Climate Change, Forced Migration, and International Law

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State Practice on Protection from Disasters and Related Harms

I. Introduction

Whereas the last chapter examined the extent to which human rights-based jurisprudence may preclude the return of people to climate-related harms, the present chapter examines particular legislative and ad hoc schemes developed by States which may assist people fleeing the impacts of disasters and other serious harm.[1] To date, most responses to cross-border climate change-related or environmental displacement have been domestic ones rather than international agreements.[2] This chapter accordingly catalogues temporary protection responses, asylum-type mechanisms, and ad hoc humanitarian schemes (group and individual) to elucidate the potential scope of existing domestic and regional frameworks in responding to climate change-related movement. Overall, it shows how varied and unpredictable these mechanisms are.

[1] As UNHCR's Assistant High Commissioner (Protection) notes: '[A]sylum is also one of the responses suitable to situations which do not fit the classical refugee paradigm, and which involve a temporary protection need. This has been partially recognised, particularly in Europe, through subsidiary protection arrangements, but also through discretionary provisions of various sorts in the immigration laws of a number of countries outside this region': Erika Feller (Assistant High Commissioner (Protection)), 'The Refugee Convention at 60: Still Fit for Its Purpose?' (Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity, Prato, 2 May 2011) 8.

[2] An exception is the 2009 Kampala Convention adopted by the African Union, which includes an obligation to 'take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change': African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, not yet in force) ('Kampala Convention') Art 5(4). While this is the first treaty to expressly recognize climate change as a form of 'natural or human made' disaster, it essentially just elaborates on the description of an 'internally displaced person' in the Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) which refers to 'natural or human-made disasters', and which only binds States with respect to people moving within their own borders, rather than across international frontiers.

II. Legislative Protection Responses

Legislative responses include temporary humanitarian assistance, through schemes such as Temporary Protected Status in the United States (US); (potentially) temporary protection in the European Union (EU); and longer-lasting refugee-like protection in countries such as Sweden and Finland. These are examined in turn below.

A. Temporary protection

A number of countries have mechanisms for providing temporary protection to people displaced by sudden disasters. The scope of the protection is set out in law, but often, as in the case of the EU and the US, an executive decision is required before the protection can be accessed.[3]

(1) United States

Temporary Protected Status (TPS) is a discretionary status in the US designed to provide safe haven for people who are reluctant to return to potentially dangerous situations in their home country. Protection is not automatic: the Attorney General must first 'designate' a country before its nationals are eligible.

A country may be 'designated' where there is an on-going armed conflict threatening people's personal safety, or where:

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph.[4]

TPS is thus a blanket form of relief granted on the basis of objective country of origin conditions, rather than circumstances particular to the individual.[5] Crucially, it only benefits people already in the US at the time of a disaster, *and* whose government requests assistance under this mechanism. A grant of TPS enables beneficiaries to work and precludes deportation for the period of the designation.[6] TPS

[3] By the Council of the European Union and the Attorney General respectively.

[4] Immigration and Nationality Act, INA § 244(b), 8 USC § 1254a(b).

[5] See generally, Ruth E Wasem and Karma Ester, 'Temporary Protected Status: Current Immigration Policy and Issues' (Congressional Research Service, 9 September 2010).

[6] US Citizenship and Immigration Services, 'Temporary Protected Status—Haiti' (last updated 1 February 2010) <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=e54e60f64f336210VgnVCM100000082ca60aRCRD&vgnextoid=e54e60f64f336210VgnVCM100000082ca60aRCRD> accessed 3 January 2011. It has been reported that France, Canada, and the Dominican Republic also eased their immigration rules in light of the earthquake: see Michael B Farrell, 'TPS: Haiti's Illegal Immigrants Given Temporary Protection in

can be granted for periods between six and 18 months, and it can be extended if country conditions do not change. However, as its name implies, it is a temporary status, and people on TPS are not eligible to become legal permanent residents (LPRs) in the US without a special act of Congress.[7]

In January 2010, as a result of the earthquake in Haiti, the Department of Homeland Security determined an 18-month designation for Haitians who had continuously resided in the US since 12 January 2010. Haitians in the country unlawfully, as well as those living there on another visa, could apply for TPS. Following Hurricane Mitch in 1998, the Attorney General indicated that the deportation of people from El Salvador, Guatemala, Honduras, and Nicaragua would be temporarily suspended, and TPS was granted a month later to people from Honduras and Nicaragua on the grounds of the extraordinary degree of displacement and damage there.[8] In 2001, TPS was granted to people from El Salvador on account of two earthquakes there.[9] There have been other calls for TPS to be granted on account of natural disasters in Peru, Pakistan, Sri Lanka, India, Indonesia, Thailand, Somalia, Myanmar, Malaysia, the Maldives, Tanzania, Seychelles, Bangladesh, and Kenya, but the US government did not take a formal position on those countries.[10]

There is, accordingly, nothing in principle which would prevent TPS from being granted to people affected by a climate change-related disaster. However, it is unlikely to assist people facing slow-onset impacts of climate change, given the time they take to manifest and their 'creeping' effect, rather than their sudden nature. Furthermore, given that TPS is only available to designated nationals already in the US at the time of the disaster, not to those who flee *after* an event, it may have little relevance to citizens of many affected countries, such as Kiribati, Tuvalu, and Bangladesh. The US is not a common destination country for these communities and many of the worst affected would lack the means to travel there in the first place. Nonetheless, opponents of TPS see it as an immigration amnesty for unauthorized migrants already in the US and as a magnet for further unauthorized movement.[11]

US, *The Christian Science Monitor* (15 January 2010) <http://www.csmonitor.com/USA/2010/0115/TPS-Haiti-s-illegal-immigrants-given-temporary-protection-in-US> accessed 16 February 2010.

[7] Wasem and Ester (n 5) 6. This occurred in 1992 when Chinese people on Deferred Enforced Departure (DED) were permitted to adjust to LPR status under the Chinese Student Protection Act of 1992: PL 102–404, 106 Stat 1969 (9 October 1992) and for Haitians under the FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act: PL 105–277, 112 Stat 2681, 105th Congress 2nd Session (21 October 1998). Legislation for some other TPS groups has been introduced but not enacted, and included in comprehensive immigration reform legislation. In the 111th Congress, HR 264 would enable some current TPS holders to convert to LPR status if they have lived in the US for five years or more; are of good moral character; have no criminal convictions; have successfully completed a course on reading, writing, and speaking in English (with exceptions on account of disability); have accepted the values and cultural life of the US; and have completed at least 40 hours of community service: see Wasem and Ester (n 5) 7.

[8] ibid.

[9] ibid.

[10] Wasem and Ester (n 5) 5.

[11] ibid, 5–6, referring to Ruth E Wasem, 'US Immigration Policy on Haitian Migrants' (Congressional Research Service Report RS 21349, 31 March 2010).

Apart from TPS, the Attorney General may provide discretionary relief from deportation. The policy is that 'all blanket relief decisions require a balance of judgment regarding foreign policy, humanitarian, and immigration concerns'.[12] Work authorization is not automatic and must be applied for separately. It has at times been granted to people whose TPS has not been renewed.[13]

(2) European Union

The EU Temporary Protection Directive was designed as an exceptional mechanism[14] to respond to mass influx on account of armed conflict, endemic violence, or generalized human rights violations.[15] It could potentially be activated to respond to a sudden influx of people on account of environmental or climate change impacts, since Article 2(c), which sets out the Directive's scope of application, is not exhaustive.[16]

The drafting history reveals that Finland sought to have included in the definition recognition of 'persons who have had to flee as a result of natural disasters', but this was not supported by other Member States, with Belgium and Spain noting that 'such situations were not mentioned in any international legal instrument on refugees'.[17] Curiously, in 2004, when the Temporary Protection Directive was concluded, the United Kingdom (UK) stated that the instrument would 'ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war and natural disasters'.[18]

Despite considerable speculation about the possible reach of the Temporary Protection Directive in the context of climate-related movement, there does not appear to be any discussion about formally expanding the instrument.[19] Kälin and Schrepfer suggest that the 'solidarity clause' of the Lisbon Treaty, which provides that '[t]he Union and its Member States shall act jointly in a spirit of solidarity if a Member State is . . . the victim of a natural or man-made disaster',[20] could

[12] This most commonly occurs as DED or Extended Voluntary Departure (EVD). See Wasem and Ester (n 5) 3.

[13] For example, to 190,000 Salvadorans in 1992; to 3,600 Liberians (whose present grant of DED runs until 30 September 2011): ibid, 4.

[14] Council Directive (EC) 2001/55 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, Art 2(a).

[15] ibid, Art 2(c).

[16] Vikram Kolmannskog and Finn Myrstad, 'Environmental Displacement in European Asylum Law' (2009) 11 European Journal of Migration and Law 313, 316ff; UK Home Office, 'UK Plans in Place to Protect Victims of Humanitarian Disasters' (20 December 2004) Press Release; Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010).

[17] Council of the European Union, 'Outcome of Proceedings of Working Party on Asylum', Doc 6128/01 LIMITE ASILE 15 (16 February 2011) 4.

[18] UK Home Office (n 16) 1.

[19] Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches' (Study for the Swiss Ministry of Foreign Affairs, April 2011) 39, forthcoming as a paper in the UNHCR Legal and Protection Policy Research Series.

[20] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed 13 December 2007) OJ C306/1 ('Lisbon Treaty') Art 188R.

provide a basis for action with respect to natural disasters *within* an EU Member State. However, as they observe, it is limited to assistance to a Member State in its own territory (so does not cover cross-border movement), and it does not extend to non-Member States. Article 10A of the Lisbon Treaty may provide more traction in its requirement that the EU 'work for a high degree of cooperation in all fields of international relations', including to 'assist populations, countries and regions confronting natural or man-made disasters', although it does not expressly refer to the admission of those displaced by such disasters[21] (and this is not ordinarily understood as a component of the duty to cooperate).[22]

Finally, given the empirical evidence on the likely nature of climate change-related movement, it remains uncertain whether the EU would ever be faced by a 'mass influx' from a climate-affected country sufficient to overwhelm the regular asylum processing procedures and warrant the exceptional grant of temporary protection.

B. Asylum-type mechanisms

(1) European Union

The EU Qualification Directive, which provides the framework for individual protection in the EU, does not contain an express provision on protection from environmental or climate change-related impacts, although the potential for such movement to be covered under 'inhuman or degrading treatment' (based on Article 3 of the European Convention on Human Rights[23]) has been discussed extensively in Chapter 3 above. Although the possibility of including 'environmental disasters' as a ground of subsidiary protection was raised during the drafting process,[24] this does not seem to have been entertained seriously in deliberations and, given the nature of the negotiations, it was very unlikely ever to be adopted.[25]

Early drafts of the Qualification Directive contained an additional ground on which subsidiary protection could be granted, namely where a person was at risk of a 'violation of a human right, sufficiently severe to engage the Member State's international obligations'.[26] This was subsequently modified to prevent return to:

> acts or treatment outside the scope of subparagraphs (a) to (c) in an applicants country of origin, or in the case of a stateless person, his or her country of former habitual residence,

[21] Kälin and Schrepfer (n 19) 39.

[22] See Ch 9 on the duty to cooperate.

[23] European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) (drafted 4 November 1950, entered into force 3 September 1953) ETS No 5 ('ECHR').

[24] Council of the European Union, 'Note from President to Asylum Working Party: Discussion Paper on Subsidiary Protection', Doc 13167/99 LIMITE ASILE 41 (19 November 1999) 6.

[25] See Jane McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 International Journal of Refugee Law 461.

[26] Commission of the European Communities, 'Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection', COM (2001) 510 final (12 September 2001) Art 15(b). See discussion in Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 81–4.

when such acts or treatment are sufficiently severe to entitle the applicant to protection against refoulement in accordance with the international obligations of Member States.[27]

Commentary on this provision, which was deleted from the final text, made clear that '[b]y using the wording "acts or treatment" it is ensured that only man-made situations, and not for instance situations arising from natural disasters or situations of famine, will lead to the granting of subsidiary protection'.[28] By extension, and from the context of the deliberations, it is apparent that Member States did not consider the other provisions on subsidiary protection to cover such flight either. That does not foreclose the possibility that treatment resulting from such situations could amount to inhuman or degrading treatment, however.

(2) National laws

At the national level, Swedish asylum law contains a provision extending protection to people who are 'unable to return to the[ir] country of origin because of an environmental disaster'.[29] To date, however, it has not been used. In any case, it is unclear if this would extend to people displaced for climate change-related reasons, since it seems that it was only ever intended to cover people fleeing specific environmental disasters such as Chernobyl, rather than more generally. Kolmannskog and Myrstad note that the drafting history reveals discussion of the idea that environmental displacement could include so-called 'sinking' island States and other longer-term scenarios,[30] but commentary on the provision as adopted clarified that it was only intended to apply in cases of sudden disasters, and would only be available if there were no internal flight alternative.[31]

Finnish asylum law also provides that a person may be granted humanitarian protection if 'he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation'.[32] Again, the law is untested in relation to climate change-related displacement.

[27] Council of the European Union, 'Outcome of Proceedings', Doc 12199/02 LIMITE ASILE 45 (25 September 2002) Art 15, as suggested in Council of the European Union, 'Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 25 September 2002: Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection', Doc 12148/02 LIMITE ASILE 43 (20 September 2002) 4.

[28] Council of the European Union, 'Presidency Note' (n 27) 7. This interpretation was confirmed by Greens MEP Jean Lambert, who was the European Parliament's Rapporteur on the topic in 2002. In an interview with Finn Myrstad, she stated: 'It became crystal clear that it was no point of pushing the agenda for (environmental refugees), there was no majority. . . . We had enough with keeping humanitarian protection in there along with asylum. That was the real battle': Finn Myrstad, 'Not Much Protection for Climate Refugees in the EU' (29 July 2008) <http://www.myrstad.eu/not-much-protection-for-climate-refugees-in-the-eu/> accessed 13 July 2011.

[29] Aliens Act 2005: 716, Ch 4, s 2(3).

[30] Swedish *travaux préparatoires* (SOU) (1995) 75, 147 in Kolmannskog and Myrstad (n 16) 323.

[31] Proposition 1996/97: 25, 100–1 in Kolmannskog and Myrstad (n 16) 323. See Ch 3.

[32] Aliens Act (301/2004, amendments up to 1152/2010 included) (Finland) ('Aliens Act (Finland)') s 88a.

According to Kälin, even though Swiss asylum law does not expressly mention natural or environmental disasters, legislation on temporary admission and subsidiary protection could be interpreted so as to accommodate climate-related scenarios.[33] Again, however, the focus is on *disasters* rather than slow-onset changes, and this creates an obvious protection gap.

In 2010, Argentina adopted new immigration legislation providing access to provisional residence permits for individuals who cannot return to their country of origin because of a natural or environmental disaster.[34] Additionally, international protection (through permanent residence) is available there to people who are not refugees but who are protected by the principle of *non-refoulement* where their human rights would be at risk in the country of origin.[35] This also has the potential to apply to individuals affected by climate impacts.

(3) Legislative proposals

In 2006, the Belgian Senate adopted a resolution (introduced by Philippe Mahoux of the socialist party) calling for Belgium to agitate in the United Nations (UN) for the recognition of an international 'environmental refugee' status.[36] During debate, some senators opposed the resolution because it did not sufficiently address the root causes of the problem, although none raised any technical or political difficulties with respect to amending the Refugee Convention.[37] In 2008, two further resolutions were introduced in the lower house—one expressly calling for a Protocol to the Refugee Convention, the other not expressly mentioning this—but

[33] Kälin (n 16) 100. He notes that this was the conclusion of an inter-departmental roundtable discussion by the Swiss Ministry of Foreign Affairs on 13 January 2009, at which he was present. See further, Kälin and Schrepfer (n 19) 38, referring to Asylum Act of 26 June 1998 (as at 1 April 2011) Switzerland, Arts 44, 66–79; Bundesgesetz über die Ausländerinnen und Ausländer vom 16 Dezember 2005 (as at 24 January 2011) Arts 83–8; Motion Zisyadis, 'Internationaler Status für Umweltflüchtlinge' (19 December 2007), Antwort des Bundesrates vom 13.2.08 und Interpellation Grüne Fraktion, 'Flüchtlingsstatus für Umweltflüchtlinge' (4 October 2007), Antwort des Bundesrates vom 28.11.2007.

[34] Decree No 616/2010 Official Bulletin No 31.898 (6 May 2010) (regulating immigration law 25.871) Art 24(h). The provision delimits its scope of application to foreigners who enter the country as 'transit residents'.

[35] ibid, Art 23(m).

[36] Sénat de Belgique, 'Proposition de résolution visant à la reconnaissance dans les conventions internationales du statut de réfugié environnemental', Doc 3-1556/3 (21 March 2006) Belgian Senate in François Gemenne, 'Environmental Changes and Migration Flows: Normative Frameworks and Policy Responses' (PhD thesis, Institut d'Etudes Politiques de Paris and University of Liège, 2009) 300, 445–7 (for copy of text adopted by the Commission des relations extérieures et de la défence, 'Proposition de résolution visant à promouvoir la reconnaissance dans les conventions internationales du statut de réfugié environnemental').

[37] 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 (together 'Refugee Convention').

a vote on both is still pending.[38] Even if they were adopted, they would be non-binding on the Parliament.[39]

Prior to being elected as the new Australian government in late 2007, the Australian Labor Party proposed the creation of a Pacific Rim coalition to accept climate change 'refugees', and encouraged the Australian government to lobby the UN to 'ensure appropriate recognition of climate change refugees in existing conventions, or through the establishment of a new convention on climate change refugees'.[40] However, when a Senator from the Greens Party proposed the Migration (Climate Refugees) Amendment Bill 2007, calling for protection visas to be granted to people fleeing 'a disaster that results from both incremental and rapid ecological and climatic change and disruption', the Labor party was quick to note that its idea of an international response required a collaborative approach with other countries, rather than unilateral action by Australia.[41] In government, Labor has not formulated any policies on this issue. A Senate inquiry in 2009 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.'[42]

III. Ad Hoc Humanitarian Schemes

A. Group-based schemes

Even in the absence of specific legislation, a number of countries provide some form of protection to people fleeing natural disasters.[43] For various reasons, States may prefer ad hoc humanitarian responses that permit them to determine on a

[38] Chambre des Représentants de Belgique, 'Proposition de résolution relative à la prise en considération et à la création d'un statut de réfugié environnemental par les Nations-Unies et l'Union européenne' (déposée par M Jean Cornil et consorts of the socialist party) Doc 52–1451/001 (3 October 2008) (calling for a Protocol to the Refugee Convention) in Gemenne (n 36) 300, 469–78 (for text); Chambre des Représentants de Belgique, 'Proposition de résolution visant à la reconnaissance d'un statut spécifique pour les réfugiés climatiques' (déposée par Mme Juliet Boulet, M Wouter Devriendt et Mme Zoé Genot of the Greens) Doc 52–1478/001 (14 October 2008) in Gemenne (n 36) 300, 460–8 (for text).

[39] Email from François Gemenne to author (4 January 2011).

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

[41] Commonwealth of Australia, *Senate: Official Hansard* (9 August 2007) 100ff.

[42] 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, 2009) para 6.60 (making reference to *Committee Hansard* (21 November 2008) 28). On 21 November 2009, a spokesperson for the then 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: Adam Morton, 'Land of the Rising Sea', *Sydney Morning Herald* (Sydney, 21 November 2009) 5 <http://www.smh.com.au/environment/land-of-the-rising-sea-20091120-iqub.html> accessed 27 November 2009.

[43] Sometimes this has been as a result of calls from UNHCR: see UNHCR, 'High Commissioner's Dialogue on Protection Challenges: Breakout Session 1: Gaps in the International Protection Framework and its implementation: Report by the Co-Chairs' (8–9 December 2010) 4.

situation-by-situation basis whether they wish to provide 'protection', for what duration, and in what form. Typically, though, this is emergency protection after a particular event, rather than pre-emptive protection for projected longer-term impacts. Further, it is unpredictable as a protection tool and 'dominated by humanitarian considerations rather than a rights-based approach'.[44]

Sometimes, special historical or cultural links may foster humanitarian goodwill towards people displaced by a sudden disaster. For example, the African community offered special protection to Haitians following the earthquake there in 2010.[45] The African Union reportedly considered a proposal to create a new country for them in Africa, citing 'a sense of duty and memory and solidarity'.[46] Historical ties and symbolism of 'home' are of paramount importance here.[47] Botswana and Tanzania have admitted people from neighbouring States escaping natural disasters, such as floods, though only on a temporary, ad hoc basis and for humanitarian reasons.[48] Latin American countries offer asylum to extended categories of refugees on a regional basis. Caribbean countries provided temporary asylum to Montserratians fleeing volcanic eruptions in the 1990s (see below). While not every country has the capacity to absorb large numbers of migrants, localized solutions may provide more culturally appropriate responses than a universal burden-sharing mechanism.

[44] Kälin and Schrepfer (n 19) 38, referring also to Roberta Cohen and Megan Bradley, 'Disasters and Displacement: Gaps in Protection' (2010) 1 Journal of International Humanitarian Legal Studies 95, 131.

[45] The President of Senegal offered to resettle displaced Haitians as descendants of African slaves: 'They have a right to return to Africa, their original land. They were colonized by the Americans. We will find them land.' See Scott Baldauf, 'Haitians to Africa? Senegal Resettlement Plans Gain Steam', *Christian Science Monitor* (2 February 2010) <http://www.csmonitor.com/World/Africa/2010/0202/Haitians-to-Africa-Senegal-resettlement-plans-gain-steam> accessed 3 August 2011.

[46] The African Union is reportedly considering a proposal to create a new country for them in Africa, citing 'a sense of duty and memory and solidarity'. See ibid.

[47] Indeed, in the context of the proposed relocation of Nauru in the 1960s, discussed in Ch 5, Tabucanon and Opeskin argue: 'The Nauruans had a strong moral and legal claim against three developed states that had the means to rehabilitate their island or accept them as new settlers [Australia, New Zealand, and the United Kingdom]. The Nauruans were the beneficiaries of a "sacred trust", and Australia, the United Kingdom and New Zealand were obliged, at least in principle, to advance their interests under the mandate and the trusteeship. In correspondence quoted above, the Australian Prime Minister acknowledged the "clear obligation" of the three governments to provide a satisfactory future for the Nauruans, and this, more than anything else, may explain the depth of the resettlement negotiations': Gil Marvel Tabucanon and Brian Opeskin, 'The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration' (2011) 46 Journal of Pacific History (forthcoming), text available online <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851910> accessed 17 July 2011.

[48] Kälin and Schrepfer (n 19) 37. See also Ch 2.

(1) Montserrat and the United Kingdom

Following volcanic eruptions in Montserrat (a UK overseas territory[49]) from July 1995, the UK provided a voluntary evacuation scheme whereby citizens[50] of Montserrat could obtain two years' exceptional leave[51] to enter/remain in the UK (provided they had a UK sponsor). Until August 1997, they had to fund their own airfare, which few could afford; after that time, some assistance was made available. They were granted permission to remain for an initial two year period, with full access to employment, income support, housing benefits, education, and healthcare as UK citizens.[52] By 1997, almost 3,500 Montserratians had relocated to the UK.[53]

In 1998, as their two year period of leave began to expire and return to Montserrat remained impossible, the Montserratians were eventually granted indefinite leave to remain in the UK.[54] On 21 May 2002, all British overseas territories citizens from Montserrat were automatically granted British citizenship (the main form of British nationality) when the principal provisions of the British Overseas Territories Act 2002 commenced. It is fair to say that this development had nothing to do with the Montserrat crisis. Extending British citizenship to Montserratians may have been good timing from the recipients' perspective, and may have appeared as a humanitarian gesture from the perspective of the international community, but it was part of a restructuring in British nationality law announced in 1999 (which extended British citizenship to virtually all the remaining British overseas territories) and implemented irrespective of the volcanic eruptions.[55]

[49] From 1 January 1983, the remaining British colonies were termed 'Dependent Territories' under the British Nationality Act 1983. In practice, they were renamed 'British overseas territories' on 16 March 1999 when the then Foreign Secretary, Robin Cook, presented to Parliament a White Paper entitled *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (White Paper, Cm 4264, 1999). The change to 'British overseas terrtitory' was made *de jure* as of 26 February 2002 by the British Overseas Territories Act 2002.

[50] This is a term of convenience. In nationality terms, those with a sufficiently close connection to Montserrat were 'citizens of the UK & Colonies' prior to 1983 (see the British Nationality Act 1948), then 'British Dependent Territories citizens' (under the British Nationality Act 1981), then 'British overseas territories citizens' from 16 March 1999/26 February 2002 (as explained in n 49). In immigration terms, it was a matter for the immigration laws of Montserrat to provide an immigration status for those entitled or allowed to reside there. I am grateful to Laurie Fransman for clarifying this.

[51] 'Leave' is the term used by the Immigration Act 1971 for 'immigration permission'. 'Exceptional leave' is a term of convenience referring to leave granted outside the Immigration Rules (which are made under the Immigration Act 1971 and list the categories of persons to whom a grant of leave will normally be confined).

[52] Select Committee on International Development (UK), *First Report, Montserrat* (HC 267) 18 November 1997, para 87. For details of services, see Select Committee on International Development, *First Special Report: Government Response to the First Report from the International Development Committee, Session 1997–98: Montserrat* (HC 532) 16 February 1998, Annex 3, 'Moving to the UK: Your Questions Answered'.

[53] Select Committee on International Development, *Sixth Report: Montserrat: Further Developments* (HC 726) 4 August 1998, para 22.

[54] Leave without time restrictions or other conditions.

[55] I am grateful to Laurie Fransman for providing me with this information. There are parallels here with New Zealand's Pacific Access Category, discussed in section IV. below.

Additionally, on 21 August 1997 an Assisted Regional Voluntary Relocation Scheme was established by the UK government to assist Montserratians relocating within the Caribbean region or to the US or Canada. It has been described as little more than a six-month holiday package,[56] since residents with less than £10,000 per head of savings were granted £2,400 per adult over six months plus £600 for each child under 18 years of age.[57] Some assistance for travel to the US and Canada was also made available, since the US granted TPS to Montserratians in August 1997 and Canada granted landed settlement rights.[58]

While this may sound like a relatively orderly process, it was in fact very protracted. The Prime Minister of Antigua-Barbuda expressed concern that the UK's reluctance to facilitate movement meant that countries in the region were effectively being forced to accommodate large numbers of Montserratians.[59] While he committed his government to continue to 'open its doors to Montserratians in the spirit of good Caribbean neighbourliness that has always marked our relationship with the island' during 'their greatest hour of need', he argued that 'appropriate arrangements must be made primarily by the Government of the United Kingdom whose responsibility Montserrat remains'.[60]

The apparent reluctance by the UK to take responsibility for its own nationals displaced by the Montserrat volcanoes does not bode well for the potential relocation of whole communities affected by climate change, especially where there are no strong ties with other States. It also shows that while temporary schemes may provide initial assistance, in some cases long-term solutions will need to be found. As has been discussed at length in the refugee context, leaving people in limbo for protracted periods is inconsistent with international human rights law and can cause considerable psychological and social harm.

(2) Natural disasters

In the absence of an international protection framework for displacement by disasters,[61] the United Nations High Commissioner for Refugees (UNHCR) has called on States to provide discretionary responses in situations of natural disaster. Following the 2004 Asian Tsunami, it called for a halt on returns to areas affected by the devastation.[62] The UK suspended involuntary returns of failed

[56] Claude ES Hogan, 'Seeking Refuge in the Mother Country: UK Maintained Strict Exclusion Policy Despite Erupting Volcano' (Montserrat Country Conference, Montserrat, 13–14 November 2002) <http://www.cavehill.uwi.edu/BNCCde/montserrat/conference/papers/hogan.html> accessed 2 August 2011.

[57] Select Committee on International Development (n 52) para 81.

[58] Hogan (n 56).

[59] Prime Minister Bird, 'Address' (18th Meeting of the Conference of Heads of Government of the Caribbean Community, Jamaica, 30 June–4 July 1997) cited in Hogan (n 56).

[60] A Joint CARICOM/OECS mission to Montserrat in April 1996 reiterated the 'easing of immigration and work permit requirements for migrating Montserratians' relocating to CARICOM Member States: Ann Dummett and Andrew Nicol, *Subjects, Citizens and Others: Nationality and Immigration Law (*Weidenfeld and Nicolson, 1990) 203, cited in Hogan (n 56).

[61] On which, see Ch 9.

[62] Kolmannskog and Myrstad (n 16) 323 citing UNHCR Executive Committee Conclusion No 103 (LVI) 'The Provision of International Protection including through Complementary Forms of Protection' (2005).

asylum seekers to India, Sri Lanka, Thailand, and Indonesia, while Canada and Australia fast-tracked permanent and temporary visa applications for people coming from tsunami-affected regions, and offered permanent residents from these regions the opportunity to expedite the procedure for sponsoring family members.[63] In Germany, the Federal Ministry of the Interior indicated that returns should be stalled, although only some of the Bundesländer implemented this. The Netherlands halted deportations until March 2005.[64] France, Canada, and the Dominican Republic also reportedly eased their immigration rules in light of the 2010 Haitian earthquake.[65] Sometimes, however, discretionary halts to removal may mean that people are able to remain, but do not have many substantive rights. These kinds of responses are not sustainable in the long term.

(3) Other domestic examples

There are other examples of State practice extending special protection to particular groups, including for environmental or socio-economic reasons (which are pertinent to the climate change context). For example, between 2001 and 2006, it was Danish practice not to return young children to Afghanistan because of drought. This was subsequently extended to landless people from areas where there was a lack of food and who would be especially vulnerable on return.[66] Denmark has also provided humanitarian asylum to single women and families with young children who would otherwise be returned to areas where living conditions are very harsh, such as on account of famine.[67] Unaccompanied minors may be granted complementary protection there if they will be placed in 'an emergency situation' if returned.[68] Australia has responded to particular crises (eg East Timor, Kosovo, China) by creating ad hoc visa categories.[69] Belgium created ad hoc temporary protection schemes during the crises in the Former Yugoslavia and Rwanda.[70]

Canada's Immigration and Protection Regulations provide that:

> The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian popu-

[63] Benjamin Glahn, '"Climate Refugees"? Addressing the International Legal Gaps—Part II', *International Bar Association* (undated) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3E9DB1B0-659E-432B-8EB9-C9AEEA53E4F6> accessed 13 January 2011.

[64] Kolmannskog and Myrstad (n 16) 324.

[65] Farrell (n 6). See also *Shpati v Canada (Minister of Public Safety and Emergency Preparedness)* [2010] FC 367 (Canada) para 47, where the court stated: 'Nor do I rule out the possibility that an enforcement officer may defer removal in circumstances in which new events have occurred after the negative PRRA [Pre-Removal Risk Assessment] decision, such as natural disasters in the form of tsunamis or earthquakes or political upheavals such as "coup d'états."'

[66] Kolmannskog and Myrstad (n 16) 324.

[67] ibid, citing Aliens (Consolidation) Act No 826 of 24 August 2005 (Denmark) Art 9b(1).

[68] Aliens (Consolidation) Act (Denmark) Art 9c(3)(ii), cited in European Council on Refugees and Exiles (ECRE), 'Complementary Protection in Europe' (July 2009) 7.

[69] See, eg, Migration Regulations 1994 (Cth) Sch 2 (Australia), Subclass 448 Kosovar Safe Haven (Temporary).

[70] Dirk Vanheule, 'The Qualification Directive: A Milestone in Belgian Asylum Law' in Karin Zwaan (ed), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2007) 71.

lation as a result of . . . (b) an environmental disaster resulting in a substantial temporary disruption of living conditions.[71]

The stay can be cancelled if the circumstances no longer pose 'a generalized risk to the entire civilian population'.[72]

Finnish law makes provision for immigration for humanitarian reasons, where, on the basis of a joint proposal from the Ministry of the Interior and the Ministry for Foreign Affairs, the government decides in a plenary session to admit aliens to Finland on special humanitarian grounds.[73] While initial admission is on a temporary basis, a continuous residence permit may be granted after three years if the grounds for issuing the temporary permit still exist.[74] A permanent residence permit may be granted four years after that.[75]

In Germany, the local state (*Land*) authorities may authorize a stay on removal on humanitarian or international law grounds for particular groups of people.[76] Swiss law provides provisional protection to people exposed to a serious general danger, especially during internal armed conflict or situations of generalized violence.[77] Although climate change is not expressly mentioned, the provision may cover this.[78] Provisional protection is granted for up to five years, after which time a resident permit is granted. This expires as soon as protection is withdrawn, but it can be challenged on a case-by-case basis.[79] If protection has not been withdrawn after 10 years, an establishment permit may be granted.[80]

What most of these ad hoc schemes have in common is the designation of *particular* countries as demonstrating sufficient, objective characteristics that 'justify' movement,[81] thereby obviating the need for people wishing to leave them to show specific reasons why—in the climate change context—climate change is personally affecting them. This has parallels with prima facie refugee status in refugee law, and even with the development of the international refugee protection regime, in which a series of international agreements based on the refugees' country

[71] Immigration and Refugee Protection Regulations, SOE/2002-227 (Canada) s 230(1).
[72] ibid, s 230(2).
[73] Aliens Act (301/2004, amendments up to 1152/2010 included) (Finland) s 93.
[74] ibid, s 113(2); ECRE (n 68) 37. [75] ibid, s 56(1).
[76] Residence Act of 30 July 2004 (Federal Law Gazette I, p 1950), last amended by the Act on Implementation of Residence- and Asylum-Related Directives of the European Union of 19 August 2007 (Federal Law Gazette I, p 1970) (Germany) ('Residence Act (Germany)'), s 60a(1).
[77] 'Asylum Act (Switzerland)' Ch 1, Art 4.
[78] Kälin (n 16) 100. He notes that this was the conclusion of an inter-departmental roundtable discussion by the Swiss Ministry of Foreign Affairs on 13 January 2009, at which he was present.
[79] Asylum Act (Switzerland) Ch 4, Art 74(2); ECRE (n 68) 62.
[80] Asylum Act (Switzerland) Ch 4, Art 74(3).
[81] The Migration (Climate Refugees) Amendment Bill 2007, proposed by the Australian Greens, 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. Similar suggestions have been made in some of the treaty proposals: see Ch 7.

of origin was created in response to particular (albeit, politically selected) crises, prior to the establishment of a universal refugee instrument.[82]

B. Discretionary grounds for individual claimants[83]

Many States have some form of discretionary leave for non-citizens to remain on humanitarian or compassionate grounds.[84] Their applicability to a person seeking protection on the basis of climate change-related displacement will vary from jurisdiction to jurisdiction, since each has different requirements as to eligibility for humanitarian protection and it remains to be seen whether decision-makers would be prepared to construe their circumstances as being of an exceptional humanitarian nature. Some humanitarian mechanisms can only be triggered once a failed asylum application has been made. Others take into account the length of time a person has already spent in the country in which they are seeking to remain (and thus the level of integration there). Some statuses do not provide very extensive rights, or may be temporary. A temporary status does not solve the problem for those who are permanently displaced. In some cases, political pressure has meant that States have had to convert people from a temporary to permanent status after a certain period of time.

The following provides a brief descriptive overview of some domestic humanitarian schemes which may be relevant in the context of climate change-related displacement.

In Austria, two kinds of humanitarian residence permits may be granted.[85] An *Aufenthaltsbewilligung* (residence permit) is for a temporary, time-bound stay, whereas a *Niederlassungsbewilligung* (establishment permit) may be permanent, since the beneficiary has already started to integrate into society.[86] Humanitarian grounds are automatically assessed for any applicant seeking to remain in Austria.[87] In Belgium, leave of stay due to exceptional circumstances may be granted for reasons such as the practical or legal impossibility of return (eg non-readmission or no means of transport), or if the applicant has developed close links to Belgium. It results in a one year extendable and renewable permit.[88] In Denmark, humanitarian status may be granted if essential considerations of a humanitarian nature conclusively warrant it. It may be granted on a

[82] See generally, Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, 2007) 16–20.

[83] See also discussion of UK Discretionary Leave in Ch 3.

[84] For an analysis of State practice in 10 European countries, see ECRE (n 68). Of the 10 States surveyed by ECRE, only Switzerland did not have such a provision: 7.

[85] Federal Act concerning Settlement and Residence in Austria, Federal Law Gazette No 100/2005 in version Federal Law Gazette No 31/2006 (Austria) (The Settlement and Residence Act) Ch 2, s 7, Arts 72–4.

[86] For the rights granted, see ECRE (n 68) 18.

[87] Ministry of the Interior, 'Ministerrat beschließt Neuregelung des Humanitären Aufenthalts', Press Release No 5318 (24 February 2009) <http://www.bmi.gv.at/> accessed 3 August 2011, cited in ECRE (n 68) 18.

[88] Intégration Sociale, 'Circulaire relative à la régularisation de séjour pour raisons médicales et son impact sur le droit à l'aide sociale', *Intégration Sociale* (20 February 2008) 3 <http://www.mi-is.be/sites/default/files/doc/OB%202008-02-20%20FR.pdf> accessed 3 August 2011, cited in ECRE (n 68) 25.

temporary or a permanent basis.[89] Importantly, humanitarian protection is only available to registered asylum seekers (seeking Refugee Convention protection). Additionally, Denmark precludes removal on the basis of exceptional reasons or hindrances to deportation, which again may lead to either temporary or permanent stay.[90] This may be granted if exceptional reasons make it appropriate (including respect for family unity); if a person who does not qualify for international protection has not been able to be removed for at least 18 months; or for certain unaccompanied minors, including—relevantly—if there is reason to assume that the unaccompanied minor will be placed in an emergency situation upon return.

As already discussed, Finland's complementary protection regime provides that a residence permit may be granted if a person cannot return because of an environmental disaster.[91] Discretionary temporary residence permits are also available if a person cannot be removed from the country (including for temporary health reasons).[92] A continuous residence permit may be granted if refusing a residence permit would be manifestly unreasonable with regard to the applicant's health, ties to Finland, or on other compassionate grounds, particularly given the circumstances they would face in their home country and/or their vulnerable position.[93]

Similarly, as discussed above, Swedish law protects as 'persons otherwise in need of protection' those who are unable to return to their country of origin because of an environmental disaster.[94] This sits within Sweden's complementary protection regime, which typically results in permanent residence. Additionally, but outside the complementary protection framework, a residence permit (normally permanent) may be granted on grounds of an exceptionally distressing situation.[95] This is determined by a holistic assessment of the applicant's circumstances, with particular attention paid to his or her state of health, integration in Sweden, and situation in the country of origin.[96] The criteria may be applied less stringently to children.

Germany provides for temporary suspension of deportation (*Duldung*).[97] Unsuccessful asylum seekers may be permitted to remain in Germany if there are practical or legal obstacles to their removal, or if humanitarian, personal considerations, or important public interests require it.[98] This is little more than a temporary stay on deportation in six-month increments. The permit can be extended if removing the individual would constitute an extraordinary hardship for him or her,[99] and permanent residence may only be granted after an 18-month suspension

[89] Aliens (Consolidation) Act No 785 of 10 August 2009 (Denmark) ss 9b, 11.
[90] ibid, ss 9c(1), 9c(2), 9c(3).
[91] Aliens Act (301/2004, amendments up to 1152/2010 included) (Finland) s 88a.
[92] ibid, s 51.
[93] ibid, s 52 in ECRE (n 68) 34.
[94] Aliens Act 2005:716 (Sweden) Ch 4, s 2. [95] ibid, Ch 5, s 6. [96] ibid.
[97] Residence Act (Germany) s 60a.
[98] ibid, s 60a(2) in ECRE (n 68) 47. [99] ibid, s 25(4).

of deportation.[100] The rights entitlements under *Duldung* status are very limited and do not include the right to work.[101]

In Switzerland, a residence permit may be granted on exceptional grounds.[102] Its aim is to regularize the legal position of people who have been in Switzerland for at least five years, and whose deportation would be particularly harsh because of his or her integration there.[103] Provisional admission may be authorized where a deportation order cannot be reasonably carried out, which would be the case if it would place a person in concrete danger, such as in a situation of generalized violence or medical necessity.[104]

In Ireland, leave to remain may be granted on a discretionary basis to an individual whose asylum claim has been rejected. The Minister for Justice, Equality and Law Reform has the discretion on humanitarian or other grounds not to issue a deportation order.[105] Australian law contains a similar discretionary provision.[106] In the Netherlands, a temporary residence permit may be granted to an individual 'for whom return to his country of origin would, in the opinion of the Minister, constitute an exceptional hardship in the context of the overall situation there'.[107] In South Africa, the Minister may grant an individual or a group 'the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision'.[108] The operation of Discretionary Leave in the UK has already been discussed at length in Chapter 3.

In addition to complementary protection grounds,[109] the New Zealand Immigration Act provides that a person may be permitted to remain in New Zealand if 'there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be deported from New Zealand', and it would not be contrary to the public interest to permit the person to remain.[110]

In Canada, people with a removal order against them may apply for Pre-Removal Risk Assessment (PRRA). A favourable PRRA decision normally leads to eligibility for permanent residence.[111] However, since this involves an assessment of the refugee and complementary protection grounds in Canadian law, its usefulness for people fleeing the effects of climate change may be limited. Canada also considers Humanitarian and Compassionate (H&C) claims.[112] H&C is usually a measure of last resort for people seeking to remain in Canada. H&C decisions take

[100] ibid, s 26(1). [101] See ECRE (n 68) 48–9.
[102] Asylum Act (Switzerland) Ch 2, art 14.
[103] See Federal Office for Migration, 'Loi sur l'asile (LAsi): questions et réponses' <http://www.bfm.admin.ch/content/dam/data/migration/asyl_schutz_vor_verfolgung/asylgesetz/abstimmungen/faq_asylg_f_neu.pdf> accessed 3 August 2011, cited in ECRE (n 68) 64.
[104] Aliens Act 2005 (as amended until January 2009) (Switzerland) Ch 11, Art 83(6), cited in ECRE (n 68) 64.
[105] Immigration Act 1999, No 22 of 1999 (Ireland) ss 3(3)(b), 3(6).
[106] Migration Act 1958 (Cth) (Australia) s 417.
[107] Vreemdelingenwet 2000 (Aliens Act 2000) (Netherlands) Art 29(1)(d).
[108] Immigration Act 2002, Act No 13 of 2002 (South Africa) Art 31(2).
[109] Immigration Act 2009, No 51 (NZ) ss 130, 131. [110] ibid, s 207.
[111] Immigration and Refugee Protection Act 2001, SC 2001, c 27 (Canada) s 112.
[112] ibid, s 25.

into account considerations such as establishment and relationships in Canada, the best interests of the child, hardships affecting the applicant, and the country of origin's ability to provide medical treatment.[113] A successful claim results in permanent residence.

IV. Migration Responses

Finally, New Zealand's Pacific Access Category (PAC) deserves a brief mention here given widespread misunderstandings about its purpose. The PAC visa was created in 2002. It was based on an existing scheme for Samoans and replaced previous work schemes and visa waiver schemes for people from Tuvalu, Kiribati, and Tonga.[114] This visa has mistakenly been hailed as a 'protection' response to people at risk of climate change-related displacement in the Pacific, both in media and academic circles.[115] 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 citizens to move, it is a traditional migration programme rather than one framed with international protection needs in mind.[116]

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.[117] 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.

Contrary to some reports that the visas were not being taken up, an analysis of the statistics since the scheme's commencement in July 2002 until August 2011 reveals that on average, 1,897 applications have been made by people from Kiribati and 419 from Tuvalu each year, with 3,226 being lodged from Kiribati in 2011

[113] Citizenship and Immigration Canada, 'Frequently Asked Questions: The Refugee System: Balanced Refugee Reform' <http://www.cic.gc.ca/english/information/faq/refugees/ref-reform-faq.asp> accessed 3 August 2011.

[114] Lianne Dalziel, 'Government Announces Pacific Access Scheme' (*Beehive*, 20 December 2001) <http://www.beehive.govt.nz/node/12740> accessed 8 December 2008.

[115] For example, it is relied upon in Camillo Boano, Roger Zetter, and Tim Morris, 'Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration' (2008) Forced Migration Policy Briefing 1 (Refugee Studies Centre, University of Oxford), and in François 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' (2006) Les Cahiers du CEDEM, Université de Liège <http://www.cedem.ulg.ac.be/m/cdc/12.pdf> accessed 8 December 2008. See also Corlett's critique : David Corlett, 'Tuvalunacy, or the Real Thing?', *Inside Story* (27 November 2008) <http://inside.org.au/tuvalunacy-or-the-real-thing/> accessed 28 January 2011. It appears that the misunderstanding was perpetuated by Al Gore's film, *An Inconvenient Truth* (2006).

[116] 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.

[117] 'Pacific Access Category' (*Immigration New Zealand*, last updated 29 November 2010) <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/> accessed 14 January 2011.

and 456 from Tuvalu.[118] Only in the first year of the scheme was the quota for Kiribati unmet, with 51 visas granted, and in 2004 only 64 visas were granted to Tuvaluans.[119] In most years, the 75 places have been exceeded by at least 10–15 additional visa grants; in 2010, a record 125 visas were granted to I-Kiribati and 120 to Tuvaluans.[120] 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.[121] Conversations with locals in Tuvalu and Kiribati revealed that many older people embraced the opportunities that their younger relatives would have by migrating to New Zealand under the scheme. While they did not want to have to move themselves, they talked about the need to plan and adapt for the future. They regarded education and training at home as a sensible way for young people to make themselves attractive migrants for developed countries, in particular by training in areas where they would be likely to get employment (such as cooking).[122] Younger people spoke positively about the scheme and the opportunities it would afford them, although they noted that life in New Zealand is expensive and one has to work very hard to bring in an income.[123]

Although New Zealand does not formally have any humanitarian visas relating to climate change and displacement, it has expressed its commitment to 'respond to climatic disasters in the Pacific and manage changes as they arise'.[124] In 2008, in

[118] See Immigration New Zealand Statistics: Ballot System <http://www.immigration.govt.nz/NR/rdonlyres/28F41153-42CF-402B-B507-7BF31FC4C37C/0/B1BallotReportReceivedandDecided06JUL2011.pdf> accessed 3 August 2011. These figures include both initial registration for the ballot, and re-registration (for people who have applied in the ballot on a previous occasion).

[119] See ibid. Figures as at August 2011 show that only 41 visas have been granted to I-Kiribati in 2011. It is unclear whether further grants will be made later in the year.

[120] See ibid.

[121] People interviewed commented on difficulties in securing a job offer in New Zealand. The job issue has partly been addressed by NZ companies visiting the islands and agreeing to provide a job to anyone selected. There is no requirement that the particular job be taken up once the person arrives in NZ. Some find the NZ$60 registration fee expensive (it is NZ$25 for re-registrations). 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 Shawn Shen, 'Noah's Ark to Save Drowning Tuvalu' (2007) 10 Just Change: Critical Thinking on Global Issues 18, 19.

[122] 'I know the older generation like myself, I don't want to move to anywhere. But the younger generation—maybe they are lucky if they want to move, there's also higher educations. They want to build up their life. They don't want to come here and live here. Those are the people who would be able to migrate and travel and stay overseas': Interview with Sir Kamuta Latasi, Speaker of the Tuvaluan Parliament (and former Prime Minister) (Funafuti, Tuvalu, 27 May 2009).

[123] 'But those who are probably younger, they are excited, because of course they're earning money more than they earn here. But they realize too that life is expensive in NZ and Australia. But they like to go because of their kids—for education and the opportunities that they don't have here': Interview with an official from the Ministry of Environment, Lands and Agricultural Development (Tarawa, Kiribati, 14 May 2009); 'Those who have gone [for seasonal work] have thought it would be an easy nine months or seven months and then return with a lot of money and in fact that's not true. You have to go there to work. And it's those people that think it's easy money who have come back with negative comments on what has happened in NZ': Interview with Tebao Awerika, Deputy Secretary, Ministry of Foreign Affairs and Immigration (Tarawa, Kiribati, 12 May 2009).

[124] 'Background: Environmental Migrants/Relocation/Displacement', New Zealand Government Poznan Delegation Brief for UNFCCC COP14, 343 (released pursuant to an Official Information Act request). The President of Kiribati has noted that so far, the country most receptive

response to 'the perceived need for action' on 'environmental migrants' in a number of Pacific countries,[125] the New Zealand government adopted a more proactive approach to the issue. Rather than simply 'correct[ing] misperceptions about New Zealand's position on the environmental migrants issue [ie no agreement to resettle people from Tuvalu]' and 'outlining New Zealand's current commitment to climate change adaptation efforts in the Pacific region',[126] it decided instead 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.[127]

Nevertheless, it remains without a specific visa category for people displaced by, or seeking to migrate away from, the impacts of climate change.

V. Conclusion

This chapter has shown that although many States have ad hoc or discretionary schemes in place for people fleeing natural disasters, they are inconsistent and unpredictable—both in terms of when they take effect and the status they accord.

Recently, UNHCR has advocated the reinforcement and development of temporary protection schemes as a means of eliciting initial international support for managing climate change-related displacement within a rights-based

to his plea for more migration has been East Timor: see remarks quoted in Morton (n 42). This accords with comments made by the President of East Timor, Dr José Ramos-Horta, 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. In 2009, Fiji's interim Minister of Foreign Affairs stated that his country would consider taking 'climate change refugees from Tuvalu and Kiribati in the future' on the basis of 'historical ties with both these two countries' and the fact that there are already Tuvaluans and I-Kiribati living in Fiji: Radio New Zealand, 2009, cited in Richard Bedford and Charlotte Bedford, 'International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu' in Bruce Burson (ed), *Climate Change and Migration: South Pacific Perspectives* (Institute of Policy Studies, Victoria University of Wellington, 2010) 90. See also Kirsty Graham, Deputy Permanent Representative for New Zealand, 'Statement' (United Nations Permanent Forum on Indigenous Issues (Seventh Session): Discussions on the Pacific, New York, 23 April 2008), noting that '[t]he Pacific Islands are extremely vulnerable to climate change and its effects. As a result, we actively support the South Pacific Regional Environment Programme, the development of the Pacific Framework and Action Plan on Climate Change and community-level projects on adaptation to climate change'.

[125] 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 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.

[126] 'Background: Environmental Migrants/Relocation/Displacement' (n 124) 343.

[127] ibid, 344.

framework.[128] According to the Assistant High Commissioner (Protection), '[i]n our assessment the time has come to work with states to develop an internationally agreed doctrine of temporary protection, which would ensure the availability of interim protection to people in temporary need'.[129] This may appeal to host States because it does not require them to permanently resettle people. It may appeal to those at risk of climate change-related displacement because it secures interim assistance and a temporary right of stay elsewhere. Having a foothold via a temporary protection mechanism may also help to shore up a subsequent, more permanent status if it becomes necessary. An instrument modelled on the Guiding Principles on Internal Displacement, for example, could identify the specific needs of the displaced within the framework of States' existing international human rights obligations and help to formalize long-standing ad hoc schemes of temporary protection.[130] This is discussed further in Chapter 9.

In some situations, temporary protection will be sufficient. However, it is likely that some people fleeing climate change-related impacts will need permanent solutions (such as the inhabitants of some small island States).[131] In such cases, it would be preferable to circumvent the political charade of temporary protection and instead develop policies that can facilitate more permanent movement for those who need and desire it. This is why principled advocacy for durable migration options remains very important, especially in contexts such as the Pacific where relatively small numbers of people may need assurances that they can ultimately settle elsewhere. This does *not* mean that top-down relocation policies should be imposed. Rather, on-going governmental dialogue about migration as an adaptation response, informed by in-depth community consultation and participation, must be part of the climate change agenda. The next chapter examines this in more detail.

[128] See, eg, António Guterres, 'High Commissioner's Closing Remarks: 2010 Dialogue on Protection Gaps and Responses' (UNHCR, Geneva, 9 December 2010) 2; António Guterres, 'Statement by António Guterres, United Nations High Commissioner for Refugees' (Nansen Conference on Climate Change and Displacement in the 21st Century, Oslo, 6 June 2011) 4, 5.

[129] Feller (n 1) 9.

[130] See, eg, Guy S Goodwin-Gill, '*Non-Refoulement* and the New Asylum Seekers' (1986) 26 Virginia Journal of International Law 897; Deborah Perluss and Joan F Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia Journal of International Law 551.

[131] See Ch 5. This was also noted in 2008 by the UN High Commissioner for Refugees: António Guterres, 'Keynote Address' (Ten Years of Guiding Principles on Internal Displacement: Achievements and Future Challenges, Oslo, 16 October 2008).