

**New Zealand's Climate Refugee Visa, a
Framework for Positive Change:**
Creating a regional framework of protections for
climate migrants from the Pacific

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Introduction

In October 2017 the Labour led coalition government announced their plan to create a humanitarian visa for climate change “refugees” (the visa). International news agencies heralded the proposal as an act of “genuine political leadership”.¹ The introduction of a targeted visa to address climate change displacement was both innovative and a bold legal step in an area notable for its lack of legislation.² New Zealand appeared as a role model for the rest of the world in an arena characterised by international gridlock.³ However, the proposed visa floundered soon after it was announced. In May 2018 the government redefined their Pacific strategy,⁴ deferring implementation of a targeted visa for those affected by climate change until after 2024.⁵

The visa was an attempt to address one of the most devastating effects of climate change: that of forced migration and displacement. This problem was identified as early as 1985 by Essam El Hinnawi in a briefing paper on “environmental refugees”, and the scale of the problem is forecast to increase.⁶ The World Bank predicts 140 million people will be displaced internally by 2050.⁷ It is predicted between 25 million and 1 billion people will be forced to migrate because of the effects of climate change.⁸ The number of people displaced by natural disasters increased by 60% from 1970-2014.⁹ It is anticipated that such displacement will escalate further due to rising sea levels and extreme weather events attributable to climate change.¹⁰

¹ Alex Randell “New Zealand Proposes Humanitarian Visa for ‘Climate Refugees’” (30 November 2017) *The Diplomat* <www.thediplomat.com/2017/11/new-zealand-proposes-humanitarian-visa-for-climate-refugees/>.

² “NZ could win global kudos with climate change refugee visa but workable policy tricky, says expert” (8 November 2017) 1 *News Now* <www.tvnz.co.nz/one-news/new-zealand/nz-could-win-global-kudos-climate-change-refugee-visa-but-workable-policy-tricky-says-expert>.

³ Rick Noack “A proposal in New Zealand could trigger the era of ‘climate change refugees’” *The Washington Post* (online ed, Washington, 31 October 2017).

⁴ Ministry of Foreign Affairs and Trade *Strategic Intentions Report 2018-2022* (April 2018) at 4; and Rt Hon Winston Peters Minister of Foreign Affairs and Trade “Shifting the dial, Eyes Wide Open Pacific Reset” (speech to the Lowy Institute, Martin Place Sydney, 1 March 2018); and The Beehive “Climate Change Assistance for the Pacific” (press release, 18 May 2018).

⁵ Cabinet Paper “Proposed immigration work program to improve Pacific migration policies” (15 May 2018) CAB 2897 at 9.

⁶ Sirresha Chirala “Acclimating to Climate change Filing the International Policy Void for Environmentally Displaced People” (2013) 35 *Houst. J. Int. Law* 359 at 373.

⁷ Kumari Rigaud and others *Groundswell: Preparing for Internal Climate Migration* (World Bank, Report, March 2016) at 107.

⁸ Oli Brown *Migration and Climate Change* (International Organisation for Migration, Report, 2008) at 11.

⁹ Internal Displacement Monitoring Centre *Global estimates 2015: people displaced by disasters* (Internal Displacement Monitoring Centre, Report, July 2015) at 1.

¹⁰ Justin Ginnett, *Disaster-related displacement risk: measuring the risk and addressing its drivers* (Internal Displacement Monitoring Centre, Report, March 2015) at 27.

Of particular importance to New Zealand is the potential impact of rising sea levels on our Pacific neighbours. New Zealand Prime Minister Jacinda Ardern has described rising sea levels as the “single biggest threat to our region”.¹¹ Those displaced by the effects of climate change will face additional hurdles if they must cross international borders to reach safety. For low lying Pacific Island countries such as Kiribati and Tuvalu, external migration will be the only option if their land is flooded. An estimate from 2011 suggested 1.7 million people will be displaced from the Pacific Islands by 2050.¹² Crucially, neither international law or domestic law currently provides formal legal protection for people who are displaced or forced to migrate because of the effects of climate change.

There is a plethora of literature suggesting methods to address the legal protection gap including a new independent convention to protect the rights of those displaced by climate change, or a new protocol on recognition, protection and resettlement under the existing United Nations (UN) Framework Convention on Climate Change.¹³ To date, none have been adopted by the international community. A recent report of the Secretary-General called for “regional cooperation frameworks to prepare countries to receive and protect people displaced across borders owing to disasters and climate change who do not have the protection of refugee status”.¹⁴

New Zealand's proposed visa scheme was a unique regional response. This dissertation will evaluate the visa in this context and provide recommendations regarding New Zealand's future response to the challenges posed by climate migration. This dissertation does not have the scope to discuss the practical implementation of a humanitarian visa scheme but will focus on the legal viability of one and how it would fit within our current protection framework. Importantly, this dissertation will stress the need to provide options specifically for Pacific Islanders, so they can choose how best to manage their future.

¹¹ Jacinda Ardern, Prime Minister of New Zealand “New Zealand National Statement to United Nations General Assembly” (speech to UN Climate Action Summit 2019, New York, 23 September 2019).

¹² Elizabeth Ferris, Michael M Cernea and Daniel Petz *On the Front Line of Climate Change and Displacement: Learning from and with Pacific Island Countries* (The Brookings Institution, London School of Economics, Report, September 2011) at 19.

¹³ Frank Biermann and Ingrid Boas “Climate Change and Human Migration: Towards a Global Governance System to Protect Climate Refugees” in Jurgen Scheffran and others (ed) *Climate Change Human Security and Violent Conflict Challenges for Societal Stability* (Springer, Amsterdam, 2012) 289 at 295.

¹⁴ Ban Ki-Moon “One Humanity: Shared Responsibility Report of the Secretary-General for the World Humanitarian Summit” (2016) 28 IJRL 336 at 342.

Chapter I will address the legal context in which the visa was suggested. Chapter II will outline the current options for migration from the Pacific and the inception of the visa. Chapter III will discuss the visa proposal, its criteria and the challenges which led to its abandonment. Chapter IV will consider protections adopted by other jurisdictions and New Zealand's international obligations. Finally, Chapter V will evaluate whether a climate related visa would be a legally viable option for New Zealand. This final chapter will propose amendments to the visa scheme and outline a regional framework of protection that New Zealand should adopt to respond to the challenge of climate induced migration.

Chapter I A Lacuna in the Law: the Existing Legal Framework and its Inadequacy in the Face of Climate Migration

Those forced to migrate due to the effects of climate change are often described as climate refugees. However, those who fall within the Refugee Convention's definition of 'refugee' gain protections unavailable to climate migrants. This chapter will explain the existing legal framework and why it is inadequate to protect those forced to migrate due to the effects of climate change.

A The Refugee Convention

The UN Refugee Convention (the Convention)¹⁵ 1951 defines the term "refugee" as someone who:¹⁶

...owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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.

146 signatory states have a legal obligation under international law to provide protection for those who fall within this definition.¹⁷ Some have suggested this definition could be read widely to include those displaced by climate change,¹⁸ or that the correct interpretation of the Convention does not require persecution but merely an inability to return to the country of origin.¹⁹ However, the dominant view is that this definition does not easily cover the situation faced by climate migrants.²⁰ This is because the definition requires the

¹⁵ Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954), art 1(2).

¹⁶At art 1.

¹⁷At art 1(2).

¹⁸ Jake Robertson "Climate Change Refugees: the extent New Zealand Law Protects Migrants Displaced by Climate Change" (LLB (Hons) Dissertation, University of Otago 2016,) at 40.

¹⁹ Heather Alexander and Jonathan Simon "'Unable to return' in the 1951 Refugee Convention; Stateless Refugees and Climate Change" (2014) 26 Fla. J. Int'l L 531 at 574.

²⁰ Joyeeta Gupta "The Least Developed Countries and Climate Change Law" in Cinnamon Carlane, Kevin Gray and Richard Tarasofsky (ed) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, Oxford, 2016) 741 at 754; and Alice Edwards "Climate Change and International Refugee law" in Rosemary Refuse and Shirely Scott (ed) *International law in the Era of Climate Change* (Elgar Publishing, Cheltenham, 2012) 58 at 66.

demonstration of both persecution, and that the persecution is on the basis of a specific characteristic.²¹

1 Climate Change as Persecution

The impacts of climate change are unlikely to fit the definition of persecution for two reasons. Firstly, the fear of being persecuted is a key requirement in the definition of refugee within the Convention. Jurisprudence from the European Parliament in a Council Directive has noted that, to amount to persecution, acts must be “sufficiently serious by...nature or repetition as to constitute a severe violation of basic human rights...”,²² or be an accumulation of acts “including violations of human rights” which have the same effect.²³ To assess whether an act amounts to persecution one must consider the nature of the right that is compromised, the seriousness and nature of the restriction, and the probability of the restriction occurring in the specific case.²⁴ Claims based on climate change are too general to fit this framework. The effects of climate change do not meet the definition of persecution as it is understood in international law.²⁵

Secondly, persecution is usually perpetrated by a tangible oppressor such as a government or rebel group. Where the environment is the problem there is no discrete oppressor.²⁶ In Article Six of the European Parliament Council Directive, the definition of “persecutors” includes “non-state actors, if...[it is] demonstrated that the state or those controlling the state...are unable or unwilling to provide protection against persecution.”²⁷ Arguably nations which emit greenhouse gases could be considered co-perpetrators of this persecution. Additionally, some states may be unable to adequately protect their citizens from the effects of climate change caused by emitting nations. This would fit within the Convention’s definition but would create an inconsistency whereby those persecuted

²¹ Persecution due to race, religion, nationality, membership of a particular social group or political opinion, see Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954), art 1(2).

²² Directive 2011/95/EU on Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9, art 9(1)(a).

²³ At art 9(1)(b).

²⁴ Jane McAdam “Climate Change and Displacement of Persons” in Cinnamon Carlane, Kevin Gray and Richard Tarasofsky (ed) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, Oxford, 2016) 520 at 522.

²⁵ At 522.

²⁶ At 523.

²⁷ Directive 2011/95/EU, above n 22, art 9(1)(a).

(climate migrants) would flee to their persecutors (developed nations identified as those responsible for greenhouse gas emissions) for safe haven.²⁸

2 *Climate Change and the “Specific Characteristics” of Persecution*

Even if the effects of climate change were classified as persecution, this would not place climate migrants within the ambit of the Convention because the persecution is not persecution on the basis of one of the specified characteristics.²⁹ Those forced to migrate in this context are not from one homogenous group. To fit within the definition of persecution they would have to be linked by something other than the effects of climate change.³⁰ This requirement has been upheld by several courts including the Australian High Court in *Applicant A v Minister for Immigration and Ethnic Affairs*. McHugh J held if “the persecutory conduct” was necessary to define the parameters of the group it could not be considered a particular social group under the Convention.³¹ It is thus unlikely climate migrants fit within the definition of refugee under the Convention.

However, climate migrants may gain refugee protection under certain circumstances. If governments intentionally withhold aid after a natural disaster, or fail to provide assistance within their power to alleviate the impacts of climate change, this could amount to persecution within the Convention definition.³² In this scenario the element determining refugee status is not the effects of climate change, but the discriminatory response or lack of support from the government in the aftermath.³³

B New Zealand's Domestic Legislation

New Zealand is a signatory to the Convention,³⁴ and incorporates the provisions of the Convention into its domestic law via the Immigration Act 2009 (the Act).³⁵ Migrants can seek asylum under s 137(1) of the Act. Refugee Protection Officers consider claims:

²⁸ McAdam, above n 24, at 523.

²⁹ The persecution needs to be because of race, religion, nationality, membership of a particular social group or political opinion, Convention Relating to the Status of Refugees, above n 21, at art 1(2).

³⁰ McAdam, above n 24, at 523.

³¹ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 130.

³² Edwards, above n 20, at 66.

³³ At 66.

³⁴ William Worster “The Evolving Definition of the Refugee in Contemporary International Law” (2012) 30 *Berkely J. Int'l L.* 94 at 160.

³⁵ Dough Tennent, Katy Armstrong and Peter Moses *Immigration and Refugee Law* (3rd ed, Lexis Nexis, Wellington, 2017) at 336.

- (1) firstly, based on entitlement to refugee status;
- (2) secondly, based on entitlement to protected persons status under the torture category; and
- (3) thirdly, under the entitlement to protected person status under the arbitrary deprivation of life and cruel treatment category.³⁶

If an asylum seeker is granted refugee or protected person status, they gain powerful protection against deportation because the non-refoulement principle applies. The non-refoulement principle enshrined in the Convention prevents refugees from being “expel[led] or return[ed],”³⁷ to a country where they will face persecution.³⁸ The non-refoulement principle is also included in the Convention against Torture,³⁹ and applies where an asylum seeker is likely to face arbitrary deprivation of life or cruel treatment if returned to their home nation as outlined in the International Convention on Civil and Political Rights (ICCPR).⁴⁰

However, claims for protection on the grounds of climate induced displacement under s 129 (as a refugee), s 130 (as a protected person under the Convention against Torture) and s 131 (as a protected person under the ICCPR) of the Immigration Act 2009 have all been unsuccessful in New Zealand courts. The Courts have ruled the Convention does not provide protection to those displaced by the effects of climate change in the current context. As such the Courts have rejected that climate change impacts amount to either torture, arbitrary deprivation of life or cruel treatment.

C New Zealand Case Law

*1 AF (Kiribati)*⁴¹

This case involved Mr and Mrs Teitiota both of whom travelled to New Zealand on work visas from Kiribati. They had three children in New Zealand, all of whom were ineligible for New Zealand citizenship. When their visas lapsed, the Teitiotas applied to stay in New Zealand, claiming either refugee or protected person status because of the impacts of climate change in Kiribati.

³⁶ Immigration Act 2009 s 137(1).

³⁷ Convention Relating to the Status of Refugees, above n 21 at 33.

³⁸ Immigration Act 2009 s 164; and Convention Relating to the Status of Refugees at 33.

³⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 3.

⁴⁰ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 6 and 7; and Cordula Droegge “Transfers of detainees: legal framework, *non refoulement* and contemporary challenges” (2008) 90 IRRC 669 at 672.

⁴¹ *AF (Kiribati)* [2013] NZIPT 800413.

The Immigration Protection Tribunal (IPT) held the Teitiotas were not being persecuted under the Convention's definition and so could not be considered refugees.⁴² The IPT reasoned that persecution in both New Zealand and international law involved either the failure of the state to control agents committing human rights violations, or the failure of the state to take steps to reduce the risk of harm perpetrated by non-state actors.⁴³ This required some element of human agency.⁴⁴ The Teitiotas did not fall within the definition of refugee because:

- (1) the effects of climate change were not caused by the failure of the Kiribatian government to control agents committing human rights violations; and
- (2) Kiribati was taking steps as far as possible to protect its citizens from the harm created by rising sea levels.⁴⁵ (By 2011 Kiribati had built over 500m of sea walls to protect from seawater erosion and planted 37,000 mangrove trees to help reduce coastal erosion.)⁴⁶

The IPT also agreed that the Teitiotas would not experience "torture" by returning to Kiribati, or be subject to arbitrary deprivation of life or cruel treatment.⁴⁷ Therefore they could not gain protection under the protected persons categories.⁴⁸ Hypothetically, if the situation in Kiribati worsens, such that return would mean almost certain death, it is likely that climate migrants would gain protected person status under s 137(1)(c) of the Immigration Act 2009. This would be an exceptionally high standard.

In the High Court Justice Priestley praised the novel nature of the Teitiota's argument,⁴⁹ but refused to grant leave for them to appeal the IPT's decision on the grounds that there had been an error of law.⁵⁰ Justice Priestley also felt it was beyond the court's scope to alter the ambit of the Refugee Convention to entitle "medium term economic deprivation or the immediate consequences of natural disasters...to protection."⁵¹ His Honour outlined a plethora of international cases where claims for refugee status on the basis of the impacts

⁴² At [76].

⁴³ *AF (Kiribati)*, above n 40, at [54].

⁴⁴ At [55].

⁴⁵ At [76].

⁴⁶ The World Bank "Kiribati Adaptation Programme Phase 2" (4 April 2014) <www.worldbank.org/en/results/2012/04/16/kiribati-adaptation-program-phase-2>

⁴⁷ *AF (Kiribati)*, above n 40, at [97].

⁴⁸ Immigration Act 2009, s 137(1)(b) or s 137(c).

⁴⁹ *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 at [51].

⁵⁰ At [63].

⁵¹ At [51].

of climate change had been denied because the threat did not amount to persecution.⁵² The Supreme Court upheld the decision of the lower courts and affirmed that while environmental degradation may create pathways to protection under the Convention or protected person category in the future, it does not in the present circumstances.⁵³

2 *AC (Tuvalu)*⁵⁴

This case involved similar facts to those of *AF (Kiribati)* in that the case concerned a family seeking refugee or protected person status because of the effects of climate change in their home nation. The IPT reasoned the negative impacts of climate change were not a result of persecution based on a Refugee Convention ground.⁵⁵

The IPT also emphasised protection from arbitrary deprivation of life or cruel treatment under s 131 requires a prospective assessment of risk: it requires the harm to be ‘in danger’ of occurring.⁵⁶ The court stated this is similar to the “real chance” test per the Refugee Convention.⁵⁷ The court applied this test and considered the nature of the future risk to determine whether the “harm” of rising sea levels could reach the necessary threshold.⁵⁸

As the government of Tuvalu are actively working to ensure the safety of their nation the arbitrary deprivation of life element was not satisfied.⁵⁹ The IPT held if a state cannot give humanitarian assistance during a natural disaster, arbitrary withholding of foreign assistance can be regarded as cruel “treatment” under s 131. That was not the case in *AC Tuvalu*.⁶⁰ None of the grounds under s 131 were fulfilled and the family returned to Tuvalu. The IPT also noted that s 131 provides a narrow band of protection.⁶¹ The Immigration Act preserves a wider scope for humanitarian considerations in s 207.⁶²

3 *AD (Tuvalu)*⁶³

This case involved a family appealing to stay based on the adverse effects of climate change under the general humanitarian provision in s 207.

⁵²At [45], the claims were from the Pacific Island nations of Kiribati, Fiji and Tuvalu.

⁵³*Teitiota v Chief Executive of Ministry of Business, Innovation and Employment*. [2015] NZSC 107 at [13].

⁵⁴*AC (Tuvalu)* [2014] NZIPT 800517-520.

⁵⁵At [45].

⁵⁶At [57].

⁵⁷At [57].

⁵⁸At [58].

⁵⁹At [102].

⁶⁰At [97].

⁶¹At [61].

⁶²At [61].

⁶³*AD (Tuvalu)* [2014] NZIPT 501370-371.

Section 207 provides that an appeal against deportation on humanitarian grounds must be allowed where a two-stage test is met. Firstly, there must be exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand.⁶⁴ Secondly, it cannot be contrary to the public interest (in all the circumstances) to allow the appellant to remain in New Zealand.⁶⁵ Climate change could be a relevant factor because it affects fundamental living standards, undermining one's ability to enjoy important economic and social rights.⁶⁶ In *AD (Tuvalu)* the appeal was granted based on the family's circumstances rather than on the climate arguments advanced.⁶⁷ It remains unclear if the climate change aspects of this case would sway future appeals absent the specific family circumstances.

This case law illustrates the New Zealand court's reluctance to extend the Convention's definition. This is likely because of the judicial view that if New Zealand wanted to extend protection to climate migrants, that decision should be made by the legislature. Justice Priestly in *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* noted:⁶⁸

on a broad level, were they to succeed and be adopted in other jurisdiction, at a stroke, millions of people who are facing...presumptive hardships caused by climate change would be entitled to protection under the Refugee Convention or under the ICCPR. It is not for the High Court of New Zealand to alter the scope of the Refugee Convention in that regard...that is the task, if they so choose, of the legislatures of sovereign states.

Extending the definition of refugee internationally is not recommended by the United Nations High Commissioner for Refugees (UNHCR) because the UNHCR is already under significant pressure dealing with 22.5 million refugees that clearly fall within its ambit. The UNHCR is "stretched to the limit".⁶⁹ Extending the definition could undermine the protections already available for these refugees.⁷⁰ However, if New Zealand were to extend

⁶⁴ Immigration Act 2009, s 207(1)(a).

⁶⁵ s 207(1)(b).

⁶⁶ *AF (Kiribati)*, above n 40, at [63].

⁶⁷ Although these climate arguments remained a relevant factor see *AF (Kiribati)* at [63].

⁶⁸ *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment*, above n 52, at [51].

⁶⁹ Antonio Guterres, UN High Commissioner for Refugees "Opening Address" (64th annual session of UNHCR's Executive Committee, Geneva, 1 October 2013); and WH. "Why Migrants do not have refugee status" *The Economist* (online ed, London, 6 March 2018).

⁷⁰ Nicole Marshall "Environmental Migration in an Era of Accelerated Climate Change: proposing a Normative Framework for International Migrant Rights and Domestic Migration Policy" (Ph.D Thesis, University of Alberta, 2015) at 53; and Shelia Murray "Environmental Migrants and Canada's Refugee Policy" (2012) 27 *Refugee* 89 at 92; and Nina Hoing and Jona Rzaazque "Unacknowledged and unwanted? 'Environmental refugees' in search of legal status" (2012) 8 *Journal of Global Ethics* 19 at 22.

refugee protection to climate change related migrants in the refugee category, they could extend the definition through domestic legislation.⁷¹

D Other Potential Legal Protections:

1 Protection under s 207

Doug Tennent suggests s 207 could provide protection for climate migrants where circumstances are severe.⁷² A climate migrant would have to illustrate the concrete negative impacts of deportation and show why these would make it unjust or unduly harsh to return them to their home nation.⁷³ Tennent suggests if sea levels rose to submerge large areas of land and if there was no alternative or realistic way to find work or housing in other areas, protection may be warranted on humanitarian grounds.⁷⁴

The s 207 humanitarian appeal provides the most likely mechanism for protection for climate migrants under the Immigration Act. The threshold to meet the standard necessary for protection under s 207 is high. Waiting for the effects of climate change to be sufficiently severe to reach this threshold runs contrary to the principles of resettlement, which advocates managing migration through gradual movement.⁷⁵

2 Protection in Extreme Circumstances

(a) Extension of the Non Refoulement Principle

Alice Edwards suggests that a serious violation of human rights may create an obligation of non-refoulement,⁷⁶ (bypassing the issue of a refugee definition). This stems from the

⁷¹ This has occurred in Sweden, asylum protection was extended to people displaced by a natural disaster in the Aliens Act (2005) Chapter 4, s 2(3).

⁷² Doug Tennent, Katy Armstrong and Peter Moses, above n 35, at 378.

⁷³ As is the requirement in the Immigration Act 2009, s 207.

⁷⁴ Tennent, Armstrong and Moses, above n 35, at 378; and Doug Tennent “The adverse effects of climate change” (2015) NZLJ 23 at 23.

⁷⁵ McAdam, above n 24, at 202; and Richard Curtain and Matthew Dornan *A pressure release valve? Migration and climate change in Kiribati, Nauru and Tuvalu* (Australian National University Development Policy Centre, Report, 2019) at 3; and Adelle Thomas and Lisa Benjamin “Policies and mechanisms to address climate induced migration and displacement in Pacific and Caribbean small island developing states” (2017) 10 IJCCSM 86 at 89; and John R Campbell “Migration and climate change in the Pacific” in Anna Triandafyllidou (ed) *Handbook of Migration and Globalization* (Edward Elgar Publishing, Cheltenham, 2018) 379 at 394; and Rina Kuusipali “Exiled by Emission – Climate change related displacement and migration in international law: gaps in global governance and the role of the UN Climate Convention” (2017) 18 Vt. J. Env'tl. L. 614 at 646.

⁷⁶ *Regina v Special Adjudicator ex parte Ullah* [2004] UKHL 26 at [24–25] per Bingham LJ, [49–50] per Steyn LJ and [67] per Carswell LJ.

gravity or exceptional nature of the violation. In *D v United Kingdom* the European Court of Human Rights found returning an AIDS sufferer to his country of origin without access to doctors, healthcare or family ties would be “inhumane treatment”.⁷⁷ This is the only time a European court case has met the threshold for exceptional circumstances, so the standard is extremely high.

Could the return of migrants to their home countries, where they must face the negative impacts from climate change, amount to inhumane treatment? Importantly, this basis could only ever be used in exceptional circumstances which would undermine the need for gradual and organised migration. However, the standard could potentially be lowered where the expelling state has contributed to greenhouse gas emissions. Edwards suggests this would create a stronger foundational obligation. She draws an analogy to the case of *N v United Kingdom*,⁷⁸ where the Court’s refusal to place an obligation on the expelling state to provide free medical care was partly because the expelling state did not cause the illness.⁷⁹

(b) Right to Life?

Edwards also argues that the “right to life” could extend to encompass “quality of life issues”.⁸⁰ In the International Court of Justice the *Danube Dam* case noted:⁸¹

“the protection of the environment...is a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself.”

However, Edwards notes “relying on human rights law is far from a guaranteed route to protection for the climate displaced.”⁸² In this context, these arguments provide limited help to those seeking legal protection, as any hypothetical rights would need to be established through costly and probably lengthy litigation.

⁷⁷ Edwards, above n 20, at 70; and *D v United Kingdom* (1997) 24 EHRR 423 (ECHR), at 54.

⁷⁸ *N v UK*, ECHR Application No. 26565/05 (27 May 2008).

⁷⁹ At 22.

⁸⁰ Edwards, above n 20, at 71.

⁸¹ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* [1997] ICJ Rep 92, separate opinion of Vice-President Weeramantry at 110.

⁸² Edwards, above n 20, at 72.

E The Current International Framework Provides No Protection

As illustrated above, there are no international legal protections for those forced to move due to the effects of climate change. New Zealand's domestic courts have held that the Refugee Convention is inapplicable to current climate migrants and New Zealand's domestic laws do not provide relief either. In extreme circumstances where the effects of climate change have already caused substantial harm, s 207 of the Immigration Act, or litigation on an extension to the non-refoulement principle may provide protection for climate migrants. These do not apply to the current environmental context.

This lack of protection is due in part to the complexity of developing an international framework for protection. Firstly, there is no universally accepted term in international or domestic law to define those displaced by climate change.⁸³ Debate over how best to define those displaced has been linked to the failure to develop a protection framework.⁸⁴ The UNHCR and the Norwegian Refugee Council both use the term environmentally displaced persons (EDPs). Although their definitions differ slightly,⁸⁵ this could provide a foundation for the development of a universally recognised term.

Secondly, it is difficult to show direct causation between climate change and individual natural disasters, which hinders the creation of visa categories or legislation.⁸⁶ Further, there is limited political appetite for developed nations to create an international framework as it could be seen as drain on resources and an acknowledgement of fault for climate impacts.⁸⁷ For these reasons many authors have suggested regional solutions are better suited to provide protection in the current political climate.⁸⁸

⁸³ Usually migration for economic or social reasons, See Chirala, above n 6, at 373.

⁸⁴ Lauren Nishimura “Climate Change Migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation” (2015) 27 IJRL 107 at 133.

⁸⁵ Chirala, above n 6, at 387 and 388.

⁸⁶ Amy Constable “Climate Change and migration in the Pacific: options for Tuvalu and the Marshall Islands” (2017) 17 Regional Environmental Change 1029 at 1029.

⁸⁷ Nishimura, above n 83, at 133.

⁸⁸ At 134; and Ban Ki-Moon, above n 14; and Jane McAdam “From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement” (2016) UNSWLJ 39 1518 at 1526; and Nansen Initiative *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Volume 1)* (Nansen Initiative Disaster-Induced Cross -Border Displacement, Agenda Document, December 2015) at 47.

Chapter II Migration Pathways, their Inadequacies, and the Visa's Inception

As there is no protection for those displaced by climate change through international law, and it is unlikely that the protections in the Immigration Act will apply, domestic policy is the next avenue to explore. Before considering how New Zealand could provide a regional protection framework, one must consider what options are currently available. This chapter will also consider why New Zealand's current migration pathways are ill suited to protect climate induced migrants, and the Government's reasoning and initial support for a new visa scheme.

A Current Pathways: The New Zealand Visa System

New Zealand's immigration laws are set out in the Immigration Act 2009, which is supported by Immigration New Zealand (INZ) operating manuals, and INZ publications.⁸⁹ Visas do not guarantee entry to New Zealand - individuals must still be approved at the border - but indicate there is no reason to believe the holder will be refused entry.⁹⁰ Visas can specify conditions such as employment so that any deviation from these conditions may result in deportation.⁹¹

The Immigration Act outlines the mechanisms for applying for visas, determining applicability and appeal routes. Beyond the fulfilment of New Zealand's international obligations,⁹² the content and conditions of visas are not governed by the Act itself, but rather by governmental policy decisions. Visa creation is heavily influenced by government objectives and support for particular visa options from New Zealanders. Public perception can be very persuasive in this area for example the creation of the Pacific Access Visa in 2002 was a campaign promise by the then Labour Government.⁹³ Currently, migration from the Pacific Islands is facilitated by both targeted permanent and temporary immigration schemes.

⁸⁹ Peter Moses "Immigration seminar series getting started or restarted a road map for learners on those getting back behind the wheel: Sources of law" (paper presented to Auckland District Law Society Continuing Professional Development seminar, Auckland, 4 July 2013) at 4.

⁹⁰ Immigration Act 2009, s 62 and s 43; and Simon Laurent "Immigration seminar series getting started or restarted a road map for learners on those getting back behind the wheel: Visas" paper presented to Auckland District Law Society Continuing Professional Development seminar, Auckland, 4 July 2013) at 5.

⁹¹ Immigration Act 2009, s 159.

⁹² These obligations are fulfilled by s 137 of the Immigration Act.

⁹³ The Beehive "Government announces Pacific access Scheme" (press release, 20 December 2001).

1 Permanent Migration Routes

The main avenues for New Zealand residency for Pacific Islanders are through the Pacific Access Category (PAC) or the Samoa Quota Category (SQC). PAC allows 650 nationals per year from Tonga, Fiji, Tuvalu and Kiribati to apply for residency if they have a job offer and English language skills.⁹⁴ SQC provides 1,100 places for Samoans under the same conditions as the PAC.⁹⁵ These visas were intended to assist and acknowledge the special relationship New Zealand has with countries in the Pacific.⁹⁶

2 Temporary Migration Routes

The Regional Seasonal Employers Scheme (RSE) allows horticulture and viticulture businesses to hire Pacific seasonal labourers if the demand is not met by New Zealand workers.⁹⁷ The visa allows recipients to remain for 7 months within an 11 month period.⁹⁸ The scheme provided 12,850 visas in 2018.⁹⁹ The RSE is an attractive option for employers because it provides a secure labour supply.¹⁰⁰ To become a recognised seasonal employer the business must fit the criteria,¹⁰¹ and ensure viable housing options are available for migrant workers.¹⁰²

⁹⁴ New Zealand Immigration “Pacific Access Category Resident Visa” (June 2019) Ministry of Business Innovation and Employment <www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa>

⁹⁵ New Zealand Immigration “Samoa Quota Resident Visa” (June 2019) Ministry of Business Innovation and Employment <www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/samoan-quota-scheme-resident-visa> at 1.

⁹⁶ The Beehive “Government announces Pacific access Scheme” (press release, 20 December 2001)

⁹⁷ New Zealand Immigration “Recognised Seasonal Employer (RSE) scheme” (July 2019) Ministry of Business Innovation and Employment <www.immigration.govt.nz/about-us/research-and-statistics/research-reports/recognised-seasonal-employer-rse-scheme> at 1.

⁹⁸ At 1. Kiribatians and Tuvaluans can stay for 9 months due to travel cost and distance.

⁹⁹ At 1.

¹⁰⁰ John Connell *Migration and Development Perspective from Small States* (Commonwealth Secretariat, London, 2015) at 65, the alternative for employers are tourists on the working holiday scheme (WHS) or undocumented workers.

¹⁰¹ The business must be certified as financially sound, have sound human resource practices, adequate health and safety policies and procedures, and be committed to training and employing New Zealanders. See New Zealand Immigration “Recognised Seasonal Employer (RSE) scheme” (July 2019)– Ministry of Business Innovation and Employment <www.immigration.govt.nz/about-us/research-and-statistics/research-reports/recognised-seasonal-employer-rse-scheme>.

¹⁰² Connell, at 65.

B The Inadequacies of these Visas

The PAC and SQC offer very limited opportunity. Demand is much higher than supply - in 2019 12,000 applications were received for 650 PAC visas.¹⁰³ The strict language, income and employment criteria create a barrier for less affluent Pacific Islanders. Only 25% of households in Kiribati, and Tuvalu believe they currently have the financial means to migrate.¹⁰⁴ The RSE visa is also an inadequate method to ease the strain on those affected by climate impacts because it is a temporary visa which does not provide a pathway to permanent residency. RSE visa recipients are also prevented from appealing to the IPT to stay in New Zealand beyond the visa's end date; workers must leave New Zealand before they can apply for another visa.¹⁰⁵

Both of these visas are inadequate in the context of climate change because their sole focus is on providing labourers for New Zealand's economy. The main benefit of these schemes for those affected by climate change comes from the remittances that can help fund adaptation for those in the Pacific.¹⁰⁶ Remittances to Tonga are most commonly used to build toilets, pay for education, and purchase second hand cars.¹⁰⁷ Samoan RSE workers on average remit NZD 3,300, return with NZD 1,800 and give an extra NZD 400 to the village for community use. The RSE is successful within its own sphere, it has improved the lives of those in the Pacific through the additional income flow, increased standards of living, and provided a financial boost to the home community. It is not well suited to providing direct protection for those negatively impacted by the effects of climate change.

These visa schemes are not very adaptable, and it would be a challenge to modify them to provide adequate protection in a climate migration context. It is clear a new visa scheme is needed to tackle this unique challenge.

¹⁰³ Radio New Zealand "Pacific immigration quotas to NZ drawn today" (7 June 2019) <www.rnz.co.nz/international/pacific-news/391448/pacific-immigration-quotas-to-nz-drawn-today>.

¹⁰⁴ *Climate Change and Migration in the Pacific: Links, attitudes and future scenarios in Nauru, Tuvalu and Kiribati* (UN Economic and Social Commission for Asia and the Pacific, Report, 2015) at 1.

¹⁰⁵ New Zealand Immigration "Information about the Recognised Seasonal Employer Limited Visa" (July 2019) Ministry of Business Innovation and Employment <www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/visa-factsheet/recognised-seasonal-employer-limited-visa#employers>.

¹⁰⁶ Barbara Bendandi and Peter Pauw "Remittances for Adaptation: An Alternative Source of International Climate Finance? In Andrea Milam and others (ed) *Migration, Risk Management and Climate Change: Evidence and Policy Responses* (Springer international Publishing, Switzerland, 2016) 195 at 207.

¹⁰⁷ Connell, above n 100, at 140.

C The Response: a New Visa Scheme

The need for a targeted visa scheme was recognised by the Green Party in 2017 who provided three reasons for pursuing this policy in their election campaign:

- (1) the relative speed of a regional mechanism would increase certainty for climate migrants compared to slow UN and international channels;¹⁰⁸
- (2) the policy was New Zealand's opportunity to become world leaders given our strong relationship with our Pacific neighbours;¹⁰⁹ and
- (3) such action supported New Zealand's reputation as a nation with strong values and as a champion of human rights.¹¹⁰

In September 2017, Labour, the Green Party and New Zealand First created the Labour-led coalition government of New Zealand. Within two months this coalition began discussing the climate change refugee visa. The National Party and New Zealand First did not support the visa. However, the Green Party,¹¹¹ Labour,¹¹² and The Māori Party all supported a “climate refugee” visa.¹¹³ Marama Fox noted it was “inevitable that we will have a climate change category [for refugees].”¹¹⁴ She recognised our unique relationship with the Pacific, “through whakapapa links, via migratory links [New Zealand] needs to be open to them”.¹¹⁵ The proposed scheme had the support of the coalition government.

¹⁰⁸ The Green Party “Welcoming more refugees: for a fairer society: Green party election priority” (3 March 2017) The Green Party < www.greens.org.nz/policy/fairer-society/welcoming-more-refugees> at 8.

¹⁰⁹ At 8.

¹¹⁰ At 8.

¹¹¹ James Shaw MP, “The Green Party of Aotearoa New Zealand Climate Change Policy” (June 2014) The Greens < [://www.greens.org.nz/sites/default/files/climatechange_20140601.f](http://www.greens.org.nz/sites/default/files/climatechange_20140601.f)> at 4.

¹¹² The Labour Party “Pacific Island Affairs” (June 2017) < [://www.labour.org.nz/pacific_island_affairs](http://www.labour.org.nz/pacific_island_affairs)>.

¹¹³ The Maori Party “Pasefika: He kakano ir ruia mai I Rangiatea, Pasefika Policy” (August 2017)< maoriparty/pages/2375/attachments/original/1504163007/Pasefika_Policy_2017>.

¹¹⁴ Interview with Marama Fox, Maori Party Co-leader (Mack Smith, 95bFM Auckland University Radio, 22 August 2017).

¹¹⁵ Interview with Marama Fox, Maori Party Co-leader (Mack Smith, 95bFM Auckland University Radio, 22 August 2017).

Chapter III The Proposed Visa Scheme

A The Format of the Proposed Visa

The only information on the format of the proposed climate visa comes from the Green Party's policy document. This document states the visa would be available for 100 people per year from "the Pacific".¹¹⁶ The criterion for application would be "a genuine fear of permanent displacement because of environmental changes or damage due to climate change".¹¹⁷ The visa would provide permanent residency.¹¹⁸

This criterion has merit because it does not require a complex assessment of the main motivator for migration. One challenge in developing policy in this area comes from the complexity of distinguishing a discrete cause of migration. Attempting to identify a single cause of migration, for example the effects of climate change, is problematic because, there are usually many factors motivating people to migrate.¹¹⁹ This criterion does not require distinguishing a motivation, merely a genuine fear of displacement.

1 Unclear Elements within the Proposed Wording

- (a) "A genuine fear of permanent displacement because of environmental changes or damage due to climate change"

There are several challenges with these criteria. The "genuine fear" standard creates criteria that are generous and wide. This is not inherently problematic but, given the visa provides relief for only 100 people, arguably it should have stricter criteria to identify those most negatively impacted and so those that would benefit most.

A "genuine fear" implies a subjective assessment of the impact and likely eventuation of permanent displacement. It is unclear what factual basis would be required to illustrate that a fear was genuine. This ambiguity would make it difficult for Immigration Officers to determine if applications are valid.

To be workable the "genuine fear" would have to include a similar definitional or factual basis to the "well-founded fear" set out in the Refugee Convention. These terms should be

¹¹⁶ The Green Party "Green Party to welcome 5,000 refugees to New Zealand" (press release, 20 June 2017).

¹¹⁷ The Green Party "Welcoming more refugees: for a fairer society: Green party election priority" (3 March 2017) < [://www.greens.org.nz/policy/fairer-society/welcoming-more-refugees](http://www.greens.org.nz/policy/fairer-society/welcoming-more-refugees)> at 8.

¹¹⁸ At 8.

¹¹⁹ Constable, above n 86, at 1031.

interpreted very similarly otherwise the provision would be far too broad and would not fulfill its objective of aiding the most in need. It would be difficult to make this criterion stricter if it remains subjective.

(b) Subjective Provisions in Law

The 'self defence' provision in s 48 of the Crimes Act 1961 includes similar subjective wording. In s 48 of the Crimes Act the defendant:

“is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.”

The way this test is interpreted (although the wording is slightly different) could be used to provide guidance in understanding the interpretation of “genuine belief”. The self defence test combines both subjective belief and objective consideration. The fact finder,¹²⁰ must assess subjectively what the defendant understood the circumstances to be when they used force.¹²¹ The fact finder then assesses objectively, given what the subjective belief of the defendant was about the circumstances, whether their use of force was reasonable.¹²²

Here the fact finder would be the Immigration New Zealand Officer (INZO) who must interpret the meaning of the visa requirements. The INZO could utilise a hybrid test with both a subjective and objective element. This two-stage test would involve:

- (a) Firstly, an assessment of what the prospective migrant subjectively believes their options are (given their subjective impression of their own situation); and
- (b) Secondly, an objective assessment as to whether a reasonable person would have a genuine fear of permanent displacement given the migrants subjective assessment of their situation.

For example, some people on land which no longer supports crop growth because of the negative impacts of climate change, may see opportunities to move inland or seek employment in other areas. Conversely, another family in the same situation may feel they do not have such options and must migrate, notwithstanding the fact their situations are the same. Based on this first assessment of the migrant's subjective belief the second stage would evaluate whether a reasonable person would have a genuine fear of permanent displacement based on the subjective assessment of their situation.

¹²⁰ Either a judge or jury.

¹²¹ *R v Smith (14 October 1994) unreported, Court of Appeal, CA 263/94.*

¹²² JB Robertson (ed) *Adams on Criminal Law* (online loose-leaf ed, Brookers) at [CA48.08A].

This appears to be the most directly comparable test that could be used by INZ to determine this criterion. However, it is both unnecessarily complicated and could be subject to exploitation. Even a subjective determination of the circumstances should have to be reasonable to be permissible. This would thus require documentation and review, adding to the complexity and expense of the test. The higher the level of review, the greater the likelihood only those who fall within the criteria would be accepted. However, this would also increase the burden in administrative costs.

(c) How to allocate the limited visa (100 places)?

There is no indication how the 100 people would be chosen. The same process that is utilised by current visa schemes could be adopted. This involves a random ballot of those wanting to apply who meet the criteria. INZ publishes the ballot numbers of successfully selected applicants, who are invited to formally send in applications.

A need-based system would be better suited to the goals of the visa. However, this is an unrealistic approach as it would be too expensive and resource intensive. It would also require an appeals mechanism which would increase the length of the process. A more viable alternative would be to prioritise applications from countries which are demonstrably most vulnerable to the negative impacts of climate change.

2 *Which Countries Should the Scheme Include?*

The proposed scheme would be available to “applicants from any Pacific Island nation”.¹²³ However, given the scheme has proposed only 100 places, it may be better to target the visa either based on need or based on the relationship New Zealand has with specific Pacific nations.

New Zealand has stronger relationships with some Pacific Island countries. This is reflected in our current migration schemes, with permanent migration available from Kiribati, Tuvaluan, Tonga, Fiji and Samoa. Temporary migration routes are also additionally available to Nauru, Papua New Guinea, Solomon Islands, Tonga, and Vanuatu. Applications from these countries could be prioritised under the new scheme.

The scheme would appropriately be targeted to the islands that are most vulnerable. This would be consistent with the spirit of the visa. Several islands in the northern Pacific have already been subsumed by water.¹²⁴ The Pacific Islands of Kiribati, Tuvalu, the Republic

¹²³ The Green Party “Welcoming more refugees: for a fairer society: Green party election priority” (3 March 2017) < www.greens.org.nz/policy/fairer-society/welcoming-more-refugees > at 8.

¹²⁴ Scientists estimate at least eight low lying islands in the Pacific have been overtaken by water. These comprise offshore islands and have not resulted in a nation state losing all its territory, Patrick D Nunn,

of the Marshall Islands, and Tokelau are likely to be the worst affected by climate impacts.¹²⁵ Kiribati is very low lying and has the greatest limitations on internal migration. To acknowledge this Kiribati applications could either receive preferential treatment or could automatically pass the “genuine fear of permanent displacement” criteria. The Republic of the Marshall Islands has a Compact of Free Association with the US, which allows citizens to move freely to the US.¹²⁶ Additionally, the majority of Tokelauans have access to migration to New Zealand.¹²⁷ In contrast Kiribati and Tuvalu have no open access to permanent residency of any other nation.¹²⁸

B The Demise of the Proposed Visa Scheme

In May 2018 the New Zealand government decided to redefine their entire Pacific strategy, including their approach to climate induced migration in the Pacific.¹²⁹ This redefined approach, “the Pacific Reset”, focused on building partnerships with Pacific countries, “adopting principles of engagement based on understanding, friendship, mutual benefit, collective ambition, and *sustainable migration*.”¹³⁰ At this point the proposed climate change refugee visa foundered.

The government announced its proposal to review Pacific migration and labour mobility, including how “temporary migration policies can better contribute to migration readiness and climate related outcomes in Pacific countries”. A rethink of immigration policy in this area involves three stages. The first and second stages involve a review of existing visas.

Augustine Kohler and Roselyn Kumar “Identifying and assessing evidence for recent shoreline change attributable to uncommonly rapid sea level rise in Pohnpei, Federated States of Micronesia, Northwest Pacific Ocean” (2017) 21 *Journal of Coastal Conservation* 726 at 726.

¹²⁵ Ministry of Foreign Affairs and Trade *Pacific climate change related displacement and migration: a New Zealand action plan* (Paper for the Environment, Energy and Climate Committee, 2 May 2018) at [7].

¹²⁶ Michael Jenkins and Cleveland McSwain “The Republic of the Marshall Islands” in Anthony Marsella, Ayda Austin and Bruce Grant (ed) *Social Change and Psychosocial Adaptations in the Pacific Islands* (Springer, New York, 2016) 187 at 209.

¹²⁷ Tokelauans born before 2006 are New Zealand citizens by birth, those born after 2006 must have one parent with New Zealand citizenship to qualify as New Zealand citizens, Citizenship (Amendment) Act 2005, s 6(1)(b).

¹²⁸ Richard Bedford and others “Population Change and Migration in Kiribati and Tuvalu, 2015-2050: hypothetical scenarios in a context of climate change” (2016) 42 *N. Z. Popul. Rev.* 103 at 104.

¹²⁹ Ministry of Foreign Affairs and Trade *Strategic Intentions Report 2018-2022* (April 2018) at 4; and Rt Hon Winston Peters Minister of Foreign affairs and Trade “Shifting the dial, Eyes Wide Open Pacific Reset” (speech to the Lowy Institute Martin Place Sydney 1 March 2018); and The Beehive “Climate Change Assistance for the Pacific” (press release, 18 May 2018).

¹³⁰ Cabinet Paper “Proposed immigration work programme to improve Pacific migration policies” (15 May 2018) CAB 2897 at 4.

The third (and only potential) stage, to be considered after 2024, proposes to “investigate the need” for a visa for climate displaced migrants.¹³¹

In the policy documents on the Pacific Reset the government outlined three reasons for their decision to abandon the humanitarian visa for climate related migration.

- (1) They wanted to assess the need for a climate visa,¹³²
- (2) to develop culturally sustainable policies,¹³³ including doing necessary foundational work;¹³⁴ and
- (3) they developed a list of proposed objectives when developing new visa and immigration policies to provide better outcomes for Pacific migrants.

These proposed objectives included engaging with Pacific nations over how best to target the visa, taking into account the perspective of Pacific countries and effect on their home labour markets, domestic outcomes for New Zealand, accessibility and ensuring security and minimising risk.¹³⁵ The Pacific Reset will engage with these identified impediments and consider how changes to the visa scheme could overcome them.

C The Impetus for New Zealand Action on this Issue:

Currently, the future of this visa scheme is unclear. New Zealand's proposal was a significant and novel acknowledgement of the issue. No other nation has specific legal or policy mechanisms to protect those externally displaced. While New Zealand is under no legal obligation to provide protection there are practical, moral and legally principled reasons for New Zealand to create a protection framework.

1 Practical Reasons for New Zealand's Creation of a Climate Related Visa Scheme:

- (a) New Zealand's ties to the Pacific

New Zealand has a long history of cooperation and ties to the Pacific region. Equally, Pacific Islanders also have a long history of migration, creating patterns of settlement and

¹³¹ At 11.

¹³² At 11.

¹³³ Victoria University Faculty of Law “Climate Migrants will need more than dignity” (November 2017) News<www.victoria.ac.nz/law/about/news/news-archives/2017-news/climate-migrants-will-need-more-than-dignity>.

¹³⁴ Cabinet Paper “Proposed immigration work programme to improve Pacific migration policies” (15 May 2018) CAB 2897 at 14.

¹³⁵ At 9.

migration to New Zealand - mobility is “in the blood” of Pacific Islanders.¹³⁶ 7.4% of New Zealand's population are from the Pacific, and 11.3% identify as Pacific people.¹³⁷ New Zealand is a nation of migrants. Visa schemes have also been operating between New Zealand and the Pacific for decades. The South Pacific Work Permit scheme in the 1970s allowed Pacific migrants temporary employment in rural unskilled work.¹³⁸ From 1986 to 2002 visa waiver schemes existed for Kiribati and Tuvalu.¹³⁹ Creating a visa scheme would be consistent with our history of cooperation with the Pacific.

(b) Self-interest

In 2019 New Zealand's net migration will be approximately 50,000.¹⁴⁰ This is a significant drop from 2017 where there was a 70,000 net migration.¹⁴¹ The population in Kiribati is 103,058, and in Tuvalu it is 10,782.¹⁴² The population of Kiribati is projected to reach 208,000 by 2050 and Tuvalu's 19,600.¹⁴³ If migration occurred gradually New Zealand could support a large percentage of these populations. Due to our geographic proximity, if no migration routes are developed and climate effects worsen (as is forecast to occur,¹⁴⁴), New Zealand may face an influx of climate migrants. This form of unplanned migration would provide worse outcomes for New Zealand and the Pacific than the gradual form promoted by a visa system.

(c) The Dangers of mass migration

Failing to provide migration options will compound the pressure placed on the environment of vulnerable Pacific Islands,¹⁴⁵ increasing the rate of deterioration and increasing the likelihood that mass migration will be required. Mass migration often leads to a decline in living standards, loss of economic opportunities and impairment of human rights for the

¹³⁶ Epeli Hau'Ofa, “Our sea of islands” in V. Naidu, E. Waddell and E. Hau'Ofa (ed) *A New Oceania: Rediscovering Our Sea of Islands* (The University of the South Pacific, Suva, 1994) at 268.

¹³⁷ Ministry of Health *Tangata Pasifika in New Zealand Manatu Hauora, Report* (January 2014).

¹³⁸ Connell, above n 100 at 163.

¹³⁹ At 64.

¹⁴⁰ Katie Fitzgerald “New Zealand has nearly 20,000 fewer immigrants than previously thought, date reveals” (1 February 2019) Newshub < www.newshub.co.nz/home/new-zealand/2019/01/new-zealand-has-nearly-20-000-fewer-immigrants-than-previously-thought-data-reveals.html>.

¹⁴¹ Statistics New Zealand *International Migration 2017 Report* (March 2017) at 5.

¹⁴² These are the numbers as at the last census in 2010 the next census will be taken in 2020 Bedford, above n 129, at 103 and 105.

¹⁴³ Bedford, 104.

¹⁴⁴ Matt McGrath “Climate change: Impacts ‘accelerating’ as leaders gather for UN talks” (22 September 2019) BBC News Science and Environment < www.bbc.com/news/science-environment-49773869>.

¹⁴⁵ Both from the effects of climate change and from the growing population.

population relocated.¹⁴⁶ Importantly, both Tuvalu and Kiribati see mass migration or forced relocation as the least desirable option.¹⁴⁷ There is a social and cultural relationship between land and identity in the Pacific, making forced relocation particularly problematic. Voluntary migration is thus the preferable option.¹⁴⁸

Mass migration is usually a last resort because it has serious ramifications for the ICCPR right to self-determination and sovereignty. The components of this right include “all peoples have the right to self-determination...[to] freely determine their political status and freely pursue their economic social and cultural development”.¹⁴⁹ If a community or population was forced to relocate this principle of self-determination should be used to guide community relocations.¹⁵⁰ This could take the form of collective decision making on adaptations, where to relocate and the process of relocation.¹⁵¹ The right to relocate is inherently part of the right to self-determination and it is also supported by other international documents.¹⁵² However, the enforcement of these rights would be difficult in the context of forced migration. The resulting financial, and other stresses, including time pressure, may make collective decision making and planning impossible. It would be hard to safeguard the culture of these communities if they become a minority in a new land. A proposed visa would limit the need for mass migration and alleviate the associated problems.

2 *Applicable Legal Principles: The Principle of Shared Responsibility*

One of the key principles underpinning Refugee law is the principle of shared responsibility. This doctrine advocates for the burdens and responsibility for providing for refugees to be shared. This is particularly applicable in this context as Pacific Island nations

¹⁴⁶ Mariya Gromiloca “Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights Based Approach” (2014) 10 *Utrecht law review* 76 at 78.

¹⁴⁷ Anote Tong, President of Kiribati 2014 “Address by His Excellency Anote Tong, President, Head of Government and Minister for Foreign Affairs of the Republic of Kiribati” (9th Plenary Meeting, 68th Session of the General Assembly of the United Nations, New York, 25 September 2013); and Ministry of Natural Resources, Environment, Agriculture and Lands, Department of Environment, *Tuvalu’s National Adaptation Programme of Action Report* (May 2007) at 5.

¹⁴⁸ Tony Weir, Liz Dovey and Dan Orheron “Social and Cultural issues raised by climate change in Pacific Island countries: an overview” (2017) 17 *Reg. Environ. Change* 1017 at 1023.

¹⁴⁹ International Covenant on Civil and Political Rights, above n 40, at art 1.

¹⁵⁰ Robin Bronen “The human rights of community relocation” in Dimitra Manou and others (ed) *Climate Change and Human Rights Law and Policy Perspectives* (Routledge, London, 2018), 129 at 140.

¹⁵¹ At 140.

¹⁵² The *Universal Declaration of Human Rights* GA Res 217A (1948) art 13 and the *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, (*Pinherio Principles*) U.N. Doc E/CN.4/2006/2 at 39 support rights of migration, and this been interpreted to include the right to migrate in times of environmental pressure, Bronen at 141.

most negatively impacted by the effects of climate change enjoyed none of the benefits from emission generation.

Shared responsibility was first articulated in the 1951 Refugee Convention where it was acknowledged that “international cooperation” was essential when dealing with refugee resettlement.¹⁵³ The New York Declaration for Refugee and Migrants,¹⁵⁴ reaffirmed the importance of shared international responsibility for bearing the cost of migration.¹⁵⁵

The most recent international Compact in this area is The Global Compact on Refugees,¹⁵⁶ (the Compact). This Compact aims to provide a tangible mechanism to effectively share the responsibility and burden internationally.¹⁵⁷ The Compact will create Global Refugee Forums where States must provide “concrete pledge contributions...”,¹⁵⁸ including “financial, material and technical assistance, resettlement places and complementary pathways”.¹⁵⁹ This Compact re-emphasises the importance of burden and responsibility sharing in the international Refugee law context. However, the Compact is a non-binding document and to be applicable in this context it would require climate migrants to be accepted as “refugees” under the Convention. It is therefore unlikely to provide an effective remediating mechanism for climate migration.

The current situation has been described as “Responsibility by Proximity” by Peter Sutherland (former United Nations Special Representative of the Secretary General for Migration and Development).¹⁶⁰ This recognises that countries which surround nations experiencing refugee crisis are often forced to absorb most of the fleeing refugees. This can be seen in the Syrian conflict where Turkey, Lebanon and Jordan have accommodated the majority of refugees who have fled the civil war. Michael Doyle is convinced the “first border crossed cannot be the exclusive principal responsibility.”¹⁶¹ He advocates for responsibility by culpability and capability.¹⁶²

¹⁵³ Convention Relating to the Status of Refugees, above n 21, preamble at 15.

¹⁵⁴ adopted unanimously by the General Assembly of the United Nations in September 2016.

¹⁵⁵ *New York Declaration for Refugees and Migrants* GA Res 71/1 (2016), introduction.

¹⁵⁶ adopted by the General Assembly in 2018

¹⁵⁷ *Global Compact on Refugees* GA Res 12107 at [14].

¹⁵⁸ At [17].

¹⁵⁹ At [18].

¹⁶⁰ Interview with Peter Sutherland United Nations Special Representative of the Secretary-General for International Migration (UN News Centre, for the UN News Centre, 2 October 2015); and Peter Sutherland (@PDSutherlandUN) “Is proximity to define responsibility for refugees? If you are far away it is someone else’s problem?” < twitter.com/pdsutherlandun/status/681397767525249025>.

¹⁶¹ Michael W Doyle “Responsibility Sharing: From Principle to Policy” (2018) 30 *IJRL* 618 at 619.

¹⁶² At 619.

New Zealand needs to be aware both that other Pacific Island countries do not have the capacity to absorb all those displaced by the effects of climate change, and that New Zealand is close to the front line for those who are displaced in the Pacific. In the absence of legal obligations, the legal principle of shared responsibility should guide our policy decisions. New Zealand has a strong interest in human rights and in being a responsible international citizen.¹⁶³ New Zealand also values its international image so should be striving to ensure that issues of migration and accessibility are approached in a principled manner. There are clear distinctions that can be made between conventional refugees and those displaced by the slow onset of negative climate impacts, but if anything, this should provide New Zealand the scope to develop a just response to the challenge. New Zealand's creation of a climate visa scheme would uphold the doctrine of shared responsibility.

At the recent UN Climate Summit Jacinda Ardern highlighted the need for action in this area:¹⁶⁴

If my Pacific neighbors do not have the option of opting out of the effects of climate change, why should we be able to opt out of taking action...not since the inception of the United Nations has there been a greater example of the importance of collective action and multilateralism, than climate change.

These should not be empty words. New Zealand should lead by example and provide a tangible mechanism for protection via a targeted climate visa scheme. New Zealand has received very few refugees and asylum seekers when compared to other nations with similar sized economies and population. Finland is the best direct comparison to New Zealand, with the a similar sized population (5 million) and a similar sized economy (Finland's GDP is \$42 USD per capita and New Zealand's GDP is \$38 USD per capita).¹⁶⁵ In the past five years Finland received 51,372 asylum applications, approved 19,321 and also accepted 5,850 quota refugees.¹⁶⁶ In contrast New Zealand received 2,049 asylum applications, approved 507 and also accepted 4,676 quota refugees.¹⁶⁷ The same pattern of refugee intake applies when comparing ourselves to other nations. This strongly indicates

¹⁶³ Sylvia Bell, Judy McGregor and Margaret Wilson "The Convention on the Rights of Disabled Persons: A remaining dilemma for New Zealand" (2015) 13 NZJPIIL 277 at 278.

¹⁶⁴ Jacinda Ardern, Prime Minister of New Zealand "New Zealand National Statement to United Nations General Assembly" (speech to UN Climate Action Summit 2019, New York, 23 September 2019).

¹⁶⁵ OECD "Population data" <[://data.oecd.org/pop/population.htm](https://data.oecd.org/pop/population.htm)>; and OECD "Gross Domestic Product data" <[://data.oecd.org/gdp/gross-domestic-product-gdp.htm#indicator-chart](https://data.oecd.org/gdp/gross-domestic-product-gdp.htm#indicator-chart)>.

¹⁶⁶ Statistics Finland "Asylum-seekers and refugee quota" (13 September 2019) <www.stat.fi/tup/suoluk/suoluk_vaesto_en.html#asylum-seekersandrefugeequota>.

¹⁶⁷ New Zealand Immigration *Refugee and Protection Unit Statistics* (2019) at 4-7.

that New Zealand should extend the protection provided by implementing a climate related visa scheme.

3 *The Alternative is not Viable due to the Scale of Relocation*

The alternative to facilitating climate related pathways for migration is leaving other Pacific nations to absorb those displaced by climate effects. In the Pacific, low lying nations like Kiribati, the Marshall Islands, Kiribati and Tuvalu have purchased land in Fiji.¹⁶⁸ The President of Kiribati Aote Tong noted the entire population could move to Fiji if required.¹⁶⁹ The Marshall Islands and Tuvalu are using land in Fiji for cropping, due to the decreased ability to provide food on their own land, where rising sea levels have made crop growing unsustainable.¹⁷⁰

There are several challenges with relocation to Fiji. Firstly, there is no formal legal right for Kiribatians, Tuvaluans or the Marshallese to move to Fiji. At the Climate Action Pacific Partnership event in Fiji in 2017 the Prime Minister of Fiji, Bainimarama, pledged “Fiji offer[s] permanent refuge to the people of Kiribati and Tuvalu...” and that “Fijians will embrace you and take you into our homes and our hearts”¹⁷¹ While this sentiment is striking, there is no legally binding agreement to resettle individuals from Kiribati on Fiji.¹⁷²

Secondly, the scale of relocation which may be required in the Pacific is large, and Fiji alone cannot support the prospective numbers. Fiji faces significant challenges itself due to the effects of climate change. The Fijian government has developed an internal migration plan for coastal villages that are vulnerable to the effects of climate change. It has identified 830 communities at risk from climate related events and 48 currently requiring urgent

¹⁶⁸ Laurence Caramel “Besieged by the rising tides of climate change, Kiribati buys land in Fiji” *The Guardian* (online ed, London, 1 July 2014).

¹⁶⁹ Laurence Caramel “Besieged by the rising tides of climate change, Kiribati buys land in Fiji” *The Guardian* (online ed, London, 1 July 2014).

¹⁷⁰ Yu Umezawa, Makoto Taniguchi and Hiroya Yamano “Groundwater Dynamics of Fongalfale Islet, Funafuti Atoll, Tuvalu” (2012) 50 *National Groundwater Association* 639 at 643; and Muliagatele Reti *An Assessment of the Impact of Climate Change on Agriculture and Food Security in the Pacific: A Case Study in the Republic of the Marshall Islands* (Food and Agriculture Organization of the United Nations, Report, February 2009) at 29.

¹⁷¹ Bainimarama, Prime Minister of Fiji “Opening Address at the Climate Action Pacific Partnership Event” (Climate Action Pacific Partnership Opening Event, The Grand Pacific Hotel, Suva, Republic of Fiji, 3 July 2017).

¹⁷² Julia B Edwards “Phosphate mining and the relocation of the Banabans to northern Fiji in 1945: Lessons for climate change-forced displacement” (2014) 138 *JSO* 121 at 130.

relocation.¹⁷³ Government funding is currently being used for urgent relocation, constructing sea walls, river dredging and riverbank protection.¹⁷⁴ As internal migration is already effecting 830 communities, Fiji does not have the capacity to absorb populations from its neighbouring Pacific nations.

The principle of shared responsibility means that Fiji should not bear the strain of accommodating all those displaced from low lying Pacific atolls that are most vulnerable. New Zealand should share the responsibility and provide a migration pathway for those who feel they must migrate due to the negative effects of climate change.

¹⁷³ Ministry of Economy *5-Year & 20-Year National Development Plan Transforming Fiji* (November 2017) at 102.

¹⁷⁴ At 102.

Chapter IV International Obligations and Innovations from other Jurisdictions:

The previous chapters of this dissertation have provided a principled argument for New Zealand's involvement in facilitating migration from the Pacific for those impacted by the effects of climate change. New Zealand is also party to several international compacts which support developing policy to facilitate migration from the Pacific. Creating a climate visa would be consistent with our international obligations. This chapter will consider how international documents support the creation of a climate visa scheme and the innovations from jurisdictions which New Zealand could utilise to improve the proposed regional protection framework.

A Our International Obligations

1 The Pacific Agreement on Closer Economic Relations (PACER) Plus

PACER Plus is a multi-lateral free trade and economic integration agreement between the 14 members of the Pacific Islands Forum.¹⁷⁵ It is ratified by New Zealand and is expected to come into force in late 2019.¹⁷⁶ PACER Plus recognises the ties of friendship, shared values, interests and cultural links between Pacific nations.¹⁷⁷ One of the aims of the agreement is to increase labour mobility. The Labour Mobility Arrangement was signed alongside PACER Plus in 2017 to facilitate this aim. This is an “understanding” between the Pacific Island Forum States and its purpose is to “strengthen labour mobility cooperation” between participants.¹⁷⁸ This Labour Mobility arrangement supports the creation of extra migration routes between the Pacific and New Zealand. A humanitarian climate visa would uphold and enhance our obligations under this agreement.

2 The Nansen Institute

In 2011 the UNHCR asked:¹⁷⁹

¹⁷⁵ The Pacific Island Forum is made up of Australia, the Cook Islands, Micronesia, Kiribati, Nauru, New Zealand, Niue Palau, Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu.

¹⁷⁶ Ministry of Foreign Affairs and Trade *Legal and Institutional Chapters – The Pacific Agreement in Closer Economic Relations Plus* (November 2018) at 2.

¹⁷⁷ Pacific Agreement on Closer Economic Relations Plus (PACER) (signed 2017, not yet in force).

¹⁷⁸ The Labour Mobility Arrangement (signed 22 June 2017).

¹⁷⁹ UNHCR *Pledges 2011 Ministerial Intergovernmental Event on Refugees and Stateless Persons* (UNHCR Division of International Protection, Report on Pledges, December 2011) at 95.

whether it would be useful for States, UNHCR and other relevant actors to develop a global guiding framework or instrument to apply to situations of displacement across borders other than those covered by the 1951 Convention?

There was no impetus for states to leave the development of policy in this area to the UNHCR or other agencies, or to develop hard law (as this would limit their sovereignty). Instead, the Nansen Initiative provided an intergovernmental discussion process aimed at providing soft law options for protections.¹⁸⁰ The initiative culminated in the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* ('Protection Agenda'). The Protection Agenda was endorsed by 109 countries, including Australia and New Zealand, in October 2015.¹⁸¹

The Protection Agenda is non-binding but provides a useful and comprehensive framework for governments to develop sound policy of protection for those displaced by the effects of climate change. Because it was state led it aimed to provide the basis for “pre-soft law initiatives, which seek to build political consensus...”¹⁸² and lay the foundations for legally binding initiatives.¹⁸³ The Protection Agenda has identified areas of priority which require urgent further action including:

- (i) the need to address gaps in protection measures for those crossing borders,
- (ii) the need to improve pathways of planned relocation as either adaption or a response to forced displacement; and

¹⁸⁰ McAdam, above n 88, at 1523.

¹⁸¹ At 1524. The countries that have endorsed the Protection Agenda are Afghanistan, Albania, Angola, Australia, Austria, Bangladesh, Barbados, Belgium, Benin, Bhutan, Bolivia, Brazil, Burundi, Cambodia, Cameroon, Chad, Chile, Colombia, Comoros, Cook Islands, Côte d'Ivoire, Costa Rica, Cyprus, Denmark, Djibouti, Dominican Republic, Democratic Republic of the Congo, Ecuador, Egypt, Ethiopia, European Union, Fiji, Finland, France, Germany, Greece, Guatemala, Haiti, Holy See, Honduras, Hungary, Indonesia, Iraq, Ireland, Israel, Italy, Jordan, Kenya, Kiribati, Korea (Republic of), Kuwait, Lao PDR, Lesotho, Liechtenstein, Luxembourg, Libya, Madagascar, Maldives, Mali, Malta, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Qatar, Republic of Moldova, Romania, Rwanda, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Somalia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Thailand, The Order of Malta, Togo, Trinidad and Tobago, Turkey, Tuvalu, Uganda, Ukraine, United Republic of Tanzania, United States of America, Uzbekistan, Vietnam, Zambia and Zimbabwe.

¹⁸² François Gemenne and Pauline Brücker, “From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration Can Learn from the Governance of Internal Displacement” (2015) IJRL 245 at 259.

¹⁸³ McAdam, above n 88, at 1525.

(iii) “facilitating migration with dignity” as a possible response to climate change.¹⁸⁴

The Nansen Initiative has continued as the Platform on Disaster Displacement.¹⁸⁵ It encourages domestic, regional and bi-lateral frameworks to tackle the issues.

As one of the 109 countries that have endorsed the Nansen Initiative, New Zealand has a moral (if not formal) obligation to work towards addressing these urgent action areas. A humanitarian climate visa scheme would address these urgent action areas by improving pathways of planned relocation, and provided the visa was suitably named, facilitate migration with dignity.

3 *The 2018 Compacts:*

(a) Compact for Safe, Orderly and Regular Migration

The UN recently created the Global Compact for Safe, Orderly and Regular Migration, which New Zealand signed in December 2019.¹⁸⁶ This Compact creates 23 objectives that countries should consider when creating migration policy.¹⁸⁷ It has a strong focus on both adaptation and liberalisation of visa schemes to increase flexibility and regular migration pathways. This aims to provide strategies of support for natural disasters and the effects of climate change.¹⁸⁸ Five countries voted against the compact, and several abstained (including Australia).¹⁸⁹

(b) The Global Compact on Refugees

As briefly mentioned in the discussion on shared responsibility, this compact aims to provide a tangible mechanism to more effectively share the responsibility and burden internationally.¹⁹⁰ These new compacts re-emphasise the importance of burden and

¹⁸⁴ At 1526; and Nansen Initiative *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Volume 1)* (Nansen Initiative Disaster-Induced Cross -Border Displacement, Agenda Document, December 2015) at 47.

¹⁸⁵ McAdam, above n 88, at 1532.

¹⁸⁶ UN “General Assembly officially adopts roadmap for migrants to improve safety, ease suffering” (19 December 2018) UN News < news.un.org/en/story/2018/12/1028941 >.

¹⁸⁷ *Global Compact on Safe, Orderly and Regular Migration* GA Res 73/195 (2018) at 5.

¹⁸⁸ At 11.

¹⁸⁹ UN “General Assembly officially adopts roadmap for migrants to improve safety, ease suffering” (19 December 2018) UN News < news.un.org/en/story/2018/12/1028941 >.

¹⁹⁰ *Global Compact on Refugees* GA Res 12107 (2018) at [14].

responsibility sharing in the international Refugee law context and they include formalised review mechanisms so that nations will be held politically responsible.¹⁹¹

A humanitarian climate visa scheme would be consistent with the principle of shared responsibility highlighted in the Global Compact on Refugees, and would increase migration pathways as highlighted by the Compact for Safe and Orderly Migration.

B Policies from Other Jurisdictions:

1 Finland

The Finnish Alien Act 2004 included a specific humanitarian protection provision providing a resident permit to those who “cannot return to...[their] country of origin...as a result of an environmental catastrophe.”¹⁹² Environmental catastrophe was not defined in the Act.¹⁹³ The Act also provided temporary protection for “aliens who need international protection and who cannot return safely...because there has been a massive displacement of people...as a result..[of an] environmental disaster.”¹⁹⁴

2 Sweden

Chapter 4 s 2 of the Swedish Alien Act 2005 created a category of “persons otherwise in need of protection” and s 4(3) included “those unable to return to the country of origin because of an environmental disaster”. While environmental disaster was limited to sudden onset disasters and those who had to externally migrate it still provided protection.¹⁹⁵

However, in 2016 over 5.1 million refugees entered Europe fleeing conflicts in Syria, and persecution in Iraq and Afghanistan.¹⁹⁶ Europe faced a refugee crisis. As a result, Finland received 32,477 asylum applications and in response to this influx repealed its

¹⁹¹ Jane McAdam “The Global Compact on Refugees and Migration: A New Era for International Protection?” (2018) 30 IJRL 571 at 573.

¹⁹² Alien Act 2004 (Finland), s 88(a)

¹⁹³ Emily Hush “Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden” (7 September 2017) Preliminary Reference – Columbia Journal of European Law < <http://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/?cn-reloaded=1>>.

¹⁹⁴ Alien Act 2004 (Finland), s 109.

¹⁹⁵ Ben Glahn “Climate refugees? Addressing the international legal gaps – Part II” (3 August 2009) International Bar Association < www.ibanet.org/Article/NewDetail.aspx?ArticleUid=3e9db1b0-659e-432b-8eb9-c9aeea53e4f6>.

¹⁹⁶ UNHCR “The Refugee Crisis in Europe” <<http://www.unrefugees.org/emergencies/refugee-crisis-in-europe/>>.

humanitarian permanent protection legislation in 2016.¹⁹⁷ Sweden also responded to the refugee crisis by issuing a three-year temporary repeal of the “persons otherwise in need of protection” category in July 2016.¹⁹⁸ While the repeal was supposed to end in July 2019, the government website notes that it “is not being used as a general rule.”¹⁹⁹

These former legislative changes provide a framework for humanitarian protections through legislation, but also illustrate the pressure that can overwhelm inflexible legislative instruments when the context changes. New Zealand could adapt domestic legislation via widening the scope of s 207 of the Immigration Act but this could prove problematic if circumstances change drastically. A regional visa is better suited to provide a solution in the climate change migration context as it can be adapted when required.

¹⁹⁷ Amnesty International *Finland Submission to the United Nations Committee on the Elimination of Racial Discrimination 92nd Session* (24 April 2017) at 8.

¹⁹⁸ Swedish Ministry of Justice “Proposal to temporarily limit the possibility of obtaining a residence permit in Sweden” (press release, 28 April 2018).

¹⁹⁹ Swedish Migration Agency “Protection Status” (13 September 2019) Migrationsverket < [://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-you-are-allowed-to-stay/Protection-status.html](http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-you-are-allowed-to-stay/Protection-status.html)>.

Chapter V A Humanitarian Climate Related Visa – a Framework for Positive Change

New Zealand has practical, legal and moral obligations to respond and provide solutions for those forced to migrate due to the effects of climate change. As mentioned above it will take considerable international effort, consensus and political will to develop an international protection framework, which remains elusive. Therefore, a domestic policy approach is currently the most effective mechanism to provide tangible relief for those affected because it can target those most in need of assistance now. As and when an international framework is adopted, an existing regional framework will complement any international agreements, as these agreements will necessarily be broadly framed. A regional mechanism can target the specific needs of those forced to migrate externally in the Pacific.

This chapter will evaluate the regional framework New Zealand should adopt to provide solutions for climate induced migrants. It will consider why a new climate visa is the most appropriate regional mechanism when compared to the alternatives: funding adaptation, modifying existing visa schemes, or legislative amendment to widen the protection provided by the s 207 humanitarian limb. Finally it will propose the visa should be supplemented by other mechanisms to create the most effective regional framework for positive change.

A Proposed Visa Changes to Improve the Scheme:

1 Terminology: Amend the Wording of the Criteria to “A well-founded fear of permanent displacement because of environmental changes or damage due to climate change” to Facilitate Implementation

The wording of the visa requires refinement to make it easier to interpret for INZ officials (INZO). In accordance with the usual process, INZ would create a section of the handbook to explain how to make decisions on eligibility. Determining whether someone has a “genuine fear” needs an element of objectivity. Without objectivity the intention of the visa - to provide protection to those most in need - would be undermined.

Changing the wording from a ‘genuine fear’ to a ‘well-founded fear’ would allow INZO to utilise the jurisprudence on the interpretation of ‘well-founded fear’ from the Refugee Convention. This would provide INZO with a ready-made framework for interpreting this

criterion.²⁰⁰ A ‘well-founded fear’ involves an objective assessment which can still be targeted to an individual’s circumstances and avoids the challenges of subjective wording.

2 Include an Option to Re-evaluate the Visa Every Year to Expand its Ambit if Required

It was appropriate that the original visa proposal was limited to 100 places because it is a new and innovative scheme that requires monitoring to ensure it is effective. However, limiting the visa to 100 places limits its potential benefit. If the scheme were successful there should be the opportunity to review and expand it.

3 Target the Visa to Countries that are Currently at the Greatest Risk: Kiribati and Tuvalu

As discussed above because the scheme is so limited in number, to provide relief to those most in need of migration, the visa scheme should be limited to the nations most vulnerable to the effects of climate change with the fewest migration options. These are Kiribati and Tuvalu. Limiting the visa allows the New Zealand government to consult with both nations and develop the visa in a manner which is consistent with their needs. This would also support Kiribati and Tuvalu’s legal right to self-determination, providing both remittances for adaptation and the opportunity for migration through choice.

The political feasibility of limiting the visa could cause concern to other Pacific islands but, importantly, the scheme could later be adapted to include a greater number of nations as and when the needs arose. This limited scope should be reviewed every five years to consider whether it still targets those countries most in need.

4 Engagement based on Understanding, Friendship, Mutual Benefit and Collective Ambition, requires a Rejection of the Climate Refugee Title : change the visa’s name

The proposed visa was discussed in relation to a “humanitarian visa” but it has also been interchangeably called a “climate refugee visa”. James Shaw used the term climate change refugee many times in interviews as part of the Green Party’s “welcoming more refugees” information pack.²⁰¹ In the Pacific context there is significant concern about the climate refugee label. It is not legally accurate and legal definitions are important because they delineate rights and obligations which people can expect to enjoy. In reality, those affected by climate change do not enjoy the same protections as refugees.

²⁰⁰ See James C Hathaway and William S Hicks “Is there a subjective element in the refugee convention’s requirement of ‘well founded fear’” (2005) 26 Mich. J. Int’l L 505 at 560.

²⁰¹ The Green Party “Welcoming more refugees: for a fairer society: Green party election priority” (3 March 2017) < greens.org.nz/policy/fairer-society/welcoming-more-refugees > at 8.

Furthermore, the term refugee is very emotive. It is preferred by the media as it is easily understood by the public and creates a sense of sympathy.²⁰² The term has raised the profile of the plight of climate migrants but in doing so it has also mischaracterised the issue, leading to misunderstandings, and complicating efforts to provide solutions.²⁰³

Many Pacific Islanders have consciously chosen to reject the label as it connotes a lack of agency.²⁰⁴ Pacific Islanders do not see themselves as passive victims. They are actively seeking solutions and retain their right to self-determination, independence and sovereignty over their territories. Jane McAdam notes that the term climate refugee is problematic and sees it - at best - as a poor description of the slow onset nature of climate effects and “pre-emptive” to illustrate the current situation, and - at worst- offensive to a culture that values dignity and honour.²⁰⁵

The rejection of the climate refugee term is also supported by the UNHCR the Migration Environment and Climate Change (MECC) Division at the UN Migration Agency (IOM) along with other key international bodies.²⁰⁶ The New Zealand government has shifted the language it uses, in recent discussion documents the term “climate change-related displacement and migration” has been adopted.²⁰⁷

For all of these reasons it is important that any future visa providing for climate induced migration does not define those displaced as “climate refugee”. Instead of a climate refugee visa the visa could be called the Pacific Climate Migration Visa.

²⁰² “A Question of Climate Refugees” *New Scientist* (online ed, London, 27 April 2011); and John Vidal “Boats pass over where our land was’: Bangladesh’s climate refugees” *The Guardian* (online ed, London 4 January 2018); and “Local Focus: ‘Most vulnerable’ climate change refugees” *The New Zealand Herald* (online ed, Auckland, 25 June 2019).

²⁰³ Jane McAdam *Climate Change, Forced Migration, and International Law* (Oxford University Press, Oxford, 2012), at 40.

²⁰⁴ Edwards, above n 40, at 66.

²⁰⁵ McAdam, above n 204, at 39.

²⁰⁶ Alex Flavell *IOM Outlook on Migration Environment and Climate Change* (International Organization for Migration, Report, 2014) at 21; and Diane Ionesco “Lets talk about climate migrants not climate refugees” (6 June 2019) UN Sustainable Development goals <www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/>.

²⁰⁷ Ministry of Foreign Affairs and Trade *Pacific climate change related displacement and migration: a New Zealand action plan* (Paper for the Environment, Energy and Climate Committee, 2 May 2018).

B New Proposed Visa Criteria:

1. “A well-founded fear of permanent displacement because of environmental changes or damage due to climate change” to expediate implementation.
2. Available for 100 peoples (with the option to expand).
3. Targeted to countries that are currently at the greatest risk from climate change impacts – low lying atolls of Kiribati and Tuvalu, with mechanisms to renew this limited scope every 5 years.
4. Ensure the name is appropriate – Pacific Climate Migration Visa (PCM)

C Consistency with the Pacific Reset:

This new proposed scheme would also respond to the three major concerns outlined by the government in the Pacific Reset: the need for a climate visa,²⁰⁸ culturally sustainable policies,²⁰⁹ and immigration policy to provide better outcomes to Pacific migrants.²¹⁰

1 The Need for a Humanitarian Visa

This dissertation has already outlined there is a need for a humanitarian visa, and this need is pressing. The Pacific Reset does not guarantee that this need will be reviewed, even in 2024. In 2015 a UN survey in Kiribati found that 70% of all households had a desire to migrate but only 24% had the capacity to do so.²¹¹ In Tuvalu 75% of households believed they may need to migrate due to climate change effects, but only half of the 75% had the capacity to do so.²¹² New Zealand case law shows there is a desire from some Pacific Islanders for migration pathways targeted at those effected by climate change.²¹³ Both the Kiribatian and Tuvaluan government support migration as a form of adaptation.²¹⁴ This proposed visa scheme is clearly necessary.

²⁰⁸ Cabinet Paper “Proposed immigration work programme to improve Pacific migration policies” (15 May 2018) CAB 2897 at 11.

²⁰⁹ Victoria University Faculty of Law “Climate Migrants will need more than dignity” (November 2017) News<www.victoria.ac.nz/law/about/news/news-archives/2017-news/climate-migrants-will-need-more-than-dignity>.

²¹⁰ Cabinet Paper “Proposed immigration work programme to improve Pacific migration policies” (15 May 2018) CAB 2897 at 9.

²¹¹ Curtain and Dornan, above n 75, at 33.

²¹² At 33.

²¹³ *AF (Kiribati)*, above n 41; and *AC (Tuvalu)*, above n 54; and *AD Tuvalu*, above n 64.

²¹⁴ McAdam, above n 204, at 202-203.

2 *Creating a Culturally Sustainable Visa*

Most migration, even the gradual migration facilitated by this proposed visa scheme, creates the potential for loss of culture. The process of fragmentation (where Pacific cultures become the minority in their new home) can threaten cultural practices and beliefs as new migrants assimilate into new cultures.²¹⁵ Nathan Ross suggests challenging this consequence by following a Protection Agenda such as those provided by the Nansen Institute and through reviewing national visa schemes. In the long term, he suggests considering innovations such as:²¹⁶

- a) How Pacific islanders might own land (individually, common or Māori freehold.)
- b) The type of legal person that represents their communities in New Zealand (such as a trust or corporation...)
- c) How to enable cultural norms and practices language and national identity...
- d) Whether these countries can access global climate change adaptation funding to buy land...
- e) ...another system of laws and norms, along with common law and Māori custom and how that might work.

These challenges are important to consider. However, given that in the short term the visa would only provide spaces for 100 people it is unlikely it will cause any significant loss of cultural identity for migrants or for those choosing not to migrate. The visa scheme would work to facilitate the preservation of culture. Migration pathways lessen the pressure on Pacific Island nations, improving the remaining populations ability to adapt and remain on their ancestral land. Retaining land in this context is the most effective way to safeguard culture, language and identity. This proposed visa scheme provides a more culturally sustainable response than failing to act on this issue. If the visa needed to be expanded or if a critical situation arose, safeguarding culture must be a consideration in any expansion plans.

3 *Providing Better Outcomes for Pacific Migrants*

Given the diversity and differing needs of Pacific nations and the limited capacity of the proposed visa, having the visa open to all Pacific countries does not target those who are

²¹⁵ Victoria University Faculty of Law “Climate Migrants will need more than dignity” (November 2017) News<www.victoria.ac.nz/law/about/news/news-archives/2017-news/climate-migrants-will-need-more-than-dignity> at 1.

²¹⁶ At 1.

most in need. It also creates challenges for identifying Pacific perspectives, how best to account for the needs of each nation's home labour markets, and how to maximise the benefits for New Zealand. A targeted scheme limited to Kiribati and Tuvalu would allow the visa to reach the most vulnerable, whose labour markets can support gradual migration.²¹⁷ It would provide a more manageable number of countries for New Zealand to engage with, ensuring cultural identity is considered.

The national labour migration policy of both the Kiribatian and Tuvaluan government supports developing employment opportunities in New Zealand. Their labour markets support gradual migration.²¹⁸ Migration academics have raised concerns over “brain drain” (the phenomena where all the skilled labour force leave small island nations) damaging the home economy.²¹⁹ While there is dispute over this theory,²²⁰ the visa scheme does not prioritise specific qualifications meaning it is unlikely in itself to compound this potential problem.

D Advantages of a Targeted Climate Visa

There are significant advantages to a targeted response over funding adaptation, expanding legislation or modifying existing migration routes. Simply funding in situ adaptation for Pacific island countries is not an adequate response to the threats posed by the effects of climate change. Adaptation,²²¹ to allow Pacific Islanders to stay in their home countries will always be the most desirable option, as by remaining on their islands, their links to home, culture, ancestry and community are not threatened. This is also the preferred option for most Pacific Islanders but it is not likely to be a viable one. While the New Zealand government has pledged NZD300 million to Pacific countries with a focus on “climate related assistance”,²²² the cost of the adaption plans to raise Kiribati 2m above the highest

²¹⁷ International Labour Organisation “Labour Migration in Kiribati” (18 December 2015) International Labour Migration www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_43653/lang--en/index.

²¹⁸ Minister of Labour and Human Resource Development, National Labour Migration *Kiribati National Labour Migration Policy Report* (December 2015) at 25; and Ministry of Foreign Affairs, Trade, Tourism, Environment and Labour *Tuvalu National Labour Migration Policy Report* (August 2015) at 16.

²¹⁹ David de la Croix, Frederic Docquier and Maurice Schiff “Brain Drain and Economic Performance in Small Island Developing States” in A Artal-Tur and others (ed) *The Socio-Economic Impact of Migration Flows* (Springer Internatioanl Publishing, Switzerland, 2014) 123 at 143; and Michel Beine, Frederic Docquier and Maurice Schiff “Brain Drain and its Determinants A Major Issue for Small States” (paper presented to the World Bank Conference on Small States, Growth Challenges and Development Solutions, Washington, 8 December 2007).

²²⁰ Michael A Clemens and David McKenzie “Think Again: Brain Drain” (22 October 2009) Foreign Policy < foreignpolicy.com/2009/10/22/think-again-brain-drain/>.

²²¹ The process of change whereby people adapt to the effects of climate change in a variety of ways including, building sea walls, implementing desalination strategies, and developing drought resistant crops.

²²² Ministry of Foreign Affairs and Trade “At home and in the Pacific: Our work in the Pacific” <www.mfat.govt.nz/en/environment/climate-change/at-home-and-in-the-pacific/>.

anticipated sea level rise are NZD408 million. This is NZD108 million higher than New Zealand's total aid budget to the Pacific. These plans are also projected to take thirty years to complete.²²³ It is unlikely that adaptation plans alone will be enough to manage the threats posed by the effects of climate change.

The creation of a new visa scheme would also be preferable to modifying the legislation via an expansion of the humanitarian limb of the Immigration Act, s 207. There are two reasons for this:

1. changing legislation is more time consuming than changing policy and these mechanisms need to be available as soon as possible; and,
2. legislation is inflexible. The flexibility of a visa scheme through policy rather than legislation allows the criteria to be adjusted based either on New Zealand's capacity for a humanitarian response, or the specific needs of Pacific countries.

In the event that the scheme is successful, the numbers could easily be raised. Conversely, if New Zealand was inundated with refugees and felt it could not afford to provide protection beyond its official obligations, a change in the law would not be required. The dangers of enacting inflexible legislation can be seen in the repealed Swedish and Finnish legislation. A visa quota can be reduced, changed, modified and expanded. A visa could better adapt to changing contexts (which are common when considering the effects of rapid onset natural disasters such as tsunamis and tropical cyclones) and provide the most appropriate protection in the circumstances.

As articulated in chapter II existing migration routes such as the PAC, SQC and RSE are not well suited to provide tangible relief to those displaced by the effects of climate change. Modifying these visa schemes is not an adequate response to the challenge of climate induced migration in isolation, as all of these visas are focused on labour markets. The PAC requirements are too onerous to provide migration pathways for many of those impacted by climate effects. The RSE is limited because it is a temporary visa. It functions because there is a seasonal demand for workers when fruit must be harvested. There is a significant portion of the year where surplus workers are not required, so it is unlikely the RSE could become a permanent visa. For these reasons simply modifying the permanent

²²³ Simon Liddell "Building resilience on Temeika Bight, Tarawa, Kiribati" (paper presented to the Environment Institute of Australia and New Zealand (EIANZ) Annual Conference Tu Kaha: Stand tall Fronting up with wicked solutions, Wellington, October 2017) at 1.

schemes would be much less effective than a visa specifically targeted to provide relief to those forced to migrate due to the effects of climate change.

E Limitations

The visa in its current form is very limited in the number of places offered. It would not be a panacea for the challenges facing the Pacific. Further, by not being embedded in domestic legislation the visa would be more vulnerable to adaptation or removal with changing governments. However, this would permit adaptation to the rapidly changing circumstances and environment. A climate visa would be an innovative regional mechanism that would provide a potential framework for positive change that other nations could emulate.

Potential criticisms of introducing this visa scheme should also be addressed. Currently immigration policy is dominated by economic factors.²²⁴ Traditionally, migration policy creation has been altruistic only to the extent the altruism is ancillary to the economic benefit for New Zealand.²²⁵ This is consistent with New Zealand's position as a country which predominantly receives rather than sends migrants. Globally, post 9/11 refugee pathways have tightened, and family immigration and humanitarian schemes have decreased.²²⁶ Migration pathways often target specific labour market requirements.²²⁷ Further to this in 2015 there was a significant backlash against immigration because of the strain on infrastructure.²²⁸ Last year the number of New Zealand residency visas granted was at a 20-year low (34,000), and temporary visas were at their highest ever (250,000). New Zealand needs workers, but the current policy does not support workers remaining permanently. The New Zealand Association for Migration and Investment have linked this policy to New Zealand's low business confidence, New Zealand wants "more rich, skilled migrants" - this demographic does not cover most climate migrants.²²⁹

²²⁴ Ather H Akbari and Martha McDonald "Immigration Policy in Australia, Canada, New Zealand, and the United States: An Overview of Recent Trends" (2014) 48 Int'l Migration Rev 801 at 818.

²²⁵ Paul Roth "Migrant Labour in New Zealand" (2009) 21 Comp. Lab. L. & Pol'y J. 67 at 88.

²²⁶ Ather H Akbari and Martha McDonald, above n 225, at 818.

²²⁷ At 818.

²²⁸ Sharon Brett-Kelly "The heartbreak behind the immigration backlog" (podcast, 17 July 2019) Radio New Zealand: the detail. [://www.rnz.co.nz/programmes/the-detail/story/2018703665/the-heartbreak-behind-the-immigration-backlog](http://www.rnz.co.nz/programmes/the-detail/story/2018703665/the-heartbreak-behind-the-immigration-backlog).

²²⁹ Sharon Brett-Kelly "The heartbreak behind the immigration backlog" (podcast, 17 July 2019) Radio New Zealand: the detail. [://www.rnz.co.nz/programmes/the-detail/story/2018703665/the-heartbreak-behind-the-immigration-backlog](http://www.rnz.co.nz/programmes/the-detail/story/2018703665/the-heartbreak-behind-the-immigration-backlog).

There is no immediate domestic need for New Zealand to provide protection for climate migrants. New Zealand does not face the same imminent challenges as the Pacific, and it is unlikely that entire populations will seek refuge in New Zealand in the immediate future. In this event New Zealand currently has a policy in place to deal with an influx.²³⁰ Taking into account the perceived lack of immediate economic benefits for New Zealand, the associated costs, and inconsistency with current economic migration policy some may advocate against the creation of a visa scheme.²³¹

This view fails to consider the long-term consequences of inaction. The economic stresses for New Zealand as a result of a potential mass influx of displaced Pacific Islanders in the future would be far greater than those from establishing migration pathways to ease pressure on threatened Pacific islands. While the visa may be inconsistent with some aspects of New Zealand immigration policy, it is consistent with New Zealand's international obligations and recent promises from our Prime Minister.

Further, the literature on whether refugees provide a net cost or benefit is not settled. The current government policy implies a net cost but there is significant literature to suggest refugees and migrants create economic benefits.²³² This topic is worthy of more research, but that research is beyond the scope of this paper. This proposed visa was an election promise of the Green Party so they believed it had merit. The initial limit to 100 places would place very little strain on New Zealand's economy, while addressing the potential consequences of inaction. These consequences including mass forced migration from the Pacific, the resultant loss of culture, identity, language and history, and the threat to human rights would place immense pressure on surrounding nations, including New Zealand.

Another concern relates to the permanence of the scheme for specific Pacific nations. Jon Barnett suggests for very small remote Pacific Islands depopulation may reduce the

²³⁰ The Immigration (Certificate and Warrant Forms) Regulations 2010 allow Immigration officers to detain those in a mass arrival (30 people or more on board the same boat, or group of boats), for up to six months to determine next steps. Immigration Act 2009, s 9A and Immigration (Certificate and Warrant Forms) Regulations 2010, form 5. These have not yet been used.

²³¹ Both financial and community support is needed for successful the transition to a new culture and environment.

²³² Roger Zetter "Are refugees an economic burden or benefit?" (2012) 41 FMR 50 at 50; and Elizabeth Matsangou "Refugees are an economic benefit, not burden to Europe" (2 November 2015) World Finance <<https://www.worldfinance.com/special-reports/refugees-are-an-economic-benefit-not-burden-to-europe>>; and Patrick Gibbons "Economic benefits of admitting refugees outweigh costs" (14 June 2017) State News Service <link.gale.com/apps/doc/A495618418/AONE?u=otago&sid=AONE&xid=06160539>.

capacity of those that remain to adapt to climate change. Using Niue as a case study, Barnett notes that depopulation caused:²³³

reduced environmental damages; distortions in markets; obsolescent political and administrative institutions; a hyper-concentration of social capital; increased demands on labour; disputes over land; difficulties in defining and maintaining 'culture'; and challenges to identity.

While Barnett's point was raised in the context of mass relocations, the premise suggests smaller nations may benefit from the extension of temporary migration through schemes such as the RSE.²³⁴ This proposed climate visa scheme would not cause mass depopulation as it is limited to 100 places, and the size of Tuvalu and Kiribati's population are significantly larger than Niue so there is little danger of hindering the remaining populations adaptation. If the scheme expanded significantly in either numbers or scope this concern would need to be addressed. The benefit of a targeted scheme is that it can be adapted to address these concerns should the need arise.

F Potential Supplementary Protection

A climate visa remains the most appropriate regional response as it would provide a permanent migration route to New Zealand. The largest limitation of this scheme is that it provides only 100 places.²³⁵ Given the scale of the problem, the limit of 100 places means many Pacific Islanders will not have access to migration. In the interim for those not chosen in the climate visa ballot, or who wish to remain but desire to utilise temporary labour schemes for remittances to fund adaptation, the RSE should be adapted to provide supplementary protection and complement the visa scheme. While the RSE scheme is inherently ill suited to provide a pathway for migration for most people suffering from the effects of climate change, it could still provide an effective ancillary protection.

The RSE Scheme is considered the most adaptable means of facilitating climate migration.²³⁶ This is because the scheme has been well received by New Zealand, provides a boost to

²³³ Jon Barnett "On the risks of engineering mobility to reduce vulnerability to climate change: insights from small island states" in Kirsten Hastrup and Karen Fog Olwig (ed) *Climate Change and Human Mobility: Challenges to the Social Sciences* (Cambridge University Press, New York, 2012) at 171.

²³⁴At 231.

²³⁵ This is necessary to effectively monitor an innovative new visa as discussed above.

²³⁶At 231.

New Zealand's economy, and has an ever-growing quota.²³⁷ Christine Brickenstein and Gil Tabucanon highlight the potential benefits of utilising current temporary labour migration programmes as adaptation strategies for Pacific Islanders.²³⁸ These schemes provide remittances to increase resilience, family stability and construction of buildings that can better withstand the effects of climate change.²³⁹ Brickenstein and Tabucanon suggest modifying both the RSE (and the Australian equivalent, the Seasonal Worker Program (SWP)) in three ways:

- (1) by identifying environmentally affected or vulnerable countries in the Pacific, and increasing the intake of workers from these countries,
- (2) by providing a specific quota for workers from countries which are projected to face the worst/harshest effects of climate change through negative environmental impacts; and
- (3) subsidising or reducing the costs for workers.²⁴⁰

Utilising the RSE and adapting it as a short term solution for those affected by climate change may also have the ancillary benefit of upskilling Pacific labourers, providing them better access to permanent migration schemes, either under the PAC, SQC or the skilled migrant visa.²⁴¹ Brickenstein and Tabucanon stress this would not require any legislative or policy modification, making it an attractive option.²⁴² Another benefit of the RSE scheme is the work does not require expertise and the government can effectively monitor employers to ensure migrants are not exploited. Amending the RSE by increasing the number of workers from Tuvalu, as well as considering extending the scheme to other areas where New Zealand is understaffed, including tourism and care services,²⁴³ could work alongside a new climate visa to provide better long-term options for climate migrants.

An extension of the RSE would provide an effective measure to fund adaptation and upskill Pacific workers, but this extension of a temporary migration scheme comes with its own potential challenges. Visa schemes operated from 1986-2002 for Kiribati and Tuvalu but they were halted due to the problems caused by migrants who stayed beyond the end of

²³⁷ This quota has increased every year.

²³⁸ Christine Brickenstein and Gil Tabucanon "Circular Migration as Climate Change Adaptation: Reconceptualizing New Zealand's and Australia's Seasonal Worker Program" (2013) 3 *Precedente Macquarie University Law Journal* 7 at 27.

²³⁹ At 28.

²⁴⁰ At 27.

²⁴¹ At 29.

²⁴² At 29.

²⁴³ Connell, above n 100 at 60.

their visa.²⁴⁴ Studies show temporary migrant workers are highly vulnerable to abuse, at the hands of employers. To effectively monitor a larger RSE, the government would need to invest in oversight and protection mechanisms for Pacific workers.²⁴⁵ New Zealand has recognised this challenge and the Human Rights Commission and the Ministry for Pacific Peoples recently held a fono,²⁴⁶ to address Pacific worker exploitation in New Zealand.²⁴⁷ Extension of temporary migration routes without extending oversight protections increases the risk of exploitation therefore New Zealand must be willing to invest in these protections for Pacific workers. This is necessary to ensure those who may be prioritised under these visa schemes because of the threat they face from climate change are provided safe work opportunities in New Zealand.

²⁴⁴ Connell, at 64.

²⁴⁵ Jessie Williams *Low skill temporary migration in New Zealand: Labour market and human rights law as a framework for managing future migration* (Institute of Policy Studies, Working Paper 09/09, July 2009), at 1; and Chris G Wright, Dimitria Groutsis and Diane van de Broek “Employer sponsored temporary labour migration schemes in Australia, Canada and Sweden: enhancing efficiency, compromising fairness?” (2017) 11 *Journal of Ethnic and Migration Studies* 1854 at 1856; and Amanda Cropp “Shameful exploitation of vulnerable migrant workers” (23 June 2019) Stuff <<https://www.stuff.co.nz/business/113639803/shameful-exploitation-of-vulnerable-migrant-workers>>.

²⁴⁶ (a council or meeting).

²⁴⁷ Ministry for Pacific Peoples “Tackling Pacific worker exploitation” (2 June 2019) <www.mpp.govt.nz/news-and-stories/tackling-pacific-worker-exploitation/>.

Conclusion: A Framework for Positive Change

This dissertation has aimed to illustrate the immense legal and political hurdles to providing relief for those who choose or are forced to migrate due to the effects of climate change. Despite the extensive literature on the scale and challenges associated with internal and external migration, and the calls for a binding international instrument or framework to provide protection, this framework may not eventuate until the problem is upon us. By that stage the scale of the challenge is likely to be immense.

Internationally, many developed countries have chosen to take a protectionist stance towards immigration, severely limiting options for those who are threatened by the effects of climate change in their own nations. Furthermore, while non-binding instruments provide aspirations and goals to produce safeguards for climate migrants, developed nations such as Australia and the US have refused to agree to even these soft law options. There are no immediately enforceable legal protections and few pathways for external migration. This leaves a huge protection gap for those affected by a problem largely created by these greenhouse gas emitting developed nations.

The best current option is the creation of regional and domestic policy for protection. New Zealand should develop a climate related visa scheme – the “Pacific Climate Migration Visa”. A scheme of this kind would be consistent with the international legal principles of shared responsibility, and our obligations as neighbours. New Zealand has benefited hugely from the wealth of the Pacific and has strong ties of friendship which Prime Minister Jacinda Ardern, has described as creating a “duty of care”.²⁴⁸ As a diverse nation made up largely of immigrants, with a declining birth rate and increase in external migration, New Zealand can support climate migration.

The lack of legal obligation to provide these options could be used to justify inaction. It is true New Zealand has many internal policy challenges such as the housing crisis, an aging population and child poverty, to name but a few. However, if New Zealand were able to provide support now, at this relatively early stage, this could prevent the problems caused by climate migration from escalating and provide better outcomes for the Pacific region and New Zealand. New Zealand should provide choice and facilitate options, so that Pacific Islanders have a chance to respond to the challenge of climate change. A framework for positive change, including an optional humanitarian visa, and modifications to our RSE is

²⁴⁸ “Climate change refugee status visa welcomed” *Otago Daily Times* (online ed, Dunedin, 2 November 2017).

how New Zealand should respond to one of the biggest threats our generation will have to face, climate induced migration.

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