University of New South Wales

University of New South Wales Faculty of Law Research Series 2010

Year 2010 *Paper* 27

Refusing 'Refuge' in the Pacific: (De)Constructing Climate-Induced Displacement in International Law

Jane McAdam*

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/unswwps-flrps10/art27

Copyright ©2010 by the author.

^{*}University of New South Wales

Refusing 'Refuge' in the Pacific: (De)Constructing Climate-Induced Displacement in International Law

Jane McAdam

Abstract

This paper challenges calls for a new international treaty for 'climate refugees' or 'climate migrants. Drawing in part on field work undertaken in Kiribati and Tuvalu, it examines some conceptual and pragmatic difficulties in attempting to construct a refugee-like instrument for people fleeing the effects of climate change, and critiques whether there are legal, as opposed to political, benefits to be gained by advocating for such an instrument.

REFUSING 'REFUGE' IN THE PACIFIC: (DE)CONSTRUCTING CLIMATE-INDUCED DISPLACEMENT IN INTERNATIONAL LAW*

Jane McAdam*

A INTRODUCTION

Human movement caused by environmental factors is not new. Natural and humaninduced environmental disasters and slow-onset degradation have displaced people in the past, and will continue to do so in the future. Such movement is a normal part of adaptation to change. The 'newness' of displacement triggered (at least in part) by climate change is its underlying anthropogenic basis, the large number of people thought to be susceptible to it,² and the relative speed with which climate change is to occur, which may hamper people's traditional adaptive patterns that historically were able to develop over time. According to the United Nations High Commissioner for Refugees, it is becoming difficult to categorize displaced people because of the combined impacts of conflict, the environment and economic pressures.³ While the term 'refugee' describes only a narrow sub-class of the world's forced migrants, it is often misapplied to those who move (or who are anticipated to move) for environmental or climate reasons. As explored below, this is not only erroneous as a matter of law, but is conceptually inaccurate as well. In contexts such as the so-called 'sinking islands' of Kiribati and Tuvalu in the South Pacific, movement is less likely to be in the nature of sudden flight, and more likely to be pre-emptive and planned. This does not mean it is not 'forced', but rather that top-down policy responses and normative frameworks that predicate forced migration on a particular notion of exodus may not match up to realities of movement. Furthermore, while 'development-induced displacement' and 'conflict-induced displacement' describe primary motivations for movement in certain contexts, field research in Tuvalu and

[†] This is a draft of a chapter that will be published in E Piguet, A Pécoud and P de Guchteneire (eds), *Migration, Environment and Climate Change* (UNESCO, Paris, forthcoming).

^{*} BA (Hons) LLB (Hons) (*Syd*), DPhil (*Oxon*); Associate Professor, Faculty of Law, University of New South Wales, Australia; Research Associate, Refugee Studies Centre, University of Oxford. I am grateful to the Australian Research Council for funding this research, including field work in Kiribati and Tuvalu. This chapter draws in part on J McAdam and M Loughry, 'We Aren't Refugees', *Inside Story* (30 June 2009) http://inside.org.au/we-arent-refugees/ (accessed 2 July 2009).

¹ That is not to say that 'natural' disasters are without anthropogenic bases: see eg B Wisner, P Blaikie, T Cannon and I Davis, *At Risk: Natural Hazards, People's Vulnerability and Disasters* (2nd edn, Routledge, London, 2004), which argues that few disasters are ever 'natural'; they are a combination of environmental *plus* socio-economic and political factors.

² President of the Global Humanitarian Forum, Kofi Annan, described 'millions of people' being 'uprooted or permanently on the move as a result' of climate change, with '[m]any more millions' to follow: Global Humanitarian Forum, *The Anatomy of a Silent Crisis* (Human Impact Report Climate Change, Geneva, 2009) ii, http://ghfgeneva.org/Portals/0/pdfs/human_impact_report.pdf (accessed 7 December 2009). Debates about numbers remain highly contentious: see eg D Kniveton and others, 'Climate Change and Migration: Improving Methodologies to Estimate Flows', IOM Migration Research Series No 33 (2008); S Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate', New Issues in Refugee Research Working Paper No 70 (2002).

³ See remarks made by High Commissioner Antonio Guterres in an interview with *The Guardian* in J Borger, 'Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN', *The Guardian* (17 June 2008) http://www.guardian.co.uk/environment/2008/jun/17/climatechange.food (accessed 2 December 2009).

Kiribati highlights the difficulties of describing human movement from these States as exclusively 'climate-induced displacement'.

A variety of actors has called for a new international treaty on climate change displacement (or a Protocol to the Refugee Convention⁴ or the United Nations Framework Convention on Climate Change⁵) to create a new class of refugee-like protected persons. At the State level, for example, the Maldives in 2006 proposed amending the 1951 Refugee Convention to extend the definition of a 'refugee' in article 1A(2) to include 'climate refugees'. In December 2009, in the run-up to the Copenhagen climate change conference, the Bangladeshi Finance Minister similarly stated: 'The convention on refugees could be revised to protect people. It's been through other revisions, so this should be possible'. A Bangladeshi NGO network, Equity and Justice Working Group Bangladesh (EquityBD), has called for a new Protocol to the UNFCCC 'to ensure social, cultural and economic rehabilitation of the "climate refugees" through recognizing them as "Universal Natural Persons"."

Some scholars have also proposed new legal instruments to address climate-related movement. For example, Biermann and Boas suggested a UNFCCC Protocol on the Recognition, Protection, and Resettlement of Climate Refugees. ¹⁰ A group of legal scholars from the University of Limoges published a Draft Convention on the International Status of Environmentally-Displaced Persons.¹¹ Docherty and Giannini

November 2009). Equity Bd no longer uses the 'refugee' terminology: Author's interview with Md Shamsuddoha and Rezaul Karim Chowdhury (Dhaka, 19 June 2010).

2

⁴ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2), read in conjunction with Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

⁵ UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1993) 1771 UNTS 107.

⁶ 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 (Male, Maldives, 14-15 August 2006) cited in F Biermann and I Boas, 'Protecting Climate Refugees: The Case for a Global Protocol', Environment (November–December 2008).

⁷ See H Grant, J Randerson and J Vidal, 'UK Should Open Borders to Climate Refugees, Says Bangladeshi Minister', The Guardian (4 December 2009) http://www.guardian.co.uk/environment/2009/nov/30/rich-west-climate-change/print (accessed 8 December 2009).

⁸ Md Shamsuddoha and Rezaul Karim Chowdhury, 'Climate Refugee: Requires Dignified Recognition under a New Protocol' (April 2009) http://www.equitybd.org/English/Press%20040409/English%20Position%20paper.pdf (accessed 10

⁹ I am adopting the term 'climate-related' movement to denote the multiple factors involved, and that

climate change is one of several. 10 F Biermann and I Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No 33 (November 2007); see also Biermann and Boas, op cit; for criticism of their approach, see M Hulme, 'Commentary: Climate Refugees: Cause for a New Agreement?', Environment (November-December 2008). For another UFCCC-based proposal, see A Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 Law & Policy 502.

¹¹ Draft Convention on the International Status of Environmentally-Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) (2008) 4 Revue Européene de Droit de l'Environnement 375. Article 2(2) defines 'environmentally-displaced persons' as 'individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence and requires their relocation and resettlement.' A 'right to resettlement' is elaborated in article 9: States parties are to establish 'transparent and open legal

proposed an 'independent' or 'stand-alone' convention defining 'climate change refugee' and containing 'guarantees of assistance, shared responsibility, and administration'. An Australian-based project also seeks to elaborate 'a draft convention for persons displaced by climate change', which would 'establish an international regime for the status and treatment of such persons.' The Council of Europe Parliamentary Assembly's Committee on Migration, Refugees and Population has suggested 'adding an additional protocol to the European Convention on Human Rights, concerning the right to a healthy and safe environment' as a way of 'enhancing the human rights protection mechanisms vis-à-vis the challenges of climate change and environmental degradation processes'. 14

All these proposals vary in terms of how they seek to define those displaced, and whether such people would be subject to individual status determination (similar to conventional refugee status determination), or whether protection would be granted on the basis of the objective country of origin conditions from which people flee. 16

While the underlying basis of each proposal is, presumably, to provide a rights-based framework for people forced to move when the impacts of climate change render life and livelihoods at home impossible, it is not self-evident that a treaty would presently best serve this end. Accordingly, this chapter provides a partial response to calls to protect 'climate refugees' through an international instrument. It is partial, because it does not engage in a detailed discussion about whether new substantive norms or machinery are needed, ¹⁷ or respond to the particular detail of each proposal mentioned above. Nor does it examine issues of compensation or responsibility-sharing—matters which might usefully be addressed in a multilateral instrument (and which some of the proposals suggest). Rather, it simply addresses the appropriateness of defining a 'climate displaced person' category within an international protection paradigm. By an 'international protection paradigm', I mean something akin to refugee protection: requiring States, as a matter of international treaty law, not to return people to climate-related harms and to grant them a domestic legal status.

The chapter does this by examining some conceptual and pragmatic difficulties in attempting to construct a refugee-like instrument for people fleeing the effects of climate change, and by critiquing whether there are legal benefits, as opposed to political benefits, to be gained by advocating for such an instrument. It should not be

¹⁶ Eg Docherty and Giannini proposal, Australian proposal and Biermann and Boas proposal.

3

procedures for the demand and grant or refusal of the status of environmentally-displace person based on the rights set forth in the present chapter.'

¹² B Docherty and T Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349, 350, 373.

¹³ See 'A Convention for Persons Displaced by Climate Change', http://www.ccdpconvention.com/ (accessed 7 December 2009).

¹⁴ The Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, 'Environmentally Induced Migration and Displacement: A 21st Century Challenge' Doc 11785 (23 December 2008) paras 6.3 and 121 respectively.

¹⁵ Eg Maldives, Bangladesh, Limoges proposals.

¹⁷ On which, see W Kälin, 'Conceptualising Climate-Induced Displacement' in J McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, Oxford, forthcoming 2010); J McAdam and B Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' in A Edwards and C Ferstman (eds) *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, Cambridge, forthcoming 2010).

read as an outright rejection of a future treaty regime whereby States accept a duty to assist people displaced in part by climate change, and to agree to responsibility-sharing mechanisms. Indeed, people are already moving in response to environmental changes, and ultimately States will need to develop coordinated responses that acknowledge the need for cross-border movement in certain circumstances and which regularize the status of those who move, either through humanitarian or migration schemes.

The chapter proceeds with three main lines of argument. First, it critiques some assumptions about the nature of climate change and displacement which underpin advocacy for a protection instrument, and suggests that other measures may achieve (more) desirable outcomes for those affected. Secondly, it queries whether it is desirable, in any event, for any new international instrument to focus on one displacement driver—climate change—rather than poverty, or conflict, or natural disaster. In other words, should displacement be addressed in terms of what drives it, or rather in terms of the needs of those who move? These conceptual critiques are linked to a more pragmatic one—namely, that States presently lack the political will to negotiate a new instrument requiring them to provide international protection to additional classes of people, and that even if they did, its ratification, implementation and enforcement could not be easily compelled. While this of itself is not an argument against legal developments, it highlights a significant obstacle in achieving treaty-based solutions (at least in the short- to mid-term) and the limitations of a treaty even if negotiated. Furthermore, it relates back to the question how best to promote the human rights of affected communities: while international human rights law principles should inform any decisions relating to movement, a protection-like response may not necessarily respond to communities' human rights concerns, especially those relating to cultural integrity, self-determination and statehood.²⁰ It may also obscure other human rights that need attention.

Together, these concerns suggest that the focus on a multilateral treaty to extend States' international protection obligations may not presently be the most appropriate tool to achieve outcomes for populations severely affected by the impacts of climate

_

¹⁸ For example, the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (entered into force by signature, 5 April 1995) 2069 UNTS 3 is a regional treaty between four States that establishes a *framework for cooperation* 'in all fields of su stain able development, utilization, management and conservation of the water and related resources of the Mekong River Basin ... in a manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences and man-made activities' (article 1). It also establishes an institutional framework, the Mekong River Commission, 'to provide an adequate, efficient and functional joint organizational structure to implement this Agreement and the projects, programs and activities taken thereunder in cooperation and coordination with each member and the international community, and to address and resolve issues and problems that may arise from the use and development of the Mekong River Basin water and related resources in an amicable, timely and good neighbourly manner' (Preamble). Thus, at a minimum, it commits States to negotiate on the issues, through 'consultation and evaluation' and 'a dynamic and practical consensus' (Ch II definitions).

¹⁹ See eg 'Carteret Islanders Become First Climate Refugees: PNG Relocates Families as Island Home Disappears', *Pacific Island Report* (4 May 2009) http://archives.pireport.org/archive/2009/may/05-04-09.htm, reporting a story from the *Papua New Guinea Post-Courier* (1 May 2009). More generally, see the special issue on climate change and displacement: (2008) 31 *Forced Migration Review*.

²⁰ On which, see J McAdam, "Disappearing States', Statelessness and the Boundaries of International Law' in McAdam (ed), *op cit*.

change. It is important to recognize that migration is a normal adaptation response to environmental change. There is a risk that legally defining a 'climate refugee' category may lead to a hardening of the concept, simultaneously defining groups 'in' or 'out' of need. Given the conceptual difficulties for devising such a definition, and for premising movement as 'flight' in response to certain triggers, it may not best encapsulate the likely nature of movement, especially with respect to slow-onset changes in small island States. Focusing attention on culturally-sensitive outcomes for people in particular contexts, which respond to the nature, timing and location of predicted movement within, from and to particular States, and their own views about how they want to be perceived, may ultimately better facilitate a human rights approach to the phenomenon. In advancing this view, particular attention is paid to the case of two small Pacific island States, Kiribati and Tuvalu.

B UNDERSTANDING THE PHENOMENON

The way a phenomenon is understood necessarily determines the way it is regulated. Responses to human trafficking, for instance, will differ depending on whether the issue is viewed through a criminal justice or a human rights lens. Similarly, how (and to what extent) international law and institutions respond to climate-related human movement will depend in part on: (a) whether such movement is perceived as voluntary or involuntary; (b) the nature of the trigger (a disaster versus a slow-onset process); (c) whether international borders are crossed; (d) the extent to which there are political incentives to characterize something as linked to climate change or not; and (e) whether movement is driven or aggravated by human factors, such as discrimination.²¹

At the macro level, there are a number of ways that such movement can be categorized and responded to: for example, as a protection issue, a migration issue, a disaster issue, an environmental issue, or a development issue. Each of these is built around an implicit set of assumptions that motivate different kinds of policy outcomes. Broadly speaking, as a protection issue, the assumption is that movement is forced and should be treated as refugee-like in nature, with binding protection obligations for States (hence calls for a new treaty) with respect to those displaced. As a migration issue, movement is cast as voluntary, and therefore as not compelling the 'international community' to respond. Rather, the assumption is that States can respond as and when they see fit through domestic immigration policy. As a disaster issue, assistance can be provided by *in situ* humanitarian relief and temporary relocation where needed. As an environmental issue, the movement of 'climate

-

²¹ See eg I Khan, *The Unheard Truth: Poverty and Human Rights* (WW Norton and Co, New York, 2009). How an issue is characterized can cut both ways, of course. While some Pacific leaders have highlighted the existential threat that climate change poses to their States (see further below), countries like the United States, Australia and the Member States of the European Union have highlighted the security threats that climate change pose to themselves, including the threat of climate migration: see eg P Schwartz and D Randall, 'An Abrupt Climate Change Scenario and Its Implications for United States National Security' (October 2003); CNA Corporation, 'National Security and the Threat of Climate Change' (2007); Prime Minister Kevin Rudd, 'The First National Security Statement to the Australian Parliament' (4 December 2008) http://www.theaustralian.news.com.au/files/security.pdf (accessed 11 December 2008); *Defending Australia in the Asia Pacific Century: Force 2030* (Defence White Paper, Commonwealth of Australia, 2009); Council of the European Union, 'Climate Change and International Security' (Report from the Commission and the Secretary-General/High Representative to the European Council) Doc No 7249/08 (3 March 2008).

refugees' from 'sinking islands' can be used as a potent political image in advocating for the reduction of carbon emissions and the protection of endangered ecosystems. Here, the refugee terminology, while rejected by most forced migration scholars, contributes to its dramatic effect. As a development issue, foreign aid and investment are seen as the tools that can fund adaptation measures and assist climate-affected countries to 'develop' their way out of poverty, poor governance and so on and thereby enhance their capacity to adapt to climate change. In each of these conceptualizations, the extent to which climate change features as the key issue varies: it is predominant in the protection and environmental discourses; it is one of a number of relevant impacts in the migration, disaster and development characterizations.

From a legal perspective, this is important because the way a phenomenon is characterized determines how law and policy are developed. Questions of conceptualization have clear governance implications, since they inform the appropriate location of environmental migration procedurally (as an international, regional or local, developed and/or developing country concern/responsibility); thematically (for example, within the existing refugee protection framework or under the UNFCCC); and institutionally (such as whether a mandate should rest with UNHCR, IOM, UNDP, UNEP, or a new organization).

C CLIMATE CHANGE AS THE DRIVER? A CASE STUDY OF KIRIBATI AND TUVALU

This part of the paper seeks to anchor this somewhat abstract discussion in a case study centred on the Pacific island States of Kiribati and Tuvalu, which have become the focus of the 'climate refugee' movement.

1 Background

Tuvalu and Kiribati are independent small island States in the South Pacific. Despite belonging to different ethnic groups (Polynesian and Micronesian respectively), the British claimed them in 1892 as a single protectorate—the Gilbert and Ellice Islands—which became a Crown colony in 1916 until independence was achieved some 30 years ago (Tuvalu in 1978, Kiribati in 1979). With an average height of less than two metres above sea level, they frequently feature in the media and NGO reports as 'sinking islands' that will be uninhabitable by the middle of this century, with their people becoming the world's first 'climate refugees'. ²²

Kiribati has a population of around 100,000, while Tuvalu is the world's smallest State (apart from the Vatican), with only 10,000 people. Half of Kiribati's population

6

²² See eg N MacFarquhar, 'Refugees Join List of Climate-Change Issues', *New York Times* (29 May 2009) http://www.nytimes.com/2009/05/29/world/29refugees.html?r=1&pagewanted=print (accessed

¹ December 2009); J Bone and R Pagnamenta, 'We are Sinking, Say Islanders, but There is Still Time to Save the World', *The Times* (23 September 2009)

www.timesonline.co.uk/tol/news/environment/article6845261.ece (accessed 10 December 2009); R Callick, 'Don't Desert Us, Say Sinking Pacific Islands', *The Australian* (30 July 2009) www.theaustralian.com.au/news/dont-desert-us-say-sinking-pacific-islands/story-0-1225756097220 (accessed 10 December 2009); J Lateu, 'That Sinking Feeling: Climate Refugees Receive Funds to Leave Islands', *New Internationalist* (March 2008)

www.newint.org/columns/currents/2008/03/01/climate-change/ (accessed 10 December 2009).

live in Tarawa, and the population is increasing rapidly.²³ On its southern tip, the population density of the 1.7 square kilometre islet of Betio is greater than that of Hong Kong, but without the high-rise apartments to house it. Sanitation is poor and pollution is high, with beach toileting and washing very common. Only 20 per cent of households have access to a sewerage system; 64 per cent do not use toilets.²⁴ Septic tanks seep into the groundwater supply, which is often brackish, and the tank infrastructure is too rudimentary to keep up with population growth. The majority of people are unemployed: only a quarter have a regular job, and half of them work in government administration. The average weekly wage in Tarawa is AUD\$60.²⁵ Of the States threatened by eventual annihilation, Kiribati has the largest population (especially in light of future population growth), and virtually no capacity for longterm internal migration because of the absence of high land. 26 Tuvalu faces similar problems of unemployment, pollution and a general lack of resources, although there each house has a rainwater tank (albeit not always functional or attached to taps). Population pressure is not quite as severe, but there is considerable reliance on employed family members to provide for their relatives.

Climate change is undoubtedly impacting on these low-lying atoll States. Driving along the main road on the central Kiribati atoll of Tarawa, with the lagoon on one side and the ocean on the other, the sense of vulnerability to the environment is palpable—a vulnerability that is magnified when there is a climate crisis like a cyclone or king tide. But to what extent can climate change be singled out as a driver of forced migration, and is the concept of 'climate-induced displacement' accurate in this context?

2 The existential threat of climate change in the Pacific

Certainly, some Pacific leaders have highlighted the impacts of climate change as an existential threat.²⁷ In June 2009, the Pacific island countries were among those that sponsored a UN General Assembly resolution on 'Climate Change and Its Possible Security Implications'. The delegate from Palau stated that: 'Never before in all history has the disappearance of whole nations been such a real possibility.'28 The President of the Marshall Islands described the rationale behind the resolution as a 'further pursuit of greater guarantees of our territorial integrity'. 29 Other leaders

²³ A 2005 census put South Tarawa's population at 40,300, an increase of almost 43 per cent over a decade: C Sherborne, 'Sinking Sandbanks', The Monthly (March 2009) http://www.themonthly.com.au/node/1472 (accessed 12 September 2009). See generally CW Stahl and RT Appleyard, Migration and Development in the Pacific Islands: Lessons from the New Zealand

Experience (AusAID, April 2007).

24 Sherborne, *op cit*, citing a Kiribati government report, *The Challenge: Things (Beginning to) Fall* Apart.
²⁵ Sherborne, *op cit*.

²⁶ Ironically, Banaba, which is the only high land, was all but depopulated in the 1950s when they were relocated to Fiji to enable phosphate mining to take place. The President of Kiribati has mentioned the possibility of eventually relocating the government there, to continue a presence on the territory for as long as possible: Author interview with President Anote Tong (Kiribati, 12 May 2009).

²⁷ As early as 1992 the South Pacific Forum 'reaffirmed that global warming and sea level rise are the most serious threats to the Pacific region and the survival of some island states': Forum Communiqué, 23rd South Pacific Forum, Honiara, Solomon Islands (8–9 July 1992) Doc SPFS(92)18, para 7.

UNGA 63rd session, 9th plenary meeting (25 September 2008) UN doc A/63/PV.9, Mr Chin (Palau).
 UNGA 63rd session, 9th plenary meeting (25 September 2008) UN doc A/63/PV.9, Mr Litokwa Tomeing (President of the Marshall Islands).

stressed the impact climate change was having on 'our very existence as inhabitants of very small and vulnerable island nations.'30

Some States themselves use this imagery to dramatic effect—a recent underwater Cabinet meeting by the government of the Maldives is a good example.³¹ However, while the image of an island disappearing beneath the rising sea provides a potent, frightening basis from which to lobby for global reductions in carbon emissions, it is not necessarily as useful for getting the international community to develop normative frameworks to respond to climate-related movement. Indeed, it may contribute to misunderstandings about the likely patterns, timescale and nature of such movement. That is not to say that this approach is disingenuous, but rather that it is important to be alert to the particular objectives it may promote: raising awareness of climate impacts on small island States, providing pressure for political outcomes in climate negotiations, and making the international community aware that a failure to act on global emissions may ultimately lead to serious destruction of human society and structures. Often this sort of advocacy involves simplifying the issues, and partially because of this, Pacific governments cannot agree among themselves on a common approach to the issue of movement.

The government of Kiribati, for example, is keen to secure international agreements in which other States recognize that climate change has contributed to their predicament and acknowledge 'relocation' as part of their obligations to assist (in a compensatory way). By contrast, the governments of Tuvalu and the Federated States of Micronesia have resisted the inclusion of 'relocation' in international agreements because of a fear that if they do, industrialized States may simply think that they can 'solve' problems like rising sea levels by relocating affected populations, instead of by reducing carbon emissions, something which would not bode well for the world as a whole. In December 2009, the Tuvaluan Prime Minister reiterated that his government rejected resettlement: '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.'

_

³⁰ UNGA 63rd session, 10th plenary meeting (25 September 2008) UN doc A/63/PV.10, Mr Emanuel Mori (Federated States of Micronesia).

³¹ See eg 'Maldives Cabinet Makes a Splash' *BBC News* (17 October 2009) http://news.bbc.co.uk/1/hi/8311838.stm (accessed 10 December 2009).

³² Author interview with President Anote Tong (Kiribati, 12 May 2009). See also the remarks of the Bangladeshi finance minister, Abul Maal Abdul Muhith, who prior to the 2009 Copenhagen climate conference stated: 'We are asking our development partners to honour the natural right of persons to migrate. We can't accommodate all these people': cited in J Vidal, 'Migration is the Only Escape from Rising Tides of Climate Change in Bangladesh', *The Guardian* (4 December 2009) http://www.guardian.co.uk/environment/2009/dec/04/bangladesh-climate-refugees/print (accessed 8 December 2009).

³³ Author interview with Kiribati Solicitor-General David Lambourne (Kiribati, 8 May 2009).

³⁴ 'Prime Minister Apisai Ielemia Says Climate Change Threatens Tuvalu's Survival' (European Parliament Press Release, 10 December 2009)

http://www.europarl.europa.eu/news/expert/infopress_page/028-66101-341-12-50-903-20091207IPR66100-07-12-2009-2009-false/default_en.htm (accessed 13 December 2009), quoting the Tuvaluan Prime Minister's comments to the Development Committee on 10 December 2009. See similar comments made by the government of Nauru when it was proposed that its population relocate to Australia in the 1960s, in McAdam, "Disappearing" States', op cit.

In this respect, it is interesting to note that in the last round of the pre-Copenhagen UNFCCC climate change talks in early November 2009, the final draft treaty text included two sections referring to human movement on which agreement had previously been unachievable. They called upon States to implement as part of their adaptation measures '[a]ctivities related to national, regional and international migration and displacement or planned relocation of persons affected by climate change, while acknowledging the need to identify modalities of inter-state cooperation to respond to the needs of affected populations who either cross an international frontier as a result of, or find themselves abroad and are unable to return owing to, the effects of climate change'. They also called on States to 'jointly undertake action under the Convention to enhance adaptation at the international level', including through'[a]ctivities related to migration and displacement or planned relocation of persons affected by climate change, while acknowledging the need to identify modalities of interstate cooperation to respond to the needs of affected populations who either cross an international frontier as a result of, or find themselves abroad and are unable to return owing to, the effects of climate change'.³⁶

These are important statements of principle that identify the need for international cooperation in responding to any movement relating to climate change impacts, but which fall short of articulating the precise measures through which such cooperation would be facilitated.³⁷ They were ultimately omitted from the final text agreed at Copenhagen,³⁸ but a more watered-down form appeared in the June 2010 negotiating text in Bonn. The relevant paragraph invites (rather than obliges) States parties to enhance adaption action under the Copenhagen Adaptation Framework ('taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances'), by undertaking '[m]easures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation, where appropriate'.³⁹ This is *not* an agreement by States to 'protect' people displaced by climate change. Rather, the provision references human movement within the much broader context of enhancing national action on adaptation; no guidance or mechanism (let alone obligation) is

³⁵ See Negotiating text, UN doc FCCC/AWGLCA/2009/14 (20 November 2009) para 12(c) (page 38) http://maindb.unfccc.int/library/view-pdf.pl?url=http://unfccc.int/resource/docs/2009/awglca7/eng/14.pdf (accessed 14 December 2009).

³⁶ *Ibid*, para 13(b) (page 56).

³⁷ Cooperation may take the means of fiscal as well as practical burden-sharing, as well as comprehensive approaches: see A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, Oxford, 2009) 138–71. However, scholars such as Fitzpatrick have lamented the prevalence of fiscal burden-sharing (as opposed to others) as a 'questionable substitute': see J Fitzpatrick, 'Temporary Protection of Refugee: Elements of a Formalized Regime' (2000) 94 *American Journal of International Law* 279, 291, cited in Hurwitz, 163.

³⁸ Copenhagen Accord (adopted 18 December 2009)

http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf (accessed 19 January 2010); C Lawton, 'What about Climate Refugees? Efforts to Help the Displaced Bog Down in Copenhagen', *Spiegel Online* (17 December 2009)

http://www.spiegel.de/international/europe/0,1518,druck-667256,00.html (accessed 19 January 2010).

³⁹ See Negotiating text, UN doc FCCC/AWGLCA/2010/6 (17 May 2010) para 4(f) (page 17) http://maindb.unfccc.int/library/view_pdf.pl?url=http://unfccc.int/resource/docs/2010/awglca10/eng/06 pdf (accessed 30 June 2010).

proposed in relation to how to translate enhanced 'understanding, coordination and cooperation' into *international* strategies.

Another disagreement among Pacific governments relates to the extent to which climate change should be pinpointed as a driver of migration. In Tuvalu, the predominant official view is that climate change must remain the focal point in any multilateral or bilateral discussions about development, assistance and migration. Officials worry that if they acknowledge the more complex, multifaceted dimensions of pressures facing the population, this will detract from the urgency which the climate change threat presents. Furthermore, they fear that without a climate change focus, adaptation efforts on the ground will stall. In other words, there is a concern that if climate drivers are overshadowed by other factors such as general poverty, which have traditionally not been seen as giving rise to a protection response by third States, efforts to achieve funding for adaptation and migration options for the future will be stymied.

By contrast, as one government official in Kiribati observed, climate change overlays pressures—overcrowding, unemployment, environmental development concerns—which means that it may provide a 'tipping point' that would not have been reached in its absence.⁴² Irrespective of the threat posed by climate change per se, the government of Kiribati would be lobbying neighbouring States like Australia and New Zealand for migration opportunities, given the pressures at home.⁴³ However, the spectre of climate change makes those negotiations all the more pressing. Over time, the climate impacts will necessarily affect resource availability, such that it may not be a single extreme weather event that provides the trigger for movement, but rather the longer-term unsustainability of the environment for human habitation as fresh water lenses are contaminated by salt water and it becomes impossible to grow crops (already problematic on the outer islands). Thus, at various points in time, the role of climate change in individual or household decisions to move may be stronger or weaker. But it is a factor that can exacerbate pre-existing vulnerabilities or impede adaptation that, in a more developed country, or in a country with greater natural resources or internal relocation options, might not be as problematic.

While people in Kiribati and Tuvalu are aware of climate change, for a variety of reasons they are not necessarily worrying about it now. Religion, lack of education, and a culture of 'living for today and not planning for tomorrow' contribute to a certain degree of complacency about environmental change.⁴⁴ In Tuvalu, for

10

⁴⁰ There was an interesting suggestion made at the first session of the UN Human Rights Council's Advisory Committee that the Human Rights Council and the Secretary-General use their good offices to extend the principle of *non-refoulement* to 'hunger refugees': Report of the Advisory Committee on its First Session (Geneva, 4–15 August 2008), UN doc A/HRC/10/2, A/HRC/AC/2008/1/2 (3 November 2008) Recommendation 1/6, 15th meeting (15 August 2008).

⁴¹ This was the impression given in author interview with Enele Sopoaga, Secretary for Foreign Affairs, Tuvalu (25 May 2009).

⁴² Author interview with Kiribati Solicitor-General David Lambourne (Kiribati, 8 May 2009).

⁴³ See further part 4 below.

⁴⁴ Author interviews with President Anote Tong (Kiribati, 12 May 2009); Betarim Rimon, Office of the President (Kiribati, 12 May 2009); Tebao Awerika, Deputy Secretary, Ministry of Foreign Affairs and Immigration (Kiribati, 12 May 2009); Church leader in Tuvalu (identity withheld by request) (26 May 2009).

example, whereas 10 years ago any community meeting related to climate change would draw a large crowd, interest has subsided. The explanation given is that some of the doomsday scenarios predicted a decade ago have not eventuated, and people's immediate fears have subsided. Perhaps also because of this time lag, while people could describe recent changes to the environment, weather patterns and local resources—changes they attributed to climate change—they also felt that they could adapt to them over time. In addition, a number of people believe that God's promise to Noah that there would be no more floods could be trusted, and that God would not have put people on low-lying atolls if they were not meant to survive.⁴⁵

Indeed, the empirical evidence suggests that even in the so-called 'sinking islands', a simple 'climate change' cause and effect is not so straightforward, and motivations for movement even less so. While ambiguous or multiple causality may complicate the establishment of parameters for dealing with climate-related movement, this is not unique to displacement situations generally, and is a poor reason to overstate the emphasis of climatic factors (which could backfire). For instance, disaster literature questions the extent to which 'natural disasters' are unconnected to social, economic and political factors. ⁴⁷

By way of analogy, in the European Union article 15(c) of the Qualification Directive extends subsidiary protection (a watered-down version of refugee protection) to those who face 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'⁴⁸ There has been considerable scholarly debate and divergence in State practice as to whether 'international or internal armed conflict' must be interpreted in accordance with its international humanitarian law meaning, or whether this imposes a layer of analysis that could, if too rigidly applied, divert the focus from the key inquiry—namely, the risk to the applicant and his or her need for protection.⁴⁹ Differing

_

⁴⁵ M Loughry and J McAdam, 'Kiribati: Relocation and Adaptation' (2008) 31 *Forced Migration Review* 51, 51.

⁴⁶ See J Campbell, 'Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land' in McAdam (ed), *op cit*, discussing the Carteret Islands; C Mortreux and J Barnett, 'Climate Change and Adaptation in Funafuti, Tuvalu' (2009) 19 *Global Environmental Change* 105. An article published in *New Scientist* in May 2010 suggested that the islands of Tuvalu and Kiribati are growing, not disappearing: W Zukerman, 'Shape-Shifting Islands Defy Sea-Level Rise', *New Scientist*, issue 2763 (2 June 2010), referring to research by Paul Kench and Arthur Webb. Some media commentators used the story to suggest that the small island States now had egg on their faces: R Callick, 'Coral Islands Left High and Dry', *The Australian* (11 June 2010) http://www.theaustralian.com.au/news/features/coral-islands-left-high-and-dry/story-e6frg6z6-1225878132101. This is one of the problems with pinning everything on 'climate change', especially when that is not the only factor impacting on movement: scientific research like this can undermine the related claims. By contrast, acknowledging the *multicausal* nature of movement means that studies like this do not discredit discussions about projected movements, and do not set back research (and policy development) on the issue.

⁴⁷ See eg Wisner and others, *op cit*.

⁴⁸ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

⁴⁹ Compare H Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20 *International Journal of Refugee Law* 1; J McAdam, 'The Impact of the Standard of Proof on Complementary Protection Claims: Comparative Approaches in Europe and North America', in JC Simeon (ed), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (Cambridge University Press, Cambridge, forthcoming 2010); GS Goodwin-Gill, 'Challenges to the

interpretations have resulted in particular conflicts being characterized as within the scope of 'international or internal armed conflict' in some EU Member States, but not in others. For example, in France, Bulgaria and the Czech Republic the situation in Iraq has been treated as an 'internal armed conflict', leading to protection under article 15(c), whereas the Swedish and Romanian authorities have not viewed it as such, and in Germany there has been inconsistency across the various state jurisdictions. As Goodwin-Gill observes: 'Given the object and purpose of Article 15(c) itself (protection from the risk of indiscriminate violence), the qualifying context ought to be one in which IHL may be illustrative, but cannot be determinative. In other words, protection needs are better realized by leaving aside the intricacies of international humanitarian law and instead focusing on the risk to fundamental human rights occasioned by indiscriminate violence in situations of conflict. A parallel argument can be made in the context of assessing risk from climate-aggravated harms: emphasizing climate change as the principal driver may inadvertently narrow an instrument's protective scope.

3 Refugee law and the 'refugee' label in the Pacific

This section of the chapter examines whether the 'climate refugee' notion is embraced or eschewed by Pacific islanders to whom it is ascribed. In Kiribati and Tuvalu, it is resoundingly rejected both at the official and the personal levels.⁵³ This is because it is seen as invoking a sense of helplessness and a lack of dignity which contradicts the very strong sense of Pacific pride. Rather than regarding 'refugees' as people with resilience, who have actively fled situations of violence or conflict, they are seen as passive victims, waiting helplessly in camps, relying on handouts, with no prospects for the future.⁵⁴ Some men explain that being described as a 'refugee' would signal a

Protection of Refugees and Stateless Persons: Compliance with International Law' (Asylum Law Seminar, Blackstone Chambers, London, 31 March 2009)

http://www.blackstonechambers.com/applications/dynamic/papers.rm?barrister_id=461&id=374&x=4

**Proved to Proceed a Processed of Processed of

⁵² See further McAdam, 'The Impact of the Standard of Proof on Complementary Protection Claims', on cit.

http://edition.cnn.com/2008/WORLD/asiapcf/11/11/maldives.president/index.html (citing the President). See also the comments of Kiribati's Foreign Secretary, Tessie Lambourne: 'We are proud people. We would like to relocate on merit and with dignity': cited in L Goering, 'Kiribati Officials Plan for "Practical and Rational" Exodus from Atolls' *Reuters AlertNet* (9 December 2009) http://www.alertnet.org/db/an art/60714/2009/11/9-181804-1.htm (accessed 13 December 2009). In the specific context of climate change, the President of Kiribati also invoked the language of

^{8&}amp;y=25 (accessed 9 December 2009).

To UNHCR, Asylum in the European Union: A Study of the Implementation of the Qualification Directive (UNHCR, Brussels, 2007) 76; European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection' (October 2008) 215.

⁵¹ Goodwin-Gill, *op cit*, para 10.

op cit.

53 See remarks by Pelenise Alofa Pilitati (Chair, Church Education 'Association, Kiribati) in 'Climate Refugees', Australia Talks (ABC Radio National, 3 August 2009)

http://www.abc.net.au/rn/australiatalks/stories/2009/2641241.htm (accessed 14 December 2009). And yet the language persists: 'Climate Refugees in Australia "Inevitable" ABC News (11 December 2009) http://www.abc.net.au/news/stories/2009/12/11/2769403.htm?site=news (accessed 14 December 2009).

⁵⁴ The Tuvaluan and i-Kiribati languages do not have a single word for 'refugee', because the concept is foreign to their communal cultures: see Etita Morikao (Tuvalu, 25 May 2009) Isala Isala interview (Tuvalu, 27 May 2009). See also the comment by the President of the Maldives: 'We do not want to leave the Maldives, but we also do not want to be climate refugees living in tents for decades':

failure on their behalf to provide for and protect their family. Tuvaluans and i-Kiribati people do not want to be seen in this way. When they speak of their own possible movement to countries like Australia or New Zealand, they describe the importance of being seen as active, valued members of a community who can positively contribute to it.⁵⁵

In part, their discomfort stems from the fact that refugees flee from their own government, whereas the people of Kiribati and Tuvalu have no desire to escape from their countries. They say it is the actions of other States that will ultimately force their movement, not the actions of their own leaders. Indeed, if anything, the persecutor in such cases might be described as the 'international community', and industrialized States in particular—the very States to which movement might be sought if the land becomes unsustainable—whose failure to cut greenhouse gas emissions has led to the predicament now being faced.⁵⁶ This de-linking of the actor of persecution from the territory from which flight occurs is the opposite to refugee law: it is a complete reversal of the refugee paradigm. Whereas Convention refugees flee their own government (or actors that the government is unable or unwilling to protect them from),⁵⁷ a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from—yet within—States that have contributed to climate change. This is another reason why focusing on climate change as a driver of movement is misplaced: in refugee law, the refugee is fleeing the persecutor, and an assessment is required into whether that particular individual is at risk. Thus, identifying the *cause* of flight is imperative to identifying the protection need. By contrast, the purpose of identifying climate change as a driver is not to attribute responsibility for harm, but rather to (presumably) identify a situation of harm from which a person should be protected. Since climate change may be but one of a number of factors leading to that situation of vulnerability, focusing solely on it may result in a skewed line of inquiry.

As I have explained in depth elsewhere, ⁵⁸ international refugee law is a cumbersome tool for trying to address flight from habitat destruction. It was devised for a very different context and will in most cases be an inappropriate framework for addressing environmental displacement. ⁵⁹ Despite the 'temptation to start with definitions that

responsibility: 'When you talk about refugees—climate refugees—you're putting the stigma on the victims, not the offenders': interview with President Anote Tong (Kiribati, 12 May 2009).

⁵⁵ This is not unique: many refugees describe similar feelings.

⁵⁶ See Intergovernmental Panel on Climate Change, Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I (Cambridge University Press, New York, 1990) 8 (fn omitted); Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report: Summary for Policymakers (2007) 5, 6, 12, 13.

Policymakers (2007) 5, 6, 12, 13.

The language of article 1A(2) of the Refugee Convention is that the refugee is 'unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. The drafters stated that "unable" refers primarily to stateless refugees but includes also refugees possessing a nationality who are refused passports or other protection by their own government': see Report of the Ad Hoc Committee on Statelessness and Related Persons (16 January to 16 February 1950) UN doc E/1618 (17 February 1950) 39. A number of domestic courts have also stated that it extends to situations in which the government is either non-existent, ineffective, or colluding with the persecutors: see eg Zalzali v Minister of Employment and Immigration [1991] FCJ No 341 (Canada).

⁵⁸ J McAdam, 'Review Essay: From Economic Refugees to Climate Refugees?' (2009) 10 *Melbourne Journal of International Law* 579.

⁵⁹ For example, *Refugee Appeal No 76374*, RSAA (28 October 2009) found the applicant to be a Convention refugee on account of the highly politicized nature of disaster-relief work in which she was

would be derivative of existing concepts',⁶⁰ it does not adequately address the time dimension of pre-emptive and staggered movement (and the fact that in some cases it will be permanent); the maintenance of culture and Statehood; or the fact that the juridical aspect of protection by the home State remains forthcoming. In other (mainly non-Pacific) contexts, it may be inappropriate because movement is only internal, and there the Guiding Principles on Internal Displacement will be instructive.⁶¹ Refugee law (and complementary protection) can only be applied for once a person has arrived on the territory of another State. This may encourage spontaneous arrivals rather than planned, gradual movement, and is likely to be a far more traumatic and uncertain experience than facilitating migration over time (especially if, as is likely, many people from Kiribati and Tuvalu will seek entry to Australia and New Zealand regardless).

A related point is that individualized decision-making processes, the conventional way in which decisions on refugee status are made in countries like Australia and New Zealand, seem highly inappropriate to the situation of climate-induced displacement. This is well-illustrated by decisions of the Refugee Status Appeals Authority (RSAA) in New Zealand and the Refugee Review Tribunal (RRT) in Australia which have expressly rejected refugee claims by people leaving Tuvalu and Kiribati on the grounds of climate change. In a 2000 New Zealand case, the RSAA stated:

This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide. As for the shortage of drinkable water and lack of hygienic sewerage systems, medicines and appropriate access to medical facilities, these are also deficiencies in the social services of Tuvalu that apply indiscriminately to all citizens of Tuvalu and cannot be said to be forms of harm directed at the appellants for reason of their civil or political status. 63

involved in the aftermath of Cyclone Nargis. While her work responded to an environmental disaster, environmental degradation was not the basis of her claim per se.

W Kälin, 'Climate Change, Migration Patterns and the Law', Keynote Address at the International Association of Refugee Law Judges 8th World Conference (Cape Town, 28 January 2009) 1.
 Guiding Principles on Internal Displacement, UN doc CN.4/1998/53/Add.2 (11 February 1998).

⁶² While nothing in the Convention mandates individualized decision-making, this is the process used in most industrialized countries because it is thought necessary to analyse the subjective and objective elements of the refugee definition. For an excellent analysis of group-based decision-making, see M Albert, 'Prima Facie Determination of Refugee Status: Exploring Its Legal Foundation' (Thesis submitted for the Masters in Forced Migration, Refugee Studies Centre, University of Oxford, 2009) (copy with author).

⁶³ Refugee Appeal No 72189/2000, RSAA (17 August 2000) para 13. For other NZ cases, see: Refugee Appeal No 72179/2000, RSAA (31 August 2000); Refugee Appeal No 72185/2000, RSAA (10 August 2000); Refugee Appeal No 72186/2000, RSAA (10 August 2000); Refugee Appeal No 72313/2000, RSAA (19 October 2000); Refugee Appeal No 72314/2000, RSAA (19 October 2000); Refugee Appeal No 72315/2000, RSAA (19 October 2000); Refugee Appeal No 72316/2000, RSAA (19 October 2000);

In a 2009 Australian decision, the RRT rejected the i-Kiribati applicant's argument that an 'element of an attitude or motivation' could be adduced from 'the continued production of carbon emissions from Australia, or indeed other high emitting countries'. 64 It also found that while there were 'many potential social groups of which the applicant is a member, the absence of the element of motivation means that persecution cannot be said to be occurring for reasons of membership of any such group.'65

If and when States recognize that it is no longer possible for people to continue to live in their traditional homelands, then it would be misplaced, in my view, to require individuals to reach a destination country and show that they meet a particular definition. Rather, as has been the case with schemes such as temporary protection in the EU, ⁶⁶ group determination in the Netherlands, ⁶⁷ Temporary Protected Status in the United States, ⁶⁸ and ad hoc visa regimes in Australia responding to particular crises (East Timor, Kosovo, China),⁶⁹ it would seem more appropriate for States to designate particular countries as demonstrating sufficient, objective characteristics that 'justify' movement, thereby obviating the need for people wishing to leave them to show specific reasons why climate change is personally affecting them.⁷⁰ Prima facie refugee status is similarly predicated on the fact that a person has fled a particular country (generally in conflict), and is deemed on that purely objective evidence to have a protection need.⁷¹

In the present context, such an approach would enable a holistic assessment of the multiple drivers of movement which, together, render a State unsafe for continued habitation. It would avoid the individual examination of claims, thus providing a

Refugee Appeal No 72719/2001, RSAA (17 September 2001). For other Australian cases, see 0907346 [2009] RRTA 1168 (10 December 2010); N00/34089 [2000] RRTA 1052 (17 November 2000); N95/09386 [1996] RRTA 3191 (7 November 1996); N96/10806 [1996] RRTA 3195 (7 November 1996); N99/30231 [2000] RRTA 17 (10 January 2000); V94/02840 [1995] RRTA 2383 (23 October

⁶⁶ Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12.

⁶⁴ 0907346 [2009] RRTA 1168 (10 December 2009) para 51.

⁶⁵ *Ibid*, para 52.

⁶⁷ The Netherlands had a policy of group protection for specific categories of asylum seekers from countries where there was a situation of indiscriminate and generalized violence. However, on 11 December 2009, the Dutch cabinet adopted a proposal by State Secretary for Justice to end it, on the basis that it was leading to abuse. The decision was strongly criticized by refugee advocates. ⁶⁸ INA § 244, 8 USC § 1254.

⁶⁹ See eg Migration Regulations 1994 (Cth), Schedule 2, Subclass 448 Kosovar Safe Haven

⁽Temporary).

70 Others have envisaged a similar mechanism: see eg Biermann and Boas, *op cit*; Australian proposal, op cit. However, they do so within an international treaty framework, which is not what I am proposing here. Furthermore, they see this mechanism as applicable globally to climate-related displacement, whereas here I refer only to small island States from which movement will, ultimately, need to be permanent.

⁷¹ See Albert, op cit. The Migration (Climate Refugees) Amendment Bill 2007, proposed by the Australian Greens (discussed below), suggested a mechanism whereby an individual application for a 'climate change refugee visa' would trigger a requirement for the Minister for Immigration to make a declaration about the 'climate change circumstance' on which the application was based, thus creating a visa pathway for others similarly affected.

more efficient process.⁷² Though necessarily ad hoc, since it permits States to themselves determine if and when they think such assistance is required, it has the flexibility to respond to particular needs as they arise and avoids the problems of trying to reach international agreement on a treaty (discussed below). To help guide State decision-making about whom to assist (and to avoid haphazardness in the exercise of discretion),⁷³ consolidating existing law applicable to the movement of people into a single soft law instrument, similar to the Guiding Principles on Internal Displacement, might provide States with useful guidance as to the kinds of considerations that might underpin such determinations. Over time, this may facilitate the implementation of such norms into domestic law, or in informing new multilateral instruments.⁷⁴

However, all this still assumes that a protection-like paradigm is appropriate. While it may become so in the absence of other action, in my view it is preferable to first work with affected governments to try to reach other solutions involving a combination of *in situ* adaptation and migration, with the acknowledgement that planned movement is an adaptation strategy. This must be considered within a human rights framework, however. Adaptation cannot occur at all costs—at a bare minimum, it must be adaption with dignity.⁷⁵ In the Pacific island context, the development of labour, education and family migration pathways are better attuned to (a) the desires of people in those countries; (b) the likely patterns of climate change on the environment (slow and gradual) and patterns of movement (pre-emptive and gradual, rather than in response to a sudden catastrophic event); and (c) the history of movement in the region.

4 Migration

The long-term strategy of the government of Kiribati is to secure 'merits-based migration' options to Australia and New Zealand, so that those who want to move have an early opportunity to do so. ⁷⁶ In this way, the President hopes that 'pockets' of i-Kiribati communities will build up abroad. This would see the gradual, transitional resettlement of i-Kiribati in other countries, so that if and when the whole population has to move, there would be existing communities and extended family networks which those left behind could join. The President hopes that in this way, i-Kiribati culture and traditions will be kept alive, but that his people will also be able to slowly

⁻

⁷² For example, in situations where large groups are seriously affected by the outbreak of uncontrolled communal violence, 'it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual: GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 129. See the reference there in fn 364 to *R v Secretary of State for the Home Department, ex parte Jeyakumaran* (No CO/290/84, QBD, unreported, 28 June 1985). See also JC Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) 91–92 (citations omitted).

⁷³ See eg A Bianchi, 'Ad-hocism and the Rule of Law' (2002) 13 *European Journal of International Law* 263.

⁷⁴ See eg African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, not in force yet) art 5(4) (Kampala Convention). See also A Betts, 'Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants' (2010) 22 *International Journal of Refugee Law* 209.

⁷⁵ See eg author's interview with Rizwana Hasan, Chief Executive of Bangladesh Environmental Lawyers Association (Dhaka, 16 June 2010).

⁷⁶ Interview with President; see also Goering, *op cit*, referring to remarks by i-Kiribati officials at Copenhagen.

adapt to new cultures and ways of life. By contrast, while Tuvalu is seeking to focus its efforts on adaptation so that people can remain at home, officials also noted the general trend towards securing additional migration pathways for Tuvaluans.⁷⁷

Australia and New Zealand take different approaches to Pacific immigration. New Zealand has long had special concessionary schemes for citizenship or permanent residence, of which the 2002 Pacific Access Category (discussed below) is the most recent. The rationale behind New Zealand's concessionary policies is to promote economic development in Pacific island States, although its original impetus came from a post-war period of industrial expansion. According to Stahl and Appleyard, such an approach is unique among developed States. 78 By contrast, Australia maintains a 'non-discriminatory' policy that does not (formally) privilege any national group, ⁷⁹ perhaps as a reaction to its White Australia policy past and prior exploitation of Pacific labour, such as through 'blackbirding' (forced recruitment). However, since 2007 AusAID has funded the Kiribati-Australia Nursing Initiative (KANI), which offers around 30 young i-Kiribati the opportunity to train as nurses at Griffith University in Queensland, and, if successful, remain in Australia. In 2009, Australia implemented a three year Pacific Seasonal Workers Pilot Scheme, modelled in part on New Zealand's Recognised Seasonal Employer (RSE) scheme. 80 Over three years, up to 2500 visas will be granted to people from Kiribati, Tonga, Vanuatu and Papua New Guinea, to work in the Australian horticultural industry for between six to seven months in each 12 month period.⁸¹ To date, no i-Kiribati have been part of the scheme.⁸² Anecdotal evidence suggests that the programme has been less successful than anticipated, not least because of a lack of job offers from Australian farmers who seem reluctant to provide labour conditions that can be avoided by relying on 'black market' labour.

Strategically, Australia and New Zealand would benefit from a more cooperative approach to migration, especially since many Pacific islanders view movement to

_

⁷⁷ Author interviews with Church leader in Tuvalu (identity withheld by request) (26 May 2009); The Rt Hon Sir Kamuta Latasi, Speaker of Parliament (Tuvalu, 27 May 2009); Tito Isala, Secretary Supernumerary, Office of the Prime Minister (Tuvalu, 22 May 2009), although the latter two suggested that this was partly part of an on-going historical process of migration from Tuvalu. Other officials described migration as being an option at the back of the government's mind, with adaption at the forefront: Kelesoma Saloa, Prime Minister's Private Secretary (Tuvalu, 25 May 2009); Enele Sopoaga, Secretary for Foreign Affairs (Tuvalu, 25 May 2009).

⁷⁸ Stahl and Appleyard, op cit, iv.

⁷⁹ *Ibid*, v; Author interview with Sir Kamuta Latasi, Speaker in Parliament (Tuvalu, 27 May 2009), referring to discussions in the mid-1990s with then Australian Prime Minister, Paul Keating.

⁸⁰ See eg S Ramasamy, V Krishnan, R Bedford and C Bedford, 'The Recognised Seasonal Employer policy: seeking the elusive triple wins for development through international migration' (2008) 23 *Pacific Economic Bulletin* 171 http://peb.anu.edu.au/pdf/PEB_23_3_Ramasamy%20et%20al_WEB.pdf (accessed 18 December 2009). The RSE scheme was introduced in April 2007 and currently includes Kiribati, Samoa, Tonga, Tuvalu, Vanuatu and, shortly, the Solomon Islands: see http://www.dol.govt.nz/initiatives/strategy/rse/index.asp (accessed 19 December 2009).

⁸¹ See http://www.deewr.gov.au/Employment/Programs/PSWPS/Pages/default.aspx (accessed 12 December 2009).

⁸² R Ball, 'The Pacific Seasonal Workers Pilot Scheme (PSWPS) and Implications for Pacific Development' http://peb.anu.edu.au/pdf/2009/PNG/ppp/Rochelle Ball Pacific Update 081209.pdf (accessed 18 December 2009).

New Zealand as the first step towards ultimately reaching Australia: once they obtain New Zealand citizenship, ⁸³ they can freely travel to and work in Australia. ⁸⁴

In 2002, New Zealand created a visa called the Pacific Access Category, which was based on an existing scheme for Samoans and replaced previous work schemes and visa waiver schemes for people from Tuvalu, Kiribati and Tonga. This visa has mistakenly been hailed as an immigration response to people at risk of climate-induced displacement in the Pacific, both in media and academic circles. Although the scheme was extended to citizens of Tuvalu after a plea from that country's government for special immigration assistance to enable some of its 12,000 citizens to relocate, it is a traditional migration programme rather than one framed with international protection needs in mind.

The scheme permits an annual quota of 75 citizens each from Tuvalu and Kiribati and 250 each from Tonga (and previously Fiji), plus their partners and dependent children, to settle in New Zealand. Eligibility is restricted to applicants between the ages of 18 and 45, who have a job offer in New Zealand, meet a minimum income requirement and have a minimum level of English. Selection is by ballot. The programme is well-known in Tuvalu and Kiribati: almost every person interviewed referred to and welcomed it, although noted that some improvements could be made. 89

Though New Zealand does not formally have any humanitarian visas relating to climate change and displacement, it is developing a general policy on environmental migration. In 2008, in light of the fact that '[t]he perceived problem posed by the potential for environmental migrants—and the perceived need for action—has gained traction within several Pacific Island countries', ⁹⁰ it revised its approach away from

_

⁸³ For people who obtained permanent residence post-21 April 2005, the waiting period is five years. Before that time, it is three years: http://www.teara.govt.nz/en/citizenship/3.

⁸⁴ 1973 Trans-Tasman Travel Arrangement; see also the Special Category Visa (SCV) for New Zealand citizens since 1994. See generally http://www.immi.gov.au/media/fact-sheets/17nz.htm.

⁸⁵ L Dalziel, 'Government Announces Pacific Access Scheme' (20 December 2001) http://www.beehiye.govt.nz/node/12740 (accessed 8 December 2008).

http://www.beehive.govt.nz/node/12740 (accessed 8 December 2008).

86 For example, it is relied upon in C Boano, R Zetter and T Morris, 'Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration' (Policy Briefing by the Refugee Studies Centre for the Department for International Development (UK), Oxford, 20 December 2007) citing F Gemenne, 'Climate Change and Forced Displacements: Towards a Global Environmental Responsibility? The Case of the Small Island Developing States (SIDS) in the South Pacific Ocean' (Les Cahiers du CEDEM, Université de Liège, 2006) http://www.cedem.ulg.ac.be/m/cdc/12.pdf (accessed 8 December 2008). See also Corlett's critique: D Corlett, 'Tuvalunacy, or the Real Thing?', Inside Story (27 November 2008) http://inside.org.au/tuvalunacy-or-the-realOthing/print/ (accessed 27 November 2008). It appears that the misunderstanding was perpetuated by Al Gore's film, *An Inconvenient Truth*.

⁸⁷ Interestingly, programmes like this may ultimately be the basis on which veiled assistance is afforded to those at risk of climate-induced displacement, since this may be politically more palatable than an explicit scheme to address the issue.

⁸⁸ http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/ (8 February 2007).

⁸⁹ People interviewed commented on difficulties in securing a job offer in New Zealand, and the fact that eligibility is only assessed after the ballot has been drawn. Although I did not encounter this view in my own interviews, one community leader reportedly condemned the scheme as a new type of 'slavery immigration', whereby educated Tuvaluans renounce stable, white-collar government employment at home to end up as cleaners or fruit-pickers in New Zealand: quoted in S Shen, 'Noah's Ark to Save Drowning Tuvalu' (2007) 10 *Just Change* 18, 19.

⁹⁰ New Zealand Ministry of Foreign Affairs and Trade, 'Climate Change and the Issue of

New Zealand Ministry of Foreign Affairs and Trade, 'Climate Change and the Issue of Environmental Migrants: A Proposed Revised Approach' (8 August 2008) (document circulated to the

simply 'correct[ing] misperceptions about New Zealand's position on the environmental migrants issue [ie no agreement to resettle people from Tuvalu], while outlining New Zealand's current commitment to climate change adaptation efforts in the Pacific region'. ⁹¹ Instead, its focus is now to:

- a) acknowledge the concerns of Pacific Island countries in relation to this issue;
- b) stress that current climate change efforts in the Pacific should continue to focus on adaptation, and should be underpinned by the desire of Pacific peoples to continue to live in their own countries; and
- c) reaffirm that New Zealand has a proven history of providing assistance where needed in the Pacific, and that our approach to environmentally displaced persons would be consistent with this.⁹²

This includes a commitment to 'respond to climatic disasters in the Pacific and manage changes as they arise.'93

By contrast, the Australian government does not have a policy on environmental migration. This is despite a proposal made by the present Labor government, when in Opposition, to create a Pacific Rim coalition to accept climate change 'refugees', and to lobby the United Nations to 'ensure appropriate recognition of climate change refugees in existing conventions, or through the establishment of a new convention on climate change refugees.' The gap between rhetoric and action was evident, however, when in June 2007 Greens Senator Kerry Nettle proposed the Migration (Climate Refugees) Amendment Bill 2007 to create a new visa class for people fleeing 'a disaster that results from both incremental and rapid ecological and climatic change and disruption, that includes sea level rise, coastal erosion, desertification, collapsing ecosystems, fresh water contamination, more frequent occurrence of extreme weather events such as cyclones, tornados, flooding and drought and that means inhabitants are unable to lead safe or sustainable lives in their immediate environment'. The Labor party was quick to note that its idea of an international response meant that without a collaborative approach with other countries, adopting

Prime Minister, the Minister Responsible for Climate Change Issues, the Minister for the Environment, and the Minister of Immigration, released pursuant to an Official Information Act request) 5.

91 'Background: Environmental Migrants/Relocation/Displacement', New Zealand Government Poznan

⁹¹ 'Background: Environmental Migrants/Relocation/Displacement', New Zealand Government Poznar Delegation Brief for UNFCCC COP14, 343 (released pursuant to an Official Information Act request). ⁹² *Ibid*, 344.

⁹³ *Ibid*, 343. The President of Kiribati has noted that so far, the country most receptive to his plea for more migration as been East Timor: see remarks quoted in A Morton, 'Land of the Rising Sea', *Sydney Morning Herald* (21 November 2009) http://www.smh.com.au/environment/land-of-the-rising-sea-20091120-iqub.html (accessed 27 November 2009). This accords with comments made by the President of East Timor, Dr Jose Ramos-Horta, at the Diplomacy Training Programme 20th Anniversary Public Lecture (Faculty of Law, University of New South Wales, 23 July 2009) http://tv.unsw.edu.au/video/dr-jose-ramos-horta-dtp-20th-anniversary-public-lecture (accessed 14 December 2009).

⁹⁴ Australian Labor Party, Our Drowning Neighbours: Labor's Policy Discussion Paper on Climate Change in the Pacific (ALP, 2006) 10.

such an obligation would be a unilateral act and therefore inconsistent with its idea of international action. ⁹⁵

Since forming government in November 2007, the Labor party has not acted on its earlier ideas. A recent Senate inquiry revealed that '[w]hen asked about the possibility of forced re-location from Pacific island countries such as Kiribati and Tuvalu, DFAT [the Department of Foreign Affairs and Trade] informed the committee that it was not aware of any government consideration of this matter. Invited to comment again on whether these two islands were under consideration, DFAT replied no.'96 Drawing on submissions by the present author, the Committee recommended 'that the Australian Government consider whether it may be necessary to review the legal and policy framework required in the event that regional communities may be forced to resettle as a consequence of changes in climate'. ⁹⁷ It expressed its concern

about the lack of government attention to formulating policy around the possibility that some Pacific island communities may have to re-locate because of rising sea levels or related environmental changes. The committee believes that the Australian Government should allow ample time to consider closely and carefully the legal and policy framework that may be required should such an eventuality arise. The committee believes that Australia could also make a valuable and significant contribution in practical ways to prepare those most at risk of having to resettle. It notes that the Government of Kiribati wants their people to be competitive and marketable. Australia could be a vital partner with countries such as Kiribati by helping with research, training, education and labour mobility arrangements to equip people, should they have to move, to take up productive positions in their new location. It believes that should migration be necessary from these Pacific Island countries, the basic principle underpinning the formulation of Australia's policy should be their 'migration with merit and dignity'.98

_

⁹⁵ See debates following Second Reading Speech in Parliament of Australia, *Senate: Official Hansard* (9 August 2007) 95ff.

⁹⁶ Senate Foreign Affairs, Defence and Trade References Committee, *Economic Challenges facing Papua New Guinea and the Island States of the Southwest Pacific* (Commonwealth of Australia, Canberra, November 2009) para 6.60 (making reference to *Committee Hansard*, 21 November 2008, 28). On 21 November 2009, a spokesperson for the Climate Change Minister, Penny Wong, was reported as acknowledging that permanent migration may eventually be the only option for some people, which will need to be dealt with by governments in the region: Morton, *op cit*.

⁹⁷ Senate Foreign Affairs, Defence and Trade References Committee, on sit page 6.62

⁹⁷ Senate Foreign Affairs, Defence and Trade References Committee, *op cit*, para 6.62 (Recommendation 3).

⁹⁸ *Ibid*, para 6.61 (referring to UN News Centre, 'Small Island Nations' Survival Threatened by Climate Change, UN Hears' (25 September 2008) http://www.un.org/apps/news/story.asp?NewsID=28265 (accessed 29 April 2009)).

Finally, it may be instructive to situate present discussions about movement within the longer history of mobility in the South Pacific. As Silverman has observed in the context of Pacific relocations, even if a particular movement 'seem[s] unique in the history of a single group, we might find them to be recurrent as we enlarge the scale of analysis to a colonial system or a regional mobility system'. While the driver of 'climate change' may be new (or at least labelling it such), the types of movement under consideration are not unfamiliar in the Pacific context. Viewing migration as one of a range of adaptation tools, and one that is frequently utilized by Pacific islanders generally, helps to place current policy debates within a more concrete framework and may also help to diffuse some of the more sensational approaches that are at times invoked.

Given that most climate impacts in the Pacific will be slow-onset, interim migration measures that permit temporary and circular movement, on the understanding that a permanent migration outcome will ultimately be possible once relocation is imperative, may appeal to affected and receiving countries alike. ¹⁰⁰ In this way, a small but sustained migration response may enable communities to remain living in their homes for longer, with certain members of the household working temporarily abroad to generate income that is fed back into the home community (and to assist with adaptation), new diaspora communities forming, and receiving States adapting over time. It is important that any such migration is reinforced by local adaptation mechanisms, since the migration of skilled workers may further deplete local human resources (although may make a significant economic contribution through remittances, thereby increasing family resilience for those who remain). 101 Such an approach builds on the historical migration patterns between Pacific countries and New Zealand. Going into the future, migration schemes might be constructively developed as part of broader bilateral partnerships, such as New Zealand's five year Strengthened Cooperation Programme with Niue from 2004 to 2009, and through enhancing regional cooperation agreements, such as those adopted at the Pacific Islands Forum.

The overarching aim should be to avoid the protection discourse needing to be engaged at all, by developing other methods for movement that give more choice to i-Kiribati and Tuvaluans about if and when they wish to move. Paradoxically, however, the protection system may have to be resorted to if no action is taken in the interim to secure safe and early migration options for those who wish to move. The principle of *non-refoulement* (non-return) in human rights law precludes States from returning people to places where they would face a substantial risk of torture or cruel, inhuman or degrading treatment, or arbitrary deprivation of life. Although the House of Lords in the United Kingdom has acknowledged that, in theory, *any*

_

⁹⁹ MG Silverman, 'Introduction: Locating Relocation in Oceania' in MD Lieber (ed), *Exiles and Migrants in Oceania* (University of Hawaii, Honolulu, 1977) 7.

¹⁰⁰ It may also be more palatable for governments to absorb some migrants in traditional labour categories, rather than to acknowledge the drivers behind the movement. Part of the challenge is to 'sell' the solution domestically, both within the country of origin and the host country.

M Pelling and JI Uitto, 'Small Island Developing States: Natural Disaster Vulnerability' (2001) 3 Environmental Hazards 49.

Environmental Hazards 49.

102 See further McAdam and Saul, op cit; J McAdam, Complementary Protection in International Refugee Law (Oxford University Press, Oxford, 2007).

sufficiently serious human rights violation could give rise to such an obligation ¹⁰³—a proposition that remains open to testing in the courts—current practice suggests that the accepted limits of the principle of non-refoulement are relatively narrowly circumscribed and the threshold for demonstrating 'inhuman or degrading treatment' is high. While it is far from clear-cut that complementary protection would ever assist a person displaced for reasons of climate change, the jurisprudence is constantly evolving. Indeed, human rights treaties are generally viewed as 'living instrument[s]' that 'must be interpreted in the light of present-day conditions'. With this in mind, the European Court of Human Rights has reclassified acts that in the past were regarded as 'merely' inhuman or degrading treatment as amounting to the higher threshold of 'torture'. 105 Similarly, the Inter-American Court of Human Rights held that the distinctions and gradations of treatment are not rigid, but rather evolve with increased protection of fundamental rights. 106 Ironically, then, a wait-and-see approach with respect to movement from Kiribati and Tuvalu could ultimately stimulate a dynamic interpretation of human rights law so as to provide a remedy for people whose homes have become uninhabitable. This, in turn, may create a precedent for accepting people from other affected States (with much larger populations, such as Bangladesh).

On the other hand, it is sobering to recall that despite existing international treaty obligations, the courts have limited the protection capability of human rights law when it comes to deprivation of socio-economic rights—for thinly-disguised policy concerns about 'opening the floodgates'. In N v United Kingdom, the European Court of Human Rights held that in removal cases concerning a person 'afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost', 107 the non-refoulement aspect of article 3 of the European Convention on Human Rights (protection from torture or inhuman or degrading treatment or punishment) will only be triggered in highly exceptional circumstances, such as if 'the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support'. The court observed that while many ECHR rights 'have implications of a social or economic nature', the instrument 'is essentially directed at the protection of civil and political rights'. ¹⁰⁹ It continued:

1

¹⁰³ R v Special Adjudicator ex parte Ullah [2004] UKHL 26, paras 24–5 (Lord Bingham), 49–50 (Lord Steyn), 67 (Lord Carswell).

Tyrer v United Kingdom (1979–80) 2 EHRR 1, para 31; see also Soering v United Kingdom (1999) 11 EHRR 439, para 102. The House of Lords described the Refugee Convention in this way: Sepet and Bulbul v Secretary of State for the Home Department [2003] UKHL 15, [2003] 1 WLR 856, para 6 (Lord Bingham); see also Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 293 (Kirby J); Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3, para 87.

¹⁰⁵ Selmouni v France (1999) 29 EHRR 403. See also Henaf v France, App No 65436/01 (European Court of Human Rights, 27 November 2003) para 55: 'it follows that certain acts previously falling outside the scope of Article 3 might in future attain the required level of severity.'

¹⁰⁶ Cantoral-Benavides v Peru, Series C No 69, Judgment of 18 August 2000.

¹⁰⁷ N v United Kingdom, App No 26565/05 (Grand Chamber, 27 May 2008) para 45.

¹⁰⁸ *Ibid*, para 42. This was the case in *D v United Kingdom* (1997) 24 EHRR 423 the only 'health' case in which an applicant has succeeded before the European Court of Human Rights.
¹⁰⁹ *Ibid*, para 44.

Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see Soering v. The United Kingdom, judgment of 7 July 1989, Series A no. 161, § 89). Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States. 110

In dissent, Judges Tulkens, Bonello and Spielmann highlighted the policy considerations that influenced the majority's approach, noting that its rationale

reflects the real concern that they had in mind: if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the resources of the State would be overstretched. Such a consideration runs counter to the absolute nature of Article 3 of the Convention and the very nature of the rights guaranteed by the Convention that would be completely negated if their enjoyment were to be restricted on the basis of policy considerations such as budgetary constraints. So does the implicit acceptance by the majority of the allegation that finding a breach of Article 3 in the present case would open up the floodgates to medical immigration and make Europe vulnerable to becoming the 'sick-bay' of the world. A glance at the Court's Rule 39 statistics concerning the United Kingdom shows that, when one compares the total number of requests received (and those refused and accepted) as against the number of HIV cases, the so-called 'floodgate' argument is totally misconceived. 111

D CONCLUSION: WHICH WAY FORWARD?

The concerns expressed above by i-Kiribati and Tuvaluans highlight some of the central failures of the international protection system. Most notably, their fear about languishing in camps is a real one, given that an absence of political will to implement the principle of burden-sharing is currently leaving millions of refugees in protracted situations with no hope of durable solutions. 112 Indeed, this is a key pragmatic argument against the creation of a new protection treaty. Given the legal obligations that States already have towards Convention refugees, and the fact that some 10 million refugees today, not to mention other displaced people numbering some 34

Ibid.
 111 Ibid, Dissenting judgment, para 8 (omitting fn citing statistics on such cases).
 112 On burden-sharing, see Hurwitz, op cit, 138–71.

million in total, 113 have no durable solution in sight, why would States be willing to commit to, and realize protection for, people displaced by climate change? 114

In responding to the first of these questions, it could be argued that States might be prepared to adopt such an instrument precisely to call for shared responsibility. For example, an individual State might perceive a need to respond to potential arrivals of 'climate refugees', but be unwilling to unilaterally create legal avenues for their protection. Were it to elicit the support of other States in adopting a treaty, however, then its humanitarian impulse could be coupled with mutual self-interest, in that it can call on other States to share the responsibility of caring for such people. However, it is in response to the second question, why States would be willing to *realize* such protection, that real difficulties arise. As we see with the present refugee regime, problems of implementation—and durable solutions—stem predominantly from a lack of political will, rather than an absence of law. Despite the 147 States parties to the Refugee Convention and/or Protocol, the plethora of soft law relating to refugees, and an international agency with a strong field as well as institutional presence, the displacement of millions remains unresolved.

A treaty is sometimes posited as the answer to climate-related displacement, but it is dangerous to see it in this way. Any treaty is necessarily an instrument of compromise, and even once achieved there needs to be political will of individual States to ratify, implement and enforce it. While international law provides important benchmarks and standards to regulate State action, they must be supported by political will and action to be fully effective. As Aleinikoff argues, 'there can be no monolithic approach to migration management. Some areas might well benefit from norms adopted by way of an international convention; guiding principles might work best for areas in which a consensus is further away'. 116

Perhaps part of the problem is the disciplinary constraints of international law and international relations. At their very core lies the objective to universalize—to create norms that take the 'particular' to a level of general applicability, that make individual rights 'human rights' at one and the same time. The danger, of course, is that if this is done without sufficient empirical understandings or foresight, we arrive at a level of generality that is too vague, and which cannot be translated into practical, rational policies and normative frameworks. It is clear that legal gaps exist, ¹¹⁷ but they should be first addressed by a dispassionate, careful appraisal of the empirical evidence, rather than motivated by an assumption that existing frameworks should be extended.

¹¹³ UNHCR, 'Total Population of Concern to UNHCR: Refugees, Asylum-Seekers, IDPs, Returnees, Stateless Persons, and Others of Concern to UNHCR by Country/Territory of Asylum, End-2008' (Tab 23) http://www.unhcr.org/pages/4a0174156.html.

UNHCR, among others, argues that there is a risk that if the Refugee Convention is opened up for renegotiation, we could see a reduction in protection overall: see quotes in Grant, Randerson and Vidal, *op cit.* However, this could be avoided by creating a Protocol rather than renegotiating the existing treaty text.

¹¹⁵ That said, some of the States that host the largest numbers of refugees are not party to the Refugee Convention or Protocol.

¹¹⁶ TA Aleinikoff, 'International Legal Norms on Migration: Substance without Architecture' in R Cholewinski, R Perrechoud and E MacDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (The Hague, TMC Asser Press, 2007) 476.

Although as Kälin notes, perhaps fewer than some believe, given that a lot of movement will be internal: see W Kälin, 'Conceptualising Climate-Induced Displacement' in McAdam (ed), *op cit*.

This is a risk of (prematurely) concentrating the diverse impacts of climate change on human movement into calls for treaties and the like. The local and the particular do not always speak well to an international law or governance agenda, where the 'cascading' effect requires broad, universalizing statements. A related critique might be the legal approach's tendency to create rights-based frameworks, which cannot always respond directly or adroitly to primarily needs-based problems.

On the other hand, international law retains sufficient flexibility to respond to particular scenarios through bilateral and regional agreements. In my view, this is where attention would best be focused initially. At this stage, it seems more probable that the development of regional soft-law declarations, such as the Niue Declaration on Climate Change, will provide a more effective springboard for developing responses, than will a new international instrument aiming to take into account the interests of all States in a wide variety of contexts. At the normative level, we already have clear frameworks to guide such actions—the human rights law regime is the most relevant and important.

For these reasons, this chapter should not be interpreted as rejecting a treaty-based regime altogether, or the underlying basis of such a regime: that States ought to provide assistance to certain people who are unable to remain in their homes. International cooperation on climate-related movement is sorely needed. Rather, the chapter's purpose is to caution against squeezing all forms of apparently forced movement into a protection paradigm, since this may not best address the patterns or needs of those who move. Responses might better be achieved by focusing on States' burden-sharing obligations to each other, and their responsibility to the international community as a whole. Of course, this sidesteps the much larger issue whether the maintenance of a privileged legal status for certain categories of displaced people is ethically and/or legally defensible, a matter that is beyond the scope of this chapter.

Finally, from an advocacy perspective, lobbying for a 'climate refugee' treaty may successfully generate attention and mobilize civil society such that the issue of climate-related movement becomes one that States cannot ignore. Policy itself may be generated because of the lobbying process, and having the maximalist option of a treaty on the table may paradoxically encourage States at least to negotiate more

_

¹¹⁸ Annex B to Forum Communiqué, 39th Pacific Islands Forum, Alofi, Niue (19–20 August 2008) Doc PIFS(08)6.

¹¹⁹ The UN High Commissioner for Refugees suggests that: 'A development-oriented approach is now required in response to displacement, emphasizing the inclusion of the most vulnerable and marginalized sections of society in efforts to ensure that they benefit from the livelihoods, services and security to which they are entitled': A Guterres, 'Bracing for the Flood', *The New York Times* (Op-Ed, 10 December 2009) http://www.nytimes.com/2009/12/11/opinion/11iht-edguterres.html?r=1&emc=eta1 (accessed 14 December 2009).

¹²⁰ As the UN High Commissioner for Refugees has noted, given that most displacement is predicted to

be internal, primary legal responsibility for ensuring people's rights will lie with the States concerned: Ibid. For a recent assessment of the nature of movement as internal, see F Laczko and C Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (IOM, Geneva, 2009). ¹²¹ See eg the recent work of Matthew Price, who argues that limiting asylum to people who face persecution is ethically justifiable: ME Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press, Cambridge, 2009); JC Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 *Journal of Refugee Studies* 349; cf A Shacknove, 'Who is a Refugee?' (1985) 95 *Ethics* 274.

minimalist responses, as a compromise or fallback position. Nevertheless, it is imperative that advocacy is well-informed, because if there is an absence of rigorous analysis and empirical evidence to support claims being made, 122 it will not achieve its ends. Indeed, messy work may lead to a backlash and attempts to discredit the phenomenon of climate-related movement altogether.

