dioxide emissions, Australia’s continued production of high levels of such pollution, in complete

<sup>29</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2).

<sup>30</sup> *Canada (Attorney-General) v Ward* [1993] 2 RCS 689, 733 (La Forest J).

<sup>31</sup> For Australian cases, see, eg, *1004726* [2010] RRTA 845 (30 September 2010); *0907346* [2009] RRTA 1168 (10 December 2009); *N00/34089* [2000] RRTA 1052 (17 November 2000); *N95/09386* [1996] RRTA 3191 (7 November 1996); *N99/30231* [2000] RRTA 17 (10 January 2000). For New Zealand cases, see, eg, *AF (Tuvalu)* [2015] NZIPT 800859 (20 October 2015); *AC (Tuvalu)* [2014] NZIPT 800517-520 (4 June 2017); *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZAR 688 (‘*Teitiota*’); *Refugee Appeal No 72185/2000* [2000] RSAA (10 August 2000).

<sup>32</sup> *Refugee Appeal No 72189/2000* [2000] RSAA (17 August 2000) 2–3 [4] (Member Joe).

disregard for people on low lying islands, constitute[ed] the relevant motivation to characterise climate change as persecution'.<sup>33</sup> The appellant in the New Zealand decision *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* ('*Teitiota*') argued that he and his family were 'fleeing climate change because of the serious harm it will do' them and that the Kiribati government is unwilling or unable to deal with such factors.<sup>34</sup>

## 1 Persecution

While the *Refugee Convention* does not define 'persecution', many state parties, including Australia and New Zealand,<sup>35</sup> have used human rights norms as a framework for judicial determination of whether particular types of harm amount to persecution.<sup>36</sup> For example, in *Chan v Minister for Immigration and Ethnic Affairs* ('*Chan*'), the High Court of Australia considered what it meant to be persecuted in the context of refugee law.<sup>37</sup> Mason CJ determined that it requires 'some serious punishment or penalty or some significant detriment or disadvantage' and that a 'denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned' may be sufficient.<sup>38</sup> McHugh J also emphasised a human rights approach and stated that the requirement may be satisfied by 'measures in disregard of human dignity'.<sup>39</sup> *Chan* has subsequently been endorsed as the accepted definition of persecution in Australian case law.<sup>40</sup> In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, McHugh and Kirby JJ added that 'whatever form the harm takes, it will constitute persecution only if, by reason of intensity or duration, the person cannot reasonably be expected to tolerate it'.<sup>41</sup> Additionally, s 5J of the *Migration Act 1958* (Cth) ('*Migration Act*') states that persecution must involve 'serious harm' to the applicant and 'systematic and discriminatory conduct'.<sup>42</sup>

In the New Zealand context, persecution also requires 'serious harm' to be faced by the applicant, characterised as a 'sustained and systematic violation of [a] core human right' or a core human right that is at risk of restriction.<sup>43</sup> Additionally, New Zealand decision-making bodies require a 'human agency'

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<sup>33</sup> 0907346 [2009] RRTA 1168 (10 December 2009) [45] (Member Duignan).

<sup>34</sup> *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) [51] (Member Burson).

<sup>35</sup> For an Australian case, see, eg, *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 388 (Mason CJ) ('*Chan*'). For a New Zealand case, see, eg, *Refugee Appeal No 2039/93 Re MN* [1996] RSAA (12 February 1996) [36]–[44] (Chairman Haines and Member Gutnick).

<sup>36</sup> José H Fischel de Andrade, 'On the Development of the Concept of "Persecution" in International Refugee Law' (2008) 3(2) *Anuário Brasileiro de Direito Internacional* 114, 124.

<sup>37</sup> *Chan* (1989) 169 CLR 379, 379.

<sup>38</sup> *Ibid* 388.

<sup>39</sup> *Ibid* 429–31.

<sup>40</sup> *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 561, 565 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 65 (McHugh J) ('*Ibrahim*').

<sup>41</sup> *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, 489.

<sup>42</sup> *Migration Act 1958* (Cth) s 5J(4) ('*Migration Act*').

<sup>43</sup> *Refugee Appeal No 74665/03* [2004] RSAA (7 July 2004) 19 [41] (Chairperson Roche, Member Haines and Member Murphy); *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) 14 [53] (Member Burson).

element, in that someone must be responsible for carrying out the persecution.<sup>44</sup> In certain cases, human agency may be established where a homeland government fails to take steps to reduce the risk of harm carried out by non-state actors.<sup>45</sup>

With these definitions in mind, it is important to note that the impacts of climate change will differ significantly from those that have traditionally triggered art 1A(2) of the *Refugee Convention*. Some impacts of climate change may be very sudden and drastic but lead to temporary movement, often not very far from home.<sup>46</sup> Other types of change, while slower in onset, may require more permanent relocation.<sup>47</sup> In the Pacific region, the effects of climate change are predicted to generally be slow onset, such as sea level rise and erosion, as well as an increase in extreme weather events.<sup>48</sup> These do not necessarily reflect, for example, sudden flight to escape politically motivated violence amounting to persecution.<sup>49</sup> Further, climate change will not only result in physical changes to the environment, but, as previously mentioned, will also amplify existing social, political and economic factors that motivate migration in and of themselves. A major distinguishing factor between persecution and the impacts of climate change is that climate change displaced persons may have the opportunity to prepare and plan for their adaptive responses over time where the effects of climate change are slow onset. However, this will not always be the case. For these reasons, as the literature and case law overwhelmingly concludes, it is difficult to classify vulnerability to the impacts of climate change as persecution.<sup>50</sup>

The Australian Refugee Review Tribunal in *0907346* found that in the absence of an actor's motivation to inflict serious harm, there was no persecution.<sup>51</sup> It was also found that the effects of climate change did not amount to persecution because there was no discriminatory element separating who is or will be affected,<sup>52</sup> a necessary requirement as laid out by the High Court of Australia in *Applicant A v Minister for Immigration and Ethnic Affairs* and statutorily under the *Migration Act*.<sup>53</sup>

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<sup>44</sup> *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) 13–14 [51]–[52], 14 [54] (Member Burson).

<sup>45</sup> *Ibid* 14 [54].

<sup>46</sup> Craig E Landry et al, 'Going Home: Evacuation — Migration Decisions of Hurricane Katrina Survivors' (2007) 74 *Southern Economic Journal* 326; James R Elliot and Jeremy Pais, 'Race, Class, and Hurricane Katrina: Social Differences in Human Responses to Disaster' (2006) 35 *Social Sciences Research* 295, cited in Jane McAdam, 'Review Essay: From Economic Refugees to Climate Refugees?' (2009) 10 *Melbourne Journal of International Law* 579, 581.

<sup>47</sup> McAdam, 'Review Essay', above n 46.

<sup>48</sup> *Climate Change and Migration Issues*, above n 3, 6–7.

<sup>49</sup> See, eg, *Saliba v Minister for Immigration and Ethnic Affairs* (1998) 159 ALR 247.

<sup>50</sup> See, eg, Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 *Law & Policy* 502, 508; Sumudu Atapattu, 'Climate Change, Human Rights, and Forced Migration: Implications for International Law' (2009) 27 *Wisconsin International Law Journal* 607, 617; McAdam, 'Review Essay', above n 46, 580–1.

<sup>51</sup> *0907346* [2009] RRTA 1168 (10 December 2009) [48]–[50] (Member Duignan).

<sup>52</sup> *Ibid* [48].

<sup>53</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 233 (Brennan CJ), 257 (McHugh J); *Migration Act* s 5J(4).



The New Zealand Court of Appeal in *Teitiota* upheld the Immigration and Protection Tribunal's decision that there had not been a human rights violation amounting to persecution. Instead, the appellant had 'undertaken what may be termed voluntary adaptive migration' and that his decision to migrate to New Zealand could not be seen as 'forced' for the purposes of the *Refugee Convention*.<sup>54</sup> The Supreme Court of New Zealand reaffirmed this decision, stating that a person detrimentally affected by the impacts of climate change 'does not, if returned, face "serious harm" and there is no evidence to suggest that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can',<sup>55</sup> thus also failing the human agency requirement.

## 2 Refugee Convention Grounds

In relation to the five *Refugee Convention* grounds — race, religion, nationality, membership of a particular social group or political opinion — it is difficult to conceive which could apply to climate change displaced persons. None fit neatly, largely because of the indiscriminate nature of climate change impacts.

The appellant in *0907346* argued that he could be defined as a member of a particular social group on the basis that the people of Kiribati, especially people who, like himself, come from parts of the island that are heavily affected by rising sea levels and salination, are a cognizable social group, distinct from the general population.<sup>56</sup> However, the Refugee Review Tribunal concluded that:

There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati ... for their ... membership of any particular social group ... Those who continue to contribute to global warming may be accused of having an indifference to the plight of those affected by it once the consequences of their actions are known, but this does not overcome the problem that there exists no evidence that any harms which flow are motivated by one of more of the *Convention* grounds.<sup>57</sup>

In addressing the same question, the New Zealand Immigration and Protection Tribunal held in *Teitiota* that the appellant's claim under the *Refugee Convention* must necessarily fail because the effects of environmental degradation were faced by the population generally. Thus, no *Refugee Convention* ground could be made out as the basis for persecution.<sup>58</sup>

The *Refugee Convention* as it currently stands does not appear to address the plight of those who may be displaced by climate change and therefore the term 'climate refugees' is misleading, despite its common use. Stevens, Wild and Miller JJ, of the New Zealand Court of Appeal, concluded in *Teitiota* that this 'is the position even if the most sympathetic, ambulatory approach permissible to

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<sup>54</sup> *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) 13 [49] (Member Burson).

<sup>55</sup> *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 [12] (Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ).

<sup>56</sup> *0907346* [2009] RRTA 1168 (10 December 2009) [22] (Member Duignan).

<sup>57</sup> *Ibid* [51].

<sup>58</sup> *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) [75] (Member Burson).

interpreting the *Convention* is taken. The *Convention* is quite simply not the solution to Kiribati's problem'.<sup>59</sup>

### 3 Potentially Fitting Scenarios under the Refugee Convention

Despite the approach of case law to date, the *Refugee Convention* has been described as a living instrument, capable of responding to new classes of vulnerable persons that emerge as the world changes.<sup>60</sup> In *Minister for Immigration Affairs v Ibrahim* ('*Ibrahim*'), Kirby J described refugee status as 'an extremely malleable legal concept which can take on different meanings as required by the nature and scope of the dilemma prompting involuntary migration'.<sup>61</sup> Additionally, there are scenarios in which the *Refugee Convention* as it currently stands could offer protection to climate change displaced persons. Refugee status could be found where a government took measures to reduce its population's vulnerability to climate change and in doing so willingly discriminated between people on the basis of any of the five *Refugee Convention* grounds.<sup>62</sup> The requirement of persecution could be met if this discrimination resulted in a breach of recognised human rights.

Domestic implementation of the *Refugee Convention* could also give rise to protection for climate change displaced persons. States could enact legislation to grant protection to a broadened class of refugees that includes people threatened by the impacts of climate change. For example, Sweden and Finland have extended protection to anyone who has left their country of origin and is unable to return because of an environmental disaster,<sup>63</sup> which could easily include consequences of changing climatic conditions.

#### B Climate Change Displaced Persons and 'Statelessness'

The definition of a 'stateless person' under art 1(1) of the *Convention Relating to the Status of Stateless Persons* is one who is 'not considered as a national by any State under the operation of its law'.<sup>64</sup> Jane McAdam, who writes extensively on climate change displacement and migration, outlines that the law on statelessness would not apply to someone whose country is at risk of inundation from rising seas, unless the country were to formally withdraw nationality from them in violation of international law.<sup>65</sup>

Under the *Montevideo Convention on the Rights and Duties of States*, four criteria must be satisfied for a state's existence: a defined territory, a permanent population, an effective government and the capacity to enter into relations with

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<sup>59</sup> *Teitiota* [2014] NZAR 688 [21].

<sup>60</sup> Peter Nygh, 'The Future of the United Nations' 1951 *Refugees Convention*' (2000) 7 *Australian International Law Journal* 1, 7–8.

<sup>61</sup> *Ibrahim* (2000) 204 CLR 1, 70 [198], quoting James Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 *International and Comparative Law Quarterly* 348, 380.

<sup>62</sup> Md Mohiuddin Khaled and Noor Israth Jahan, 'Need for Recognizing the Unrecognized Climate Refugees: In the Context of Bangladesh' (2016) 21(11) *IOSR Journal of Humanities and Social Science* 1, 4.

<sup>63</sup> *Aliens Act 2005* (Sweden) Ch 4 s 2; *Aliens Act 2004* (Finland) s 88A(1).

<sup>64</sup> *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1(1).

<sup>65</sup> McAdam, 'Building International Approaches to Climate Change', above n 11, 8.

other countries.<sup>66</sup> The relevant question is whether the concept of statelessness would apply if a state's landmass ceased to exist or its population was no longer permanent. The literature largely argues that it would not, as the international community will generally presume the continued existence of a state, regardless of whether one or more of the formal criteria of statehood becomes less apparent.<sup>67</sup> As summarised by Derek Wong, it is well accepted that in international law there are only three ways a state may legally become extinct: by merger, voluntary absorption of one state into another or the breaking up of one state into several,<sup>68</sup> none of which consider the physical disappearance of territory.

While the relationship between statelessness and states at risk of disappearance has not yet been settled as a matter of international law, it is also important to note that a state will become uninhabitable well before it is submerged by rising seas. One of the main problems is likely to be saltwater intrusion, which will degrade fresh water supplies and endanger agricultural land.<sup>69</sup> Food security and livelihoods will be critically threatened long before a landmass disappears. For these reasons, it is clear that even if the statelessness mechanism did apply to cases of disappearing states, it would not provide sufficient protection in a timely manner or adequately address the most fundamental needs of those affected.

### C Climate Change Displaced Persons and 'Complementary Protection'

There is no definition for 'complementary protection' in any international instrument. The phrase has emerged to describe a situation where a country grants an individual legal status because of broader international protection needs under national, regional or international law, despite the individual having failed to meet the definition of a refugee under the *Refugee Convention*.<sup>70</sup> As the principle of complementary protection operates outside the *Refugee Convention*, it requires additional legal sources to provide an alternative basis for protection.<sup>71</sup> For example, under human rights instruments, the non-refoulement

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<sup>66</sup> *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1.

<sup>67</sup> Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14 *Melbourne Journal of International Law* 346, 360; McAdam, *Climate Change, Forced Migration, and International Law*, above n 13, 128; Rosemary Rayfuse, 'International Law and Disappearing States: Maritime Zones and the Criteria for Statehood' (2011) 41 *Environmental Policy and Law* 281; Rosemary Rayfuse and Emily Crawford, 'Climate Change, Sovereignty and Statehood' (Research Paper No 11/59, University of Sydney Law School, September 2011) 5; Thomas D Grant, 'Defining Statehood: The *Montevideo Convention* and its Discontents' (1999) 37 *Columbia Journal of Transnational Law* 403, 435; Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librarie Droz, 1968) 199–236.

<sup>68</sup> Wong, above n 67, 361–2, citing McAdam, *Climate Change, Forced Migration, and International Law*, above n 13, 127–8; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 705–14.

<sup>69</sup> McAdam, 'Building International Approaches to Climate Change', above n 11, 7.

<sup>70</sup> Ruma Mandal, 'Protection Mechanisms outside of the 1951 Convention ("Complementary Protection")' (Report PPLA/2005/02, United Nations High Commissioner for Refugees, June 2005) viii.

<sup>71</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 23.

principle may prevent a state from returning an individual to a situation in their home country where they may be subjected to torture or cruel, inhumane or degrading treatment.<sup>72</sup> The United Kingdom's House of Lords has indicated that any sufficiently serious human rights violation could, in theory, give rise to such a protection obligation.<sup>73</sup>

Article 11 of the *International Covenant on Economic, Social and Cultural Rights* provides for the right to an adequate standard of living, including adequate food, clothing, housing and the continuous improvement of living conditions.<sup>74</sup> There is judicial acknowledgement in New Zealand that 'where natural disasters and environmental degradation occur with frequency and intensity, this can have an adverse effect on the standard of living of persons living in affected areas'.<sup>75</sup> Further, in *Öneryildiz v Turkey* and *Budayeva v Russia*,<sup>76</sup> the European Court of Human Rights ('ECtHR') also examined the duty of a state to protect the right to life in relation to environmental disasters. In both cases, the ECtHR found a violation of the right to life of those killed because government authorities had not discharged their positive obligations to protect life against risks from known and imminent environmental hazards.<sup>77</sup> This is significant as it shows growing recognition of human rights in the context of environmental disasters.

Despite the growing recognition of the relationship between human rights and environmental disasters, it has yet to be determined whether returning an individual to their home country that has been adversely affected by climate change could amount to a breach of human rights sufficient to warrant a subsequent grant of complementary protection.<sup>78</sup> However, academic work on this point has so far concluded that even if an affirmative determination were made, complementary protection would offer little value to securing the protection of climate change displaced persons as it operates largely on an ad hoc, discretionary basis and does not provide a strong legal obligation for states to protect these individuals.<sup>79</sup> Further, in the absence of a concrete mechanism with defined parameters and obligations, it would be difficult to mobilise the requisite political consent and will necessary for such a process to be effective.<sup>80</sup>

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<sup>72</sup> Williams, above n 50, 514; *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Migration Act* s 36.

<sup>73</sup> *R v Special Adjudicator Ex parte Ullah* [2004] UKHL 26 (17 June 2004) [22]–[24] (Lord Bingham), [49]–[50] (Lord Steyn), [67] (Lord Carswell).

<sup>74</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1).

<sup>75</sup> *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) [63].

<sup>76</sup> *Öneryildiz v Turkey* [2004] XII Eur Court HR 79 ('Öneryildiz'); *Budayeva v Russia* [2008] II Eur Court HR 267 ('Budayeva').

<sup>77</sup> *Öneryildiz* [2004] XII Eur Court HR 79, 29 [89]; *Budayeva* [2008] II Eur Court HR 267, 32 [160].

<sup>78</sup> Khaled and Jahan, above n 62, 6.

<sup>79</sup> Williams, above n 50, 514; Vikram Kolmannskog and Lisetta Trebbi, 'Climate Change, Natural Disasters and Displacement: A Multi-Track Approach to Filling the Protection Gaps' (2010) 92 *International Review of the Red Cross* 713, 727–8.

<sup>80</sup> Kolmannskog and Trebbi, above n 79, 727.

### III ANALYSIS OF PROPOSED SOLUTIONS

There is a strong body of literature on the anticipated increase of climate change displacement and migration within international law, as well as the deficiencies of the current protection regime. It is clear that solutions must be developed and implemented, but it is less clear which of the proposed solutions would be the most effective at ensuring adequate protection for those who are forced to move to safer ground. A review of existing research identifies three dominantly proposed solutions to the legal protection gap: a new international legal instrument; a protocol to the *Refugee Convention* or *UNFCCC*; and enhanced pathways under existing migration schemes.

#### A A New International Instrument

Many scholars have advocated for a new international instrument to address climate change displacement and migration.<sup>81</sup> Proposals for such an instrument have adopted different terms to identify protected persons using varying definitions. For example, Bonnie Docherty and Tyler Giannini use the term ‘climate change refugees’, defined as people who are forced to move,<sup>82</sup> regardless of whether they relocate temporarily or permanently,<sup>83</sup> due to a ‘sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed’,<sup>84</sup> as summarised by Katrina Wyman.<sup>85</sup> In another significant study, David Hodgkinson et al use the term ‘climate change displaced persons’ and define the threshold for human contribution to climate change ‘as very likely’ rather than ‘more likely than not’.<sup>86</sup>

An important recurring feature of these proposed instruments is that protected persons would be guaranteed domestic legal status and the framework would be legally binding and enforceable on state parties.<sup>87</sup> It has been argued that for a new convention to be effective, it should re-imagine the current non-refoulement principle to ‘prohibit forced return to a home state where climate-induced environmental change would threaten the refugee’s life or ability to survive’.<sup>88</sup> Docherty and Giannini suggest that a new convention would also need to guarantee human rights protections in the course of resettlement and humanitarian assistance by borrowing extensively from existing refugee law.<sup>89</sup>

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<sup>81</sup> See, eg, Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review* 349; David Hodgkinson et al ‘“The Hour When the Ship Comes In”: A Convention for Persons Displaced by Climate Change’ (2010) 36 *Monash University Law Review* 69.

<sup>82</sup> Docherty and Giannini, above n 81, 369.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* 361.

<sup>85</sup> Katrina Wyman, ‘Responses to Climate Migration’ (2013) 37 *Harvard Environmental Law Review* 167, 186–7.

<sup>86</sup> Hodgkinson et al, above n 81, 90.

<sup>87</sup> *Ibid.* 98. See also Margit Ammer et al, ‘Legal Status and Legal Treatment of Environmental Refugees’ (Report, Federal Ministry of the Environment, Nature Conservation and Nuclear Safety, November 2010) 10 (‘*Legal Status and Legal Treatment of Environmental Refugees*’).

<sup>88</sup> Docherty and Giannini, above n 81, 377.

<sup>89</sup> *Ibid.*

These rights would facilitate integration of resettled protected persons, including access to courts and legal assistance in terms of civil and political rights, as well as a number of economic, cultural and social rights, such as access to rations, education, employment benefits, workers compensation and social security.<sup>90</sup>

As the anticipated increase of climate change displacement will occur on a mass scale, there will be a need for responsibility-sharing amongst industrialised countries regarding their refugee intakes and associated costs.<sup>91</sup> Proposed mechanisms have included the ‘polluter-pays’ principle, whereby states with the highest carbon emissions are obliged to cover the costs of relocation,<sup>92</sup> or requiring the worst emitters to become the host countries for displaced persons.<sup>93</sup> Presumably, these requirements are aimed at mitigating the effects of climate change by reducing emissions and subsequently reducing displacement.

Legal obligations would provide important international standards to regulate state action and would reinforce the principle of solidarity which underpins public international law.<sup>94</sup> A new international instrument dedicated solely to addressing the plight of climate change displaced persons would acknowledge the issue as unique, complex and deserving of international attention, while providing a rights-based framework to protect those affected.

## 1 Challenges

There is a danger in rigidly defining who is deserving of protection and who is not when it comes to climate change displaced persons in particular. Under the current protection framework, states have typically interpreted definitions narrowly to avoid excessive responsibility and obligations. There is an obvious risk that by codifying a definition with strict parameters, individuals will be deemed either deserving or undeserving of protection, which may not reflect a common-sense assessment of circumstances. Additionally, there is a broader problem that the international community may simply lack the requisite political will to negotiate, adopt and implement an effective new instrument.

### B Protocol to an Existing International Instrument

Despite receiving comparatively less support in the literature, a protocol to existing legal mechanisms has been called for by governments of states that will experience significant climate change impacts and should therefore be considered. In 2006, the Maldives proposed amending the *Refugee Convention* to

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<sup>90</sup> Ibid 376–7.

<sup>91</sup> See, eg, ibid 350; *Legal Status and Legal Treatment of Environmental Refugees*, above n 87, 12.

<sup>92</sup> *Legal Status and Legal Treatment of Environmental Refugees*, above n 87, 12–13.

<sup>93</sup> Jacquelynn Kittel, ‘The Global “Disappearing Act”: How Island States Can Maintain Statehood in the Face of Disappearing Territory’ [2014] *Michigan State Law Review* 1207, 1237–50.

<sup>94</sup> Michel Prieur et al, ‘Draft Convention on the International Status of Environmentally-Displaced Persons’ (2008) 4 *Revue Européenne de Droit de l’Environnement* 395, 396.

extend the definition of a refugee to include ‘climate refugees’.<sup>95</sup> Similarly, in the lead-up to the Copenhagen Climate Change Conference in 2009, the Finance Minister of Bangladesh also argued that ‘[t]he *Convention on Refugees* could be revised to protect people [affected by the impacts of climate change]’.<sup>96</sup> In 2010, Frank Biermann and Ingrid Boas proposed a *UNFCCC* ‘Protocol on the Recognition, Protection and Resettlement of Climate Refugees’.<sup>97</sup> Similarly, a Bangladeshi non-government organisation also proposed a South Asian joint initiative to garner international support under the *UNFCCC* to prepare for and ensure social, cultural and economic rehabilitation for displaced persons.<sup>98</sup>

As an example, Biermann and Boas advocate for a protocol based on five core principles: planned relocation and resettlement; resettlement instead of temporary asylum; collective rights for local populations; international assistance for domestic measures; and international burden sharing.<sup>99</sup> This proposal seeks to avoid emergency responses and disaster relief by initiating long-term planning and immediate action to begin the resettlement of populations living in areas likely to be most affected by climate change. It is suggested that such a framework could operate with assistance from the Intergovernmental Panel on Climate Change, the Conference of the Parties to the *UNFCCC*, the United Nations Development Programme and the World Bank.<sup>100</sup>

For the implementation of a protocol or a standalone convention, some scholars have also argued for economic responsibility-sharing among states by establishing an international ‘Climate Change Displacement Fund’.<sup>101</sup> Such a fund would help to cover the costs of protection and resettlement of climate change displaced persons and to ensure that neither threatened nor destination countries are burdened with the entire cost of resettlement.<sup>102</sup> In 2013, the then Fijian President stated of the top carbon emitting countries: ‘They are our friends but need to treat us all collectively in a more responsible manner and deal with

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<sup>95</sup> Republic of the Maldives Ministry of Environment, Energy and Water, ‘Report on the First Meeting on *Protocol on Environmental Refugees*: Recognition of Environmental Refugees in the 1951 *Convention* and 1967 *Protocol Relating to the Status of Refugees*’ (Report, Republic of the Maldives Ministry of Environment, Energy and Water, 14–15 August 2006), cited in Frank Biermann and Ingrid Boas, ‘Protecting Climate Refugees: The Case for a Global Protocol’ (2008) 50(6) *Environment: Science and Policy for Sustainable Development* 8; Jane McAdam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23 *International Journal of Refugee Law* 2, 6.

<sup>96</sup> Harriet Grant, James Randerson and John Vidal, ‘UK Should Open Borders to Climate Refugees, Says Bangladeshi Minister’, *The Guardian* (online), 5 December 2009 <<https://www.theguardian.com/environment/2009/nov/30/rich-west-climate-change>> archived at <<https://perma.cc/6MGA-8S2N>>, cited in McAdam, ‘Swimming against the Tide’, above n 95, 6.

<sup>97</sup> Frank Biermann and Ingrid Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10(1) *Global Environmental Politics* 60, 78.

<sup>98</sup> Md Shamsuddoha and Rezaul Karim Chowdhury, ‘Climate Change Induced Forced Migrants: In Need of Dignified Recognition under a New Protocol’ (Report, Equity and Justice Working Group Bangladesh, December 2009) 1, cited in McAdam, ‘Swimming against the Tide’, above n 95, 6.

<sup>99</sup> Biermann and Boas, ‘Preparing for a Warmer World’, above n 97, 75–6.

<sup>100</sup> *Ibid* 76–7.

<sup>101</sup> See, eg, Hodgkinson et al, above n 81, 95; Biermann and Boas, ‘Preparing for a Warmer World’, above n 97, 81.

<sup>102</sup> Biermann and Boas, ‘Preparing for a Warmer World’, above n 97, 74.

this crisis. We certainly expect them to shoulder the financial impact that we suffer as Pacific Islanders'.<sup>103</sup> This is justified as many states predicted to be the most affected by climate change are less industrialised, have produced substantially less carbon emissions and have less capacity to bear the costs of resettlement themselves.

The appeal of a protocol is that it could provide a rights-based framework and adapt to an existing formal mechanism.<sup>104</sup> This is an important factor given the immediacy of the issue at hand. It has also been suggested that a protocol to an existing instrument would build on the substantial political support received by the *UNFCCC* and also draw on widely agreed principles such as common but differentiated state responsibilities.<sup>105</sup>

## 1 Challenges

To date, existing legal obligations under international refugee law have struggled to address the plight of millions of refugees and displaced persons across the globe. With no solution in sight to the present period of mass migration currently experienced by the international community, it is difficult to imagine that states would be willing to sign up to new responsibilities under international law, and even if they were, that those responsibilities would be met. Further, there is concern that if the *Refugee Convention* is opened for renegotiation, it could risk undermining the protection regime altogether by potentially lowering current protection standards for refugees and focusing too heavily on flaws in the current process.<sup>106</sup>

The current refugee protection framework has been criticised for its 'reactive rather than proactive' application.<sup>107</sup> It enters operation following persecution and does little, if anything, to address the source of forced migration. In relation to climate change displacement, the international community has a unique opportunity to proactively tackle the anticipated increase in migration before it becomes overwhelming or life-threatening, unlike cases that have traditionally fallen under refugee law. This should be a primary incentive in any related discussions and a substantial consideration in any approach adopted.

### C Enhanced Pathways under Existing Migration Schemes

Whilst a new convention or protocol may appear attractive, these proposals fail to consider the inherent difficulties faced by international law, particularly its dependence on the political climate of the day for effective implementation. It has been suggested that at its core, this issue is one of development policy rather than international law and that proposed solutions should be reframed

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<sup>103</sup> Apisalome Coka, 'Fiji Ready for Kiribati: PM', *Fiji Broadcasting Corporation* (online), 9 December 2013 <<http://www.fbc.com.fj/fiji/16052/fiji-ready-for-kiribati-pm>> archived at <<https://perma.cc/2WEG-7GBN>>.

<sup>104</sup> McAdam, 'Swimming against the Tide', above n 95, 7.

<sup>105</sup> Biermann and Boas, 'Preparing for a Warmer World', above n 97, 76.

<sup>106</sup> António Guterres, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective* (Policy Paper, United Nations High Commissioner for Refugees, 23 October 2008) 7.

<sup>107</sup> Khalid Koser, 'Australia and the 1951 Refugee Convention' (Analysis Paper, Lowy Institute for International Policy, April 2015) 6.



accordingly.<sup>108</sup> A number of research and discussion papers have been published in recent years that advocate for a third solution to address climate change displacement: domestic policy development aimed at enhancing pathways under existing migration schemes. This approach is also favoured by some affected states, including the government of Kiribati, which is seeking an outcome where its people can voluntarily ‘migrate with dignity’.<sup>109</sup>

We cannot anticipate precisely when climate change may trigger mass displacement and one of the most difficult variables to account for is human adaptive capacity.<sup>110</sup> It has been noted that in the context of the Pacific Islands, movement is more likely to be pre-emptive and planned because it is predicted that the region will experience slow onset effects of climate change. This means that cross-border movement will be undertaken primarily as an expression of personal choice between available options to avoid more frequent and intensifying natural disasters or adapt to changes in the physical environment.<sup>111</sup> However, the fact that adaptive migration has a certain element of voluntariness does not negate the fact that it is nonetheless ‘forced’ if to stay means to face increased risk to life and livelihood.

From an economic perspective, the World Bank’s publication *Pacific Possible* argues that development policy targeted at regional mobility would ‘allow for gradual migration from the atoll nations and [would] be less costly and preferable to a last-minute abandonment that would require a significant level of emergency assistance and be difficult to manage’.<sup>112</sup> It is argued that advanced economies, such as Australia, will require high rates of net migration in the coming years to address major labour market shortfalls, particularly in sectors such as aged care,<sup>113</sup> construction, healthcare and social assistance.<sup>114</sup> With training, Pacific Island nationals would be in prime position to fill those gaps. *Pacific Possible* also encourages Australia and New Zealand to redirect their aid budgets to expanding regional migration opportunities. On this point, in December 2016, the Lowy Institute, a Sydney-based international policy think tank, published Leon Berkelmans and Jonathan Pryke’s analysis of the development benefits of expanding Pacific access to Australia’s labour market. It was found that allowing just one per cent of the Pacific’s population — an average annual intake of less than 3000 people — to work permanently in Australia would deliver three times the benefits to the people of the Pacific

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<sup>108</sup> Asian Development Bank, ‘Addressing Climate Change and Migration in Asia and the Pacific: Final Report’ (Report, Asian Development Bank, 2012) viii; Biermann and Boas, ‘Preparing for a Warmer World’, above n 97, 74.

<sup>109</sup> ‘Pacific Islanders Reject “Climate Refugee” Status, Want to “Migrate with Dignity”’, SIDS Conference Hears’, *ABC News* (online), 6 September 2014 <<http://www.abc.net.au/news/2014-09-05/pacific-islanders-reject-calls-for-27climate-refugee27-status/5723078>> archived at <<https://perma.cc/TN94-EPJT>>.

<sup>110</sup> McAdam, *Climate Change and Displacement*, above n 10, 1–2.

<sup>111</sup> *Clusters and Hubs*, above n 12, 6.

<sup>112</sup> *Pacific Possible*, above n 27, 89.

<sup>113</sup> *Ibid* 35.

<sup>114</sup> Richard Curtain et al, ‘Pacific Possible: Labour Mobility: The Ten Billion Dollar Prize’ (Report, World Bank, July 2016) 8 (*Pacific Possible: Labour Mobility*).

Islands by 2040 than Australia's current aid programme.<sup>115</sup> This demonstrates that in addition to the legal and moral obligation that Australia has to assist its neighbours, there is a substantial economic benefit to fully exploiting regional economic opportunities by enhancing labour mobility.

In addition to the economic benefits of increased regional mobility, the small size of most Pacific nations makes the goal of eventual permanent migration in response to climate change a manageable one. Although equally reliant on political will for effective implementation, policy development may be a more attractive option as it has the capacity to flexibly adapt to changing circumstances, in contrast to the relative rigidity of international law. Further, many of the appealing features of proposed conventions or protocols may be integrated into domestic policies without the need for states to sign up to stringent obligations.

### 1 'Clusters' and 'Hubs'

The Nansen Initiative's consultations identified that colonisation, along with the mandate and trusteeship processes developed by the League of Nations and United Nations post-World War I and II, has laid the foundation for subregional 'clusters' of states in the Pacific.<sup>116</sup> Within these clusters, nationals are granted varying degrees of privileged access to temporary or permanent residency in the former colonial, mandate or trustee state, which typically acts a cluster 'hub'.<sup>117</sup> The Nansen Initiative's proclaimed 'New Zealand cluster' provides a good example. The legal origins of this grouping trace to 1901, when the boundary of the Colony of New Zealand was extended to include modern day Niue and the Cook Islands, which remained part of New Zealand until 1974 and 1964 respectively. During World War I, the New Zealand government also seized modern day Samoa from German control. Administration for Samoa was then officially conferred on New Zealand by a League of Nations Mandate in 1920, which was operational until Samoan independence in 1962.<sup>118</sup>

Certain preferential mobility arrangements exist within the New Zealand cluster. Until the end of 2005, most children born in the independent island nations of the Cook Islands, Niue or Tokelau (a dependant territory of New Zealand) were automatically New Zealand citizens at birth. From 1 January 2006, the same applied, provided that at least one parent was a New Zealand citizen who was entitled to reside indefinitely in the Cook Islands, Niue or Tokelau.<sup>119</sup> In recognition of its colonial and mandate past, New Zealand allows up to 1100 Samoan citizens a year to be granted permanent residency under the Samoan Quota.<sup>120</sup> Further, the Pacific Access Category scheme allows 250

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<sup>115</sup> Leon Berkemans and Jonathan Pryke, 'The Development Benefits of Expanding Pacific Access to Australia's Labour Market' (Analysis Paper, Lowy Institute for International Policy, December 2016) 14.

<sup>116</sup> *Clusters and Hubs*, above n 12, 24.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid* 25–6.

<sup>119</sup> *Ibid* 26.

<sup>120</sup> *Ibid.*

Tongans, 75 Tuvaluans and 75 I-Kiribati to be granted New Zealand permanent residency each year.<sup>121</sup>

No single country should be burdened with the responsibility of responding to increased climate change displacement in the region, nor would such an approach be effective. While the impacts of climate change will be global, regional responses may be more effective in order to promote responsibility-sharing among industrialised destination countries and to preserve the historical and cultural identity of migrant groups. The Nansen Initiative's cluster and hub conceptualisation of the Pacific could potentially provide a rough outline for a responsibility-sharing mechanism between industrialised countries to determine appropriate destinations for threatened island communities. Whether legal instruments, such as regional treaties, are required to formalise the arrangements or whether less formal methods of adoption are preferred is a matter for further investigation. Future research into preferred methods of adoption must consider concerns of implementation and accountability.

By shifting focus from the 'state' to the 'region' or 'cluster', policymakers could build on existing migration pathways to enable greater regional voluntary adaptive migration. The New Zealand cluster demonstrates that it is possible to provide circular regional migration based on recognition of historical ties, with the possibility of eventual permanent residency. Governmental recognition of regional commonalities and historical ties has the potential to reduce elements of xenophobia and anti-immigration sentiment that currently exist. It could create less of an 'us' and 'them' mentality by focusing on similarities between threatened and destination states rather than differences.

## 2 *Challenges and Lessons from the Past*

It is important to reflect on past experiences of Pacific resettlement in order to identify critical issues of self-determination and preservation of cultural identity so that they can be addressed with appropriate sensitivity in future policy development. McAdam provides a comprehensive study of the 1945 Banaban relocation from present-day Kiribati to Fiji, making comparisons with other planned relocations in the Pacific. She also identifies lessons to consider moving forward.<sup>122</sup> By way of background, Banaba, which became known as Ocean Island, was proclaimed a British protectorate in 1900. It was later discovered that the island was a rich source of high-grade phosphate and eventually access to the resource was deemed to be for the 'greater good of the [British] empire'.<sup>123</sup> Official records reveal that the decision was made to move the Banabans 'whether they were agreeable or not' and many who moved felt that the process of obtaining consent was deceptive in the British representation of the island to which they would move.<sup>124</sup>

McAdam's research into the Banaban relocation uncovered that even today, resettled communities maintain a firmly separate identity and culture from the

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<sup>121</sup> Ibid 27.

<sup>122</sup> Jane McAdam, 'Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change' (2014) 49 *The Journal of Pacific History* 301.

<sup>123</sup> Ibid 308.

<sup>124</sup> Ibid 311–12.

host state Fiji,<sup>125</sup> as well as feelings of being ‘caught in between’ their past and present home.<sup>126</sup> Despite over 70 years having passed, descendants of the resettled population perceive themselves as an alien community, finding it difficult and uncomfortable to describe themselves as citizens of the host country.<sup>127</sup> Several attempts were made by these communities to either return home or seek independence for their new islands from Fiji.<sup>128</sup> These examples demonstrate the deep, intergenerational psychological consequences of planned relocation without appropriate self-determination.

In order to avoid or minimise detrimental psychological consequences, McAdam concludes that it is essential for any future planned relocation to extensively

involve affected communities; include sufficient lead time to enable careful, participatory planning processes; provide for appropriate land acquisition; and ensure sustained and sufficient financing to resettle people in a way that improves rather than deteriorates living standards.<sup>129</sup>

It has been argued that whenever relocation has occurred in the Pacific, social tensions have followed in the form of local opposition and resentment to the relocated group. Often this results from concern about access to jobs, land and resources (such as food, water, healthcare and education).<sup>130</sup> These tensions echo concerns that are often associated with refugees who are resettled under the current protection framework. It is not difficult to imagine that if additional migration pathways are forged to address climate change displacement, questions will be raised as to why these displaced persons should receive preferential treatment over those who flee from traditional forms of persecution, conflict or famine. Perhaps this could be reconciled by the Australian government actively emphasising the historical and cultural ‘closeness’ that exists in the Pacific and by the fact that we have significant pre-warning of the threats posed by climate change impacts, thus giving threatened and destination countries adequate time to prepare for voluntary adaptive migration.

#### IV POLICY RECOMMENDATIONS FOR AUSTRALIA

As previously discussed, the effects of climate change will not affect all vulnerable populations in the same manner. Depending on whether impacts are sudden and drastic or slower in onset, different strategies of adaptation will be required and it will be necessary for states to respond to these varying scenarios as they arise. The above assessment of three proposed solutions, in the context of recent international fora, state-led initiatives, scholarship and economic analyses, reveals that a multifaceted response to climate change related displacement will be the most effective.

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<sup>125</sup> Ibid 320.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid 323.

<sup>128</sup> Ibid 320–1.

<sup>129</sup> Ibid 305.

<sup>130</sup> John Connell, ‘Population Resettlement in the Pacific: Lessons from a Hazardous History?’ (2012) 43 *Australian Geographer* 127, 138.

The government of Kiribati has expressed that its long-term strategy is to secure ‘merits-based migration’ options to Australia and New Zealand, to provide an early opportunity to achieve security.<sup>131</sup> As there is currently no climate change displacement and migration convention or protocol on the international agenda, at this preliminary stage it is recommended that Australia enhances regional bilateral relationships with its Pacific neighbours and opens dialogue on broadening migration pathways to enable gradual and permanent voluntary adaptive migration.

Interim migration policies enabling temporary and circular movement, on the understanding that permanent migration will ultimately be possible once relocation becomes imperative, may be more attractive to affected and receiving countries alike.<sup>132</sup> The benefit of a scheme characterised by small but sustained migration is that it would enable communities to remain in their homes for longer, with some members working temporarily abroad and eventually obtaining permanent residency. This will facilitate gradual migration rather than flocking and will also generate income that may be fed back home to assist with adaptation, reducing financial pressures on state governments. Additionally, by developing new diaspora communities in destination countries over time, social difficulties faced by migrating populations may be eased, as may attitudes of communities into which threatened populations will move.<sup>133</sup>

### 1 *Regional Mobility Precedent and Progress*

There is evidence to suggest that an Australian mobility cluster has begun to emerge.<sup>134</sup> In September 2017, then Prime Minister Malcolm Turnbull announced Australia’s new Pacific Labour Scheme (‘PLS’) at the Pacific Island Forum (‘PIF’) in Samoa. Under the PLS, up to 2000 people from Nauru, Kiribati and Tuvalu will be allowed to work in rural and regional parts of Australia for up to three years.<sup>135</sup> Interestingly, this announcement comes soon after the publication of the World Bank’s Pacific Possible series, which outlines the economic benefits of regional migration and development. Presumably this scheme is designed to address Australia’s own shortage of rural labour and to assist Australia to move away from its current reliance on backpackers and students to meet unskilled job demand.<sup>136</sup> Nonetheless, this programme demonstrates an increased willingness on the part of the Australian government to engage with its Pacific neighbours for the benefit of the region. It is also

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<sup>131</sup> See generally ‘Pacific Islanders Reject “Climate Refugee” Status’, above n 109.

<sup>132</sup> Jane McAdam, ‘Refusing “Refuge” in the Pacific: (De)constructing Climate-Induced Displacement in International Law’ in Etienne Piguet, Antoine Pécoud and Paul de Guchteneire (eds), *Migration and Climate Change* (UNESCO Publishing, 2011) 102, 102–37, 126.

<sup>133</sup> Ibid.

<sup>134</sup> *Clusters and Hubs*, above n 12, 25.

<sup>135</sup> Grant Wyeth, ‘Australia to Welcome More Pacific Islanders with New Visa Program’, *The Diplomat* (online), 14 September 2017 <<https://thediplomat.com/2017/09/australia-to-welcome-more-pacific-islanders-with-new-visa-program/>> archived at <<https://perma.cc/P5K9-FG7H>>.

<sup>136</sup> *Pacific Possible: Labour Mobility*, above n 114, iv.

important to note that Kiribati and Tuvalu, included under the PLS, are two of the states most at risk of rising sea levels in the Pacific.<sup>137</sup>

Australia also has existing visa schemes that are indicative of a cluster. In 2008, Australia launched the Pacific Seasonal Worker Pilot Scheme, which became the Seasonal Worker Programme ('SWP') in 2012. The SWP offers seasonal work for up to nine months to citizens of Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.<sup>138</sup> Available employment sectors include agriculture, horticulture, accommodation and tourism.<sup>139</sup>

Another Australian government initiative is the Australia-Pacific Training Coalition ('APTC'), announced in 2006.<sup>140</sup> The APTC aims to provide Australian-standard skills and qualifications for vocational occupations where skilled employees are in high demand. The programmes are offered at campuses in five Pacific Island countries. Australia's Temporary Graduate visa (subclass 485) enables applicants to work in Australia provided they have completed a degree, diploma or trade qualification with an Australian educational institution.<sup>141</sup> Currently, the APTC is not recognised as an Australian educational institution for visa purposes, but this represents an opportunity for the Australian government to extend visa eligibility given that the APTC is designed and funded by Australia.<sup>142</sup>

When considering preferential migration relationships in the region, it also is important to note Australia and New Zealand's *Trans-Tasman Travel Arrangement* ('TTTA'), established in 1973.<sup>143</sup> Under the TTTA, Australian and New Zealand citizens can enter each other's country to visit, live and work indefinitely, without the need to apply for authority to enter the other country before travelling. For example, New Zealand citizens who wish to travel or live and work in Australia do so on the Special Category visa (subclass 444) ('SCV'), which may be obtained on arrival in Australia.<sup>144</sup> The TTTA also provides opportunities to obtain permanent residency and citizenship. Demonstrating the close relationship between the two countries, in 2016, the Australian government

<sup>137</sup> Jon Barnett and W Neil Adger, 'Climate Dangers and Atoll Countries' (2003) 61 *Climatic Change* 321.

<sup>138</sup> Department of Jobs and Small Business, *Frequently Asked Questions About the Seasonal Worker Programme* (2018) <<https://www.employment.gov.au/frequently-asked-questions-about-seasonal-worker-programme>> archived at <<https://perma.cc/NEZ7-ZAV4>>.

<sup>139</sup> Department of Jobs and Small Business, *Seasonal Worker Programme* (2018) <<https://www.employment.gov.au/seasonal-worker-programme>> archived at <<https://perma.cc/ZF5M-QJ8Y>>.

<sup>140</sup> Australia-Pacific Training Coalition, *About Us* (2017) <<https://www.aptc.edu.au/about/us>> archived at <<https://perma.cc/3T34-J38T>>.

<sup>141</sup> Department of Home Affairs, *Temporary Graduate Visa (Subclass 485)* <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-graduate-485>> archived at <<https://perma.cc/X8CV-DGMM>>.

<sup>142</sup> *Pacific Possible: Labour Mobility*, above n 114, 19.

<sup>143</sup> Rather than a bilateral treaty, the *Trans-Tasman Travel Arrangement* ('TTTA') is an informal arrangement between Australia and New Zealand based on a series of ministerial-level agreements and understandings. The TTTA was announced in a joint communiqué between the Prime Ministers the Hon Edward Gough Whitlam and the Hon Norman Kirk on 22 January 1973, but its origins lie in earlier colonial immigration arrangements. See generally Department of Prime Minister and Cabinet, 'Australia–New Zealand Cooperation' (Joint Communiqué, 22 January 1973).

<sup>144</sup> *Migration Act* s 32.

announced the new Skilled Independent visa (subclass 189) ('SIV'). The SIV enables New Zealand citizens to obtain permanent residency if they have been living in Australia for at least five years on the SCV and have shown a commitment and continuous contribution to Australia. Further, New Zealand citizens who are granted permanent residency under this stream will be eligible to apply for Australian citizenship after an additional 12 months.<sup>145</sup> Crucially, under the *TTTA*, Pacific Islanders who have become citizens of New Zealand have been able to travel to and stay in Australia indefinitely.<sup>146</sup>

The growing preferential mobility systems for Pacific Islanders to Australia is indicative of an emerging new cluster. This cluster could provide the essential architecture to develop and enhance avenues for voluntary adaptive migration to deal with the effects of climate change and shape Australia's policy development moving forward.<sup>147</sup> The 10 Nansen Principles, developed in 2011 at the Nansen Conference, provide a foundation on which policy could be based and built upon.<sup>148</sup> In particular, this includes the need for responses to climate change displacement to be guided by key human rights principles and

implemented on the basis of non-discrimination, consent, empowerment, participation and partnerships with those directly affected, with due sensitivity to age, gender and diversity aspects. The voices of the displaced or those threatened with displacement, loss of home or livelihood must be heard and taken into account, without neglecting those who may choose to remain.<sup>149</sup>

## 2 Human Rights Considerations

Moving forward, it is critical that future policy on this issue is framed in a way that ensures the civil, political, economic, social and cultural rights of those who will be forced to migrate across borders. Not only will this enhance respect for those rights but may also help avert the risk of secondary movements to another country.<sup>150</sup> As concluded by the *Protection Agenda*, effective future practices must ensure full substantive human rights for climate change migrants, including state assistance to meet their basic needs, such as shelter, food, medical care, education, livelihoods, security, family unity and respect for social and cultural identity.<sup>151</sup> Voluntary adaptive migration will not be an easy transition and any related policy must focus on dignity, self-determination and the preservation of intangible culture, to ensure that communities can effectively integrate and re-establish themselves together in the destination country.<sup>152</sup> Additionally, procedural rights must also be ensured throughout the relocation process. In particular, it will be important that climate change migrants have

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<sup>145</sup> Department of Home Affairs, *An Additional Pathway to Permanent Residence for New Zealand Citizens* <<https://www.border.gov.au/Visasupport/Pages/an-additional-pathway.aspx>> archived at <<https://perma.cc/Z5LP-VSZ9>>.

<sup>146</sup> Richard Bedford and Graeme Hugo, 'Population Movement in the Pacific: A Perspective on Future Prospects' (Report, New Zealand Department of Labour, February 2012) 54, 57.

<sup>147</sup> *Clusters and Hubs*, above n 12, 24.

<sup>148</sup> *The Nansen Conference: Climate Change and Displacement*, above n 22, 5.

<sup>149</sup> *Ibid.*

<sup>150</sup> The Nansen Initiative, 'Agenda for the Protection of Cross-border Displaced Persons in the Context of Disasters and Climate Change' (Report, December 2015) vol 1, 8.

<sup>151</sup> *Ibid.* 28.

<sup>152</sup> Hodgkinson et al, above n 81, 112.

access to courts and legal assistance at a level equal to that of host state nationals, so that they have an avenue to promote and, if necessary, defend their rights.<sup>153</sup> It is hoped that by framing policy development with human rights considerations, these assurances will shape norms moving forward and improve Australia's institutional and societal respect for human rights as a whole.

On 20 July 2018, following the adoption of the *United Nations New York Declaration for Refugees and Migrants* in September 2016 and an extensive process of six formal consultations with United Nations Member States,<sup>154</sup> the UNHCR released the final version of the proposed *Global Compact on Refugees* ('*Global Compact*').<sup>155</sup> This document seeks to provide a basis for predictable and equitable burden and responsibility sharing among all United Nations Member States in addressing issues relating to human mobility.<sup>156</sup> As stated in its introduction, the *Global Compact* itself is not legally binding, but represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries.<sup>157</sup> Relevantly, in relation to identifying international protection needs, para 63 of the *Global Compact* provides that

where appropriate, stakeholders with relevant mandates and expertise will provide guidance and support for measures to address other protection and humanitarian challenges. This could include measures to assist those forcibly displaced by natural disasters, taking into account national laws and regional instruments as applicable, as well as practices such as temporary protection and humanitarian stay arrangements.<sup>158</sup>

Against that background and considering this paper's analysis, the following recommendations are made.

### 3 Key Recommended Policy Features

First, in relation to resettlement, Australia must engage in constructive dialogue with threatened Pacific states to promote the self-determination and dignity of affected communities in any future responses. Australia could use its position in the PIF to open discourse so that all affected states can be adequately represented and involved in the planning process. It is acknowledged that this consultation itself will cause complications not in the least because different communities will seek different courses of action. For example, the government of Kiribati has expressed its desire to secure international agreements in which industrialised states acknowledge their contribution to climate change and that

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<sup>153</sup> Docherty and Giannini, above n 81, 376.

<sup>154</sup> *United Nations New York Declaration for Refugees and Migrants*, GA Res 71/1, UN GAOR, 71<sup>st</sup> sess, 7<sup>th</sup> plen mtg, Agenda Items 13 and 117, UN Doc A/RES/71/1 (19 September 2016).

<sup>155</sup> United Nations High Commissioner for Refugees, 'Global Compact on Refugees' (Global Compact, 20 July 2018) (advance).

<sup>156</sup> *Ibid* 3 [3].

<sup>157</sup> *Ibid* 3 [4].

<sup>158</sup> *Ibid* 15 [63].



offering relocation to affected states constitutes a compensatory obligation.<sup>159</sup> In contrast, the Prime Minister of Tuvalu has expressed that:

While Tuvalu faces an uncertain future because of climate change, it is our view that Tuvaluans will remain in Tuvalu. We will fight to keep our country, our culture and our way of living. We are not considering any migration scheme. We believe if the right actions are taken to address climate change, Tuvalu will survive.<sup>160</sup>

It is clear that a blanket approach will not be appropriate and the PIF could provide an appropriate platform for regional dialogue and collaborative policy planning.

Second, Australia's recently announced PLS is a positive step for increasing regional migration opportunities. However, it is recommended that the Australian government expands the list of countries from which nationals are eligible to participate (Nauru, Kiribati and Tuvalu) to include the other six countries in Australia's SWP (Fiji, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga and Vanuatu).

Additionally, the length of the proposed PLS visa should be extended beyond three years and eventual access to permanent residency should be incorporated into the scheme to facilitate a gradual stream of permanent relocation and minimise mass crisis migration in years to come. If Australian permanent residency is offered to skilled workers across the Pacific, it is important that Australia assists threatened states in developing local adaptation schemes, as presumably many skilled workers will take advantage of migration opportunities and leave a deficit of human resources at home.

Third, Australia must increase the number of Pacific Islanders immigrating annually through existing migration schemes. Between 2010 to 2015, only 2905 Temporary Work (Skilled) visas (subclass 457) were granted to migrants from the Pacific Islands to work in Australia, less than one per cent of total arrivals under this visa category over that period.<sup>161</sup> An increase in numbers could be achieved by discounting the heavy visa application fees for Pacific Islanders and ensuring greater awareness of mobility opportunities amongst potential immigrants. Further, just under 1500 workers were recruited of the total 2500 permits allocated under the SWP in 2013.<sup>162</sup> Efforts must also be made to improve the SWP and ensure the programme's permit capacity is met.

Fourth, it is important that the *TTTA* remains intact and continues to enable movement in the Pacific, including that of Pacific Islanders. Keeping this channel open will promote responsibility-sharing between Australia and New Zealand, the two largest and most developed states in the region. Responsibility-sharing could reduce stresses associated with increased migration — such as resource deployment to assist integration, community opposition to immigration and subsequent political pressures — by demonstrating that climate change

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<sup>159</sup> McAdam, 'Refusing "Refuge"', above n 132, 111, citing an interview with the then President of Kiribati (12 May 2009).

<sup>160</sup> *Ibid.*

<sup>161</sup> *Pacific Possible: Labour Mobility*, above n 114, iv.

<sup>162</sup> *Clusters and Hubs*, above n 12, 34.

displacement is a regional challenge being tackled jointly with other states and not just Australia in isolation.

Fifth, Australia must commit to redesigning the APTC in order to ensure that the project delivers successful outcomes measured by APTC graduates obtaining access to the Australian job market. This could be achieved by making APTC graduates eligible for Australian Graduate visas, which would allow them time to complete work experience certification requirements and to secure employment.<sup>163</sup> Further, a portion of APTC funding should be used to promote APTC graduates to Australian employers and increase positions available in courses.<sup>164</sup>

Sixth, policy development relating to climate change displacement and migration must be framed with human rights considerations in order to adequately protect affected persons and ensure a smooth resettlement process. Resettled groups must have access to the same rights and entitlements as those whose country they will make home, including eventual citizenship. Particular focus must be placed on dignity, self-determination and cultural preservation.

Finally, it is important for Australia not to adopt any one approach in isolation and to remain flexible as developments occur. In addition to enhancing regional migration opportunities, Australia must also remain open to the possibility of humanitarian assistance for rapid-onset disasters and in the longer term, as there will undoubtedly be individuals affected who will be unable or unwilling to preemptively migrate.<sup>165</sup> If a new convention or protocol on climate change displacement is pursued by the international community, it is important for Australia to demonstrate regional leadership and positively engage in the negotiation process to promote the protection of its Pacific neighbours.

## V CONCLUSION

Ultimately, climate change displacement and migration sit between the realms of international law and development policy. People are already moving in response to the effects of climate change,<sup>166</sup> and it is clear that states must develop coordinated responses that acknowledge the need for cross-border movement in certain circumstances and which regularise the legal status of those who move.<sup>167</sup> The Prime Minister of Fiji has said that ‘Fiji will not turn its back on our [Pacific] neighbours in their hour of need’.<sup>168</sup> It is imperative that Australia does not either. In a position to assume regional leadership, Australia must continue and improve upon its current regional migration efforts and further develop policy to respond proactively to climate change displacement

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<sup>163</sup> *Pacific Possible: Labour Mobility*, above n 114, iv–v.

<sup>164</sup> *Ibid.*

<sup>165</sup> McAdam, *Climate Change, Forced Migration, and International Law*, above n 13, 187.

<sup>166</sup> See, eg, Lauren Beldi, ‘Carteret Climate Refugees Seek Home’, *ABC* (online), 7 August 2016 <<http://www.abc.net.au/news/2016-08-07/carteret-climate-refugees-new-home/7693950>> archived at <<https://perma.cc/9SCR-3S49>>; Geoffrey Lean, ‘Disappearing World: Global Warming Claims Tropical Island’, *The Independent* (online), 24 December 2006 <<https://www.independent.co.uk/environment/climate-change/disappearing-world-global-warming-claims-tropical-island-5331748.html>> archived at <<https://perma.cc/QN98-DRYP>>.

<sup>167</sup> McAdam, ‘Refusing “Refuge”’, above n 132, 105–6.

<sup>168</sup> Coka, above n 103.

through regional cooperation, labour mobility and new migration schemes, within a rights-based framework. However, it is also important that Australia remains open to humanitarian assistance to deal with rapid-onset disasters and longer-term impacts, as well as binding international agreements if pursued by the global community. These actions will help to protect our regional neighbours and ease a situation of mass crisis migration that will undoubtedly occur in the near future if Australia does not act now.