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Protection of Cross-border Climate Displaced Persons in the South Pacific :

Case of Tuvalu and New Zealand*

Kyoko KAWAJIRI**

投稿論文

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Abstract

Cross-border Climate Displaced Persons (CCDPs) are people who cross borders due to the impact of climate change in order to access the protection they need in another country. Despite the increasing number of CCDPs, current international laws do not provide sufficient protection for them. To address the issue, this study evaluates the possible responses for CCDPs from Tuvalu under the Immigration Act of New Zealand with the effective practices for CCDPs proposed by the Nansen Initiative. It then goes on to identify the problems and recommend the possible solutions. The findings show that a new humanitarian visa category needs to be developed for protection of CCDPs who cannot under the labour migration scheme. This could hopefully contribute to New Zealand's further consideration of a new humanitarian visa category for CCDPs from Pacific islands.

Keywords : Climate Change, Displacement, Cross-border Climate Displaced Persons (CCDPs), Refugee, Tuvalu

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1. Introduction

The Intergovernmental Panel on Climate Change (IPCC) clearly pointed out in its Fifth Assessment Report (AR5) that ‘warming of the climate system is unequivocal’,¹ and the ‘evidence for human influence has grown since AR4. It is *extremely likely*² that human influence has been the dominant cause of the observed warming since the mid-20th century’.³

In fact, the global mean concentration of CO₂ in 2015 reached the symbolic and significant milestone of 400 ppm⁴ for the first time, and the year of 2016’s global average temperature was the hottest year on record, being approximately 1.1 °C above pre-industrial levels.⁵ Consequently, many weather-related hazards such as cyclones, droughts, and floods happened in many parts of the world, and triggered many displacements. From 2008 to 2016, 195.7 million people in total have been displaced internally by climate or weather-related disasters. This is larger than the total number of people who were displaced by conflict in the same period.⁶

In November 2016, the Paris Agreement, a new post-2020 legally binding international convention on climate change, entered into force. And it reinforces all the Parties’ climate actions in keeping the increase in global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit it to 1.5 °C above pre-industrial levels in order to balance anthropogenic greenhouse gas emissions by sources with removals by sinks in the second half of the century.⁷

However, current estimated aggregated greenhouse gas emission reduction targets pledged by the Parties to the Paris Agreement would limit warming only to about 3 °C above pre-industrial levels by 2100.⁸ If limiting warming to 1.5 °C above pre-industrial levels is not achieved, there will be a high possibility of an increase in the number of people displaced in the future, especially in the Small Island States, despite those effected not having contributed much to greenhouse gas emissions themselves. This is the reason why the protection of climate displaced people needs to be considered alongside greenhouse gas emission reduction.

1.1: Displacement by Natural Disasters

Displacement refers to ‘situations where people are forced or obliged to leave their home or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard’⁹ in response to a sudden extreme weather event, such as a flood, or cyclone, regardless of whether people only move temporarily or for a short time.¹⁰ Most people displaced by natural disasters remain

¹ IPCC (2013) *Climate Change 2013: The Physical Science Basis. Contribution of Working Groups I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policymakers*, IPCC, p. 4.

² According to IPCC AR5, *extremely likely* means 95-100%. Italic form was used in the original text of IPCC AR5.

³ IPCC, *supra* note 1, p. 17.

⁴ It stands for parts per million, which is the ratio of the number of gas molecules to the total number of molecules of dry air.

⁵ World Meteorological Organization (2017) “WMO confirms 2016 as hottest year on the record, about 1.1°C above preindustrial era”, at: <https://public.wmo.int/en/media/press-release/wmo-confirms-2016-hottest-year-record-about-1-1cB-above-pre-industrial-era> (as of 8 January, 2018).

⁶ Internal Displacement Monitoring Center and Norwegian Refugee Council (2017) *GRID 2017 Global Report On Internal Displacement*, pp. 31-33.

⁷ UNFCCC (2015) *Paris Agreement*, article.2.1.(a), and article. 4.1.

⁸ United Nations Environmental Programme (2017) *The Emission Gap Report 2017 UN Environment Synthesis Report*, p. xviii.

⁹ The Nansen Initiative (2015) *Agenda for The Protection of Cross-Border Displaced Persons in the Context of Disaster And Climate Change: Volume I*, The Nansen Initiative, para. 16

¹⁰ McAdam, Jane, (2012) *Climate Change, Forced Migration, and International Law*, Oxford University Press, p. 6.

within their own country.¹¹ Those people are usually categorized as Internally Displacement Persons (IDPs). According to the Guiding Principles on Internal Displaced adopted by the United Nations in 1998, the definition of IDPs includes natural disasters that force persons or a group of persons to leave their home or place of habitual residence, and the States have a primary duty and responsibility to provide protection and humanitarian assistance to IDPs who are in their jurisdiction.¹²

1.2: Cross-border Climate Displaced Persons (CCDPs)

However, in extreme cases, some people cross borders to access protection in another country. Generally, it is considered that persons who travel across an international border because of environmental causes would be entitled to the human rights guaranteed in their receiving States.¹³ In actual fact, however, not only would they have no right of entry to the States, they would also not be under sufficient protection of current international legal frameworks such as the Refugee Convention, international climate change law, and international human rights law, even if they do manage to enter a State. This issue is the major emerging concern for the Small Island States as well as for the potential receiving States. The Prime Minister of Tuvalu appealed for the need of a legal framework to ensure the human rights protection and security for people displaced by the impact of climate change, and adoption of a UN Resolution on the establishment of such a legal process at the UN General Assembly (UNGA) in 2016.¹⁴ And New Zealand announced that it considers developing “an experimental humanitarian visa category” for people displaced by the impact of climate change in the Pacific.¹⁵

To address the issue, this paper conducts a study to illustrate the challenges in protecting people who cross borders due to the impact of climate change, which are called ‘Cross-border Climate Displaced Persons’ (hereafter ‘CCDPs’) in this study. The study particularly focuses on CCDPs in the case of Tuvalu, where CCDPs will very likely emerge due to the impact of climate change, and its receiving State New Zealand. This paper will evaluate possible responses for CCDPs from Tuvalu under the Immigration Act of New Zealand with the effective practices for CCDPs proposed by the Nansen Initiative and identify the problems. Then, it will recommend the necessary points of improvement in the protection of CCDPs from Tuvalu. And, the last chapter discusses about the future challenges in protecting CCDPs in the South Pacific region.

2. Protection Gaps in the International Legal Frameworks

Before the evaluation, this chapter illustrates existing protection gaps for CCDPs in current international legal frameworks; such as i) the Refugee Convention, ii) international climate change law, and iii) international human rights law. Then, it marshals arguments to fill the gaps to protect CCDPs in international frameworks by scholars and explores possible solutions for Small Island States in the South Pacific region.

¹¹ Internal Displacement Monitoring Center and Norwegian Refugee Council, *supra* note 6, pp. 53-54.

¹² United Nations Economic and Social Council (1998) E/CN.4/1998/53/Add.2, pp. 5-6.

¹³ Human Rights Council (2009) A/HRC/10/61, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, para 58.

¹⁴ Government of Tuvalu (2016) “Statement Presented by Prime Minister of Tuvalu: Honorable Enele Sosene Sopoanga at The 71st Session of the United Nations General Assembly General Debate on September 23, 2016”, at: https://gadebate.un.org/sites/default/files/gastatements/71/71_TV_en.pdf (as of 8 January, 2018), para. 8.

¹⁵ REUTERS (2017) “New Zealand considers visa for climate ‘refugees’ from Pacific islands”, <https://www.reuters.com/article/us-newzealand-climatechange-visa/new-zealand-considers-visa-for-climate-refugees-from-pacific-islands-idUSKBN1DH1JB>, (as of 7 January, 2018).

2.1: Treatment of CCDPs under the Refugee Convention

If people cross borders and seek protection in another country, they are generally categorized as a refugee. According to the definition of refugee under Article 1.A.(ii) of the Refugee Convention, CCDPs are also outside their country of origin, and not receiving protection from the government in their country of origin. However, CCDPs are not considered to have a ‘well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion’.¹⁶

Natural disasters including the impacts of climate change, which are the main cause of displacement across borders to seek protection in other countries, are not considered a reason of persecution under the Refugee Convention. Therefore, CCDPs are not recognised as refugees and cannot receive relevant protection under the Refugee Convention.¹⁷

On the other hand, a mandate of the United Nations High Commissioner for Refugees (UNHCR), a supervisory organization responsible for the Refugee Convention, has been evolving since the end of the cold war and the agency started to engage with IDPs in Bosnia and Herzegovina in the 1990s.¹⁸ In 2004, when the Indian Ocean earthquake and tsunami happened, upon request by Secretary General of the United Nations, UNHCR started to offer assistance to IDPs by natural disasters.

Due to the high media attention to so called “climate refugees”¹⁹ from around the start of the 21st century, the UNHCR began to engage with policy debate on climate change and displacement under the strong leadership of High Commissioners. In 2007, Antonio Guterres who was the High Commissioner of UNHCR made a statement acknowledging the linkage between climate change and displacement at the Executive Committee (ExCOM) of UNHCR for the first time. He referred to climate change as a new “mega-trend” in his speech and has worked actively to expand its mandate to include climate change and natural disaster displacement.²⁰

In 2016, adoption of the New York Declaration for Refugees and Migrants at UNGA initiated the negotiations on Global Compact on Refugees²¹ and Global Compact for Safe, Orderly and Regular Migration,²² which will be adopted at UNGA in 2018. Both zero drafts contain paragraphs referring to climate-induced human mobility respectively. However, those references might be modified during the formal consultations with UN Member States.

¹⁶ Definition of Refugee under Article 1.A.(ii) of the Refugee Convention “As a result of events occurring before 1 January 1951 and owing to 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.” (UNHCR (2010) *Convention and Protocol Relating to the Status of Refugees*, p. 16.)

¹⁷ McAdam, Jane, *supra* note 10, pp. 42-48.

¹⁸ Abe, Kohki (2005) The new face of humanitarianisms-The internally displaced problem and politics of law, *Internally displaced people and international law*, Shinzansha, p. 236. 阿部浩己「新たな人道主義の相貌—国内避難民問題の法と政治」『国内避難民と国際法』, (2005 年、信山社) 236 頁。

¹⁹ Office of UNHCR the International Organization for Migration (IOM) and other humanitarian organizations have advised that these terms has no legal basis in international refugee law and should be avoided in order to undermine the international legal regime for the protection of refugee. (Human Rights Council, *supra* note 13, para. 58.)

²⁰ Hall, Nina (2016) *Displacement, Development, and Climate Change International organizations moving beyond their mandate*, Rutledge, pp. 50-86.

²¹ UNHCR (2018) “UNHCR releases draft outlining a new global refugee deal”, <http://www.unhcr.org/news/latest/2018/1/5a71f6914/unhcr-releases-draft-outlining-new-global-refugee-deal.html>, (as of 27 February, 2018)

²² Global Compact for Migration (2018) “Global Compact for Safe, Orderly and Regular Migration Zero Draft”, https://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf, (as of 27 February, 2018)

2.2: Treatment of CCDPs under the International Climate Change Law

As explained in the introduction, the number of people displaced is projected to increase in the future because of climate change. This section discusses the treatment of CCDPs under the relevant international climate change law; such as the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement.

Due to the failure on adopting the post-2013 international framework on climate change at the fifteenth session of the Conference of the Parties (COP15) in 2009²³, there had been no decision related to climate induced human mobility under the UNFCCC and Kyoto Protocol until COP16 adopted the Cancun Adaptation Framework²⁴ in 2010.²⁵ Paragraph 14(f) of the Cancun Agreement invites all parties to take measures related to climate change induced displacement, migration²⁶ and planned relocation²⁷ as adaptation²⁸ measures for the first time.²⁹ This paragraph enhances important recognition of the impact of climate change on human movement by States in the UNFCCC process, and appeals to the world for the need to address this issue.³⁰ However, as this decision on the Cancun Adaptation Framework was the COP's decision, which does not have a mandatory nature, concrete measures to address this issue were not undertaken.³¹

In December 2015, some progress was made on the climate displacement issue as a part of response to loss and damage³² associated with climate change impact at COP21 in Paris. Paragraph 49 in the decision adopted by the COP phrases that the COP requests the Executive Committee of the Warsaw International Mechanism to establish a task force to develop recommendations for addressing displacement related to the adverse impacts of climate change.³³

This is quite significant as the decision allows the formation of a new body and the start of a formal long-term international process to address issues related to climate displacement specifically in the context of loss and damage.³⁴ The draft recommendations will be presented in December 2018 at COP24 in Katowice,

²³ High Commissioner of UNHCR, Anonio Guterres participated in COP15 for the first time and called a need for a new framework to protect climate change displaced peoples for the first time.

²⁴ The Cancun Adaptation Framework aims to enhance action of adaptation, and establish the process that the Parties the most vulnerability to the impacts of climate change enable to implement National Adaptation Plan of Action (NAPA). Moreover, it decides to establish the work programme to consider the approaches to address loss and damage associated with climate change. (UNFCCC (2011) FCCC/CP/2010/7/Add.1, para. 11-35.)

²⁵ Simonelli, Andrea C. (2016) *Governing Climate Induced Migration and Displacement IGO Expansion and Global Policy Implications*, Palgrave Macmillan, pp. 121-126.

²⁶ Migration that is understood as the primarily voluntary movement of persons. And planned relocation that is understood as planned process of setting persons or groups of persons to a new location. (The Nansen Initiative *supra* note 9, para. 22-23.)

²⁷ Planned relocation can be described as a planned process in which persons or groups of persons move or are assisted to move away from their homes or places of temporary residence, are settled in a new location, and provided with the conditions for rebuilding their lives. (The Nansen Initiative *supra* note 9, para. 21.)

²⁸ Adaptation refers 'the process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects'. (IPCC (2014) *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC p. 118.)

²⁹ UNFCCC, *supra* note 24, para. 14.(f).

³⁰ McAdam, *supra* note 10, pp. 230-232.

³¹ Kälin, Walter (2012) "From the Nansen Principles to the Nansen Initiative", *Forced Migration Review*, Issue 41, pp. 48-49.

³² Loss and damage is defined as 'the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems'. And loss means 'negative impacts in relation to which reparation or restoration is impossible, such as loss of freshwater resources', and damage means 'negative impacts in relation to which reparation or restoration is possible, such as windstorm damage to the roof of a building, or damage to a coastal mangrove forest as a result of coastal surges'. (UNFCCC (2012) FCCC/SBI/2012/INF.14, para. 2.)

³³ UNFCCC, *supra* note 7, para. 49.

³⁴ Not only expert groups under UNFCCC such as Executive Committee of the Warsaw International Mechanism for Loss and Damage, Adaptation Committee, Least Developed Countries Expert Group, and accredited Non Governmental Organizations (NGOs) constituency groups to UNFCCC, but also members from UN related agencies such as UNHCR, International

Poland after the consultation with stakeholders on; I. Policy/practice at national and subnational level, II. Policy at international level, and III. Displacement related data and assessment in May.³⁵

The recommendations from the task force could be used not only as comprehensive information but also as a base to develop further discussions to address the climate displacement issue. But, displacement related to the adverse impact of climate change in paragraph 49 includes both internal displacement and cross border displacement. Therefore, it is not clear yet whether the latest findings and information identified by the task force will lead to some concrete legal actions to fill the existing legal gaps for the protection of CCDPs or not.³⁶

2.3: Application of International Human Rights Law for CCDPs

The impact of climate change affects many things that consist of your daily life such as food, water, health, and housing, which would threaten your enjoyment of human rights directly and indirectly. This was recognised in the resolution of the United Nations Human Rights Council (HRC) in 2008³⁷ for the first time. And it was acknowledged in the preambles of the UNFCCC's Cancun Agreement³⁸ and Paris Agreement³⁹ respectively.

International human rights law such as the Universal Declaration of Human Rights (UDHR)⁴⁰, UN International Covenant on Civil and Political Rights (ICCPR)⁴¹ and International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴², display not only the 'minimum standards of treatment that the States must provide to individuals within their territories', but also offer 'a means of assessing which rights are compromised by climate change and which national authorities have primary responsibility for responding to those rights at risk'.⁴³ See more details in Figure. 1.⁴⁴

Primarily, States have the obligation to ensure human rights of individuals in their jurisdictions by taking mitigation, adaptation, and loss and damage measures to minimize the impact of climate change on human rights. States also have 'extraterritorial obligations to promote and protect economic, social and cultural rights'.⁴⁵ The Committee on Economic, Social and Cultural Rights (CESCR) identified four extraterritorial obligations in their general comments; 'i) refrain from interfering with the enjoyment of human rights in other countries, ii) take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries, iii) take steps through international assistance and cooperation, depending on the availability of resources to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons, and iv) ensure that human rights are given due attention in international agreements and that such agreements

Organization for Migration (IOM), United Nations Developed Programme (UNDP), Platform on Disaster Displacement, International Labour Organization (ILO) and International Federation of Red Cross and Red Crescent Societies (IFRCRCS) are also members of the task force.

³⁵ UNFCCC (2018) "Task Force on Displacement", at:

http://unfccc.int/adaptation/groups_committees/loss_and_damage_executive_committee/items/9978.php (as of 7 January, 2018).

³⁶ Bodansky, Daniel et. Al (2017) *International Climate Change Law*, Oxford University Press, p. 327.

³⁷ United Nations Human Rights Council (2008) Resolution 7/23, para. 1.

³⁸ UNFCCC, *supra* note 24, p. 2.

³⁹ UNFCCC, *supra* note 7, p. 2.

⁴⁰ United Nations (1948) *Universal Declaration of Human Rights*.

⁴¹ UNHCR (1966) *International Covenant on Civil and Political Rights*.

⁴² United Nations Human Rights Office Of The High Commissioner (1976) *International Covenant on Economic, Social and Cultural Rights*.

⁴³ McAdam, *supra* note 10, p. 52.

⁴⁴ Limon, Marc (2009) "Human Rights and Climate Change: Constructing a Case for Political Action", Vol.33, *Hervred Environmental Law Review*, p. 476.

⁴⁵ Human Rights Council, *supra* note 13, para. 86.

do not adversely impact upon human rights'.⁴⁶ Based on the third obligation, you could say that the States have a responsibility to protect CCDPs as well.

Moreover, international human rights law has an additional role especially for CCDPs. They 'may provide a legal basis on which protection may be sought (and granted) in another State',⁴⁷ if the rights are violated. The well known practice of this is so called complementary protection, which describes the protections that States afford people who are at risk of serious human rights violations if they go back to their country of origin, but who do not qualify as refugee under the Refugee Convention.⁴⁸ The need for the protection is assessed by the court or tribunal, taking into account relevant international human rights law such as i) ICCPR, and ii) UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁴⁹

Fig.1 : Example of Some Impacts by Climate Change on the Enjoyment of Human Rights

| Climate Impacts | Human Impacts | Rights Implicated |
|---|--|---|
| Sea Level Rise <ul style="list-style-type: none"> • Flooding • Sea surge • Erosion • Salination of land and water | <ul style="list-style-type: none"> • Loss of land • Drowning, injury • Lack of clean water, disease • Damage to coastal infrastructure, homes, and property • Loss of agricultural lands • Threat to tourism, lost beaches | <ul style="list-style-type: none"> • Self-determination [ICCPR; ICESCR, 1] • Life [UDHR, 3; ICCPR, 6] • Health [ICESCR, 12] • Water [CEDAW, 14; ICESCR, 11] • Means of subsistence [ICESCR, 1] • Standard of living [ICESCR, 12] • Adequate housing [ICESCR, 11] • Culture [ICCPR, 27] • Property [UDHR, 17] |
| Temperature Increase <ul style="list-style-type: none"> • Change in disease vectors • Coral bleaching • Impact on fisheries | <ul style="list-style-type: none"> • Spread of disease • Changes in traditional fishing livelihood and commercial fishing • Threat to tourism, lost coral and fish diversity | <ul style="list-style-type: none"> • Life [ICCPR, 6] • Health [ICESCR, 12] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12] |
| Extreme Weather Events <ul style="list-style-type: none"> • Higher intensity storms • Sea surges | <ul style="list-style-type: none"> • Dislocation of populations • Contamination of water supply • Damage to infrastructure : delays in medical treatment, food crisis • Psychological distress • Increased transmission of disease • Damage to agricultural lands • Disruption of educational services • Damage to tourism sector • Massive property damage | <ul style="list-style-type: none"> • Life [ICCPR, 6] • Health [ICESCR, 12] • Water [CEDAW, 14; ICRC, 24] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12] • Adequate and secure housing [ICESCR, 11] • Education [ICESCR, 13] • Property [UDHR, 17] |
| Changes in Precipitation <ul style="list-style-type: none"> • Changes in disease vectors • Erosion | <ul style="list-style-type: none"> • Outbreak of disease • Depletion of agricultural soils | <ul style="list-style-type: none"> • Life [ICCPR, 6] • Health [ICESCR, 12] • Means of subsistence [ICESCR, 1] |

Source: Modified by the author, original version is found in Limon, Marc (2009) "Human Rights and Climate Change: Constructing a Case for Political Action", Vol.33, Harvard Environmental Law Review, p. 476.

⁴⁶ *Ibid.*

⁴⁷ McAdam, *supra* note 10, p. 52.

⁴⁸ Dicker, Nicole and Joanna Miasfield (2012) *Filling the protection gap: current trends in complementary protection in Canada, Mexico and Australia*, UNHCR, p.1.

⁴⁹ UNHCR (1984) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

However, there are limitations of international human rights law. First, it is challenging to access the rights linked to climate displacement, because it is difficult to qualify the climate change impacts as human rights violations, as several factors often contribute to climate change effects and it is not easy to single out the specific climate change impact affecting the human right. In addition, courts have been more likely to assess conditions in an affected area very cautiously if i) the conditions in the affected area are harmful enough and become uninhabitable; ii) returning someone to the affected States would expose them to a real risk of death, inhuman, or degrading treatment⁵⁰ in light of relevant international human rights law.

The second difficulty is that generally CCDPs would not have a right of entry to receiving States, despite the fact that CCDPs should 'be entitled to general human rights guarantees in the receiving States,'⁵¹ and stay as long as they need in those States. This is because the State owns discretionary power to regulate and determine on matters of immigration under customary international law,⁵² unless there are agreements to provide special operations for entry and stay.

In conclusion, international human rights law could be used as a firm base to obligate the receiving States to assess and ensure CCDPs' human rights during their stay in that State. However, as CCDPs do not have the right to enter and stay in the receiving States, which would be the main obstacle especially for those who are in the Pacific, it is crucial to find a way for CCDPs to enter the receiving States as the first step to consider the protection of CCDPs.

2.4: Solutions to Close the Gaps

The first half of Chapter 2 has discussed the existing protection gaps for CCDPs in current international law and reconfirms that the international law does not provide sufficient protection for CCDPs. The second half of Chapter 2 marshals arguments on filling the gap to provide protection for CCDPs in international frameworks by scholars and explores possible solutions for Small Island States in the South Pacific region.

2.4.1: A New International Agreement for CCDPs

The most popular proposal to filling the protection gap in the international law is to create a new international agreement for CCDPs.⁵³ There are many proposals from various actors to fill the protection gaps for CCDPs in the international frameworks.⁵⁴ The ideas vary widely in range including 'a new international convention on environmental or climate displacement, a protocol to the Refugee Convention or the UNFCCC, a new legal instrument under the auspices of the UNFCCC, adding a right to a healthy and safe environment to current agreements',⁵⁵ 'creating a new class and of refugee-like protected persons, and amending the Refugee

⁵⁰ McAdam, Jane and Marc Limon (2015) *Policy Report: Human Rights, Climate Change and cross-border displacement: the role of the international human rights community in contributing to effective and just solutions*, Universal Right Group, pp. 18-19.

⁵¹ Human Rights Council, *supra* note 13, para. 58.

⁵² Chen, Lung-chu (2015) *An Introduction to Contemporary International Law: A Policy-Oriented Perspective Third Edition*, Oxford University Press, p. 229.

⁵³ Nishimura, Lauren (2015) "'Climate Change Migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies", *International Journal of Refugee Law*, Vol.27, No.1, p. 118.

⁵⁴ McAdam, Jane (2011) "Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer", *International Journal of Refugee Law*, Vol.23, No.1, pp. 6-7.

⁵⁵ Nishimura, *supra* note 53, p. 118.

Convention to extend the definition of a refugee to include climate refugee'.⁵⁶

However, McAdam⁵⁷ together with Yamamoto and Esteban⁵⁸ oppose to having a new convention only focusing on climate change displacement for several reasons because there is a lack of political will to negotiate, adopt, ratify, and implement such a new instrument.⁵⁹ Nishimura also shares the view on this.⁶⁰ Other obstacles McAdam indicates are that most climate displacement treaty proposals are based on assumptions about climate change and human movement, which are not based on empirical studies. She also argues that climate change is not the only cause of displacement and there are other socio-economic factors that might influence the displacement of people.⁶¹ And, it is almost impossible to examine the link between climate change and displacement in each case by an expert group like a refugee recognition process. Another concern is that a convention only focused on climate displacement will result in privileging those displaced by climate change over other forced migrants, such as those escaping poverty.

2.4.2: Use of Bilateral Agreements for CCDPs

Yamamoto and Esteban conclude that utilizing bilateral agreements with the potential receiving States is a more feasible way for small low lying islands States like Tuvalu, since various bilateral agreements, such as the labor migration scheme called Pacific Access Category, already exist. Although they are not established to specifically deal with climate change issues, they can serve as a model for the development of future bilateral agreements to deal with possible displacement across borders.⁶² They also state parties' direct involvements being less costly and time-consuming to agree compared with multilateral treaties involving many parties, as an advantage of bilateral agreements.⁶³ McAdam moreover agreed on these advantages.⁶⁴

However, there are some obstacles. First, political will is also required for the adoption of bilateral agreements. Second, political power balance between the affected States and the receiving States will strongly influence the contents of the agreement. Lastly, the type of protections that the receiving States offer to CCDPs might vary even in the same regions.

2.4.3: Soft Law Approach for CCDPs

A major example of soft law in the context of displacement is Guiding Principle on Internal Displacement. The principle was developed in response to the growing need for protection of IDPs in the mid-1990s. Although this principle was not adopted by UNGA and just taken note of due to the political sensitivities that measures might intervene in national sovereignty, it is endorsed by humanitarian agencies, translated into over 60 languages and disseminated widely. The principle became the basis for developing binding international law at the regional level, such as the 2006 Great Lake Protocol on the Protection and Assistance to Internally Displaced Persons and the 2009 African Union Convention for the Protection and Assistance of Internally

⁵⁶ McAdam, *supra* note 54, pp. 6-7.

⁵⁷ *Ibid.*, pp. 8-18.

⁵⁸ Yamamoto, Lilian and Miguel Esteban (2014) *Atoll Island States and International Law Climate Change Displacement and Sovereignty*, Springer Heidelberg, pp. 237-240.

⁵⁹ McAdam, *supra* note 54, p. 25.

⁶⁰ Nishimura, *supra* note 53, p. 118.

⁶¹ McAdam, *supra* note 54, pp. 8-18.

⁶² Yamamoto and Esteban, *supra* note 58, pp. 249-251.

⁶³ *Ibid.*

⁶⁴ McAdam, *supra* note 10, pp. 210-211.

Displaced Persons in Africa.⁶⁵

Scholars pointed out several advantages of the soft law approach. First its flexibility allows States to experiment with new ideas.⁶⁶ Second, it allows governments to make more ambitious commitments than they would do in a binding treaty'.⁶⁷ Third, it provides a more effective foundation for developing responses and allowing all States to have their interests reflected in a wide variety of contexts.⁶⁸

Considering difficulties to agree a new Convention for CCDPs as discussed in the previous section, the application of soft law is much easier and faster.

3. Challenges for CCDPs from Tuvalu to New Zealand

Many scholars conclude that bilateral or (sub-) regional frameworks are faster, more flexible, and politically easier than an international framework, especially for small low lying islands States like Tuvalu. They also see that bilateral or (sub-) regional frameworks are a more realistic solution, considering that CCDPs could happen anytime and need sudden response. Moreover, they pointed out that the application of soft law is much easier and faster, considering the difficulties to agreeing a new Convention for CCDPs.

Considering these points, this study takes up the case of CCDPs from Tuvalu to New Zealand to illustrate the challenges in protecting CCDPs in the South Pacific region in the next chapter. Since the State has the authority to regulate and decide on matters of immigration unless there are agreements that provide special operations for entry and stay, CCDPs do not have the right to enter and stay in the receiving States. Therefore, it is crucial to identify the current problems on admission and stay in the receiving States for CCDPs as the first step.

First, this chapter explains evaluation criteria, which are effective practices proposed in the Protection Agenda of the Nansen Initiative. It then discusses the possible responses that CCDPs from Tuvalu can apply under the 2009 Immigration Act of New Zealand (the 2009 Act) in Chapter 4. After the evaluation of those possible responses with evaluation criteria shown in Chapter 3, this paper presents the results in Chapter 5 and makes recommendations in Chapter 6.

3.1: Evaluation Criteria

This study use effective practices identified in the Protection Agenda of the Nansen Initiative as evaluation criteria, because it provides certain guidance for both the affected States and the receiving States to protect CCDPs.⁶⁹ Effective practices are sorted into two phases of human mobility; i) upon arrival and ii) after entering the States. Subcategories in the figure are based on categories used in the Protection Agenda. Please see the details in the Figure. 2.

3.2: The Protection Agenda of the Nansen Initiative

The Nansen Initiative is a State-led and bottom-up consultative process to build consensus among concerned

⁶⁵ Ferris, Elizabeth (2017) "The relevance of the Guiding Principle on Internal Displacement for the climate change-migration nexus", *Research Handbook on Climate Change, Migration and the Law*, Elgar, pp. 108-130.

⁶⁶ McAdam, *supra* note 10, p. 238.

⁶⁷ Yamamoto and Esteban, *supra* note 58, pp. 252-254.

⁶⁸ McAdam, *supra* note 10, pp. 210-211.

⁶⁹ McAdam, Jane (2014) "Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010-2013", *Refugee*, Volume 29, No.2, pp. 18-20.

States on a global protection agenda for cross-border displacement in the context of disasters including the adverse effect of climate change, through regional and global consultation. With strong leadership from High Commissioner Antonio Guterres, the initiative was launched in October 2012 to break the impasse of failing the adoption of the Nansen Principles⁷⁰ as well as including reference to climate change and natural disaster displacement in the final communiqué at the UNHCR Ministerial Meeting in December 2011.⁷¹

Fig.2 : Effective Practices Proposed in the Protection Agenda used as Evaluation Criteria in this Study

| | Category | | Effective Practices Proposed in the Protection Agenda |
|-------------------------------------|--|-----------------------|--|
| Upon Arrival | Admission and Stay | Using Existing Scheme | <ul style="list-style-type: none"> Granting Visas that authorize travel and entry upon arrival for people from disaster-affected countries, or temporarily suspending visa requirements. Prioritizing and expanding the processing of regular migration categories for foreigners from affected countries following a disaster, or waiving certain admission requirements for such category. |
| | | Exceptional Measures | <ul style="list-style-type: none"> Granting temporary entry and stay for cross-border disaster-displaced persons, such as through the issuance of humanitarian visas or other exceptional migration measures. Granting entry and temporary stay for a group or “mass influx” of cross-border disaster-displaced persons. |
| During Stay in the Receiving States | Clarifying the Rights and Responsibilities | | <ul style="list-style-type: none"> Clarifying and ensuring that those admitted enjoy full respect of their human rights, and, if needed, have access to assistance that meets their basic need, including: shelter, food, medical care, education, livelihood, security, family unity, and respect for social and cultural identity. Ensuring that information about their rights and responsibilities is provided to admitted persons in a language and manner they are likely to understand. |
| | Refrain from Returning Foreigners Abroad | | <ul style="list-style-type: none"> Providing such persons with humanitarian protection measures such as suspending their deportation or extending or changing their existing migration status on humanitarian grounds if: <ul style="list-style-type: none"> ➤ They would experience extreme hardship as a consequence of the disaster in the case of returning to their country of origin; or ➤ Their country of origin has declared a disaster and is temporarily unable to manage the return of its citizens for reasons related to the disaster. |
| | Finding Lasting Solutions | | <ul style="list-style-type: none"> Developing criteria and mechanisms, preferably at bilateral or (sub-) regional level, to determine when return from abroad in disaster context may take place and how to facilitate the return, including necessary exit procedures and travel. Ensuring cooperation between countries of origin and receiving countries and, where relevant with international organizations, to ensure that returnees are received with respect for their safety, dignity, and human rights, and under conditions that allow them to find lasting solutions to their displacement. Alternatively, allowing cross-border disaster-displaced persons to apply for renewed or permanent residency, or resettlement to a third country when conditions causing the displacement persist for an extended period of time or become permanent. Developing measures to support sustained cultural and familial ties when return to the country of origin is not possible. Ensuring information of, consultation with and participation by effected persons or groups of persons, including host communities, in finding lasting solutions. |

Source: Modified by the author, original version is found in The Nansen Initiative (2015) Agenda for The Protection of Cross-Border Displaced Persons in the Context of Disaster And Climate Change: Volume I, The Nansen Initiative.

⁷⁰ Nansen Principle was drafted by UNHCR, the Norwegian Refugee Council (NRC) and Norwegian government. The Principles contain 10 recommendations and urges a need of “A more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters.” (Government of Norway (2016) “The Nansen Principles”, at https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_prinsipper.pdf (as of 8 January, 2018).)

⁷¹ Kälin, *supra* note 31, pp. 48-49.

The Initiative is run by a small steering group, including Australia, Philippines, Mexico, Costa Rica, Bangladesh, Kenya, Germany, and chaired by Norway and Switzerland. Although it is a State-led consultative process outside the UN, the Office of UNHCR and the IOM are involved as standing invitees to the Steering Group. Three years of regional and global consultations resulted in the Protection Agenda as the outcome. It identified effective practices proposed for the protection of persons across borders in the context of natural disasters including the impact of climate change. With about 100 countries' endorsement, the Protection Agenda presents a common understanding among participating governments of the issue.⁷²

As the Protection Agenda is the first and only document that addresses the protection and assistance needs of persons displaced across borders in the context of disasters including the adverse effect of climate change at this moment, it is considered relevant to use their suggested effective practices as evaluation criteria in this study.

4. Possible Responses for CCDPs Under the 2009 Act

Since it is crucial to identify the current problems that CCDPs face on their arrival in the receiving States as the first step, this chapter illustrates the possible responses for CCDPs from a cyclone hitting Tuvalu under the 2009 Act.

New Zealand has legislated the 2009 Act to regulate the admission of foreign nationals to its territory. According to the 2009 Act, there are three types of visas that Immigration New Zealand (the INZ) issues; i) Residence class visa; ii) Temporary entry class visa; and iii) Transit visa.⁷³ And the Minister and Immigration Office have the authority to decide on the matter of issuing visas.⁷⁴ Under the 2009 Act, Tuvaluans need a visa to enter New Zealand, except for purpose of transit. Apart from that, the 2009 Act provides several schemes that allow Tuvaluans to obtain various visas to enter New Zealand under special circumstances, such as Pacific Access Category (PAC) Resident Visa.

4.1: Pacific Access Category (PAC) Resident Visa

PAC is a scheme for permanent migration to New Zealand from Kiribati, Tonga, Tuvalu and Fiji. The scheme was initially established based on bilateral agreements with Tonga, Tuvalu and Kiribati in 2002, and extended to Fiji in 2003. Since then, it provides residency for seventy-five people from Kiribati, seventy-five from Tuvalu, 250 from Tonga, and 250 from Fiji randomly through a ballot every year.

The detailed instructions are illustrated under the Immigration New Zealand Operation Manual (the INZ Manual) S1.40.⁷⁵ Partners and dependent children aged twenty-four and under of the applicants are allowed to be included in the residence application. The applicants, who are granted the resident visa, are able to live permanently in New Zealand. Working and studying are also allowed with the resident visa.

Under this scheme many Tuvaluans have migrated to New Zealand. Accordingly, the population of Tuvaluan

⁷² The Nansen Initiative (2016) “About us: Towards a Protection Agenda for People Displaced Across Borders in the Context of Disasters and the Effects of Climate Change”, at <https://www.nanseninitiative.org/secretariat/> (as of 8 January, 2018).

⁷³ New Zealand Legislation (2017) *Immigration Act 2009*, section. 70.

⁷⁴ *Ibid*, section. 72 (1).

⁷⁵ Immigration New Zealand (2018) “The Immigration New Zealand Operation Manual”, at: <http://onlineservices.immigration.govt.nz/opsmanual/index.htm> (as of 8 January, 2018), S1.40.

in New Zealand has increased 80% since 2002.⁷⁶

However, the eligibility criteria⁷⁷ are quite strict to meet. Especially meeting criterion v); *have an acceptable offer of employment or have a partner, included in the application, who has an acceptable offer of employment*, is quite hard to fulfil especially for Tuvaluans who live in extremely remote islands⁷⁸ with poor telecommunication and Internet environment.⁷⁹

Applicant has to meet all the criteria;

- i) *be a citizen of Fiji, Tonga, Tuvalu, or Kiribati; and*
- ii) *have their PAC registration drawn from the relevant Fiji, Tonga, Tuvalu, or Kiribati pool of the PAC; and*
- iii) *lodge their application for a resident visa under the PAC within eight months of written advice from the INZ that their registration has been drawn from the relevant Fiji, Tonga, Tuvalu, or Kiribati pool of the PAC; and*
- iv) *have been aged between 18 and 45 at the registration closing date; and*
- v) *have an acceptable offer of employment or have a partner, included in the application, who has an acceptable offer of employment; and*
- vi) *(if they have dependent children) meet the minimum income requirement; and*
- vii) *meet a minimum level of English language ability; and*
- viii) *meet health and character requirements (no criminal record).*

4.2: Recognised Seasonal Employer (RSE) Scheme

There is another labour migration scheme that Tuvaluans can apply to which is the RSE Scheme. The scheme was introduced in 2007, but became included in the negotiations under regional agreement called the Pacific Agreement on Closer Economic Relations (PACER) Plus in 2009.⁸⁰ The details of the Scheme are arranged based on an Inter-agency Understanding (IAU) between New Zealand Ministry of Business, Innovation, and Employment and relevant agency of each Pacific Island countries.

The scheme grants migrants limited visas to those older than eighteen and allows them to come to New Zealand to work in the horticulture and viticulture industries in the regions where the Ministry of Social Development (MSD) identified an absolute shortage of labour in the industries.⁸¹ Most of the RSE workers are from Vanuatu, Tonga, Samoa, Solomon Islands, Kiribati, Tuvalu, Papua New Guinea, Nauru, and Fiji.

The detailed instructions of RSE Scheme are illustrated under the INZ Manual WH1.⁸² The duration of stay with this visa is up to seven months in any eleven-months-period for citizens of most countries. However, it was amended to allow citizens of Tuvalu and Kiribati to stay an extra two months (maximum total of nine months), after taking into account their procedural and transportation burden such as distance and fee. The applicant for RSE needs a New Zealand job offer from a designated RSE before the application.

The RSE visa holder can apply for another RSE visa during the stay in New Zealand. But the RSE visa

⁷⁶ Government of Tuvalu (2012) Tuvalu National Population And Housing Census 2012: Migration, Urbanisation and Youth Monograph, Government of Tuvalu and United Nations Population Fund Pacific Sub-Regional Office, pp. 9-10.

⁷⁷ Immigration New Zealand (2016) "About this visa Pacific Access Category Resident Visa", at:

<https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa> (as of 8 January, 2018).

⁷⁸ Government of Tuvalu, *supra* note 76, pp. 9-10.

⁷⁹ Stahl, Charles W. and Reginald T. Appleyard (2007) Migration and Development in the Pacific Islands: Lessons from New Zealand Experience, Australian Agency for International Development, pp. 30-33.

⁸⁰ PACER Plus negotiations started building on existing trade agreements, such as the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA) in 1980 and the PACER Agreement in 2001. The negotiation includes Australia, New Zealand, Fiji, Federated States of Micronesia, Palau, Samoa, Tonga, Vanuatu, Cook Islands, Kiribati, Marshall Islands, Nauru, Niue, Papua New Guinea, Solomon Islands, and Tuvalu. Regional labour mobility like RSE Scheme is a core component of discussions related to the free trade negotiations.

⁸¹ Stahl and Appleyard, *supra* note 79, pp. 35-36.

⁸² Immigration New Zealand, *supra* note 75, WH1.

holder can't apply for any other kind of visa, even with a special reason. An RSE visa holder has to leave New Zealand before the limited visa expires. The RSE visa holder can't appeal a decision on the decline of a residential visa grant, the liability of deportation, or a visa extension to the Immigration and Protection Tribunal (IPT), which is part of the Ministry of Justice. Moreover, unlike the PAC scheme, RSE visa holders can't include a partner or dependent children in the visa application.⁸³

4.3: Other Possible Responses

There are other cases where INZ has issued temporary visas to either protect or assist foreigners who are in the territory when their home countries have suffered from serious natural disasters.

When TC PAM hit Vanuatu directly in March 2015, the INZ extended Vanuatu worker visas to those already working through the RSE Scheme in New Zealand from 5-7 months on a case-by-case basis. This practice allows them to stay longer to earn money. Moreover, the INZ has arranged the waiver of the visa fee for the RSE workers who have returned home and are coming back to New Zealand to work, and encouraged new vacancies of RSE works to be filled with workers from Vanuatu.⁸⁴

4.4: Refugees and Protected Persons

As Party to the Refugee Convention and international human rights law, New Zealand has a domestic scheme to determine and recognize refugee and protected persons for protection under part 5 of the 2009 Act⁸⁵ and Section C1 to C8 of the INZ Manual.⁸⁶

Asylum seekers who arrive at an airport or seaport in New Zealand can claim asylum by telling an immigration officer or a policeman. The Refugee Status Branch processes the claims and assigns a Refugee and Protection Officer (the RPO) who will determine the claim in accordance with the 2009 Act within 140 days. Until the claim is determined, asylum seekers will not be deported.

Under section 137 of the 2009 Act, the PRO must consider and determine for each claim of the 2009 Act, in the following order:

- (a) whether to recognise the claimant as a refugee within the meaning of the Refugee Convention; and
- (b) whether to recognise the claimant as a protected person under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Torture Convention); and
- (c) whether to recognise the claimant as a protected person under the ICCPR.⁸⁷

Moreover, there are various services to support asylum seekers in New Zealand. For example, publicly funded health care is provided while the claim is being processed. Doctor visits are free for children under six years of age. Since all children between the age of six and sixteen must attend school in New Zealand, children of asylum seekers can enroll at school and obtain a student visa. Asylum seekers can also apply for a work visa and get a job during the process of claiming asylum.⁸⁸

Once the claim is determined to recognise the claimant as a refugee or protected person, they are able to stay

⁸³ Immigration New Zealand (2016) "About this Visa Recognised Seasonal Employer Limited Visa", at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/recognised-seasonal-employer-limited-visa> (as of 8 January, 2018).

⁸⁴ Vanuatu Daily Post (2016) "NZ waives visa fee for RSE workers", at: http://dailypost.vu/news/article_642dd990-881c-51ec-9954-c01120dc6209.html (as of 8 January, 2018).

⁸⁵ New Zealand Legislation, *supra* note 73, part. 5.

⁸⁶ Immigration New Zealand, *supra* note 75, section. C1-C8.

⁸⁷ New Zealand Legislation, *supra* note 73, section. 131.

⁸⁸ Immigration New Zealand (2017) *Services for Asylum Seekers Auckland*, pp. 1-2.

in New Zealand permanently and apply for a permanent resident visa. If the claim is determined not to recognise them as refugee or protected person, there is an appeal process. The claimant can appeal the decision to the IPT to reassess the status. If the appeal is accepted, permanent stay in New Zealand is allowed. Otherwise, the failed appellant must leave New Zealand.⁸⁹ The appeal process is explained more in Chapter 4.6.

4.5: Temporary Visa for a Mass Arrival Group

The INZ Manual's C8.10⁹⁰ of refugee and protection section illustrates the instructions to grant temporary visas with a duration of three years for those who are a member of a mass arrival group of more than thirty, and who meet the conditions such as being recognised as refugees or protected persons under the relevant international refugee and human rights convention.⁹¹

Generally, this visa allows adults to obtain work visas immediately, and school-aged children to acquire student visas. But, visitor visas will be granted to dependent children who don't attend school.⁹² Moreover, members of a mass arrival group who are granted the temporary visas are able to apply to obtain subsequent temporary visas for six months if they fulfil the conditions.⁹³

However, in 2013, the 2009 Act was amended and new sections 317A to 317 were inserted allowing mass detention of groups of more than thirty who arrive in New Zealand to seek asylum as a group for up to six months.⁹⁴ An immigration officer can apply to a District Court Judge for a warrant of commitment authorizing the detention⁹⁵ of the member of a mass arrivals group, if the warrant is necessary;

- i) to manage mass arrival group effectively and to manage any threat or risk to security; or
- ii) to the public arising from or that may arise from, 1 or more members of the mass arrival group; or
- iii) to uphold the integrity or efficiency of the immigration system; or
- iv) to avoid disrupting the efficient functioning of the District Court, including the warrant of commitment application procedure.

The detention period can be extended up to twenty-eight days by the decision of a District Court Judge.⁹⁶

New Zealand Law Society⁹⁷ raised strong concerns that the new sections 317A to 317 of the 2009 Act would violate the right elaborated in article 31 of the Refugee Convention.⁹⁸

⁸⁹ Tennent. Doug (2014) *Immigration and Refugee Law 2nd Edition*, LexisNexis NZ, pp. 363-381.

⁹⁰ Immigration New Zealand, *supra* note 75, section. C8.10.

⁹¹ *Ibid*, section.C8.10.15.

⁹² Kaldor Centre for International Refugee Law (2016) "Temporary Protection Visas and Safe Haven Enterprise Visas", University of New South Wales, Andrew & Renata Kaldor Centre for International Refugee Law, pp. 8-9.

⁹³ "Grant of a subsequent temporary visa; a. A member of a mass arrival group may be granted a further temporary visa of six months' duration if they: i. hold, or have held, a temporary visa that was granted for three years' duration under C8.10.1 or section 61 of the Immigration Act 2009; and ii. are in New Zealand lawfully; and iii. meet the requirements specified at C8.10.1(a)(ii) and (iii); and either iv. hold refugee or protection status in New Zealand; or v. have had their refugee or protection status ceased or cancelled after a review of their refugee or protection status as specified at C6.1.1, C6.1.5, or C8.15, have appealed against that decision and that appeal is being determined. b. The type of temporary visa granted under C8.10.15(a) will be determined in accordance with C8.10.5." (Immigration New Zealand, *supra* note 75, section, C8.10.15.)

⁹⁴ Tennent, *supra* note 89, pp. 21-22.

⁹⁵ New Zealand Legislation, *supra* note 73, section. 317 A (1).

⁹⁶ *Ibid*, section. 317 E (2).

⁹⁷ New Zealand Law Society (2015) *United Nations Convention against Torture; New Zealand's sixth periodic review, 2015-shadow report*, para. 21 and p.5

⁹⁸ "Article 31 Refugee unlawfully in the Country of Refugee The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country" (UNHCR, *supra* note 16, p. 29.).

In Addition, New Zealand Law Society⁹⁹ claimed that the Act is also inconsistent with section 22 of New Zealand Bill of Rights Act 1990 (Liberty of Person),¹⁰⁰ article 9 of the ICCPR (Liberty and Security of Person)¹⁰¹ and the right to seek asylum contained under article 14 of the UDHR (Right to Seek Asylum).¹⁰²

New Zealand human rights activists also pointed out that the procedure for detention is unnecessary, since mass arrival of asylum seekers has never occurred in New Zealand except for the hundreds of boats fleeing poverty in Britain in the nineteenth century. Geographical reasons also backed up this argument because New Zealand has no land bridge or easy access by boat from any other places in the world.¹⁰³

4.6: The Appeal Process

In New Zealand, the appeal process is built into section 129 through to section 131 of the 2009 Act, which includes a form of protection supplementary to refugee and protected persons status.¹⁰⁴ The process allows people who were declined applications for residence class visa, failed the claims to be recognised as a refugee or a protected person and found liable for deportation to appeal against those decisions to the IPT for reassessment.

The 2009 Act created the IPT as a specialist body¹⁰⁵ to determine appeals against;¹⁰⁶

- i) *decisions to decline to grant residence class visas;*
- ii) *decisions in relation to recognition as a refugee or a protected person;*
- iii) *decisions to cease to recognise a person as a refugee or a protected person;*
- iv) *decisions to cancel the recognition of a New Zealand citizen as a refugee or a protected person; and*
- v) *liability for deportation.*

As discussed in Chapter 2.3 of this paper, it is difficult to obtain protection, especially for CCDPs who are in another State already because courts tend to assess the conditions in an affected area very cautiously¹⁰⁷ in light of relevant international human rights law.

However, in 2014, the IPT made a remarkable decision that could apply to the case of CCDPs. A Tuvaluan family of four was granted a permanent residence visa in AD (Tuvalu) [2014] NZIPT501370-371, which was a humanitarian appeal under the 2009 Act to appeal against their liability of deportation on the grounds of

⁹⁹ New Zealand Law Society, *supra* note 97, para. 21 and p. 5.

¹⁰⁰ “Section 22 Liberty of the person Everyone has the right not to be arbitrarily arrested or detained.” (New Zealand Legislation (2013) *New Zealand Bill of Rights Act 1990*, section. 22.).

¹⁰¹ “Article 9 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” (UNHCR, *supra* note 41, article. 9.).

¹⁰² “Article 14 (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.” (United Nations *supra* note 40, article 14.).

¹⁰³ Stephens, Murdoch (2016) “Asylum Seeker and Refugee at the end of the world”, at: <http://www.lawsociety.org.nz/law-society-services/law-society-branches/auckland/news/asylum-seekers-and-refugees-at-the-end-of-the-world-by-murdoch-stevens> (as of 8 January, 2018).

¹⁰⁴ Frquhar, Harriet (2014) “*Migration with Dignity*”: *Toward a New Zealand Response to Climate Change Displacement in the Pacific*, Victoria University of Wellington, p. 6.

¹⁰⁵ Tennent, *supra* note 89, pp. 383-453.

¹⁰⁶ New Zealand Legislation, *supra* note 73, section. 217.

¹⁰⁷ McAdam and Limon, *supra* note 50, pp. 18-19.

unlawful stay in New Zealand,¹⁰⁸ whereas their appeal to be recognized as refugees was dismissed in AC (Tuvalu) [2014] NZIPT 800517-520.¹⁰⁹

This Tuvaluan couple arrived in New Zealand with visitor visas in 2007. Although they tried to obtain work permits whenever they got a job offer, all were unsuccessful and it became unlawful for them to stay in New Zealand. They even tried to apply for PAC to be selected by ballot in 2009. However, they were not able to pursue the application as they were residing unlawfully and therefore ineligible. They live together with two kids who were born in New Zealand. All of the husband's siblings and his mother are also resident in New Zealand and he takes care of mother who has health issues as the only son.¹¹⁰

Based on the section 207 of the 2009 Act, the IPT assessed following three points; i) exceptional circumstances; ii) of a humanitarian nature; iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand.¹¹¹

The IPT recognized the following points. First, their strong family ties with the appellant's mother who is a permanent resident in New Zealand, and heavily reliance on the appellant as the only son for her mobility and health-care need. Deportation of the appellant family to Tuvalu could provide significant disruption to the family relationship of three generations in New Zealand, and impact on the quality of life of the appellant's mother. Second, their wider integration into their community as members of a Tuvaluan church and their eldest child's attendance in the New Zealand school system. Third, their two young age children were born in New Zealand and the only life they know is living as part of an extended family network. Their separation from the families and removal from New Zealand to Tuvalu where they have never been could violate the best interest of the children, which is stated under article 3.1 of the 1989 United Nations Convention on the Rights of the Child.¹¹² Moreover, the young children are more vulnerable to natural disasters and the adverse effect of climate change in consideration of the best interests of children. As a forth point, Tuvalu is particularly vulnerable to the adverse impact of climate change as a low-lying island State. And environmental degradation such as coastal erosion, flooding, and inundation, increased salinity of fresh ground-water supplies, destruction of primary occurring in subsistence, and destruction of personal and community property caused by climate change is already a feature of life in Tuvalu. Exposure to those degradations can be acknowledged as being a circumstance of a humanitarian nature and make it unjust or unduly harsh to remove a particular individual.¹¹³

Taking into account these points on a cumulative basis, the IPT concluded "there are exceptional circumstances of a humanitarian nature, which would make it unjust or unduly harsh for the appellants to be removed from New Zealand."¹¹⁴

However, the views on this judgment vary among scholars. McAdam saw the decision as exceptional circumstances of a humanitarian nature and pointed out that AD (Tuvalu) 'highlights the limitation of existing

¹⁰⁸ "Section 207 of the Act: (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that (a) There are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and (b) It would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand." (New Zealand Legislation, *supra* note 73, section. 207.)

¹⁰⁹ AC (Tuvalu) (2014) [2014] NZIPT 800517-520.

¹¹⁰ AD (Tuvalu) (2014) [2014] NZIPT501370-371, para. 3-13.

¹¹¹ *Ibid*, para. 17-18.

¹¹² "Article 3 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (UNHCR (1966) *Convention on the Rights of the Child*, article. 3.1.)

¹¹³ AD (Tuvalu), *supra* note 110, para. 19-29.

¹¹⁴ *Ibid*, para. 30-33.

international protection framework to address the impacts of disasters and climate change, and the need for other legal and policy response to fill the gap',¹¹⁵ while Wyman recognised that the outcome of AD (Tuvalu) demonstrated the possible way of using existing categories in domestic law to protect CCDPs.¹¹⁶

5. Evaluation Results

As a result of evaluation, it came to the conclusion that not all CCDPs will be protected sufficiently by the possible responses under the current 2009 Act. A major problem is that the people most vulnerable to the impact of climate change in the affected States, namely children, women, elderly, people with special needs, and people injured, will not be admitted and protected. Moreover, CCDPs are not able to secure a life in the Receiving States since there is no humanitarian visa to provide for CCDPs and no specific responses for finding lasting solutions.

More details of the problems under the Act in the context of protecting CCDPs are shown in Figure. 3.

Fig.3 : Problems under the 2009 Act in the context of Protecting CCDPs

| | Category | | Problems under the 2009 Act in the context of protecting CCDPs |
|-------------------------------------|--|-----------------------|--|
| Upon Arrival | Admission and Stay | Using Existing Scheme | <ul style="list-style-type: none"> Existing migration schemes such as PAC and the RSE Scheme could be the first tool to admit CCDPs. However, the most vulnerable people to the impact of climate change in the society of the affected States, namely children, women, elderly, people with special needs, and people injured, will not be admitted and protected. Although some CCDPs are admitted under existing migration schemes, the treatment in the receiving States will vary depending on the status of visas granted. (Ex. the RSE Scheme can grant only limited work visas that do not allow permanent stay and appeal against a decision to the IPT to stay longer in New Zealand.) |
| | | Exceptional Measures | <ul style="list-style-type: none"> There is no exceptional measure that provides humanitarian visas to those who do not enter the receiving States under existing migration scheme. Provisions for providing temporary visas to mass arrival groups do not apply for CCDPs. |
| During Stay In the Receiving States | Clarifying the Rights and Responsibilities | | <ul style="list-style-type: none"> There is no supporting service for CCDPs who are admitted in the receiving States to clarify their rights and responsibilities during their stay. |
| | Refrain from Returning Foreigners Abroad | | <ul style="list-style-type: none"> The appeal process under the 2009 Act is the only tool to appeal a decision to the receiving States to refrain from returning foreigners abroad. However, the appealing process is not designed to provide lasting solutions for CCDPs. There are no clear criteria and schemes to decide if CCDPs are able to go back to home country. |
| | Finding Lasting Solutions | | <ul style="list-style-type: none"> There are no specific responses for finding lasting solutions. As the practices to provide lasting solutions for CCDPs would vary depending on the types and scale of the disaster caused by the impact of climate change, the practices for CCDPs only by the receiving States are not enough. |

¹¹⁵ McAdam, Jane (2015) "The emerging New Zealand jurisprudence on climate change, disasters and displacement", *Migration Studies*, Volume 3, pp. 138-139.

¹¹⁶ Wyman, Katrina M. (2016) "Human mobility and climate change", in Daniel A. Farber and Marjan Peeter (eds.), *Elger Encyclopedia of Environmental Law: Climate Change Law*, Edward Elgar Publishing, Inc., p. 643.

6. Recommendations

Taking into account the evaluation results, this chapter recommends the points of improvement to protect CCDPs.

6.1: Admission and Stay

The State's discretionary power over limiting the admission of foreigners to its territory is the major obstacle in providing protection for CCDPs. However, it could be practiced flexibly and broadly especially for CCDPs that travel to the receiving State and ask for admission to enter and stay in order to access protection.

1. Humanitarian based practices need to be exercised, such as granting humanitarian visas that waive some conditions in expedited procedures, because the existing migration schemes such as PAC and RSE Scheme do not allow all CCDPs to enter New Zealand because of the prerequisite conditions. For example, the people who do not meet the conditions, mostly women, children, elderly, people with disabilities, and people in need of urgent medical assistance, will not fall into this category. And they end up in situations that expose them to the extreme hardship in the affected States without appropriate protection, despite being the most vulnerable at the time of disaster.
2. The receiving States have to ensure all CCDPs are able to renew their visa and/or apply for a permanent visa and have access to the appeal process, even though the eligibility criteria to those practices are varied in the visa status.
3. Measures to accept a mass arrival of people also need to be practiced to apply to CCDPs.

6.2: During Stay in the Receiving States

Once the receiving States have admitted CCDPs, the States have assumed obligations to ensure their human rights. This could be interpreted as the receiving States having a responsibility to provide ways for CCDPs to remain in the States until their rights are no longer violated in their countries of origin.

Taking into account these points, this paper makes the following recommendations.

1. It is important to clarify and ensure their rights during their stay in accordance with international human rights law and relevant domestic legislations. At the same time, the information needs to be informed in a language and manner they understand. These practices need to be exercised not only for people who are recognised as refugees or protected persons but also for the CCDPs.
2. The lasting solutions for CCDPs need to be introduced to rebuild their lives in a sustainable way.

The main lasting solutions are;

- i) returning to their home country voluntarily after the confirmation of safety;
- ii) allowing them to stay longer or permanently in the receiving State;
- iii) allowing them to move to a third country for resettlement.

However, the current appeal process under the 2009 Act does not provide the solutions i) and iii) mentioned above. Therefore, the process needs to be reviewed and enhanced to address the issue of finding lasting solutions for CCDPs. And a cooperative framework for CCDPs' lasting solutions among the potential affected States, the potential receiving States and other States in the region needs to be developed, especially for solutions i) and iii).

7. Conclusion

This study's results show the limitation of using only existing labour migration and refugee protection schemes as protection of CCDPs. Humanitarian based practices need to be exercised for those who are vulnerable in society and the impact of climate change, which are mostly women, children, elderly, people with disabilities, and people needing urgent medical assistance. Moreover, introducing lasting solutions for CCDPs is essential for rebuilding their life when they are not able to go back to their country of origin.

One of the challenges is reflecting the views of the potentially affected States in domestic legislations and policies because receiving States' views are more strongly reflected due to their political power balance, especially in the South Pacific region. Moreover, the issues of CCDPs are quite sensitive especially to people who are in the South Pacific, because they are frustrated with the fact that they might have to leave their home island due to the impact of climate change, which is caused by people in other countries. They view cross-border climate displacement to be different to transnational 'migration as a significant pattern of lifestyle'¹¹⁷ in Polynesia and consider it as a last resort option. Safety, dignity, and human rights of CCDPs should be ensured through the cooperation among the affected States and the receiving State.

Another challenge is to develop criteria or mechanisms to protect CCDPs among the potential affected States, the potential receiving States, and international organizations. These will allow the potential receiving States to prepare for CCDPs and provide appropriate protection in a timely manner, even in a tense situation such as responding to a mass arrival group from sudden onset events together with other receiving States.

Though it is still difficult to get positive support from potential receiving States, the recent news in New Zealand considering developing "an experimental humanitarian visa category" for people displaced by the impact of climate change in the Pacific is a ray of light in the darkness. The findings of this study could hopefully contribute to New Zealand's further consideration of a new humanitarian visa category for CCDPs from Pacific islands. In order to contribute further to this progress, the next study will evaluate other receiving States' Immigration Acts in the Pacific and identify the common practices for developing criteria or mechanisms in protecting CCDPs from the region.

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¹¹⁷ Shen, Shawn and Francois Gemenne, (2011) "Contrasted Views on Environmental Change and Migration: the Case of Tuvaluan Migration to New Zealand", *International Migration*, Vol. 49, Issue Supplement s1, p. 228.

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