

MIGRATION FOR ENVIRONMENTALLY DISPLACED PACIFIC PEOPLES: LEGAL OPTIONS IN THE PACIFIC RIM

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ABSTRACT

This paper explores the complex relationship between the environment and migration, namely the various protection options available for environmentally-displaced Pacific peoples under the laws of the United States, Canada, Australia, and New Zealand. It seeks to ascertain whether flexibility exists in these countries' domestic laws for environmental migrants from neighboring Pacific countries. It asks if humanitarian and ministerial discretion admissions and preferential admission schemes sufficiently address potential Pacific island relocations brought about by global warming and climate change, and identifies both opportunities and challenges in legislation.

This paper argues that in the absence of an international legal protection regime for environmental migrants, states need to expand immigration opportunities for persons fleeing from environmental threats. In recent decades, the four above-mentioned Pacific Rim states have developed relatively open and liberal migration policies, albeit not specifically geared towards environmental migration. Admitting environmental migrants under equitable and just terms is not only in line with the fundamental values and interests of these Pacific Rim states, but it is also central to their ethical, humanitarian, and domestic legal obligations, although the latter are ad hoc and limited.

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I. INTRODUCTION

Environmental migration is not a new phenomenon in the Pacific. Pacific Islanders have moved across great distances in the past, many times in response to environmental triggers.¹ Recent environmental events, however, suggest that environmental migrations are expected to increase significantly over the coming years.² The Pacific region, with many low-elevation island nations, is particularly vulnerable to environmental challenges, and it is predicted to be among those areas where the adverse effects of environmental change will be felt the most.³ The Intergovernmental Panel on Climate Change (IPCC) projects that the “greatest single impact” of environmental change will be on “human migration and displacement.”⁴ Yet, unlike refugees and refugee-like peoples, environmental migrants are not covered by an international legal framework. Under international law, environmental migrants are not a “formal category of people in need of special protection”⁵ and there is no “coordinated legal and administrative system” to relocate them in a “planned and orderly manner.”⁶ As of now there is little international support for a

1. ALAN THORNE & ROBERT RAYMOND, *MAN ON THE RIM, THE PEOPLING OF THE PACIFIC* 29-30 (1989). “Exactly when this movement began it is still impossible to say. But as some certainly reached Australia and Melanesia by 50,000 years ago, that initial expansion must have begun much earlier. . . it is likely that the main-springs of mankind’s first seaborne migrations were sea level changes around the fringes of Asia, coupled with local geological and volcanic processes.” *Id.* at 36-37.

2. *See generally* INTERNATIONAL ORGANIZATION FOR MIGRATION, *MIGRATION, CLIMATE CHANGE AND THE ENVIRONMENT* (2009), available at http://publications.iom.int/bookstore/free/migration_and_environment.pdf (last visited 1 February 2013).

3. Justin Locke, *Climate Change-Induced Migration in the Pacific Region: Sudan Crisis and Long-term Developments*, 175 *THE GEOGRAPHICAL JOURNAL* 171, 172 (2009).

4. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *First Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 1990).

5. Jane McAdam & Ben Saul, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, in *HUMAN SECURITY & NON-CITIZENS* (Alice Edwards & Carla Ferstman eds., 2010), 359-60.

6. Ilona Millar, *There’s No Place like Home: Human Displacement and Climate Change*, 14 *AUSTRALIAN INT’L L.J.* 71, 71 (2007). The IOM defines environmental migrants as “persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living

new normative category,⁷ and the difficulty of inducing policy-makers to act cannot be underestimated.⁸

Absent an international regime, perhaps the most pragmatic approach for dealing with environmentally-displaced peoples is the implementation of domestic migration policies. In some countries, environmental migration policies are already in place, albeit in an embryonic state. Sweden and Finland, for example, have legislated protection mechanisms for victims of environmental disasters.⁹ Swedish immigration policy names environmental migrants as a separate category of “person in need of protection.”¹⁰ The Finnish Aliens Act grants residence permits to those who “cannot return because of an armed conflict or environmental disaster.”¹¹ Further, an alien residing in Finland is issued a “residence permit on the basis of 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.”¹² Although the legislative history of the Aliens Act indicates that the preferred option in environmental disasters is “internal relocation and international humanitarian

conditions, are obliged to leave their homes or choose to do so, either temporarily or permanently, and who move either within their country or abroad.” INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 2, at 19. The definition, however, is not universally accepted due to difficulty in isolating the environment as a single independent variable impacting the decision to move.

7. See Vikram Odedra Kolmannskog, To What Extent Can Existing Forms of Legal and Operational Protection Apply to Climate Change-Related Displacement in General and Cross-Border Displacement (paper presented at the Oxford U. Workshop on Envtl. Change and Migration, January 8-9, 2009), available at http://www.nrc.no/arch/_img/9448543.pdf.

8. Dhananjayan Sriskandarajah, *Changing Climate, Changing Policies*, 31 FORCED MIGRATION REV. 61 (2008).

9. Swedish Aliens Act, § 2(3), 2007:716, available at <http://www.regeringen.se/content/1/c6/06/61/22/bfb61014.pdf> (last visited 3 February 2013); Finnish Aliens Act, § 109, 301/2004, available at <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf> (last visited 3 February 2013). Both the Swedish Aliens Act (2006) and Finnish Aliens Act (2009) mention “environmental disasters” as a basis for the grant of protection and residency in Sweden and Finland, respectively. The Swedish Aliens Act, Chapter 4, Section 2(3) defines a “person otherwise in need of protection” as an alien “unable to return to the country of origin because of an environmental disaster.” Chapter 5, Section 1 entitles “persons otherwise in need of protection” to a “residence permit.” The Finnish Aliens Act, Chapter 6 Section 109(1) on the other hand, grants “[t]emporary protection” to aliens in “need [of] international protection and who cannot return safely to their home country or country of permanent residence, because there has been. . . an environmental disaster.” Temporary protection may be for a “short duration,” and “lasts for a maximum of three years in total.”

10. Swedish Aliens Act, Ch 4, s.2(3) (2006).

11. Finnish Aliens Act, Ch. 6 s.109 (1) (2009).

12. *Id.* at § 88a(1), 323/2009.

aid,” the Act expressly acknowledges that protection in Finland may become necessary.¹³

While migration opportunities exist for environmentally-displaced peoples in the Pacific Rim, most are limited and ad hoc. There is a need to amend existing laws and protection policies to address these gaps and limitations and to consider the extent to which domestic legislation can adequately meet the needs of environmental migrants from the region.¹⁴ There are various perspectives on this issue. Opeskin and MacDermott argue for enhanced migration opportunities for Pacific peoples to Pacific Rim countries as a way of redressing past and current injustices while at the same time expanding opportunities for human development.¹⁵ This reasoning holds true, perhaps with even more cogency, for environmental migrants. McAdam proposes that, absent an international framework, states need to develop “coordinated responses” to acknowledge the needs of cross-border environmental migrants, and regularize their status through either humanitarian or migration schemes.¹⁶ Bedford and Bedford argue that, in addition to the current commitments of Australia and New Zealand (among other Pacific Rim countries) to development in Kiribati and Tuvalu, these states should examine their immigration policies to determine whether they can accommodate more I-Kiribati and Tuvaluans in their annual intake of migrants for work and family reunion purposes, and through special programs such as New Zealand’s Pacific Access Category (PAC), a dedicated immigration scheme for Pacific peoples granting permanent residency status in New Zealand to up to “250 citizens of Tonga, 75 citizens of Tuvalu, and 75 citizens of Kiribati” each year.¹⁷

13. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, FORCED DISPLACEMENT IN THE CONTEXT OF CLIMATE CHANGE: CHALLENGES FOR STATES UNDER INTERNATIONAL LAW 12 (2009), available at <http://www.unhcr.org/4a1e4d8c2.html> (last visited 3 February 2013).

14. VIKRAM ODEDRA KOLMANSKOG, FUTURE FLOODS OF REFUGEES: A COMMENT ON CLIMATE CHANGE, CONFLICT AND FORCED MIGRATION 5 (2008), available at http://www.nrc.no/arch/_img/9268480.pdf (last visited 3 February 2013).

15. See BRIAN OPESKIN & THERESE MACDERMOTT, PACIFIC INSTITUTE OF PUBLIC POLICY, ENHANCING OPPORTUNITIES FOR REGIONAL MIGRATION IN THE PACIFIC 1 (2010).

16. JANE MCADAM, *Refusing Refugee in the Pacific: (De)constructing Climate-Changed Displacements in International Law*, in Migration, Environment and Climate Change (Etienne Piguet, et al. eds., 2011).

17. IMMIGRATION NEW ZEALAND, Operations Manual, S1.40 Pacific Access Category. “The total number of individuals approved under each category includes principal applicants, their partners and dependent children.” *Id.* at S1.40.1. See also Richard Bedford & Charlotte Bedford, *International Migration and Climate Change*, in CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 89-134 (Bruce Burson ed., 2010).

This paper explores the complex relationship between the environment and migration, namely the various protection options available for environmentally-displaced Pacific peoples under the laws of the United States, Canada, Australia, and New Zealand. The paper first seeks to ascertain whether flexibility exists in the domestic laws and policies of Pacific Rim states for the absorption of environmental migrants from the Pacific. It also considers under what circumstances the principles of humanity and justice oblige these countries to accept the environmentally displaced. The paper then focuses on the Pacific environmental predicament, and projects how environmental events and processes impact individual migration decisions. Finally, the paper will analyze existing migration and protection policies in the U.S., Canada, Australia, and New Zealand – the likely destinations for environmental migrants in the Pacific – and the ramifications for environmental migrants. This paper argues that, in the absence of an international legal protection regime for environmental migrants, states need to expand immigration opportunities for persons fleeing from environmental threats. In recent decades, the four above-mentioned Pacific Rim states have developed relatively open and liberal migration policies, albeit not specifically geared towards environmental migration. Admitting environmental migrants under equitable and just terms is not only in line with the fundamental values and interests of these Pacific Rim states, but it is also central to their ethical, humanitarian, and domestic legal obligations, although the latter are ad hoc and limited.

II. THE PACIFIC SITUATION

The Pacific region presents a unique opportunity to understand the complex relationship between environmental change and migration. First, the Pacific Rim, with its active volcanoes and geologic faults, has produced some of the world's worst earthquakes, volcanic eruptions, and tsunamis, resulting in displaced populations. Japan's March 2011 earthquake and tsunami, for example, left 550,000 people homeless with millions more lacking adequate supplies and services.¹⁸

Second, many places in the Pacific are regular pathways for typhoons and tropical cyclones. Fiji, for example, was devastated by tropical cyclone Gene in 2008, which damaged infrastructure,

18. John Garnaut Yamagata, *Winter Blast Compounds Crisis for Half a Million Homeless*, AGE, Mar. 17, 2011, available at <http://www.theage.com.au/world/winter-blast-compounds-crisis-for-half-a-million-homeless-20110316-1bxf.html> (last visited 3 February 2013).

agriculture, and utilities, and necessitated the provision of FJ\$1.7 million worth of food rations by the Fijian government.¹⁹

Third, the Pacific is extremely vulnerable to long-term environmental processes such as climate change and sea level rise. Examples include instances of coastal flooding due to unusually high tides in the Marshall Islands, Kiribati, and northern Papua New Guinea²⁰ and seawater intrusion into farmlands and freshwater aquifers in the Solomon Islands.²¹ Admittedly, some of these processes have been exacerbated by neglect, short-sightedness in implementation of construction projects, and mismanagement. Connell argues that in Tuvalu, for instance, the construction of roads between islands has blocked the natural lagoon and that dredging and sea wall construction, airport runway sealing, and land reclamation have “all transformed the topography of tiny islands” and “ensured that the effects of storms and high tides are different to those in earlier times.”²² In any case, low-lying atoll states, such as Tuvalu, remain extremely vulnerable to long-term environmental processes such as climate change and sea level rise.

Fourth, resource depletion and pollution have impacted relocation – or serious plans for relocation – of Pacific populations. The experiences of Nauru and Ocean Island (Banaba) provide examples. In August 1963, and in response to environmental damage resulting from unmitigated phosphate mining activities, Australia offered to resettle the Nauruans on Curtis Island in Queensland, a move eventually rejected by Nauru.²³ The

19. Government of Fiji, *Fiji: \$1.7 Million for Tropical Cyclone Gene Rehabilitation*, RELIEFWEB (Feb. 12, 2008), www.reliefweb.int/rw/rwb.nsf/db900sid/MUMA-7BT93K?OpenDocument&emid=TC-2008-000016-FJI (last visited 3 February 2013).

20. United Nations Office for the Coordination of Humanitarian Affairs, *Pacific Islands: Abnormally High Sea Levels, Situation Report No. 1*, RELIEFWEB (Dec. 13, 2008), <http://css.static.reliefweb.int/report/kiribati/pacific-islands-abnormally-high-sea-levels-ocha-situation-report-no-1> (last visited 3 February 2013).

21. JULIE WEBB, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, *ENGAGING YOUNG PEOPLE IN THE SOLOMON ISLANDS FOR RED CROSS ACTION ON CLIMATE CHANGE* (2008).

22. John Connell, *Losing Ground? Tuvalu, the Greenhouse effect and the Garbage Can*, 44 *ASIA/PACIFIC VIEWPOINT* 89, 104 (2003).

23. Gil Marvel Tabucanon & Brian Opeskin, *The Resettlement of the Nauruans in Australia: An Early Case of Failed Environmental Migration*, 35 *The J. of Pac. Hist.* 337, 346-48 (2011). In the 1950s, Australia, the United Kingdom and New Zealand as joint administrators of a United Nations trusteeship, were forced to consider the long-term future of their Trust Territory of Nauru, which had suffered escalating environmental damage from decades of unmitigated phosphate mining. In 1962, the Australian Minister for Territories appointed a Director of Nauruan Resettlement to search for potential resettlement sites. In August, 1963, the Australian government, through the Director, offered Curtis Island (a few kilometers off mainland Queensland) to Nauru as a potential resettlement site. Australia's plan was to acquire all the land on Curtis Island from the small population of private owners and give the

Banabans (located in modern day Kiribati) were similarly relocated to Rabi Island in Fiji by the British colonial government upon the near exhaustion of Banaba Island's phosphate deposits.²⁴ More recently, the possibility of nuclear contamination in Japan as a result of the 2011 earthquake and tsunami led to human displacement, with people leaving their homes and some even departing from the country.²⁵ The Japanese experience shows that environmental displacement can occur at any time and under conditions that allow little warning, regardless of a country's level of economic development.

III. MIGRATION AND PROTECTION OPTIONS FOR PACIFIC PEOPLES

The less developed Pacific Island countries enjoy a special relationship with their more developed neighbors in the Pacific Rim. This is due not only to geographical proximity, but also to a long history of economic, cultural, and political ties that inextricably bind the peoples of the Pacific islands to their former colonial powers. These connections continue to have implications for environmental migration. The people of some Pacific island countries are given unlimited opportunities to migrate to other

Nauruans freehold title to the island. A Nauruan Council would be established with wide powers of local government under the laws of the State of Queensland, where "the people would be able to preserve the kind of life and community that they valued." They would receive "homes, land, and assistance in gaining employment in nearby Rockhampton on the mainland." However, despite extended negotiations, the plans were never consummated. By 1964, the Nauruans had rejected, in turn, the idea of their dispersal as new citizens of one of those three Western states; their resettlement as a community in a mainland enclave; and their resettlement as a separate community of 'New Nauru' on an island off the Queensland coast. *Id.* at 346-48.

24. Martin Silverman, *Making Sense: A Study of a Banaban Meeting*, in EXILES AND MIGRANTS IN OCEANIA, at 124 (Michael Lieber ed., 1977). The Banabans are indigenous inhabitants of Banaba (called Ocean Island in colonial times), now politically part of the Republic of Kiribati. In December, 1945, due to continued phosphate mining operations after the war, the entire community of Banabans was forced to relocate to Rabi Island in Fiji. During the colonial era, there have been only three cases of community relocations: the Banaban and Vaitupuian (Ellice) Islanders to Rabi and Kioa Islands in Fiji, respectively, and Phoenix Islanders (from the Gilberts, now Kiribati) to the Western Province in the Solomon Islands. Of the three, only the Banaban resettlement involved the "complete removal" of a population from their home island. See John Campbell, *Climate Change and Population Movement in Pacific Island Countries*, in CLIMATE CHANGE AND MIGRATION SOUTH PACIFIC PERSPECTIVES, 29, 38-39 (Bruce Burson ed., 2010).

25. See Ben Doherty, *Rush Hour Approaches Crush Hour in a City Where the Only Way is Out*, SYDNEY MORNING HERALD (Mar. 18, 2011), available at <http://www.smh.com.au/environment/rush-hour-approaches-crush-hour-in-a-city-where-the-only-way-is-out-20110317-1bz4i.html> (last visited 3 February 2013). The report stated that "[a]s radiation warnings escalate[d], . . . [t]housands of Japanese and expatriates poured into Narita Airport's departures hall yesterday, many without tickets but carrying several suitcases, looking to escape the country."

Pacific Rim states, while others have limited but preferential migration privileges. For many environmental migrants, however, ministerial discretion is the only pathway to admission abroad.

A. LEGACY OF COLONIALISM

Colonialism has left the Pacific region with a “complex legacy of legal and political associations.”²⁶ In some instances, the remnants of colonialism have constrained Pacific peoples’ free movement in the region while in other cases they have expanded opportunities for migration. Under New Zealand’s Citizenship Act of 1977, residents of New Zealand’s former colonies, the Cook Islands and Niue (now self-governing countries in free association with New Zealand), are considered to be New Zealand citizens with open migration access to New Zealand and access to its social services. Under the same Act, inhabitants of Tokelau, a New Zealand territory, are *ipso facto* New Zealand citizens.²⁷ For Niueans and Cook Islanders, the granting of citizenship and powers of self-government in free association with New Zealand was the outcome of negotiations for independence and was “possibly one of the most generous post-colonial arrangements in modern history.”²⁸ This agreement has implications for environmental migration and has facilitated the movement of former colonial peoples to New Zealand following devastating environmental events. For example, in 1990, Hurricane Ofa “nearly necessitated an evacuation of the island [Niue] to New Zealand.”²⁹ Additionally, Hurricanes Val (1992) and Percy (2005) destroyed most of Tokelau’s agriculture and led to “severe food shortages” such that New Zealand had to relocate Toke-

26. Brian Opeskin & Therese MacDermott, *Resources, Population and Migration in the Pacific: Connecting Islands and Rim*, 50 ASIA PACIFIC VIEWPOINT 353, 363 (2009).

27. Section 29 of the New Zealand Citizenship Act 1977 (“(1) Whereas in accordance with Article 46 of the Constitution of the Cook Islands (as set out in the Second Schedule to the Cook Islands Constitution Amendment Act 1965) the Government of Cook Islands has requested and consented to the enactment of a provisions of this Act to the Cook Islands as part of the law of the Cook Islands: Be it therefore enacted as follows: The provisions of this Act shall extend to the Cook Islands as part of the law of the Cook Islands. (2) Whereas in accordance with Article 36 of the Constitution of Niue (as set out in the Second Schedule to the Niue Constitution Act 1974) the Niue Assembly has by resolution requested and consented to the enactment of a provision extending all of the provisions of this Act to Niue as part of the law of Niue: Be it therefore enacted as follows: The Niue Act 1966 is hereby amended by inserting, after section 684, the following section: ‘684A. Citizenship Act in force in Niue—The Citizenship Act 1977 shall extend to and be in force in Niue.’ (3) The provisions of this Act shall be in force in Tokelau.”).

28. VASANTHA KRISHNAN, ET AL., *THE CHALLENGE OF CHANGE: PACIFIC ISLAND COMMUNITIES IN NEW ZEALAND 1986–1993* 4 (1994).

29. Judith Barker, *Hurricanes and Socioeconomic Development on Niue island*, 41 ASIA PACIFIC VIEWPOINT 191, 201 (2000).

lauans to New Zealand.³⁰ There are now 14 times as many Niueans, six times as many Tokelauans, and three times as many Cook Islanders living in New Zealand than in the islands themselves.³¹ Further, as New Zealand citizens, the Niueans, Cook Islanders, and Tokelauans, by way of step migration, may enter Australia by virtue of the Trans-Tasman Travel Arrangement, where citizens of either country are given rights of free movement to the other.³² This further broadens opportunities for relocation for environmental migrants.

The 1985 Torres Strait Treaty between Australia and its former colony Papua New Guinea permits “free movement” and access to Australia’s “protected zone” within the Strait to Papua New Guineans living in the coastal area of Papua New Guinea in and adjacent to the Torres Strait.³³ This agreement differs from New Zealand’s arrangement with Tokelau in that although the Papua New Guineans residing in the designated area are not deemed Australian citizens, the same mobility rights have been secured by them via treaty. In practice, normal migration con-

30. See EJ Moore & JW Smith, *Climate Change and Migration from Oceania: Implications for Australia, New Zealand and the United States of America*, 17 POPULATION & ENV'T 105, 115 (1995).

31. OPESKIN & MACDERMOTT, *supra* note 15, at 3.

32. *The Trans-Tasman Travel Arrangement*, NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE, <http://www.mfat.govt.nz/Foreign-Relations/Australia/0-trans-tasman-travel-arrangement.php> (last updated Nov. 29, 2010). Only 76% of New Zealand’s 24,686 permanent migrants to Australia in 1998/99 were New Zealand born; the rest were “step migrants.” See Rainer Winkelmann, *Immigration Policies and Their Impact: The Case of New Zealand and Australia* (Ctr. for Comparative Immigration Studies, Univ. of Cal. San Diego, Working Paper No. 29, 2001).

33. Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters, art. 11(1) [Dec. 18, 1978] ATS 4. The Treaty allows Torres Strait residents of Papua New Guinea short visits to the Torres Strait Islands within Australian territory for traditional purposes. Art 1(1)(d) defines “free movement” as “movement by the traditional inhabitants for or in the course of traditional activities” and within the Torres Strait “protected zone” consisting of the southernmost parts of Papua New Guinea and the northernmost islands of Australia. Art 11 (1) allows free movement to Torres Strait residents: “Free movement and traditional activities including traditional fishing. 1. Subject to the other provisions of this Treaty, each Party shall continue to permit free movement and the performance of lawful traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party. Art 12 allows the performance of traditional activities and grants “traditional customary rights” to Torres Strait residents: “Where the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of areas of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and those rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.”

trols are waived. Close to 30,000 Papua New Guineans annually stream into the “outer Australian islands” without “customs clearance, health checks, or even passports.”³⁴ Many avail themselves of Australian medical facilities, with the Queensland government taking a “humanitarian approach to the PNG nationals who arrive at its doors sick, injured or in labor.”³⁵ Such humanitarian and liberal treaty implementation may provide a portal of protection for environmental migrants in the Torres Strait region. Climate change challenges exist in the Strait, and the community of 8,500 individuals living amongst the 20 islands between the northern tip of Australia and Papua New Guinea will undoubtedly be affected. For instance, Australia’s northernmost island of Saibai often experiences unusually high tides, “flooding homes, sewage treatment works, water supplies, crops and sacred cultural sites.”³⁶ While it remains debatable as to whether climate change has been involved here, the fact remains that these “monster tides” have already affected Australia’s northern islands and threaten to do so with more frequency with rising sea levels.³⁷ The Islanders in the Strait have already begun lobbying for Australian assistance in dealing with coastal erosion and flooding problems.³⁸ The Torres Strait Island Regional Council has “started work on a project to upgrade seawalls,”³⁹ and asked for “\$5 million, through round two of the Federal Government’s Regional Development Australia Fund (RDAF), to help rebuild seawalls to protect communities from flooding in king tides.”⁴⁰ Torres Strait Councilor Gela and Council CEO John Scarce stated in a July, 2011 open letter to Australian Prime Minister Julia Gillard that, “[f]ailure to act on desperately needed adaptation measures in the Torres Strait [may put] Australia at risk of being the first developed nation with internally displace[d] climate change refugees.”⁴¹

34. Debra Jopson, *Slim Reward for Islanders Protecting Our Border*, SYDNEY MORNING HERALD (Dec. 6, 2010).

35. *Id.* at 1.

36. SUELLEN HINDE, *Monster Tides Smother Torres Strait Islands*, The Sunday Mail News Queensland, 31 January 2011.

37. *Id.*

38. SARA COLLERTON, *Torres Strait Pleads for Climate Change Action*, ABC News, 12 July 2011.

39. KIRSTY, *Council Makes Bid for \$5m Seawalls Revamp*, Australian Broadcasting Corporation (ABC) News, 5 December 2011.

40. *Id.*

41. COLLERTON *supra* note 38. Mr. Toshie Kris, Chairperson of the Torres Strait Regional Authority, in a statement delivered on 17 May 2011 to the 10th Session of the United Nations Permanent Forum on Indigenous Issues regarding Climate Change implications for Torres Strait Island communities, said: “Funding is urgently required to reduce erosion and flooding impacts on the six most vulnerable communities. Affected infrastructure includes schools, health clinics, police stations,

The United States also has a colonial legacy of open migration to the U.S. mainland as to Guam and American Samoa (unincorporated territories). This, together with the United States' Compact of Free Association (COFA) with Micronesia, Palau, and the Marshall Islands, has implications for environmental migration in terms of access to U.S. social services in disaster situations and guaranteed entry rights to the U.S. mainland, should extreme conditions occur. Unlike New Zealand's arrangement with its former colonies, however, citizens of Pacific states under the COFA are not granted U.S. citizenship.⁴² That being said, under Article IV, section 141(a) of the COFA, citizens of the Marshall Islands and the Federated States of Micronesia may "lawfully engage in occupations, and establish residence as a non-immigrant in the United States and its territories."⁴³ Further, the citizens of the associated states have access, within their home states, to U.S. social services including the disaster response and recovery and hazard mitigation programs under the Federal Emergency Management Agency.⁴⁴

water supplies, homes and stores. . .The only other alternative is relocation from traditional Indigenous lands. . .[c]learly, significant sections of a unique Indigenous culture now face the possibility of irreparable damage."

42. New Zealand Citizenship Act, art. 29, sec. (1)(2)(3), Citizenship Act 1977, 1977, Commenced: 1 January 1978. See also Compact of Free Association Act, art. IV, sec 141 (A)(1)(2)(3), U.S. Public Law 108-188 (2003). The Compact of Free Association was opened for signature 1 October 1982 (U.S. – Federated States of Micronesia), and 25 June 1983 (U.S.- Republic of the Marshall Islands). Legislation on the Compact was adopted by the U.S. Congress, and signed into law on 13 November 1986. The Compacts with the Federated States of Micronesia and the Republic of the Marshall Islands were renewed for 20 years from 2003. See Government of the Federated States of Micronesia website, <http://www.fsmlaw.org/compact/> (last visited 3 February 2013); see also HOWARD LOOMIS HILLS, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 *International Lawyer* 584, 1984. The Compact with the Republic of Palau which took effect in 1994 does not have a termination date but "requires a review on the 15-year, 30-year and 40-year anniversaries." See U.S. Department of State website, <http://www.state.gov/p/eap/rls/rm/2011/11/177965.htm> (last visited 3 February 2013).

43. Compact of Free Association Act, art. IV, sec 141 (A)(1)(2)(3), U.S. Public Law 108-188 (2003).

44. *Id.* at title II, art. II, sec 22. Section 221: (a) The Government of the United States shall make available to the Marshall Islands and the Federated States of Micronesia, in accordance with and to the extent provided in the separate agreements referred to in Section 232, without compensation and at the levels equivalent to those available to the Trust Territory of the Pacific Islands during the year prior to the effective date of this Compact, the services and related programs: (1) of the United States Weather Service; (2) of the United States Federal Emergency Management Agency; (3) provided pursuant to the Postal Reorganization Act, 39 U.S.C. 101 et seq; (4) of the United States Federal Aviation Administration; and (5) of the United States Civil Aeronautics Board . . . (b) The Government of the United States, recognizing the special needs of the Marshall islands and the Federated States of Micronesia particularly in the fields of education and health care, shall make available, as provided by the laws of the United States, the annual amount of \$10 million which shall be allocated in accordance with the provisions of the sepa-

B. TEMPORARY PROTECTION IN ENVIRONMENTAL EMERGENCIES

Both the United States and Canada provide temporary humanitarian protection to nationals from countries affected by environmental disasters, provided these nationals are in the U.S. or Canada at the time of the disaster. Both countries grant temporary safe havens and suspension of deportation regardless of how the nationals entered the country. The U.S. *Immigration Act of 1990* (IMMACT) grants Temporary Protection Status (TPS) to eligible nationals of countries affected by an “earthquake, flood, drought, epidemic, or other environmental disaster” where the governments of the effected states have officially requested temporary protection for their nationals in the United States.⁴⁵ Canada’s Immigration and Refugee Protection Regulations grant authority to the Minister of Public Safety to impose a Temporary Suspension of Removal (TSR) to eligible nationals of countries where there is an ongoing “environmental disaster resulting in substantial temporary disruption of living conditions.”⁴⁶

The TPS and TSR are statutory embodiments of the concept of safe haven that provides protection to those who do not meet the legal definition of “refugee” but are “nonetheless fleeing or reluctant to return to potentially dangerous situations.”⁴⁷ It represents a shift in the line of thinking from the type of protection

rate agreement referred to in Section 232. Section 232: The specific nature, extent and contractual arrangements of the services and programs provided for in Section 221 as well as the legal status of agencies of the Government of the United States, their civilian employees and contractors, and the dependents of such personnel while present in the Marshall Islands or the Federated States of Micronesia, and other arrangements in connection with a service or program furnished by the Government of the United States, are set forth in separate agreements which shall come into effect simultaneously with this Compact.

45. Immigration and Nationality Act, 8 U.S.C. § 1254a (1998).

46. Press Release, Canada Border Services Agency, Temporary Suspensions of Removals Lifted for Burundi, Liberia and Rwanda (July 23, 2009), available at <http://www.cbsa-asfc.gc.ca/media/release-communique/2009/2009-07-23-eng.html> (last visited 3 February 2013).

47. RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS20884, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3 (2008). “The concept of safe haven. . . covers those who may not meet the legal definition of refugee but are nonetheless fleeing potentially dangerous situations. Safe haven also assumes that the host country, in this instance the United States, is the first country in which the fleeing alien arrives safely, or is the country where the alien is temporarily residing when the unsafe conditions occur. Safe haven is implicitly temporary in nature because it is given prior to any decision on the long-term resolution of the alien’s status. It is also a form of blanket relief because it is premised on more generalized conditions of turmoil or deprivation in the country of origin, in contrast to the individual circumstances weighed in the case-by-case asylum process.” *Id.* at 2. See also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 13 (“In 1990, Temporary Protected Status (TPS) was enacted as the statutory embodiment of safe haven in the USA for those who do

given to conventional refugees. Whereas in the traditional refugee convention line of thinking, receiving states work “in opposition” to the sending state (particularly in cases of state-sponsored or tolerated persecutions), in the TPS/TSR protection regime the receiving state works “in support of” the sending state.⁴⁸ In essence, the TPS and TSR legislations were enacted to protect specific groups of foreigners who are in the U.S. or Canada but cannot return to their country of origin because of armed conflict or environmental disasters.⁴⁹

The U.S. has provided temporary protection status to nationals from Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Somalia, and Sudan [see Table 1].⁵⁰ It is typically granted for periods of 6 to 18 months, but may be extended if conditions in the sending state do not improve, as was the case with El Salvador, Honduras, and Nicaragua.⁵¹ Temporary protection status was granted to 70,000 nationals from Honduras and 3,500 nationals from Nicaragua in response to (category 5) Hurricane Mitch, which devastated large parts of Central America in 1998.⁵² To date, no Pacific island state has been granted a temporary protection status.

not meet the legal definition of refugee, but are nonetheless reluctant to return to potentially dangerous situations.”)

48. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 13. Conventional refugees flee from their country due to a well-founded fear of persecution which are often state-sponsored or tolerated. Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees defines a refugee as one who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150.

49. SUSAN MARTIN, CLIMATE CHANGE AND INT’L MIGRATION (2010); CITIZENSHIP AND IMMIGRATION CANADA, IMMIGRANT APPLICATIONS IN CANADA MADE ON HUMANITARIAN OR COMPASSIONATE GROUNDS, CHAPTER IP-5 (2011).

50. WASEM & ESTER, *supra* note 47.

51. See ROYCE BERNSTEIN MURRAY & SARAH PETRIN WILLIAMSON, CTR. FOR GLOBAL DEV., MIGRATION AS A TOOL FOR DISASTER RECOVERY: A CASE STUDY ON U.S. POLICY OPTIONS FOR POST-EARTHQUAKE HAITI 10 (June 2011), available at http://www.cgdev.org/files/1425143_file_Murray_Williamson_disaster_recovery_FINAL.pdf (last visited 3 February 2013).

52. WASEM & ESTER, *supra* note 47.

Table 1. Countries Whose Nationals in the United States Benefited from Temporary Protected Status and Deferred Enforced Departure

Country	Status	Dates	Estimated Number*
El Salvador	TPS	March 2, 2001-September 9, 2012	229,000
Haiti	TPS	January 15, 2010-July 22, 2013	100,000-200,000**
Honduras	TPS	December 30, 1998-July 5, 2010	70,000
Liberia	DED	October 1, 2007-March 31, 2010	3,600
Nicaragua	TPS	December 30, 1998-July 5, 2010	3,500
Somalia	TPS	September 16, 1991-March 17, 2011	250
Sudan	TPS	November 4, 1997-November 2, 2011	700

*Estimates based upon USCIS data for designated status or work authorizations. These approximate numbers do not necessarily include all aliens from the countries who are in the United States and might be eligible for the status.

**Preliminary range of estimates USCIS has made prior to issuing work authorizations. Before its expiration in July 2011, Haiti's temporary protected status designation was extended by the Secretary of Homeland Security to January 22, 2013.⁵³

Source: Congressional Research Service (CRS) compilation of USCIS data.⁵⁴

A limit of the temporary protection status is that while beneficiaries are "allowed to work during the period the status is in effect,"⁵⁵ they are "ineligible for public assistance by states and localities," and cannot apply to have their spouses and children come over to the United States.⁵⁶ As the protection does not lead to permanent residency, once it expires, beneficiaries re-

53. Press Release, U.S. Dep't of Homeland Security, Secretary Napolitano Announces the Extension of temporary Protected Status for Haiti Beneficiaries, (May 17, 2011), available at <http://www.dhs.gov/news/2011/05/17/secretary-napolitano-announces-extension-temporary-protected-status-haiti> (last visited March 3, 2013).

54. Cited in WASSEM & ESTER, *supra* note 47. While Temporary Protected Status (TPS) is an immigration benefit for nationals from countries designated by the Secretary of Homeland Security based on certain conditions, the Deferred Enforced Departure (DED) comes from a Presidential directive and is not an immigration status. For instance, due to armed conflict in their home country, Liberians were granted TPS which ended on October 1, 2007. President Bush then "deferred the enforced departure of the Liberians originally granted TPS," a privilege extended by President Obama to March 31, 2010. See Office of the Press Sec'y, Presidential Memorandum—Deferred Enforced Departure for Liberians, available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-deferred-enforced-departure-liberians>, (last visited 28 September 2012).

55. AURELIE LOPEZ, *The Protection of Environmentally-Displaced Persons in International Law*, 37 Environmental Law 365, 401 (2007), 8 U.S.C. § 1254a(a)(1)(B), (a)(2) (2000).

56. *Id.* See 8 U.S.C. § 1254a(f)(2) (2000).

sume their original immigration status, or such other statuses as may be granted in the meantime.⁵⁷

In Canada, temporary suspension of removal status was granted to nationals from Burundi (1994), Rwanda (1994), and Liberia (2003) due to armed conflicts in those countries.⁵⁸ On 23 July 2009, Canada announced the lifting of temporary suspension of removal status for these three countries in light of improving conditions and the presumption that generalized violence was no longer an issue.⁵⁹ Those 2,100 African nationals that had lived in Canada for more than a decade were given the option of applying for permanent residence in Canada based on humanitarian and compassionate grounds in light of the lifting of their temporary suspension of removal status.⁶⁰ The option to apply for permanent residence is humane considering these nationals have most likely developed significant social and economic ties to Canada. For victims of natural disasters and environmental emergencies in the Pacific, the limits of the TPS and TSR privileges are obvious. Both are issued on an ad hoc and temporary basis. For the temporary protection status to be afforded, affected Pacific countries must apply to the U.S. Secretary of Homeland Security, whose granting authority is discretionary.⁶¹ TSR grants are equally discretionary on the part of the Canadian Minister of Public Safety.⁶² Under both the TPS and TSR regimes, there is neither a guarantee of the status being bestowed nor any form of legal entitlement for affected countries. The granting of these statuses is thus subject to the political whims and priorities of the times in the U.S. and Canada. For example, while Hondurans and Nicaraguans were granted temporary protection status in 1998 after Hurricane Mitch, this status was denied to Haitians in 2004, despite the severe aftermath of Tropical Storm Jeanne. The same decision was reached in 2008 despite the “series of cyclones” that “resulted in hundreds of deaths” in Haiti.⁶³ The Administration of then U.S. President Bush opposed the granting of temporary protection status to Haitians on the ground that it

57. JANE MCADAM, *Complementary Protection and Beyond: How States Deal with Human Rights Protection 1* (United Nations High Comm’r of Refugees, Working Paper No. 118, 2005).

58. CANADA BORDER SERVICES AGENCY, News Release: Lifting the TSRs to Burundi, Liberia and Rwanda (CBSA 2009).

59. *Id.*

60. *Id.*

61. LOPEZ, *supra* note 55 at 400.

62. CITIZENSHIP AND IMMIGRATION CANADA, IMMIGRANT APPLICATIONS IN CANADA MADE ON HUMANITARIAN OR COMPASSIONATE GROUNDS, IP 5.10 (2011), available at <http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf> (last visited 3 February 2013).

63. RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 7 (2010).

would “result in an immigration amnesty for unauthorized Haitians and foster illegal migration from the island.”⁶⁴ A departure from this policy occurred in January 2010 in the aftermath of Haiti’s devastating earthquake, with the announcement from Department of Homeland Security Secretary Napolitano that temporary protection status would be granted for 18 months to Haitians who were in the United States as of January 12, 2010.⁶⁵

Considering that TPS and TSR remedies come with the expectation that foreign nationals will return home after the resolution of environmental disasters, the statutes are ill-equipped to deal with environmental deteriorations of a long-term or permanent nature. Illustrative of this is the fact that in 2005, the TPS designation of Montserrat was discontinued as it was deemed “likely that [volcanic] eruptions will continue for decades, [and] the situation that led to Montserrat’s designation can no longer be considered *temporary* as required by Congress when it enacted the TPS statute” (emphasis added).⁶⁶ In light of this event and the government’s reasoning, it is clear that the potential of the TPS and TSR regimes to help Pacific peoples who may be permanently displaced from their island homelands due to sea level rise is minimal. Canada recognized this reality in the days following Haiti’s January 2010 earthquake by announcing that it would “speed up” Haitian family reunification visas for primary relatives, while Quebec instituted its own “humanitarian sponsorship” program to allow humanitarian entry of both primary and secondary relatives.⁶⁷

In contrast to the TSP and TSR statutes in the U.S. and Canada, Australia’s Temporary Protection Visa (TPV) regime, introduced in October 1999 and abolished in 2008, was silent on victims of natural disasters. The three temporary protection visa subclasses extended temporary protection to individually assessed convention refugees and asylum seekers.⁶⁸ The temporary protection was limited to refugee or refugee-like situations where

64. *Id.*

65. Press Release, U.S. Dep’t of Homeland Security, Statement from Homeland Security Secretary Janet Napolitano on Temporary Protected Status (TPS) for Haitian Nationals (Jan. 15, 2010), available at <http://www.dhs.gov/news/2010/01/15/secretary-napolitano-temporary-protected-status-tps-haitian-nationals> (last visited 3 February 2013).

66. Vikram Komannskog, Climate Change-Related Displacement and the European Response (2009) (paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague), <http://sideurope.files.wordpress.com/2009/02/presentation-kolmannskog.doc>.

67. MURRAY & WILLIAMSON, *supra* note 51.

68. See Fethi Mansouri & Michael Leach, *The Evolution of the Temporary Protection Visa Regime in Australia*, 47 INT’L MIGRATION REV. 101, 102 (2009).

applicants were either persecuted or discriminated against, and did not cover those affected by environmental calamities.⁶⁹

C. MINISTERIAL DISCRETION AS AN OPPORTUNITY FOR THE ENVIRONMENTALLY DISPLACED

Based on the international law principles of state sovereignty and territorial integrity, states continue to have “near-absolute discretion” over migration flows into and out of their territories.⁷⁰ In promulgating admission policies, a country may choose to reflect not only its cumulative values and attitudes about how it wants to position itself in the world, but also current global realities and the need for states to behave as collective members of the family of nations. No legislation, however, can be expected to anticipate *all* possible ramifications as to who will be admitted into a state.⁷¹ Discretionary powers have thus been granted to immigration ministers in some countries in order to address difficult cases that do not fit into defined immigration classifications. As Australian Minister for Immigration and Citizenship Senator Chris Evans stated, ministerial intervention powers in Australia were “intended to provide an outcome for unique and exceptional cases.”⁷² The power of ministerial discretion, when guided by policy direction, may provide windows of opportunity for environmental migrants, including those from the Pacific.

All four Pacific Rim countries discussed in this paper have ministerial discretion built into their migration legislation. The United States Immigration and Nationality Act, Section 212(d)(5)(a), grants the Secretary of the Department of Homeland Security the discretion to parole an individual into the U.S. temporarily for humanitarian reasons or for significant public benefit.⁷³ For instance, in response to the January 12, 2010 mag-

69. Jane McAdam, *supra* note 16.

70. Wui Ling Cheah, *Migrant Workers as Citizens within the ASEAN Landscape: International Law and the Singapore Experiment*, 8 CHINESE J. OF INT'L LAW 205, 208 (2009).

71. See AUSTL. SENATE SELECT COMM. ON MINISTERIAL DISCRETION IN MIGRATION MATTERS, REPORT 149 (March 2004) [hereinafter “SENATE SELECT COMMITTEE”], available at http://www.aph.gov.au/binaries/senate/committee/minmig_ctte/report/report.pdf.

72. Andrew Bartlett, *Ministerial Discretion in the Migration Act: Policy, Legislation and Politics*, 39, 40 *Immigration Review, Bulletin* 16, 16 (2009).

73. U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVS., HUMANITARIAN PAROLE, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=acc3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=acc3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited 5 March 2013).

nitide 7 earthquake in Haiti which killed up to 230,000 people,⁷⁴ the United States granted “humanitarian parole” to Haitian orphan children to come to the United States for inter-country adoption.⁷⁵

New Zealand’s Immigration Act of 2009, Section 61 (1) empowers the Minister of Immigration the discretion to grant “a visa of any type” to any person, regardless of the status of that person’s stay in New Zealand, provided no deportation order is in force.⁷⁶ The decision to grant a visa may be given at “any time” and is within the Minister’s “own volition” and “absolute discretion.”⁷⁷ Such Ministerial discretion, in theory at least, would have bearing on both the admission and residence status of the peoples of neighbouring Pacific states who may be forcibly displaced by environmental causes.

In Australia, humanitarian applications for persons who fall outside the definition of “refugee,” but who nonetheless suffer from human rights abuses in their home country are classified under the “Refugee and Humanitarian (Class XB) Visa Categories.”⁷⁸ These are for people in refugee-like situations, including a) those, who “while not. . .refugees,” are subject to “substantial discrimination and human rights abuses in their home country” (subclass 202 Visa, “Global Special Humanitarian Program”); b) people subject to “persecution in their home country and assessed to be in a situation such that delays due to normal processing could put their life or freedom in danger” (subclass 203 Visa, “Emergency Rescue”); and c) women “and their dependents” who are subject to “persecution or are of concern to the United Nations High Commissioner for Refugees (UNHCR),” are “living outside their home country without the protection of a male relative, and [are] in danger of victimisation, harassment or serious abuse because of gender” (subclass 204 Visa, “Woman at Risk”).⁷⁹

74. *Haiti Raises Earthquake Toll to 230,000*, WASH. POST, Feb. 10, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020904447.html> (last visited 3 February 2013).

75. Press Release, US Citizenship and Immigration Services, Special Humanitarian Parole Program for Haitian Orphans Draws to a Close at Request of Haitian Government (May 7, 2010).

76. New Zealand Immigration Act 2009, Section 61 (1): Grant of visa in special case: (1) The Minister may at any time, of the Minister’s own volition, grant a visa of any type to a person who (a) is unlawfully in New Zealand; and (b) is not a person in respect of whom a deportation order is in force.

77. New Zealand Immigration Act 2009, Section 61 (2): A decision to grant a visa under subsection (1) is in the Minister’s absolute discretion.

78. DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, Refugee and Humanitarian Entry to Australia, <http://www.immi.gov.au/visas/humanitarian/offshore/visas.htm> (last visited 3 February 2013).

79. *Id.*

Recognising that there are humanitarian and compassionate claims that do not fit neatly into refugee or refugee-like situations, the legislature in Australia granted the Minister of Immigration wide discretionary powers for reasons of “public interest.”⁸⁰ The Minister, through his or her “intervention powers,” is allowed to override unfavourable decisions of review bodies and make a decision more favourable to the applicant.⁸¹ The legislative basis upon which Australia’s Ministerial discretion is exercised is Section 417 of the *Migration Act 1958* (Cth), as amended:

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

“Public interest” under the Ministerial Guidelines (MSI 225) is defined as that which

“may be served through the Australian Government responding with care and compassion where an individual’s situation involves unique and exceptional circumstances.⁸² This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.”⁸³

The Minister’s intervention powers over decisions of the review tribunals refer to protection cases decided by the Refugee Re-

80. THE SENATE SELECT COMMITTEE REPORT, The Senate Select Committee Report on Ministerial Discretion in Migration Matters (Commonwealth of Australia 2004). Quoting Ms. Biok, Legal Aid Commission of New South Wales, Committee Hansard, 22 September 2003, p. 33.

81. Before the minister can intervene and exercise his “public interest powers,” there must be a prior review tribunal decision on the applicant’s case. “Review tribunal” may refer to any of the three appellate bodies reviewing the eligibility applications of refugees or migrants: Refugee Review Tribunal (RRT), the Migration Review Tribunal (MRT) or, in certain circumstances, the Administrative Appeals Tribunal (AAT). See DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, Ministerial Intervention, http://www.immi.gov.au/refugee/ministerial_intervention.htm (last visited 3 February 2013).

82. DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, Unique or Exceptional Circumstances, <http://www.immi.gov.au/refugee/circumstances.htm> (last visited 3 February 2013). Among the instances constituting “unique or exceptional circumstances” are “[c]ompassionate circumstances regarding [one’s] age and/or health and/or psychological state such that failure to recognise them would result in irreparable harm and continuing hardship,” or “[c]ircumstances that the legislation does not anticipate or clearly unintended consequences of legislation or the application of relevant legislation leads to unfair or unreasonable results.” *Id.*

83. Philip Ruddock, Ministerial Guidelines For The Identification Of Unique Or Exceptional Cases Where It May Be In The Public Interest To Substitute A More Favourable Decision Under S345, 351, 391, 417, 454 of The Migration Act 1958, at 4.1 (Mar. 31, 1999), available at http://www.alhr.asn.au/documents/417_guidelines.html (last visited 3 February 2013).

view Tribunal (RRT)⁸⁴ and all other migration (except protection visa) cases decided by the Migration Review Tribunal (MRT).⁸⁵

Unlike Canada's Ministerial discretion provisions (discussed below), which may be invoked at first instance, Australia's discretion provisions may only be called upon at post-review levels and as an applicant's final avenue of appeal. Furthermore, the Section 417 power can only be exercised if the applicant is in Australia, and his or her claim for protection has been rejected at first instance by the Department of Immigration and Multicultural and Indigenous Affairs (now Department of Immigration and Citizenship, DIAC) and on appeal by the Refugee Review Board (RRT)⁸⁶ (DIAC officials screen appeals dismissed by the RRT and refer cases to the Minister for possible Section 417 intervention).⁸⁷ The Minister's discretion is non-delegable, non-compellable, and non-reviewable.⁸⁸ Although Subsections 4 and 5 of Section 417 of the Migration Act require the Minister to provide the Parliament with a written statement in cases where the discretion is used, the reasons for the discretion are generally not given.⁸⁹ Once granted, the rights of Section 417 beneficiaries are the same as those of conventional refugees, and include that of permanent residency.⁹⁰

Historically, Australia's grant of ministerial discretion on immigration matters was, like Canada's, available at first instance. The Immigration Act of 1901 (Cth) gave the Minister of Immigration wide discretionary powers in determining who may be admitted to or deported from Australia.⁹¹ The Migration Act of 1958 (Cth), Section 198, likewise granted wide discretion to the Minister to determine who is a "unlawful non-citizen" liable for deportation, in effect giving the Minister the last word on who may remain in or who must leave Australia. Both the 1901 and 1958 migration laws conferred "wide discretionary powers upon the Minister and the Department to grant entry permits, cancel

84. Migration Act 1958, Sec. 417 (1).

85. Migration Act 1958, Sec. 351 (1).

86. Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention* ("Complimentary Protection"), U.N. Doc. PPLA/2005/02 (June 2005).

87. *Id.* at 66.

88. *Id.*

89. *Id.* at 66-67.

90. *Id.*

91. KERRY CARRINGTON, PARLIAMENT OF AUSTRALIA, CURRENT ISSUES BRIEF NO. 3 2003-04, MINISTERIAL DISCRETION IN MIGRATION MATTERS: CONTEMPORARY POLICY ISSUES IN HISTORICAL CONTEXT (SEPT. 15, 2003), available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0304/04cib03 (last visited 3 February 2013).

those permits, and deport unlawful non-citizens and others deemed to be undesirable.”⁹²

Eventually, the heavy reliance on ministerial discretion brought with it an unusually heavy workload and made the Minister vulnerable to charges of “patronage, favouritism, unfairness, and inconsistency.”⁹³ Additionally, discretionary decisions were “difficult to defend and easy to overturn in administrative law,” particularly after the Federal Court was established in 1976.⁹⁴ Thus, in 1989, the Migration Act was amended, and the Minister’s general and first instance discretion to admit or refuse an alien was replaced by defined visa categories. That being said, the Minister retained a residual discretionary power that may be exercised only after the migration and review agencies have issued an unfavourable decision.

A careful reading of the requirements under Australia’s law and the guidelines reveals that, although they do not explicitly refer to the environmental factors (unlike Sweden and Finland) as a basis for migration opportunities, the doors are not closed for environmental migrants. Under the Minister’s discretionary and intervention powers, windows of opportunity exist for the environmentally displaced, albeit implicitly. This is in part because historically, Australia’s “humanitarian visa” category included an expanded “non-refoulement”⁹⁵ undertaking for residents of countries suffering from natural disasters.

Although the IRPA does not explicitly mention victims of natural disasters as among those eligible to benefit from Canada’s humanitarian admission, the law nevertheless provides “sufficient discretion to respond in a flexible and humane manner to emergency situations.”⁹⁶ Specifically, those affected by natural disasters, such as those caused by climatic changes for instance, may be considered among those in “unusual” and “undeserved” conditions outside the applicant’s control. As earlier indicated, Citizenship and Immigration Canada defines “circumstances beyond the applicant’s control” as those “general country

92. *Id.*

93. *Id.*

94. *Id.*

95. “Non-refoulement” is a central principle in international refugee protection. Article 33(1) of the 1951 Refugee Convention provides: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”

96. See CITIZENSHIP AND IMMIGRATION CANADA, OPERATIONAL BULLETIN OB-083, GUIDELINES FOR PRIORITY PROCESSING IN THE EVENT OF DISASTER SITUATIONS (2008), available at <http://www.cic.gc.ca/english/resources/manuals/bulletins/2008/ob083.asp>.

conditions . . . considered unsafe due to war, civil unrest, *environmental disaster*, etc.” The Minister of Public Safety may impose a temporary suspension of removals (TSR) for countries, which are affected by such conditions.⁹⁷

In 2008, the Canadian Minister of Citizenship and Immigration issued guidelines related to natural disaster situations entitled, “Guidelines for Priority Processing in the Event of Disaster Situations,” indicating that it may be possible to process applications expeditiously and with priority when applicants are made vulnerable to natural disasters. “In the event of a disaster,” the Guidelines require (“remind”) visa offices to “continue to pull the applications of affected persons to the front of the queue for review.”⁹⁸ “As situations change,” Citizenship and Immigration Canada will continue its practice of “responding in a humane and expeditious manner.”⁹⁹ Nevertheless, there is “no [actual] program or other priority processing in relation to [natural] disasters.”¹⁰⁰

Despite these guidelines, Canadian case law seems to require the element of “persecution” to warrant Canada’s protection.¹⁰¹ The common reasoning of the tribunals in denying petitions for refugee protection status is that applicants are in fact economic migrants. In the Ward case, the Court required serious and unequivocal proof of persecution in relation to one of the five grounds enumerated in the definition of “Convention refugee:” race, religion, nationality, membership in a particular social group, and political opinion. Moreover, the Court distinguished between persecuted applicants on the one hand and economic migrants (including environmental migrants) on the other:

The need for “persecution” in order to warrant international protection, for example results in the exclusion of such pleas as those of economic migrants, i.e. individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both these cases might seem deserving of international sanctuary.¹⁰²

In reality, however, the distinctions between persecuted migrants and those economic/environmentally-displaced migrants are far more blurred. The case of BG, a Fijian-Banaban, decided by the Immigration and Protection Tribunal of New Zealand on January 20, 2012, illustrates the blurred boundaries between per-

97. CITIZENSHIP AND IMMIGRATION CANADA, *supra* note 49 (emphasis added).

98. *Id.*

99. *Id.*

100. *Id.*

101. Canada (Att’y Gen.) v. Ward (1993), 2 S.C.R. 689, 731-32.

102. *Id.*

secuted refugees, economic migrants, and environmental migrants.¹⁰³ BG's family was forced to relocate from Banaba Island (in the Gilberts, now part of the Republic of Kiribati) to Rabi Island (Fiji) in 1945 due to the environmental depletion of Banaba Island brought about by decades of phosphate mining. BG claimed before the New Zealand tribunal that the Banabans, as environmental migrants to Fiji, "occupy the lowest rung of the socio-economic ladder because of discrimination."¹⁰⁴ He argued that the discriminatory conditions he would encounter in Fiji as a Banaban (should he be sent back to Fiji), were such as to "entitle him to either refugee or protected person status"¹⁰⁵ in New Zealand. The Refugee Status Branch (RSB) of the Department of Labour declined to grant refugee protection status to BG. On appeal, BG's petition was similarly denied for the reason that he was neither a Convention refugee nor a protected person within the meaning of the Convention Against Torture and the Covenant on Civil and Political Rights.¹⁰⁶

The denial of BG's appeal at the Immigration and Protection Tribunal level raises the question as to whether his experienced socio-economic deprivation and discrimination will warrant a grant of admission in New Zealand on alternative ground and via Ministerial discretion. In other words, it will be interesting to see whether BG's socio-economic hardships, flowing from the initial environmental displacement of his family from Banaba (i.e. conditions beyond the control of the applicant), may warrant a grant of migration rights to New Zealand through Ministerial discretion. Under the New Zealand Immigration Act of 2009, the Minister of Immigration may "at any time" and at his or her "own volition, grant a visa of any type to a person," regardless of the status of that person's stay in New Zealand, any time prior to a deportation order.¹⁰⁷

It should be noted at this point that even if ministerial discretion powers provide a window of opportunity for some environmental migrants, there are downsides to this approach. First, definite rights and remedies can never be expected due to the non-compellable and non-reviewable nature of discretionary decisions. Second, and in the case of Australia, preventing the invocation of the power until the last tier of the administrative

103. *BG (Fiji) v. Refugee Status Branch (RSB) of the Department of Labour* (2012) NZIPT 800091.

104. *Id.* at 3.

105. *Id.*

106. *Id.* at 58. BG has since reapplied for a reconsideration of his status from the tribunal. See MICHAEL FIELD, *Fiji Man Re-applies for Refugee Status*, Fairfax New Zealand News, September 5, 2012.

107. Section 61(1) of the New Zealand Immigration Act 2009.

process unwittingly makes the process more cumbersome. Third, the wide latitude of ministerial power subjects applicants to the changing winds of political preferences, rendering the process vulnerable to charges of favouritism.

The non-compellable and non-reviewable power of ministerial discretion does not guarantee any definite legal right or protection for environmental migrants. The Australian Full Federal Court articulated in the *Ozmanian* case that the nature of the discretionary power “makes it clear that the Minister is not under a duty to consider whether to exercise the power under §417(1) in respect to any decision, whether or not the Minister is requested to do so by the applicant or any other person, or in any other circumstances.”¹⁰⁸ The “no duty to consider” provision was likewise affirmed in *Re Bedlington*,¹⁰⁹ triggering criticisms about the “unsettling implications” of discretionary powers and how they are “almost ungovernable by the courts.”¹¹⁰ The near absolute nature of the Minister’s personal judgment in exercising such “discretion” on the one hand, coupled with the “no duty to consider” provision has brought about charges of the Minister “playing God;” the “Minister is under no obligation to consider a request to exercise discretion, no matter how strong a case may be.”¹¹¹ Similarly in Canada, the *Nyvt v. Canada (Secretary of State)* case held that “[a] decision to allow an individual to apply for landing from within Canada is administrative and discretionary. An immigration officer cannot be faulted for refusing to exercise his or her discretion in favour of an applicant if it is known, at the time, that the process would be futile.”¹¹²

In Australia, the placement of the discretionary power provision at the last tier of the administrative process has made the process inefficient and is arguably counter to the goals of “compassion” from which the ministerial discretion was supposedly based.¹¹³ In *Elmi v. Australia*, a case involving a persecuted Somali asylum seeker, the applicant was held in detention while his claim was rejected by both the Department of Immigration and Multicultural Affairs and the RRT only because the case was not one defined under the Refugee Convention.¹¹⁴ At the final stage

108. *Ozmanian v Minister for Immigration Local Gov't and Ethnic Affairs* (1996) 141 ALR 322, 336 (Austl.).

109. See *Re Bedlington and Another: Ex parte Chong* (1998) 157 ALR 436.

110. SAVITRITAYLOR, *Sovereign Power at the Border*, 16 Public Law Review 55 (1995).

111. MATTHER ZAGOR, *Playing God – Ministerial Discretion in Migration Law*, 22 Legaldate 3 (2010).

112. *Nyvt v. Canada*, 26 Imm. L. R. (2d) 95 (F.C.T.D.) (1994).

113. See Ministerial Guidelines, *supra* note 83.

114. See Sadiq Shek Elmi v. Australia, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1988(1999).

of the application process, an appeal was made for ministerial discretion, but the Minister refused to exercise that option.¹¹⁵ Elmi registered a complaint with the UN under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which declared that Australia has a non-refoulement obligation under Article 3 of the Convention.¹¹⁶ Instead of granting a visa, the Minister indicated that the applicant would have to re-apply and go through the lengthy refugee status determination procedure again.¹¹⁷ Elmi left Australia because of a lack of viable alternatives.¹¹⁸

The *Elmi* case is, admittedly, an extreme example. But for environmental migrants fleeing from natural disasters, their refugee-like situation demands an expeditious process and not the long, drawn-out procedure afforded to the applicant in *Elmi*. The processing of Canada's humanitarian applications, at first instance, is a more efficient alternative, since the applicant does not have to wait for a double denial of his or her appeal before appealing to ministerial discretion.

For all its administrative hitches, ministerial discretion still offers the most promise in providing migration options for environmentally displaced Pacific peoples. This holds true whether assistance is required due to environmental emergencies resulting from natural disasters or from long-term environmental processes such as climate change, although the latter scenario presents a less compelling case for ministerial discretion. To invoke ministerial discretion, Canada requires the presence of "humanitarian," "compassionate," or "public policy" rationales;¹¹⁹ Australia requires a "public interest" rationale where the Australian Government may respond with "care and compassion" if the applicant's situation involves "unique and exceptional circumstances."¹²⁰ Many environmental migration cases would fit squarely within these criteria.

115. *Id.*

116. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 3, *open for signature* on Dec. 10 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). Article 3 (1) reads: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Australia ratified CAT on 8 August 1989.

117. Sadiq Shek Elmi v. Australia, *supra* note 114.

118. *Id.*

119. Immigration and Refugee Protection Act, S.C. 2001, c. 27 §25(1) (Can.) (2001).

120. RUDDOCK, *supra* note 83.

D. PREFERENTIAL MIGRATION SCHEMES FOR PACIFIC PEOPLES

Environmental migration is not always “forced” in the sense of people relocating because their lives are in danger. A large number of people *choose* to move before grave environmental deterioration directly endangers their lives.¹²¹ For many of these voluntary migrants, poverty (or loss of livelihood) is a motivating factor in the decision to relocate; the primary force creating this factor is that the environment of the potential migrant’s home can no longer sustain certain livelihoods. Proactive migration is a necessary step in obviating, or at least mitigating, the need for eventual forced mass migration. Although couched in economic terms, New Zealand and Australia’s preferential migration schemes may be regarded as initial attempts at establishing proactive migration schemes in the Pacific.

Although New Zealand makes no express reference to environmental migration, it has special concessionary policies concerning the entry of other Pacific peoples. In 2002, the Pacific Access Category (PAC), a new visa class, was established, allowing 250 people from Tonga, 75 from Kiribati, and 75 from Tuvalu to migrate to New Zealand each year.¹²² Under the PAC, citizens of Tonga, Tuvalu, and Kiribati between 18 and 45 years of age must register during the designated period, usually from 1 to 30 April.¹²³ For applicants whose names are drawn, Immigration New Zealand will notify them within one month regarding their successful registration, and “they must lodge a full application under the Pacific Access Category. . . not more than six months after the date of that advice.”¹²⁴ To qualify for residency,

121. KOKO WARNER ET AL., UNITED NATIONS UNIVERSITY: INSTITUTE FOR ENVIRONMENT AND HUMAN SECURITY, HUMAN SECURITY, CLIMATE CHANGE AND ENVIRONMENTALLY INDUCED MIGRATION 8 (June 30, 2008).

122. IMMIGRATION NEW ZEALAND, OPERATIONS MANUAL, S1.40 (2012), available at <http://www.immigration.govt.nz/opsmanual/45503.htm> (last visited 17 March 2013).

123. *Id.* at S1.40.10 Definition of ‘principal registrant’. The registration period for principal registrants in 2012 is 2 to 30 April.

124. *Id.* at S1.40.25 Selection process following closure of registration. S1.40.25 reads: “(a) Immigration New Zealand (INZ) will conduct an electronic draw as soon as practicable after the closure of the registration period; (b) Registrations will be randomly drawn from the pool of registrations, until the appropriate number of potential registrants to meet the various quotas of available places within the annual period has been drawn; (c) Principal registrants whose registrations have been drawn from the various pools will be notified by INZ in the month following the draw that their registration has been successful and that they must lodge a full application under the Pacific Access Category to the appropriate receiving office of INZ not more than six months after the date of that advice; (d) Principal registrants who are unsuccessful in the registration process within a particular registration period are able to re-register within subsequent registration periods at a reduced fee.”

applicants must meet the following requirements: 1) be in good health and character; 2) have an acceptable offer of full time employment; and 3) possess minimum English language skills.¹²⁵ The principal applicant must include in the registration his or her partner and dependent children, if any.¹²⁶ Once approved, an applicant is granted a New Zealand resident visa “with travel conditions allowing first entry (into New Zealand) within three months, while the applicant’s partner and dependent children will be granted resident visas with travel conditions allowing first entry within 12 months.”¹²⁷ An older preferential migration scheme called the Samoan Quota Scheme (SQS), established in 1970, is still in place and runs parallel with the PAC. The SQS allows 1,100 Samoan citizens to be granted a New Zealand resident visa each year¹²⁸ under requirements, which are similar to those of the PAC. In April 2007, the Recognised Seasonal Employer (RSE) scheme was established, allowing workers from Pacific countries to work in New Zealand’s horticulture and viticulture industries for up to seven months in any eleven-month period, under a Limited Purpose Entry Seasonal Work visa.¹²⁹ The RSE was likely patterned from, or at least parallels Canada’s Seasonal Agricultural Workers Program (SAWP), a long-standing and generally considered “best practice model.”¹³⁰ Established in 1966, SAWP addressed labour shortages across Ontario’s farms by permitting Jamaican, and later, Mexican and Caribbean workers to engage in work in Canada.¹³¹ What SAWP was to the Caribbean, RSE became to the Pacific. The RSE

125. IMMIGRATION NEW ZEALAND, *supra* note 122, at S1.40.5 Criteria for a resident visa. Under S1.40.5 (a)(v), an “acceptable offer of employment” may be for the applicant or to his or her “partner, included in the application.” S1.40.30 (b) defines “acceptable offers of employment” as: “full-time employment (i.e. amounts to, on average, at least 30 hours per week); current at the time of assessing the application and at the time of grant the visa; and for a position that is paid by salary or wages (i.e., positions of self-employment, payment by commission and/or retainer are not acceptable); and accompanied by evidence of professional or technical registration if this is required by law to take up the offer; and compliant with all relevant employment law in force in New Zealand.”

126. *Id.* at S1.40.15 Inclusion in registration of immediate family members of the principal registrant.

127. *Id.* at S1.40, 55 Grant of visas.

128. IMMIGRATION NEW ZEALAND, OPERATIONS MANUAL, S1.10 SAMOAN QUOTA SCHEME (2010), available at <http://www.immigration.govt.nz/opsmanual/30656.htm> (last visited 17 March 2013).

129. See DEP’T OF LABOUR, SUMMARY OF EVALUATION FINDINGS FROM RECOGNISED SEASONAL EMPLOYER (RSE) POLICY, FIRST SEASON (2007-08) (N.Z.) (2009).

130. Christina Gabriel & Laura Macdonald, *Citizenship at the Margins: The Canadian Seasonal Agricultural Worker Program and Civil Society Advocacy*, 39 POL. & POL’Y 45, 49 (2011).

131. LEIGH BINFORD, *The Seasonal Agricultural Workers Program and Mexican Development*, FOCAL POLICY PAPER (2006).

scheme allows up to 8,000 (increased from 5,000) Pacific workers to be employed on New Zealand's farms each year.¹³² Nationals from 11 Pacific countries are eligible, namely Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.¹³³ However, five countries, namely Kiribati, Samoa, Tonga, Tuvalu, and Vanuatu were priority ("kick start") states and were given expedited status in the initial stages of the scheme.¹³⁴ The Solomon Islands was formally added in 2010 with the signing of the RSE Inter-Agency Understanding between the governments of New Zealand and the Solomon Islands.¹³⁵ Unofficially, however, more than 450 Solomon Islanders have worked on New Zealand's farms since 2007 under the RSE.¹³⁶ The RSE scheme provides workers the opportunity for "circular migration," by allowing them to return in future seasons.¹³⁷ Under the program, New Zealand employers apply for an Agreement to Recruit (ATR) while their soon-to-be Pacific workers must obtain "a passport, successful screening for tuberculosis, medical evaluation, police clearance, and a return ticket," half of which is paid for by the sponsoring employer.¹³⁸

While the RSE establishes a type of circular migration where workers are obliged to return home after the growing season, it could potentially open up opportunities for permanent migration. A worker's experience and professional network in New Zealand could, for example, make them better candidates for permanent migration under skilled migration visa categories or the PAC. The RSE may also serve as a model for similar schemes in other Pacific Rim countries.

132. IMMIGRATION NEW ZEALAND, *Recognised Seasonal Employer (RSE) Work Policy*, <http://www.immigration.govt.nz/migrant/general/generalinformation/media/rse.htm> (last visited 17 March 2013).

133. *Id.* "Unless employers can show they have pre-established relationships with workers from other countries, they may only recruit workers under the RSE policy from the . . . eligible Pacific Forum countries."

134. INTERNATIONAL LABOR ORGANIZATION, *The Recognized Seasonal Employers Scheme (RSE)*, http://www.ilo.org/dyn/migpractice/migmmain.showPractice?p_lang=en&p_practice_id=48 (last visited 4 February 2013).

135. Press Release, Office of the Prime Minister and Cabinet (New Zealand), *Solomon Islands Hails New Zealand Seasonal Labour Scheme* (April 20, 2010, 2:41 PM), available at <http://www.pmc.gov.sb/headlines/solomon-islands-hails-new-zealand-seasonal-labour-scheme> (last visited 17 March 2013).

136. *Id.*

137. DEP'T OF LABOUR, *supra* note 129.

138. Fanny Thornton, *Regional Labour Migration as Adaptation to Climate Change?: Options in the Pacific*, CLIMATE CHANGE AND MIGRATION: RETHINKING POLICIES FOR ADAPTATION AND DISASTER RISK REDUCTION 82, 86 (Michelle Leighton, et al. eds., 2010).

The United States has parallel programs for seasonal employment of foreign workers under the H-2A (Temporary Agricultural Worker) and H2B (Temporary Non-Agricultural Worker) visa categories.¹³⁹ The following Pacific countries (among others) have been designated as eligible for the program: Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.¹⁴⁰ The total maximum period of stay under both the H-2A and H2-B classifications is 3 years, after which the worker must “depart and remain outside the United States for an uninterrupted period of 3 months before seeking readmission” as an H-2A or H2-B non-immigrant.¹⁴¹ The worker’s “spouse and unmarried children under 21 years of age may seek admission via H-4 non-immigrant classification,” however, they are “not eligible for employment in the United States while in H-4 status.”¹⁴²

Australia’s seasonal workers schemes much resemble New Zealand’s. In 2008, Australia announced the Pacific Seasonal Worker Pilot Scheme (PSWPS), giving Pacific Islanders preferential work slots in its horticulture and viticulture industries.¹⁴³ The PSWPS is a three-year pilot program, with the first workers having arrived in February 2009.¹⁴⁴ Up to 2,500 visas will be issued during the entire program to workers from four Pacific countries, namely, Kiribati, Papua New Guinea, Tonga, and Vanuatu, to assist Australia’s horticultural industry, with guaranteed grants of at least six month’s employment at an average of 30 hours per week.¹⁴⁵ Visas granted under the PSWPS have a

139. Press Release, U.S.CITIZENSHIP & IMMIGR. SERV., New Countries Eligible to Participate in H-2A and H-2B Programs, U.S.CITIZENSHIP & IMMIGR. SERV. (Jan.14, 2011), available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=c94e6d26d17df110VgnVCM1000004718190aRCRD&vgnnextoid=88404e9c7c08d210VgnVCM100000082ca60aRCRD> (last visited 4 February 2013). The H-2A and H2-B programs allow United States employers to bring foreign nationals to the United States to fill temporary agricultural (H2-A) and non-agricultural (H2-B) jobs.

140. U.S.CITIZENSHIP AND IMMIGRATION SERVICES, *H-2A Temporary Agricultural Workers*, [http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3c5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3c5b9ac89243c6a7543f6d1a/?vgnnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD) (last visited 17 March 2013); see also *H-2B Temporary Non-Agricultural Workers* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3c5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD> (last visited 17 March 2013).

141. *Id.* at *Period of Stay*.

142. *Id.* at *Family of H-2A/H-2B Workers*.

143. DEPARTMENT OF IMMIGRATION AND CITIZENSHIP (Austl.), ADMINISTERED ITEM—PACIFIC SEASONAL WORKER PILOT SCHEME, ANNUAL REPORT 2009-2010.

144. CHERYL REED ET AL., INTERIM EVALUATION OF THE PACIFIC SEASONAL WORKER PILOT SCHEME 2 (2010).

145. *Id.*

duration of seven months in any given 12-month period.¹⁴⁶ On July 1, 2012, right after the termination of PSWPS, the Seasonal Worker Program (SWP) was introduced, building on the earlier program by offering access to workers from East Timor, and eight Pacific island nations, namely, Kiribati, Papua New Guinea, Tonga, Vanuatu, Samoa, Solomon Islands, Tuvalu, and Nauru (the latter four countries, together with East Timor, were excluded under the PSWPS).¹⁴⁷ The SWP extends beyond the horticultural (fruits and vegetables) and viticultural coverage of PSWPS, and for the first time includes 1) the “broader agriculture industry,” particularly cotton and cane operations, 2) the fishing industry, particularly aquaculture, and 3) “accommodation providers” in the tourism industry.¹⁴⁸ A total of 1,550 visas will be made available during the “small scale trial” which will run for three years or up to June 30, 2015.¹⁴⁹

The PAC’s concessionary benefits, and to a lesser extent the benefits derived from RSE and SWP, provide promise for a more integrated humanitarian response towards Pacific peoples, particularly for the low-lying Marshall Islands, Tuvalu, and Kiribati. With climate change and sea level rise, there is the possibility that entire populations of atoll states will need to be relocated in the coming years. Should relocation of entire island countries become necessary, it is essential to ensure the survival of social and cultural heritage, in addition to the survival of human beings. Under the best scenario and through schemes such as the PAC, which provides for voluntary and pro-active migration, those who migrate early can provide social and cultural foundations for later migrants through chain migration. Such voluntary schemes would diminish the potential negative impacts on culture, which would result from massive displacements following from a singular disaster. Workers under the RSE and SWS become pioneers of sorts for their communities, gaining experience in Pacific metropolitan countries, and facilitating a more gradual and natural cultural transition.

IV. PROSPECTS FOR PACIFIC ENVIRONMENTAL MIGRANTS

As noted earlier, the Pacific is among those regions where the adverse effects of environmental change are felt the most.

146. *Id.* at 2.

147. DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKERS RELATIONS (Austl.), THE SEASONAL WORKER PROGRAM, http://www.deewr.gov.au/Employment/Programs/seasonalworker/Documents/SeasonalWorkerProgram_FS.pdf (2012) (last visited 17 March 2013).

148. *Id.*

149. *Id.*

The Secretariat of the Pacific Community estimated that by mid-century, environmental migrants could be between 665,000 and 1,750,000 people, at which point the total population of the Pacific will likely exceed 18 million.¹⁵⁰ Though only an estimate relying on conditions some 40 years from the present day, the Pacific Community prediction is nonetheless daunting. Other vulnerabilities in the Pacific include coral bleaching, soil erosion, and increased salination of water reserves.¹⁵¹ For example, if Tuvalu and Kiribati's fresh water lens reserves become contaminated with seawater, the islands will become uninhabitable.¹⁵² In Kiribati, where groundwater is the main source of drinking water for most of the country's islands, residents have already been "forced to migrate temporarily to areas with higher rainfall."¹⁵³ If climate change predictions eventuate, I-Kiribati and Tuvaluans would have no choice but to relocate.

While the extent of the impact of environmental change is still subject to debate, plans for proactive migration of human populations are emerging, particularly among small island states. In 2005, President Anote Tong of Kiribati spoke before the 60th Session of the United Nations General Assembly on the need for atoll countries to consider relocating their populations.¹⁵⁴ In 2008, President Nasheed of the Maldives announced his country's "Safer Islands Plan," outlining a possible relocation of the Maldives population to India or Iceland.¹⁵⁵

As discussed above, some Pacific countries, by virtue of past colonial ties, have access to metropolitan Pacific Rim countries, which will have positive implications for environmental migrants. Micronesia, Palau, and the Marshall Islands have entry privileges into the United States under the COFA agreements, and the people of New Zealand's former colonies (the Cook Islands and Niue) are citizens of New Zealand under the Citizenship Act of 1977. Other countries, however, do not have the same privileges. Kiribati, Tuvalu and Nauru, for instance, do not have the privilege of open migration to the U.S., Canada, Australia, or New Zealand. Unfortunately, it is these island states which are

150. John Campbell, *Climate Change and Population Movement in Pacific Island Countries*, in CLIMATE CHANGE AND MIGRATION SOUTH PACIFIC PERSPECTIVES 29, 38 (Bruce Burson ed., 2010).

151. John Conell, *Environmental Change, Economic Development and Emigration in Tuvalu*, 22 PACIFIC STUDIES 1, 3 (1999).

152. Peter Roy & John Connell, *Climatic Change and the Future of Atoll States*, 7 J. COASTAL RES. 1057, 1069 (1991).

153. *Id.* at 1065.

154. MARYANNE LOUGHRY & JANE MCADAM, *Kiribati –Relocation and Adaptation*, 31 FORCED MIGRATION REVIEW 51, (2008).

155. KOKO WARNER, et al., *In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement* 19 (2009).

equally, if not more vulnerable to changes from the physical environment. Kiribati and Tuvalu, together with other low-lying island states, primarily face challenges related to sea level rise,¹⁵⁶ while Nauru's environmental degradation results from the long-term extraction of its phosphate reserves which has rendered most of the interior part of the island barren and unfit for habitation and agriculture.¹⁵⁷

For those most affected by climate change, the PAC and the seasonal migration schemes of New Zealand and Australia could be utilized as relocation test cases, to assess the feasibility of incorporating environmental migrants into already-existing economic migration regimes. This incorporation may be possible because of labor shortages in Pacific Rim countries' farming and manufacturing sectors, which would be remedied in part by increased migration from communities vulnerable to environmental change.¹⁵⁸ A host country's assistance to environmental migrants may include facilitated visa grants, language and job skills training, work and housing assistance, and facilitation of networking with other migrants.¹⁵⁹

Although New Zealand has disassociated the PAC and RSE schemes from climate change and environmental migration, both programs still continue to attract international attention as potential solutions to regional problems.¹⁶⁰ While the PAC and RSE are explicitly couched in economic terms, their undercurrents unmistakably indicate consideration of environmental migration, or at least could be invoked to mitigate potential mass

156. See PHILIPPE BONCOUR & BRUCE BURSON, *Climate Change and Migration: South Pacific Perspectives*, INSTITUTE OF POLICY STUDIES 11, (2010): "[G]iven the low elevation of many South Pacific states and their exposure to changing ocean weather patterns, it is likely this region will feel the effects of climate change before many others. . . [.] low lying atoll states such as Kiribati and Tuvalu in the region are projected, at a certain threshold level of climate change, to face the risk of being completely overcome by the sea or otherwise rendered uninhabitable."

157. TABUCANON & OPESKIN, *supra* note 23.

158. MINISTERS MEDIA CENTRE, *Pacific and East Timor Workers Helping Australian Farmers and Tourism Industry*, Joint Media Release, 18 December 2011.

159. See generally ROGER ZETTER ET AL., *SURVEY ON POLICY AND PRACTICE RELATED TO REFUGEE INTEGRATION* (Oxford Brooks University 2002).

160. See FRANCOIS GEMENNE & SHAWN SHEN, *Tuvalu and New Zealand Case Study Report*, Environmental Change and Forced Migration Scenarios (EACH-FOR) project, http://www.each-for.eu/documents/CSR_Tuvalu_090215.pdf (last visited 4 February 2013): "New Zealand doesn't have migration plans with Tuvalu other than the schemes that already exist. Even though some Ministers and high-level officials have repeatedly claimed they would welcome Tuvuluans in New Zealand in case of a major disaster, no such plan exists: 'Should the worst happen, I guess we'd send a boat to get them.'

It's clear that we won't let them down, but we don't plan any relocation scheme, we have migration agreements already that Tuvuluans can use if they want to, but Tuvalu is not drowning yet, so I think it wouldn't be appropriate to have this kind of policy for now (Don Wil, NZ Aid)."

relocation scenarios. This is because New Zealand has no motivation other than humanitarian considerations to include Kiribati and Tuvalu, which are two of the most vulnerable states to climate change impacts.¹⁶¹ Of the five Pacific countries eligible for the RSE, Kiribati, Samoa, Tonga, Tuvalu, and Vanuatu, all except Kiribati and Tuvalu are given up to seven months in any eleven-month period. Nationals from Kiribati and Tuvalu have up to nine months in an eleven-month period.¹⁶² No official reason exists as to why Tuvalu and Kiribati were granted an additional 2 months' work under the scheme. From a practical viewpoint, however, the extension has significant financial benefits for Tuvaluan and I-Kiribati workers and their families and highlights New Zealand's sensitivity to the hardships of particular Pacific populations.

Indeed, New Zealand's and Australia's experiences with preferential migration schemes for Pacific peoples serve as prototype schemes for environmental migration in other Pacific Rim countries. While there is always room for improvement, Australia's SWP and New Zealand's PAC and RSE programs provide models to other potential destination countries of how to address economic as well as environmental vulnerabilities of small Pacific island countries.¹⁶³ The choice of Kiribati and Tuvalu as sending states in particular could have an important impact on environmental migration. If more permanent migration opportunities are granted for these countries, the initial "seasonal" or "circular" phase could become a "bridge" for family members to follow in the (all too likely) event that either Kiribati or Tuvalu becomes uninhabitable.

As explained above, TPS and TSR only cater to a select group of affected migrants — those already in the U.S. or Canada at the time of a disaster — and not those actually fleeing from a disaster's aftermath. Because of these limitations, there is a need for legislation specifically targeting migrants fleeing from

161. *Id.* Note, for instance, the above quote by a New Zealand official.

162. IMMIGRATION NEW ZEALAND, GUIDE TO WORKING FOR A RECOGNIZED SEASONAL EMPLOYER (INZ1144), (2012): "[T]he . . . RSE limited visa can not exceed seven months in an 11-month period (unless you are a citizen and resident of Tuvalu or Kiribati, in which case you are eligible for a maximum of nine months in an 11-month period). You must leave New Zealand before your RSE limited visa expires."

163. JOHN CONNELL & RICHARD BROWN, *Remittances in the Pacific: An Overview*, PACIFIC STUDIES SERIES 17 (2005): "[M]igration is expected to improve both the living standards of those who remain at home and the life styles and incomes of the migrants. . . . In Tuvalu, two thirds of respondents claimed that food was the most important use and about half of all remittance income was spent on it with additional expenditures for electricity for the refrigerators that were consequently necessary. Much the same is true in Kiribati where almost all remittances are used for basic needs, including food and clothes."

extreme environmental events, such as natural disasters. Ministerial discretion offers some promise since admission is premised on humanitarian or public interest grounds. However, the better model of humanitarian discretion is that of Canada where the discretion may be granted onshore and at first instance. Conversely, the Australian “last tier” exercise of ministerial discretion has the tendency to negate its original humanitarian and equitable objectives for the following reasons. First, environmental migrants, particularly those affected by extreme environmental change, require emergency responses such as food, shelter, and proper care. Their need to seek out an alternative home mirrors the situation of refugees seeking asylum and demands an expeditious process, not the long and drawn out procedure epitomized in the *Elmi* case. Second, environmental migrants often come from economically, or otherwise, devastated countries. As such, these countries’ capacity to respond to environmental destruction is limited, and, in many cases, these countries are not in a position to help and assist their own citizens. Article 3 (2) of the UN Framework Convention on Climate Change recognizes the “specific needs and special circumstances” of those “that are particularly vulnerable to the adverse effects of climate change.”¹⁶⁴ Climate change-induced population displacements would be among those cases of specific needs under special circumstances requiring specific solutions. Third, under the emerging, albeit controversial, international law principle of “common but differentiated responsibilities” certain states are given greater responsibilities in responding to environmentally-induced problems in view of their contribution to environmental deterioration, and their level of technological and financial advancement.¹⁶⁵ The top four greenhouse gas emitting countries on a tonnes per capita basis are the developed countries of Australia (at 30.9), the United States (25.0), Canada (23.1) and New Zealand (23.0).¹⁶⁶ It may be argued that an expanded interpretation of the “common but differentiated responsibilities” principle

164. U. N. Framework Convention on Climate Change (UNFCCC), New York, U.S., (1992).

165. Rio Declaration on Environment and Development, U. N. Conference on Environment and Development, UN Doc. A/CONF.151/26 (vol. 1) / 31 ILM 874 (1992). Principle 7 of the Rio Declaration reads: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

166. International Energy Agency, *CO2 Emissions from Fuel Combustion*, cited in RODNEY TIFFEN and ROSS GITTINS, *How Australia Compares*, Cambridge University Press, 2nd ed., 154 (2009).

mandates these countries to undertake a greater role in finding a solution to the problem of environmental displacements, including a possible taking in of a greater share of cross border environmentally-displaced populations. What is considered a fair number remains to be determined and negotiated.

Admittedly, “[a]t the international level, no normative framework exists yet that would address cross-border displacement.”¹⁶⁷ Still, Kalin notes that based on what he calls “compassionate and humanitarian grounds,” the environmentally displaced should not be returned back to their home countries:

Even when return would be lawful and reasonable, people should not, on the basis of compassionate and humanitarian grounds, be expected to go back if the country of origin does not provide any assistance or protection, or if what is provided falls far below international standards of what would be considered adequate. The same is true where authorities do not provide any kind of durable solutions to the displaced that are in line with international standards and would allow them to resume normal lives especially where areas of land have become (or have been declared) uninhabitable and people have been unable to find an acceptable alternative themselves.¹⁶⁸

While the types of harm to which the usual non-refoulement principle attaches does not cover environmental migrants,¹⁶⁹ it can be argued that populations displaced from their homes due to climate-change-related events would be exposed to equally life-threatening situations, as well as violations of fundamental human rights, should they be returned to their places of origin.¹⁷⁰ For environmental migrants caught up in extreme environmental events, human needs are real and urgent, and the need for protection from other states is definite. If ministerial discretion provisions are placed within a rights-based legal structure, the duty to protect environmental migrants would become obligatory and binding, better reflecting the urgency of environmental migrants’

167. WALTER KALIN, *Climate Changed Induced Displacement, A Challenge for International Law*, Distinguished Lecture Series 3, Course Material of the CRG Annual Winter Course on Forced Migration, March 2011.

168. *Id.* at 28.

169. Under international law, the principle of non-refoulement attaches to the following harms: (1) threat to life or freedom on account of a person’s race, religion, nationality, membership of a particular social group or political opinion (Convention Relating to the Status of Refugees art. 33(1), April 22, 1954, 189 U.N.T.S. 150); (2) exposure to torture (Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), December 10, 1984, U.N. Doc. A/39/51); (3) arbitrary deprivation of life, or exposure to cruel, inhuman, or degrading treatment or punishment (International Covenant on Civil and Political Rights art. 6 & 7; March 23, 1976, 999 U.N.T.S. 171); (4) threat to life of a child (Convention on the Rights of the Child, art. 6, Sept. 2, 1990, 44 U.N. GAOR Supp. (No. 49).

170. KALIN *supra* note 167 at 27.

positions and corresponding to the humanitarian objectives of many states.

The most pragmatic approach in dealing with environmental migration in an *ad hoc* manner is for Pacific states to amend their national laws and policies.¹⁷¹ Unlike the currently non-existent international legal framework for environmental migrants, domestic laws on environmental migration already exist, albeit sporadically, premised on the host state's discretion. Yet, these laws offer promise for immigrants meeting certain "threshold criteria."¹⁷² This approach does not preclude the establishment of an international legal and normative regime, nor does it preclude a coordinated international or regional response to environmental migration.

In 2007, Australian Green Party Senator Kerry Nettle introduced a bill creating a new visa class for those fleeing a "disaster that results from both incremental and rapid ecological climate change and disruption."¹⁷³ The term includes "sea-level rise, coastal erosion, desertification, collapsing ecosystems, fresh water contamination, more frequent occurrence of extreme weather events such as cyclones, tornadoes, flooding and drought."¹⁷⁴ The Green Party's initiative consisted of three proposals: (1) to amend the Migration Act to incorporate a Climate Change Visa Class; (2) to establish an environmental migration intake per year of up to 300 climate change refugees from Tuvalu, 300 from Kiribati, and 300 from elsewhere in the Pacific and; (3) to propose to the U.N. the adoption of a definition and framework on climate change and environmental refugees.¹⁷⁵ The third point is similar to the 2006 proposal of the Australian Labour Party in its "policy discussion paper" on climate-change.¹⁷⁶ This proposal called for a "coalition" among Pacific-Rim countries to accept climate-change refugees, and proposed that the United Nations ensure "appropriate recognition of climate change refugees in existing conventions, or through the establishment of a new convention on climate change refugees."¹⁷⁷ Although the Green Party bill was defeated, there is nothing to keep it from being reintroduced in the future. The bill also

171. JANE McADAM & BEN SAUL, *supra*, note 16.

172. ILONA MILLAR, *supra* note 6.

173. Migration (Climate Refugees) Amendment Bill 2007(Cth) sched. 1(1) (Austl.).

174. *Id.* at 1 Subsection 5(1).

175. SUSAN MARTIN, *supra* note 49.

176. BOB SERCOMBE & ANTHONY ALBANESE, OUR DROWNING NEIGHBOURS: LABOUR'S POLICY DISCUSSION PAPER ON CLIMATE CHANGE IN THE PACIFIC ch. 2, element 5 (2006).

177. *Id.*

serves as a model for potential legislation in other Pacific-rim countries.

V. CONCLUSION

Currently, the most pragmatic approach in dealing with environmental migration is through domestic legislation and policies. Unlike multilateral treaties, domestic laws on environmental migrants already exist. Premised on the host state's discretion, these laws offer promise to immigrants meeting a certain "threshold criteria rather than any legal basis for protection."¹⁷⁸

Since Pacific peoples require practical and principled help, the "complex interaction" between people and the environment needs to be better analyzed¹⁷⁹ and the relationship between migration access and the nature of environmental change must be better understood. While more research needs to be done in this area, one thing is certain: the scenario of mass displacements may be pre-empted by way of gradual, phased, and proactive national schemes in migration.

Migration has long been an important feature of the Pacific region. For hundreds of years, Pacific Islanders used outrigger sailing canoes to "occupy the remotest corners" of the world's largest ocean.¹⁸⁰ Pacific peoples once roamed freely from island to island, particularly in times of resource scarcity or environmental threats.¹⁸¹ Today their movement is restricted by legal regulations. While Pacific peoples' migration options among the four Pacific Rim countries discussed are not closed, they remain *ad hoc* and temporary. Policies in these countries must be reformed to enhance migration opportunities. The four Pacific Rim states all have generally liberal and open migration policies; admitting environmental migrants under equitable conditions would be in line with their fundamental values and interests.

Environmental change is a global challenge that cannot be solved through piecemeal and exclusionary approaches. Nation states, through domestic policies and legislation, play a crucial role in helping alleviate the predicaments of people beyond their borders. This process requires continuous rethinking and old paradigms must give way to more responsive and inclusionary

178. ILONA MILLAR, *supra* note 6.

179. Richard Towle, *Foreword* to CLIMATE CHANGE AND MIGRATION SOUTH PACIFIC PERSPECTIVES, at v (Bruce Burson ed., 2010).

180. ALAN THORNE & ROBERT RAYMOND, MAN ON THE RIM: THE PEOPLING OF THE PACIFIC (1989).

181. See STEVEN ROGER FISCHER, A HISTORY OF THE PACIFIC ISLANDS 33 (Jeremy Black ed., 2002).

approaches. In the absence of binding international legal frameworks addressing cross-border environmental migration, windows of opportunity for environmental migrants exist in domestic legislation, although ad hoc and limited in application. As states continue to have near-absolute discretion over which persons or groups are allowed entry into their territories, it remains to be seen whether individual states, or the international community, can provide a humane framework as climate change makes its impact felt in the Pacific.