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PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

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THE CONTRIBUTION OF HUMAN RIGHTS AS AN ADDITIONAL PERSPECTIVE ON CLIMATE CHANGE IMPACTS WITHIN THE PACIFIC

*Stephen Tully**

The adverse impacts of climate change include temperature variations, lost biodiversity and more frequent extreme weather events. In particular, low-lying Pacific Island countries and territories will be inundated if predicted sea level rises eventuate. These impacts threaten the continued enjoyment by Pacific Islanders of their fundamental human rights. Rising sea levels threatens their personal safety, continued good health, secure access to proper means of subsistence including food and water and the habitability of coastal settlements. The United Nations Framework Convention on Climate Change encourages developed states to adopt measures that mitigate greenhouse gas emissions and financially support adaptation activity undertaken by developing countries. However, several states lack the requisite political will, financial support is inadequate, adaptation measures are limited and small island developing states are becoming increasingly vulnerable.

This article provides an overview of climate change impacts within the Pacific region in human rights terms. It argues that the strategy of adaptation, although consistent with the sustainable development agenda, is limited as an effective long-term response to sea level rise. It proposes an international framework that ensures, in the worst-case scenario, that affected individuals are relocated and resettled within other states. It draws upon existing and emergent legal regimes with respect to humanitarian assistance, natural disasters, maritime law concerning search and rescue, internally displaced persons, the environmental refugee concept and the obligations of inter-state cooperation arising under international environmental law in the event of transboundary harm. This framework will be most effective if underpinned by the many positive contributions to be made by the paradigm for the protection of human rights.

* The College of Law, Sydney, Australia. Sincere thanks to an anonymous referee for helpful comments on a previous draft. All opinions expressed are wholly attributable to the author and do not reflect the views of any particular organisation.

I INTRODUCTION

The adverse impacts of climate change, particularly predicted sea level rise, are a matter of survival for individuals residing within Pacific Island countries and territories (PICTs).¹ Although the implications of sea level rise have been considered for international law² and small island developing states (SIDS),³ the particular vulnerability of individuals tends to have been overlooked. Sea level rise threatens human life, continuing good health, secure access to means of subsistence, the habitability of settlements and coastal development. These internationally-recognised human rights oblige states party to the United Nations Framework Convention on Climate Change (UNFCCC) to adopt certain measures. Part II identifies climate change impacts within the Pacific and Part III examines the limitations of adaptation as a response to sea level rise within the sustainable development context. Given the implications of climate change for the continuing enjoyment of human rights within the Pacific, Part IV argues that the human rights paradigm can positively contribute to an international framework that draws upon existing and emergent legal regimes concerning humanitarian assistance, natural disasters, maritime search and rescue, internally displaced persons and environmental refugees. Although not without its own limitations, the application of a distinctive human rights orientation offers useful insights for addressing the challenges posed by sea level rise.

II CLIMATE CHANGE IMPACTS WITHIN THE PACIFIC

Climate change presents significant adverse effects upon socio-economic systems, human welfare and human health.⁴ Addressing these concerns requires the widest possible cooperation by States Parties to the UNFCCC and their participation in effective and appropriate international responses in accordance with their common but differentiated responsibilities.⁵ Low-lying and small island states are particularly vulnerable to adverse climate change effects.⁶ Developing states similarly bear a disproportionate or abnormal burden whose specific needs warrant full

1 Pacific Island countries and territories (PICTs) include the Cook Islands, Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Papua New Guinea, Western Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

2 See David Freestone "International Law and Sea Level Rise" in Robin Churchill and David Freestone (eds), *International Law and Global Climate Change* (Kluwer Law International, London, 1991) 109.

3 See Chris Larson "Racing the Rising Tide: Legal Options for the Marshall Islands" (2000) 21 Mich J Int'l L 495.

4 United Nations Framework Convention on Climate Change (UNFCCC) (9 May 1992) (1994) NZTS No 5, art I.

5 Ibid, preamble.

6 Ibid.

consideration.⁷ Governmental cooperation in adapting to climate change⁸ accordingly includes developed states financially assisting developing countries, particularly small island states.⁹ Their very survival depends on fulfilling that obligation.¹⁰

The environmental challenges confronting PICTs include coastal degradation, deforestation, lost biodiversity, depleted freshwater resources and accelerated sea level rise.¹¹ Climate change is an urgent and primary concern already having devastating effects on SIDS, threatening the well-being and economic survival of island communities.¹² Sea level rise in particular has caused significant damage to human settlements, droughts and excessive rainfall are more frequent and coral bleaching is "probably the most severe in recorded history."¹³ Pacific atoll states are likely to experience increasing saltwater intrusion into groundwater supplies, coastal erosion and greater storm damage.¹⁴ However, "other than continuing to berate the industrial nations on their lack of concerted action",¹⁵ the number of solutions is limited.

Nevertheless, scientific opinion concerning the scale of sea level rise resulting from climate change has begun to coalesce. For example, the Intergovernmental Panel on Climate Change (IPCC)

7 Ibid, art 3(2).

8 Ibid, art 4(1)(e).

9 Ibid, arts 4(4) and (8). See generally Roda Verheyen "Adaptation to the Impacts of Anthropogenic Climate Change: The International Legal Framework" (2002) 11 RECIEL 129.

10 UNFCCC "Implementation of Art 4, paras 8 & 9, of the Convention (Conference of the Parties Decision 3/CP.3 (11 December 1997) & arts 2(3) and 3(14) of the Kyoto Protocol): Programme of Work (1999)" Submissions from Samoa (on behalf of the Alliance of Small Island States), 10.

11 UNEP and South Pacific Regional Environmental Programme *Pacific Islands Environment Outlook* (Apia, 1999).

12 UN Economic and Social Commission for Asia and the Pacific "Preparatory Meeting of Senior Officials" (31 August – 2 September 2000) Ministerial Conference on Environment and Development in Asia and the Pacific E/ESCAP/SO/MCED(00)/4, para 10.

13 UNEP *Review of the State of the Environment of the Pacific Islands* (Kitakyushu, 2000), paras 23, 24 and 25.

14 Peter Roy and John Connell *Greenhouse: the Impact of Sea Level Rise on Low Coral Islands in the South Pacific* (Research Institute for Asia, University of Sydney, Sydney, 1989). See also Pene Lefale "Climate Trends and Projections for Small Island States of the South-West Pacific" in Ralph Chapman, Jonathan Boston and Margot Schwass (eds) *Confronting Climate Change: Critical Issues for New Zealand* (Victoria University Press, Wellington, 2006).

15 UN Economic and Social Commission for Asia and the Pacific *Climate Change and the Pacific Islands* (Kitakyushu, 2000).

predicted a sea level rise of 9 to 88 centimetres by the year 2100¹⁶ or approximately 2 millimetres per year.¹⁷ Alternative recordings begun in 1991 estimate a sea level rise of approximately 25 millimetres per year.¹⁸ Indeed, sea levels will rise by at least 20 feet if the Greenland ice sheet melts sooner than anticipated¹⁹ with the East and West Antarctic ice sheets each capable of comparable contributions. A 1 metre sea-level rise may cause coastlines to recede by several kilometres, thereby displacing coastal settlements and depriving individuals of land and resources;²⁰ river delta systems are also particularly susceptible to coastline recession. Variable temperature increases are also predicted.²¹

Sea level rise is a particular concern for the Alliance of Small Island States (AOSIS).²² Small island states rarely exceed 3 to 4 metres in elevation above mean sea level.²³ Sea level rise therefore poses grave risks to their continuing social and economic viability with the choice limited to

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- 16 Australian Department for the Environment and Heritage *Climate Change Science: Questions Answered* (Canberra, 2006).
 - 17 Jim Salinger and others "Observed Variability and Change in Climate and Sea Level in Australia, New Zealand and the South Pacific" in Willem Bouma, Graeme Pearman and Martin Manning (eds) *Greenhouse: Coping with Climate Change* (CSIRO Publishing, Collingwood, 1996) 100.
 - 18 South Pacific Regional Environmental Programme *Pacific at Risk: Our Knowledge: The Reality* (Apia, 2001) 1.
 - 19 Jonathan Overpeck and others "Paleoclimatic Evidence for Future Ice-Sheet Instability and Rapid Sea-Level Rise" (2006) 311 *Science* 1747.
 - 20 Eric Bird "Potential Effects of Sea Level Rise on the Coasts of Australia, Africa, and Asia" in James Titus (ed) *Effects of Changes in Stratospheric Ozone and Global Climate* (vol 4, UNEP, Nairobi, 1986).
 - 21 Pacific Regional Environmental Programme *An Analysis of the Impacts of the Kyoto Protocol on Pacific Island Countries* (Apia, 1999).
 - 22 UNFCCC "Third Assessment Report of the Intergovernmental Panel on Climate Change: Views on Priority Areas of Research and Questions for the Scientific Community Relevant to the Convention", Submission from Samoa on behalf of the Alliance of Small Island States (2 October 2002) 2. This is because 80 centimetres could inundate two-thirds of the Marshall Islands and Kiribati whereas 90 centimetres could flood 85 per cent of Male, the capital of the Maldives. The latest projections for globally-averaged sea level rise, as outlined in the Intergovernmental Panel on Climate Change's Fourth Assessment Report, are slightly smaller than the findings of its Third Assessment Report.
 - 23 John Hay and others "Implications of Climate Change and Sea Level Rise for Small Island Nations of the South Pacific: a Regional Synthesis" (1993) 16 *Weather and Climate* 1.

remaining on the island or not.²⁴ Case studies undertaken for several PICTs confirm this conclusion.²⁵ Indeed, six national communications from eleven developing states within the UNFCCC context reported inundated low-lying coastal areas.²⁶ PICTs also noted additional climate-related stresses including more severe weather events.²⁷ These states will increasingly experience loss of territory and socio-economic and cultural disruption before ceasing to be habitable. For example, sea level rise has destroyed communities and forced relocation within Tuvalu and threatens its submergence within 50 years.²⁸ Profound impacts including disappearance are envisaged for the Marshall Islands and Kiribati, severe impacts occasioning major population displacement are contemplated for Micronesia, Nauru and Tonga, moderate to severe impacts are predicted for Fiji and the Solomon Islands and finally severe to catastrophic effects will be experienced by Vanuatu and Western Samoa.²⁹ Coastal settlements are particularly vulnerable due to high population density and inhospitable higher locations.³⁰

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- 24 UN "International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States" (11 January 2005) A/CONF.207/7/Add.1, paras 8–9. See further South Pacific Regional Environmental Programme *Climate Change and Sea Level Rise in the South Pacific Region: Proceedings of the Second SPREP Meeting* (Noumea, 6-10 April 1992); Ove Hoegh-Guldberg and others "Pacific in Peril: Biological, Economic and Social Impacts of Climate Change on Pacific Coral Reefs" (Greenpeace, Amsterdam, 2000).
- 25 See South Pacific Regional Environmental Programme *Implications of Climate Change and Sea Level Rise for Guam* (Apia, 1994), Federated States of Micronesia (Apia, 1994), Palau (Apia, 1994), Tokelau (Apia, 1993), Western Samoa (Apia, 1992), Tonga (Apia, 1992), Cook Islands (Apia, 1992) and Tuvalu (Apia, 1992).
- 26 UNFCCC "Coastal Adaptation Technologies" (25 May 1999) FCCC/TP/1999/1, paras 17–18.
- 27 UNFCCC "Sixth Compilation and Synthesis of Initial National Communications from Parties not Included in Annex I to the Convention: Addendum" (25 October 2005) FCCC/SBI/2005/18/Add.5, paras 9–10.
- 28 Bikenibe Paeniu, Former Prime Minister of Tuvalu "Tuvalu and Global Warming" (Kyoto, 8 December 1997).
- 29 John Pernetta "Projected Climate Change and Sea-Level Rise: A Relative Impact Rating for the Countries of the Pacific Basin" in John Pernetta (ed), *Potential Impacts of Greenhouse Gas Generated Climate Change and Projected Sea Level Rise on Pacific Island States of the SPREP Region* (ASPEI Task Team, Split, 1988) 1. See further South Pacific Regional Environmental Programme *Assessment of Coastal Vulnerability and Resilience to Sea Level Rise and Climate Change: Case Studies of Savai'i Island, Western Samoa* (Apia, 1994), Yasawa Islands, Fiji (Apia, 1994) and Tuvalu (Apia, 1996). See also South Pacific Regional Environmental Programme *Vulnerability Assessment for Accelerated Sea Level Rise Case Study: Majuro Atoll, Marshall Islands* (Report No 60, Apia, 1992); South Pacific Regional Environmental Programme *Coastal Protection in the Pacific Islands: Current Trends and Future Prospects* (Report No 177, Apia, 1993).
- 30 UN Secretary-General "Climate Change and Sea Level Rise" (19 January 1999) E/CN.17/1999/6/Add.1, para 3.

SIDS are generally characterised by their small size, remoteness, geographical dispersion, susceptibility to natural disasters, fragile ecosystems, transport and communication constraints, isolated markets, limited natural and human resources, costly administrative structures and dependency upon energy imports, tourism and agriculture. Monitoring climate change vulnerability is accordingly a high priority.³¹ Furthermore, SIDS depend upon financial assistance from developed states³² for meeting adaptation costs.³³ Their vulnerability is assessed against elevation, coastal population density and water resource levels.³⁴ Although other indicia have been identified,³⁵ SIDS are already close to their tolerance limits and vulnerability to sea level rise "worsens with each passing year".³⁶

III ADAPTING TO SEA LEVEL RISE

Greenhouse gas emissions are sought to be reduced by adopting strategies of mitigation and adaptation consistent with the UNFCCC.³⁷ South Pacific governments have also concluded additional instruments to further inter-state collaboration.³⁸ For example, the Pacific Islands

31 UNGA "Letter Dated 16 August 1999 from the Chargé d'affaires a.i. of the Permanent Mission of the Marshall Islands to the United Nations Addressed to the Secretary-General" (1 September 1999) A/S-22/5, annex.

32 Small States Conference on Sea Level Rise "Male Declaration on Global Warming and Sea Level Rise" (Maldives, 14-18 November 1989).

33 UNFCCC "Activities, Programmes and Measures of the Special Climate Change Fund" (10 April 2003) FCCC/SBI/2003/MISC.1, 14. See further UNFCCC Conference of the Parties Decision 7/CP.7 (10 November 2001) establishing the Special Climate Change Fund; and UNFCCC Conference of the Parties Decision 10/CP.7 (10 November 2001) establishing the Adaptation Fund.

34 South Pacific Applied Geoscience Commission and UNEP *Building Resilience in SIDS: The Environmental Vulnerability Index* (Nairobi, 2005) 12. See also Intergovernmental Panel on Climate Change *Assessment of the Vulnerability of Coastal Areas to Sea Level Rise: A Common Methodology* Report of the Coastal Zone Management Subgroup of Intergovernmental Panel on Climate Change Working Group III (1991).

35 Roundtable of Pacific Ministers on Sustainable Development (Auckland, 17 December 1998) Ministerial Statement.

36 UNFCCC *Climate Change and Small Island Developing States* (Bonn, 2005) 15 <unfccc.int/resource/docs/publications/cc_sids.pdf> (accessed 8 May 2007).

37 ECOSOC "Report of the Ministerial Conference on Environment and Development in Asia and the Pacific" (29 March 2005) E/ESCAP/MCED(05)/Rep, annex I, para 1(f).

38 South Pacific Regional Environmental Programme *Pacific Islands Framework for Action on Climate Change, Climate Variability and Sea Level Rise* (Apia, 2001).

Framework for Action on Climate Change envisages improved governance, additional education, training and awareness and developing co-operative partnerships.³⁹

Adaptation can be defined as the institutional, technological and behavioural changes adopted by states to reduce their vulnerability to climate change or ameliorate its adverse impacts. This strategy includes natural resource management, coastal development and early warning systems.⁴⁰ Adaptation options for coastal systems may be "hard" (involving natural environments or infrastructure) and "soft" (institutions, socio-cultural conditions and the economy).⁴¹ Coastal area capacity-building and environmental management includes the systematic monitoring of water resources, food security and human health.⁴² Ultimately, adaptation seeks to ensure continuing access to food and water, adequate living standards, preventing disease and habitable human settlements. Thus national communications by SIDS within the UNFCCC context include assessments of agricultural infrastructure, water resources, human settlements and health conditions.⁴³

That said, the threat posed by sea level rise also depends upon dynamic, variable and complex ecological factors. Nonetheless, the Commonwealth Scientific and Industrial Research Organisation of Australia, for example, envisages greater flooding for island states.⁴⁴ In 1999 it estimated that carbon emissions up until 1995 had guaranteed a 5 to 12 centimetre sea-level rise expected to peak between 2020 and 2025.⁴⁵ Given that greenhouse gas emissions have continued largely unabated since 1995, the wisdom of ongoing reliance upon adaptation strategies as a response to predicted sea level rise is questionable.

39 South Pacific Regional Environmental Programme *Pacific Islands Framework for Action on Climate Change 2006-2015* (Apia, 2005).

40 UNFCCC "Sixth Compilation and Synthesis of Initial National Communications from Parties Not Included in Annex I to the Convention" (25 October 2005) FCCC/SBI/2005/18, paras 66 and 77.

41 Kazuhito Yamada and others "Methodology for the Assessment of Vulnerability of South Pacific Island Countries to Sea-Level Rise and Climate Change" (1995) 1 J Global Environmental Engineering 101.

42 UNFCCC "Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol" (30 October 2000) FCCC/SB/2000/12, para 5 and annex.

43 UN Secretary-General "Integrated Review of the Thematic Cluster of Energy for Sustainable Development, Industrial Development, Air Pollution/Atmosphere and Climate Change in SIDS" (20 February 2006) E/CN.17/2006/7, paras 56–57 and 61–64.

44 "Global Warming May Cause Sea Levels to Rise 34 Centimetres by 2100" (27 January 2006) *Associated Press*.

45 South Pacific Regional Environmental Programme *Pacific Island Countries Regional Statement on Climate Change* (Apia, 2001) 6.

Coastal responses range between protection (for example, constructing seawalls or levee banks), accommodation (erecting movable structures or elevating buildings, waste-water management and flood-tolerant crops) and managed retreat (including abandoning coastal areas).⁴⁶ Measures adopted to date include implementing UNFCCC commitments and undertaking integrated coastal zone management.⁴⁷ Sea level changes are detected and observed.⁴⁸ PICTs have more recently sought to strengthen their meteorological capacity, encourage further research and acquire technical or legal expertise.⁴⁹ Many PICTs have assessed their socio-economic vulnerability to sea level rise and prepared national adaptation programmes of action.⁵⁰

Whereas resilience can be increased by anticipating the likely impacts of climate change,⁵¹ "reactive" adaptations may prove expensive, socially disruptive and environmentally unsustainable.⁵² SIDS are highly vulnerable and adaptation options limited⁵³ because of low human, financial and technical response capacity within limited national boundaries. Additional challenges include physical conditions, implementation delays and unfulfilled political commitments. Enhancing their capacity involves injecting adaptation strategies into sustainable development

46 Luitzen Bijlsma and others "Coastal Zones and Small Islands" in Intergovernmental Panel on Climate Change *Climate Change 1995: Impacts, Adaptations and Mitigation of Climate Change: Scientific–Technical Analyses*, Contribution of Working Group II to the Second Assessment Report (Cambridge University Press, Cambridge, 1996) 289; South Pacific Regional Environmental Programme *Adapting to Climate Change: Incorporating Climate Change Adaptations into Development Activities in PICTs* (Apia, 2000) 13–15.

47 South Pacific Regional Environmental Programme *SPREP Action Plan for Managing the Environment of the South Pacific Region 1997–2000* (Apia, 1997) 15–17.

48 South Pacific Regional Environmental Programme. *SPREP Action Plan 2001–2004* (Apia, 2000) para 5.3.3.

49 South Pacific Regional Environmental Programme. *SPREP Action Plan 2005–2009* (Apia, 2004) para 5.3.

50 UNFCCC "Report on the Third Meeting of the Least Developed Countries Expert Group" (5 May 2003) FCCC/SBI/2003/6, para 18(f).

51 Jon Barnett "Adapting To Climate Change In Pacific Island Countries: The Problem Of Uncertainty" (2001) 29(6) *World Development* 977.

52 Alliance of Small Island States "Guiding Principles on Adaptation" <www.sidsnet.org/docshare/climate/AOSISAdapt.doc> (accessed 4 June 2006).

53 UNFCCC "Report of the Consultative Group of Experts to the Subsidiary Bodies" (5 October 2001) FCCC/SBI/2001/Misc.2, 17.

planning and adopting preventive measures.⁵⁴ Such an approach is not characterised as "fatalistic surrender to natural forces" but rather a "no regrets" risk management of natural hazards.⁵⁵

The viability of adaptation also depends upon ongoing international financial support.⁵⁶ Given the ever-increasing burden of artificially maintaining coral atolls,⁵⁷ evacuating PICTs has been controversially suggested as a more efficient solution than reducing carbon emissions.⁵⁸ However, abandoning PICTs also requires substantial financial resources and is socially and culturally disruptive.⁵⁹ Migration has been described as "maladaptive behaviour" that limits resilience as much as poverty, rapid population growth, inequitable land ownership, subsistence agriculture or lack of educational and employment opportunities,⁶⁰ notwithstanding that it may be the only realistic and feasible option in several cases. In the interim, developed states are ostensibly committed to providing financial and technological assistance and a clear long-term vision is lacking.

Adaptation is defective in part because it is predicated upon a state-centric sustainable development agenda. The sustainable development paradigm involves satisfying the needs of present generations without compromising the ability of future ones to meet their own requirements.⁶¹ The inundation occasioned by sea level rise obviates that rationale as much as other significant environmental trends.⁶² The vulnerability of small low-lying states to sea level rise

54 UN Secretary General "Climate Change and Sea Level Rise" (3 March 1998) E/CN.17/1998/7/Add.1, paras 26–29.

55 Sofia Bettencourt and others "Not if but When: Adapting to Natural Hazards in the Pacific Islands Region" (World Bank Policy Note, Washington DC, 2006) 9 and 38.

56 30th South Pacific Forum "Forum Communiqué on Climate Change" (Palau, 3–5 October 1999), annex 3, para 7 <www.dfat.gov.au/geo/spacific/regional_orgs/spf30_communique.pdf> (accessed 8 May 2007).

57 Commonwealth Scientific and Industrial Research Organisation "More Floods, Population: More Costs at the Coast" (5 June 2003) Press Release No 2003/94 <www.csiro.au/files/mediarelease/mr2003/Prextreme.htm> (accessed 8 May 2007).

58 Dr Brian Fisher (Executive Director, ABARE) (8 June 1996) *The Weekend Australian* 8.

59 Leonard Nurse and others "Small Island States" in Intergovernmental Panel on Climate Change *The Regional Impacts of Climate Change: An Assessment of Vulnerability*, Special Report of Working Group II (Cambridge University Press, Cambridge, 1998) 331.

60 Emma Tompkins and others *Surviving Climate Change in Small Islands: A Guidebook* (Tyndall Centre for Climate Change Research, University of East Anglia, Norwich, 2005) 30–31.

61 World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987) 43.

62 "Vision for the Twenty-First Century: Ministerial Declaration on Environment and Development in Asia and the Pacific 2000" (Kitakyushu, 2000) para 5 <www.unescap.org/mced2000/declaration.pdf> (accessed 8 May 2007).

includes the loss of their entire national territory.⁶³ A precautionary and anticipatory approach to this unrivalled socio-economic and environmental challenge must include the formulation of appropriate contingency plans.⁶⁴

Interestingly, the sustainable development agenda enjoys an "effective synergy" with the prevention of environmental disasters.⁶⁵ For the attributes outlined above, SIDS are vulnerable to natural disasters and possess a limited response and recovery capacity.⁶⁶ Environmental disasters adversely affect their economic growth and social development.⁶⁷ Disaster risk management is sought to be mainstreamed into sustainable development planning in a consistent and supportive manner with adaptation to climate change.⁶⁸ Thus the Association of the South East Asian Nations, for example, undertakes risk monitoring, early warning and preparedness initiatives.⁶⁹ Sea level rise will destroy the economic infrastructure and existing human settlements.⁷⁰ National economic losses in terms of natural resource access, commercial fishing stocks, transportation infrastructure and tourism are estimated to be considerable.⁷¹ The South Pacific Disaster Reduction Programme accordingly occupies a high priority given the dangers posed by natural hazards to national development.⁷²

63 UN Conference on Environment and Development "Agenda 21" (14 August 1992) A/CONF.151/26, para 17.125.

64 Ibid, para 17.128(g).

65 UN Secretary General "Management of Natural and Environmental Disasters in SIDS" (29 February 1996) E/CN.17/1996/20/Add.1, paras 10, 54 and 58.

66 UNGA "Report of the Global Conference on the Sustainable Development of Small Island Developing States" (October 1994) A/CONF.167/9, ch 1, annex I:I(III) paras 1–2 (endorsed by UNGA Resolution 49/122 (19 December 1994), para 2).

67 UNGA Resolution 50/6 (24 October 1995) A/RES/50/6, para 8.

68 John Hay and others *Climate Variability and Change and Sea-level Rise in the Pacific Islands Region: A Resource Book for Policy and Decision Makers, Educators and Other Stakeholders* (South Pacific Regional Environmental Programme, Apia, 2003) ch 5.

69 ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005) arts 5–8.

70 UNGA, above n 66, ch 1, annex II, para 18.

71 By 2050, for example, US\$23–52 million per year (2 to 4 percent of GDP) of economic loss for Viti Levu, Fiji and US\$8–16 million per year (17 to 34 per cent of GDP) for Tarawa, Kiribati: World Bank *Cities, Seas and Storms: Managing Change in Pacific Island Economies* (vol 4, Washington DC, 2000).

72 UN Secretary-General "Management of Natural and Environmental Disasters in SIDS" (5 February 1999) E/CN.17/1999/6/Add.13, para 15.

The proposition that the continued existence of PICTs is intimately connected with their island environments is also acknowledged within the UNFCCC context.⁷³ However, it is becoming clear that UNFCCC commitments "should be considered inadequate for the long term and further action may be required".⁷⁴ Sustainability "is not an abstruse, arcane concern" for island states and sea level rise is "not simply a theoretical issue; it is a threat to their continued existence".⁷⁵ National infrastructure, human settlements and cultural traditions will be obliterated.⁷⁶ States are accordingly urged to implement the Barbados Programme of Action for the Sustainable Development of SIDS⁷⁷ including providing financial support.⁷⁸ Adaptation is an "absolute necessity" for SIDS and international assistance a "critical" complement.⁷⁹

Developed states are, however, only mobilising sufficient resources for satisfying their own UNFCCC commitments.⁸⁰ Notwithstanding attempts to increase financial resources,⁸¹ not all of these commitments have been honoured.⁸² Vulnerability has increased over the last decade, resilience is not improving and implementation of the Barbados Programme is weak.⁸³ States have been called upon to redouble their efforts for dealing with the consequences of climate change and regional programmes including the Pacific Umbrella Initiative on Island Adaptation or the Pacific

73 Seventh Economic Summit of Smaller Island States Leaders "Statement on Climate Change and Sea Level Rise" (Rarotonga, 1997).

74 UNGA, above n 66, para 19.

75 Ibid, annex II.

76 UNGA Resolution 51/183 (16 December 1996) A/51/49, para 15.

77 UNGA Resolution 54/224 (22 December 1999), para 3.

78 UNGA Resolution 19/2 (19 September 1997), paras 71–72.

79 UNGA "Report of the Ad Hoc Committee of the Whole" (27 September 1999) A/S-22/9/Rev.1, annex, para (II)(a)8.

80 UN "Report of the World Summit for Sustainable Development" (4 September 2002) A/CONF.199/20, ch I(2), annex, paras 58(j), 58(h).

81 UNFCCC Conference of the Parties Decision 1/CP.10 (19 April 2005).

82 Inter-Regional Preparatory Meeting of SIDS for the International Meeting to Review Implementation of the Barbados Programme of Action on the Sustainable Development of SIDS "Nassau Declaration on Small Island States" paras 9 and 12 <www.sidsnet.org/docshare/other/20040206162805_Nassau_declaration_final_version.pdf> (accessed 8 May 2007).

83 SIDS *Report of the Pacific Regional Preparatory Meeting for the Review of the Programme of Action for the Sustainable Development of SIDS* (Apia, 4–8 August 2003) paras 9 and 10 <www.un.org/special-rep/ohrls/sid/Apia_Meeting_Final_Report_8_August_2003.pdf> (accessed 8 May 2007).

Islands Climate Change Assistance Project should be "aggressively pursued".⁸⁴ Vulnerability is expected to increase unless urgent measures are taken.⁸⁵ However, UNFCCC obligations are split along development lines such that developed states are insufficiently motivated to reduce carbon emissions and developing states are unable to afford adaptation. States party to the UNFCCC are content to stabilise greenhouse gas emissions consistent with its provisions and their common but differentiated responsibilities.⁸⁶ Furthermore, states such as Australia and the United States are not bound to any Kyoto Protocol obligations. Thus, within the UNFCCC framework, SIDS are left to their own devices to facilitate adaptation and undertake regional cooperation.⁸⁷

Financial assistance from developed states to support adaptation initiatives in the face of predicted sea level rise has been accompanied by a declining sense of urgency, no doubt encouraged by the necessity for costly protective measures, whereas the pressure to adopt appropriate measures of mitigation is intensifying. The unilateral and regional efforts of SIDS have thus far made little or no real impact on the magnitude of the problems facing them.⁸⁸ While developed states are pushed to commit adequate resources given probable environmental impacts,⁸⁹ the adverse impacts of climate change are currently being experienced within all regions.⁹⁰ For example, climate change programmes received miniscule bilateral and no multilateral overseas development assistance between 1992 and 1997.⁹¹ Intergovernmental organisations assumed the initiative: for example, United Nations Habitat Programme analysed the implications for coastal settlements⁹² and United

84 UN Secretary-General (11 March 2004) E/CN.17/2004/8, paras 37 and 108.

85 UN "International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States" (14 January 2005) A/CONF.207/L.6, para 3 (endorsed by UNGA Resolution 59/311 (14 July 2005), para 2).

86 UN "International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States" (13 January 2005) A/CONF.207/CRP.7, paras 16bis, 16ter and 17.

87 Ibid, para 84.

88 UN Secretary-General "Implementation of the Programme of Action for the Sustainable Development of SIDS" (17 January 1997) E/CN.17/1997/14, paras 22–23.

89 Commission on Sustainable Development Decision 6/4 (1 May 1998), para 10.

90 Alliance of Small Island States "Third Summit of the Heads of State and Government of the Alliance of Small Island States" (25 September 1999) Communiqué, paras 7 and 12.

91 UN Secretary General "Current Donor Activities" (5 January 1999) E/CN.17/1999/7, para 9 and Table 1.

92 UN Secretary-General "Report on Action Taken by the Organs, Organizations and Bodies of the UN System to Implement the Programme of Action for the Sustainable Development of SIDS" (15 November 1995) A/50/422, para 39.

Nations Environment Program assisted adaptation planning.⁹³ Between 1999 and 2003, Japan contributed meteorological monitoring support to Fiji and constructed seawalls in the Maldives, New Zealand assessed the vulnerability of Fiji, Kiribati and other Pacific Islands, the Commonwealth Secretariat strengthened the technical capacity of SIDS, the Global Environmental Facility assisted the preparation of national communications by the Maldives, Niue and Papua New Guinea, and United Nations Educational, Scientific and Cultural Organization undertook a global ocean observing system for the South Pacific.⁹⁴

To summarise thus far, adaptation and disaster preparedness as prospective solutions to the adverse impacts of climate change are constructed to varying degrees around the sustainable development agenda. It is useful to recall that individuals occupy the core of that paradigm.⁹⁵ Is implementation of the human right to development similarly futile if PICTS may ultimately be abandoned? Despite its obvious appeal, the application of a human rights template to the problems raised by the sea level rise occasioned by climate change is not unproblematic. However, given the relevance and limitations of existing and emergent international legal regimes, a human rights perspective can make a distinctive contribution to addressing the concerns of Pacific Islanders.

IV THE CONTRIBUTIONS MADE BY A HUMAN RIGHTS PERSPECTIVE ON CLIMATE CHANGE

The legal and ethical obligations currently imposed upon states under the UNFCCC do not directly address the adverse impacts of climate change upon affected individuals. The issue is moreover fragmented across several other specialised regimes, obligations are narrowly circumscribed, political resolve is lacking and legal evolution is slow. Rather than relying upon multiple international legal sources, a comprehensive framework that addresses the contribution of climate change to population movements in a robust, coherent and humane fashion is necessary. Such an initiative is not a substitute for greater resolve by developed states to adopt measures that mitigate carbon emissions or cease financial support for adaptation initiatives adopted within SIDS. As will become evident, the key elements of this framework include conceptual precision, a fuller set of obligations imposed upon developed states to receive affected individuals, intergovernmental oversight and adherence to elementary principles of human rights.

93 UN Secretary-General "Report on Action Taken by the Organs, Organizations and Bodies of the UN System to Implement the Programme of Action for the Sustainable Development of SIDS" (23 September 1994) A/49/425, paras 22–23.

94 UN Secretary General "Plans and Projects for the Sustainable Development of SIDS Implemented, Under Implementation or Envisaged for the Period 1999–2003 by Bilateral Donors, UN Organisations and Regional and Non–UN International Organisations" (11 September 1998) A/53/358, tables 1 and 2.

95 UNGA Resolution 41/128 (4 December 1986) A/RES/41/128, art 2(1).

A convenient starting point is the prevailing factual conditions. Sea level rise will incrementally erode coastlines, threaten human settlements, force migration to higher ground and compel evacuation from PICTs once uninhabitable. Each of these progressive stages raises specific entitlements for individuals. A human rights orientation emphasises basic needs, offers practical solutions, substitutes ad hoc responses with a proactive vision, adds persuasive weight to Pacific Islander demands and draws upon the human rights monitoring mechanisms of the United Nations system. Furthermore, the insights offered by the human rights paradigm can fruitfully complement other potentially-applicable regimes with the potential to sidestep or overcome their doctrinal gaps or limitations.

A Appreciating Climate Change Impacts in Human Rights Terms

The adverse impacts of climate change upon Pacific Islanders can be understood within existing legal arrangements for the protection and promotion of human rights. It is axiomatic that everyone is entitled to realise those economic, social and cultural rights indispensable for their dignity and free development of their personality.⁹⁶ Thus the AOSIS, for example, promotes the rights to non-discrimination, adequate living standards, health, food, social services, cultural diversity, education, work and participation in decision-making.⁹⁷ Although the state of nationality is primarily responsible for ensuring their fulfillment, specific duties arise for other states in conjunction with each right. Thus all individuals including stateless persons, asylum-seekers, refugees and migrant workers are entitled to benefit.⁹⁸

Sea level rise poses multiple human rights impacts upon individuals residing in low-lying coastal settlements. For example, by threatening the unique cultural diversity and traditions of PICTs,⁹⁹ sea level rise impairs the right to cultural participation.¹⁰⁰ Indeed, sea level rise threatens the continued enjoyment of human rights on a massive scale. Human security considers "how people live and breathe in a society, how freely they exercise their many choices, how much access they

96 UNGA Resolution 217 A (III) (10 December 1948), art 22.

97 Alliance of Small Island States "Inter-Regional Preparatory Meeting of SIDS for the International Meeting to Review Implementation of the Programme of Action on the Sustainable Development of SIDS" (Nassau, 26–30 January 2004) paras 10, 13 and 15.

98 UN Human Rights Committee "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 10.

99 Robert Watson, Chairman of the Intergovernmental Panel on Climate Change, "Presentation to the United Nations Framework Convention on Climate Change" (Sixth Conference of Parties, 13 November 2000) <www.ipcc.ch/press/speech.htm> (accessed 25 January 2006).

100 International Covenant on Economic, Social and Cultural Rights (ICESCR) (19 December 1966) 993 UNTS 3, art 15.

have to market and social opportunities and whether they live in conflict or peace".¹⁰¹ In other words, the concept focuses upon the adequacy of living conditions, the enjoyment of human rights and continuing political stability.¹⁰²

For example, individuals enjoy the right to the highest attainable standard of physical and mental health.¹⁰³ The right to a healthy environment moreover encompasses a wide array of socio-economic factors.¹⁰⁴ Conversely, environmental degradation threatens human health and physical integrity.¹⁰⁵ Sea level rise can increase mortality or post-traumatic stress disorder, induce chemical poisoning and facilitate exposure to water-borne diseases including cholera.¹⁰⁶ Although not all adverse health impacts associated with flooding are attributable to climate change,¹⁰⁷ states such as New Zealand envisage a greater role to preserve good human health including accepting individuals from PICTs where necessary.¹⁰⁸

Similarly, all states are obliged to ensure the right to food.¹⁰⁹ The Pacific region depends on the marine environment for sustenance and cannot afford to damage this environment.¹¹⁰ Food security

101 UNDP *Human Development Report 1994* (Oxford University Press, New York, 1994) 23.

102 ICESCR, above n 100, art 11.

103 *Ibid*, art 12.

104 UN Committee on Economic, Social and Cultural Rights "General Comment No 14 on Substantive Issues Arising in the Implementation of the ICESCR (art 12)" (11 August 2000) E/C.12/2000/4.

105 Inter-American Court of Human Rights "Report on the Situation of Human Rights in Ecuador" (24 April 1997) OEA/Ser.L/V/II.96 Doc 10 Rev 1, 88.

106 Evidence to Australian Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 18 June 2001, 358 and 368 (Robert Watson, Chairman of the Intergovernmental Panel on Climate Change); Anthony McMichael and others (eds) "Climate Change and Human Health: An Assessment" (16 July 1996) WHO/EHG/96.7; Alistair Woodward and others "Climate Change and Human Health in the Asia Pacific: Who Will Be Most Vulnerable?" (1998) 11 *Climate Research* 11. Harmful effects are established where an activity "contributes in a measurable degree to the sum total of human ill in any given territory" *Nuclear Tests (Australia v France)* (Merits) [1973] ICJ Pleadings 1 331, para 454.

107 World Health Organization "Flooding: Health Effects and Preventative Measures" Facts Sheet 05/02 (Rome, 2002) 1.

108 Ministry of the Environment *Climate Change: Potential Effects on Human Health in New Zealand* (ME 413, Wellington, 2001) v and 15.

109 UN Human Rights Committee "General Comment No 12 on the Right to Adequate Food" (12 May 1999) E/C.12/1999/5.

110 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (Oral Pleadings) CR/95/28 (9 November 1995).

is threatened when saline intrusion occasions lost agricultural land or fishery stocks are depleted.¹¹¹ Ocean acidification processes arising from greater carbon absorption are increasingly threatening marine environments.¹¹² Individuals typically relocate to secure food supplies.¹¹³ With respect to the right to water,¹¹⁴ PICTs face severely limited and life-threateningly low freshwater supplies.¹¹⁵ The quality of freshwater and availability of sanitation services are adversely affected by drought and flooding. Thus sea level rise as a critical threat to Pacific Islander health and welfare¹¹⁶ requires integrated assessments of food and water access.¹¹⁷ Having established the conceptual appeal of invoking human rights standards, the next question is their interaction with complementary regimes for addressing climate change impacts.

B Human Rights Obligations as a Complement to Existing Regimes

A human rights perspective formally recognises and operationalises essential human needs. Basic requirements are expected to be satisfied by states irrespective of financial or technical capacity.¹¹⁸ For example, states are obliged to protect the right to life.¹¹⁹ They must adopt effective

111 Given the "complex and closely interrelated" life systems of the ocean "no one can say that pollution ... in one place cannot eventually have consequences in another", thereby impairing high seas fishery rights *Nuclear Tests Case (Australia v France)*, above n 106, para 459.

112 For example John Raven and others *Ocean Acidification Due to Increasing Atmospheric Carbon Dioxide* (Royal Society, London, 2005); Ken Caldeira and Michael Wickett "Anthropogenic Carbon and Ocean pH" (2003) 425 *Nature* 365.

113 Gerald Meehl "Vulnerability of Freshwater Resources to Climate Change in the Tropical Pacific Region" (1996) 92 *Water, Air, and Soil Pollution* 203.

114 UN Human Rights Committee "General Comment No. 15 on the Right to Water" (20 January 2003) E/C.12/2002/11.

115 William Burns "The Potential Implications of Climate Change for the Coastal Resources of Pacific Island Developing Countries and Potential Legal and Policy Responses" (2005) 8(1) *Harvard Asia-Pacific Review* 4, 7.

116 Australian Greenhouse Office *Climate Change: An Australian Guide to the Science and Potential Impacts* (Canberra, 2003) 155 and 178.

117 Australian Greenhouse Office *Regional Adaptation to a Global Challenge: Locally Addressing the Impacts of Climate Change on Regional and National Economic Development* (Canberra, 19 February 2004) 2.

118 Asbjorn Eide "Realisation of Social and Economic Rights and the Minimum Threshold Approach" (1989) 10 *HRLJ* 35, 43–47.

119 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, art 6; UN Human Rights Committee "Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies" (15 August 1997) HRI/GEN/1/Rev.3, 6–7, para 5.

measures to prevent and safeguard against life-threatening environmental hazards.¹²⁰ Furthermore, the right to life compels states to protect individuals from immediate and known risks to which they may be exposed following natural or man-made disasters.¹²¹ Relocation may be required.¹²² Since sea level rise threatens the lives of Pacific Islanders,¹²³ neighbouring states are obliged to relocate them in order to respect this right.

Protecting the right to life usefully complements existing obligations upon states arising under international maritime law. Individuals affected by flooding will utilise boats and other flotation devices in the territorial and high seas. States are obliged to require the masters of vessels flying their flag to render assistance to any person found at sea in danger of being lost.¹²⁴ This duty permits entering the territorial sea in order to render bona fide emergency assistance to individuals in danger or distress.¹²⁵ Thus Australia, for example, has requested vessels to rescue individuals, provide food or medicine and consider evacuation.¹²⁶ It has moreover concluded ad hoc agreements to convey rescuees to New Zealand or Nauru with safe transit through Papua New Guinea.¹²⁷

120 Bertrand Ramcharan (ed) *The Right to Life in International Law* (Martinus Nijhoff Publishers, The Hague, 1985) 310–311.

121 *Oneriyildiz v Turkey* (2004) 39 EHRR 12 (Grand Chamber, ECHR).

122 World Council of Churches "WCC Statement to the High Level Segment of the UN Climate Change Conference" (Montréal, 9 December 2005) <www.wcc-coe.org/wcc/what/jpc/climatechange-cop11.html> (accessed 12 June 2006).

123 Pacific Churches Statement on Climate Change "The Otin Taai Declaration" (Kiribati, 6–11 March 2004) <www.wcc-coe.org/wcc/what/jpc/otin_taaai_declaration.html> (accessed 4 October 2006).

124 Geneva Convention on the High Seas (29 April 1958) 463 UNTS 366, art 12; UN Convention on the Law of the Sea (UNCLOS) (10 December 1982) 1833 UNTS 3, art 98; Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (23 September 1910) ATS No 15, art 11; International Convention for the Safety of Life at Sea (17 June 1960) 536 UNTS 28, reg 10 and 15. For implementation, see for example Navigation Act 1912 (Cth), s 317A.

125 UNCLOS, above n 124, art 18(2).

126 *Ruddock v Vadarlis* [2001] FCA 1329 paras 128, 131 and 136 French J. On another view, preventing disembarkation within the territorial waters and arranging the departure of individuals rescued on the high seas may constitute unlawful detention.

127 *Ibid*, para 143 French J.

Coastal states are also obliged through regional arrangements of cooperation to establish adequate and effective search and rescue units for retrieving individuals.¹²⁸ The obligation to render assistance applies to any person in distress at sea irrespective of their nationality, status or circumstance.¹²⁹ Government authorities with reason to believe that individuals, vessels or other crafts are in a state of emergency shall convey this information to rescue coordination centres.¹³⁰ Furthermore, rescue units entering another state's territory to search for casualties and rescue survivors shall receive due authorisation.

That said, the practice of Australia suggests that there is no further obligation to rescue individuals in distress for the purposes of enabling them to apply for refugee status.¹³¹ The jurisdiction of rescuing vessels does not amount to automatically entering state territory, thereby obliging flag states to grant durable asylum and resettlement.¹³² States retain the power to exclude aliens¹³³ including those individuals lacking entry rights.¹³⁴ Nonetheless, the strict observance of maritime rules is encouraged, including rescuing individuals in distress irrespective of their potential status as refugees, displaced persons or otherwise.¹³⁵ The self-evident complementarity between the

128 International Convention for the Safety of Life at Sea (1 November 1974) 1184 UNTS 3, reg 15, ch V; Geneva Convention on the High Seas, above n 124, art 12(2). States must additionally take "all possible measures" to search for and collect shipwrecked "persons" (Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 85 UNTS 75, arts 13 and 18(1)).

129 International Convention on Maritime Search and Rescue (27 April 1979) 1405 UNTS 97, para 2.1.10. Obligations arising during a "distress phase" apply to vessels and persons "in grave or imminent danger and in need of immediate assistance".

130 Australian Department of Foreign Affairs and Trade *Amendments to the International Convention on Maritime Search and Rescue of 27 April 1979* (Select Documents on International Affairs No 47 (4703), Canberra, 1999) 20, para 4.2.3.

131 Stephen Neff "Rescue Across State Boundaries: International Legal Aspects of Rescue" in Michael Menlowe and Alexander McCall Smith (eds) *The Duty to Rescue: The Jurisprudence of Aid* (Aldershot Publishing Co Ltd, Dartmouth, 1993) 159, 180. Hence "international law imposes no obligation upon the coastal State to resettle those rescued in the coastal State's territory" *Ruddock v Vadarlis*, above n 126, para 126 Beaumont J.

132 UN High Commissioner for Refugees "Problems Related to the Rescue of Asylum Seekers in Distress at Sea" (26 August 1981) EC/SCP/18, para 23.

133 Migration Act 1958 (Cth), s.7A; *Ruddock v Vadarlis* above n 126, paras 123–124 Beaumont J and para 197 French J; *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* [2001] FCA 1297 para 122 North J.

134 *Ruddock v Vadarlis*, above n 126, para 77 Black CJ; paras 97 and 111 Beaumont J; para 213 French J.

135 International Maritime Organisation "Guidelines on the Treatment of Persons Rescued at Sea" (20 May 2004) MSC.167(78); International Maritime Organisation Resolution A.920 (22nd Assembly) (30 November 2001).

human right to life in the circumstances of sea level rise and the existing maritime obligation to rescue individuals in distress at a minimum entitles individuals to temporary resettlement within responding states.

C Emphasising Individual Entitlements above Claims to a Particular Status

A human rights framework raises awareness in favour of individuals by recasting their claims as entitlements owed by states. The paradigm offers unquestionable legal authority and persuasive moral weight that compels government intervention through special protective measures. In response to the plight of individuals adversely affected by climate change, much of the existing literature either recognises their status as a distinct class or expands existing categories. However, labelling individuals as "internally displaced persons" (IDPs) or "environmental refugees" is preconditioned by state discretion. By contrast, human rights standards are universally applicable and intend to ensure equality. Such an orientation empowers individuals by identifying beneficial entitlements for all. Furthermore, individuals can demand acknowledgment of their concerns and interests through rights enforceable against states. More importantly, the doctrinal deficiencies associated with concepts such as "nationality", "statelessness", "refugee" or "alien" are sidestepped and/or overcome.

Environmental degradation, for example, reputedly creates a broad category of forcibly displaced individuals.¹³⁶ Sea level rise is also expected to displace local populations from coastal settlements.¹³⁷ However, if IDPs are compelled to "suddenly and unexpectedly" flee habitual residences but do not cross any state border,¹³⁸ this definition would appear to exclude those individuals displaced because of sea level rise. Nonetheless, they enjoy the right to access items indispensable to their survival including food, water, housing, clothing, medical supplies and sanitation services.¹³⁹ Although these are ordinarily provided by home states,¹⁴⁰ other actors may be obliged to perform humanitarian functions where the magnitude of the problem exceeds national

136 UN High Commissioner for Refugees *The State of the World's Refugees: Human Displacement in the New Millennium* (Geneva, 2006) 27–28.

137 Intergovernmental Panel on Climate Change *Climate Change 2001: Impacts, Adaptation and Vulnerability* (Cambridge University Press, 2001) para 11.2.6.1.

138 UN Secretary-General Representative Mr Francis Deng "Internally Displaced Persons: Report Submitted Pursuant to Commission on Human Rights Resolutions 1993/95 & 1994/68" (2 February 1995) E/CN.4/1995/50, paras 116–127.

139 UN Secretary-General Representative Mr Francis Deng "Report submitted pursuant to Commission on Human Rights Resolution 1995/57: Compilation and Analysis of Legal Norms" (5 December 1995) E/CN.4/1996/52/Add.2, paras 180 and 359.

140 *Ibid.*, paras 360–361.

relief capability.¹⁴¹ Furthermore, national authorities are primarily responsible for establishing the conditions in which IDPs can voluntarily return to their homes safely and with dignity.¹⁴² However, all states must prevent and avoid those conditions that might lead to displacement.¹⁴³ Individuals must not be arbitrarily displaced unless their health or safety requires evacuation.¹⁴⁴ In addition, protection against forcible repatriation or relocation to areas where their life, safety, liberty or health is threatened entitles IDPs to seek asylum in other states.¹⁴⁵ These principles are being increasingly accepted throughout South East Asia.¹⁴⁶

An alternative approach classifies individuals as "environmental refugees".¹⁴⁷ As noted above, adverse environmental conditions threaten human health, continued livelihoods, food production, clean water and sustainable human settlements. The term "environmental refugee" encapsulates environmental contributions such as desertification to population movements.¹⁴⁸ Although having earlier origins,¹⁴⁹ it was proposed in 1992 at the Rio de Janeiro UN Conference on Environment and Development in connection with drought relief. However, where it is sought to be linked to a particular set of legal consequences, "environmental refugee" should first be authoritatively defined as a legal concept.¹⁵⁰

141 Ibid, paras 368 and 391.

142 UN Human Rights Commission "Guiding Principles on Internal Displacement" (11 February 1998) E/CN.4/1998/53/Add.2, principle 28.

143 Ibid, principles 3 and 5.

144 Ibid, principle 6(2)(d).

145 Ibid, principle 15.

146 UN Secretary-General Representative Francis M Deng "Report on Internally Displaced Persons" (21 January 2003) E/CN.4/2003/86, para 36.

147 For example Norman Myers "Environmental Refugees in a Globally Warmed World" (1993) 43 *Bioscience* 752.

148 The World Commission on Environment and Development, above n 61, 291.

149 Essam El-Hinnawi *Environmental Refugees* (UNEP, Nairobi, 1985).

150 UN High Commissioner for Refugees (1991) 10 *Rapport: Special Edition on the Environment* 4–5.

The proposition that sea level rise creates a class of "environmental refugee" has been made among others by heads of state,¹⁵¹ publicists¹⁵² and non-governmental organisations.¹⁵³ Although referring to "environmental refugees" under the rubric of desertification, the UN Secretary-General has also identified links between climate change and sea level rise.¹⁵⁴ Indeed, the IPCC identified populations at risk from sea level rise from predicted refugee movements.¹⁵⁵ The number of potentially-affected individuals may exceed those fleeing armed conflict.¹⁵⁶ PICTs are encouraging regional practice with Kiribati undertaking internal resettlement and Niue accepting citizens from Tuvalu.¹⁵⁷

In 2001, Tuvalu approached Australia requesting resettlement of its population. Australia declined, invoking the obligation to treat individuals in a non-discriminatory manner,¹⁵⁸ and reputedly respecting Pacific Islander wishes to remain. More recently it has been alleged that several Australian officials and politicians suppressed scientific opinion concerning predicted sea level rise for fear that they would recognise the novel legal category of environmental refugee.¹⁵⁹ Although a parliamentary motion to that effect was defeated during 2005, the Australian Labor Party is willing to recognise "environmental refugees" and evacuate the Pacific Islands if necessary.¹⁶⁰ Political

151 President Maumoon Abdul Gayoom (Maldives) "Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of SIDS" (14 January 2005) A/CONF.207/11, 81, para 3.

152 Diane Bates "Environmental Refugees? Classifying Human Migrations Caused by Environmental Change" (2002) 23(5) *Population and Environment* 465; Crispin Tickell "Environmental Refugees: The Human Impact of Global Climate Change" (1989) *National Environmental Research Council News* 14.

153 Australian Friends of the Earth *A citizen's guide to climate refugees* (Melbourne, 2005).

154 UN Secretary-General "In Larger Freedom: Towards Development, Security and Human Rights For All" (21 March 2005) A/59/2005, paras 58 and 60.

155 James Bruce and others *Climate Change 1995: Economic and Social Dimensions of Climate Change Intergovernmental Panel on Climate Change Second Assessment Report* (Cambridge University Press, Cambridge, 1996).

156 International Federation of Red Cross and Red Crescent Societies *World Disasters Report* (Geneva, 2001) ch 1 <www.ifrc.org/publicat/wdr2001/contents.asp> (accessed 8 May 2007).

157 South Pacific Regional Environmental Programme *Pacific at Risk: Our Islands Our Lives* (Apia, 2001) 4.

158 Lyn Allison (Leader of the Australian Democrats, Victoria), Australian Senate *Hansard* 15 (10 October 2005) 122–124.

159 Australian Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Hansard* (14 February 2006) 159–171. It was also suggested that the natural sinking of coral atolls is more serious than sea level rise.

160 Australian Labor Party *Pacific Climate Change Strategy* (Canberra, 2006). See also "'No room' for ALP's climate refugees" (6 January 2006) *The Australian*.

reluctance to recognise the concept stems from the possibility that declarations concerning legal or factual situations can create obligations for states.¹⁶¹ A commitment to accept Pacific Islanders could instil the obligations attendant with refugee status.¹⁶² However, the right to be treated as such only arises under Australian law when individuals fulfil the legislative requirements.¹⁶³ That said, refugees are entitled to protection for as long as the circumstances occasioning flight persist.¹⁶⁴

The refugee definition is itself problematic for individuals fleeing environmental conditions.¹⁶⁵ First, a well-founded fear of persecution may exclude natural disaster victims although such circumstances are not altogether irrelevant.¹⁶⁶ Although persecution does not emanate from the state of nationality, it could be argued that effective protection from sea level rise is inadequate or that developed states knowingly contributed to that circumstance. Second, individuals must satisfy one of the five Refugee Convention grounds.¹⁶⁷ Even where persecution is established, individuals lacking protection from the environment must constitute, for example, a distinct social group.¹⁶⁸ Third, although inhospitable conditions may preclude repatriation, sea level rise by itself does not guarantee relocation to a third state. The question of relocation also considers whether protection is reasonably available in another part of the state of origin.¹⁶⁹ That said, practical realities including

161 *Nuclear Test cases (Australia/New Zealand v France)* [1974] ICJ Rep 253 paras 43 and 51; *Frontier Dispute between Burkina Faso and the Republic of Mali* [1986] ICJ Rep 554, 573; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 261.

162 Additional concerns include overloading offshore refugee processing centres, human trafficking and Australian employment rates.

163 *Wu v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245.

164 UN High Commissioner for Refugees *Handbook on Voluntary Repatriation: International Protection* (Geneva, 1996) 39.

165 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150, art 1A(2); Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267, art 2.

166 UN High Commissioner for Refugees "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (January 1992) HCR/IP/4/Eng/REV.1, para 39.

167 Convention Relating to the Status of Refugees, above n 165, art 1A(2).

168 Jessica Cooper "Environmental Refugees: Meeting the Requirements of the Refugee Definition" (1998) 6 NYU Env LJ 480, 521.

169 *Randhawa v MILGEA* (1994) 52 FCR 437, 441 Black CJ and 451 Beaumont J; UN High Commissioner for Refugees "Guidelines on International Protection: 'Internal Flight or Relocation Alternative' within the Context of Art 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees" (23 July 2003) HCR/GIP/03/04.

personal safety and good health are relevant.¹⁷⁰ It is moreover necessary to consider the accessibility of safe areas¹⁷¹ and the physical capability of affected individuals.¹⁷²

Australia has appeared to more readily accept individuals on humanitarian rather than refugee grounds, at least as far as the period between 1989 and 1996 is concerned.¹⁷³ Protection visas are granted to individuals for whom Australia owes obligations under the Refugee Convention¹⁷⁴ whereas temporary safe haven visas are granted until there are fundamental, durable and stable changes within home states.¹⁷⁵ The compelling reasons for granting refugee, humanitarian or emergency rescue visas turn upon the extent of persecution, personal links with Australia and Australia's resettlement capacity given other suitable states.¹⁷⁶ Permanent settlement must be appropriate, consistent with Australia's regional and global priorities and not contrary to national interests. Recipients of a temporary humanitarian visa have typically been displaced from their habitual residence, cannot reasonably return given the circumstances and gravely fear for their safety. Relevant public interest criteria include compassionate or compelling circumstances, ease of establishment, the prospect of significant health care or community costs and Australia's foreign policy.¹⁷⁷

The category of "stateless refugee" (that is, those lacking nationality, outside their former habitual residence and unable to return) has been construed equally narrowly.¹⁷⁸ "Stateless persons" are ordinarily treated as aliens¹⁷⁹ with only socio-political changes rather than environmental conditions being acknowledged causes.¹⁸⁰ That said, national law concerning the admission of

170 *NNN v MIMA* [1999] FCA 1290, para 7 Madgwick J.

171 *Ismail v MIMA* [2000] FCA 194, para 25 Emmett J.

172 *Harbans Singh v MIMA* [2000] FCA 77, para 32 Mansfield J.

173 UN High Commissioner for Refugees *Populations of Concern to UNHCR: A Statistical Overview* (Geneva, 1996) 52, 55.

174 Convention Relating to the Status of Refugees, above n 165.

175 Migration Act 1958 (Cth), ss36, 37A.

176 Migration Regs 1994 (Cth), sch 2.

177 *Ibid*, sch 4.

178 UN High Commissioner for Refugees, above n 166, para 101. See, for example, *Sui v Minister for Immigration* (1996) 47 ALD 528 (AAT).

179 Convention relating to the Status of Stateless Persons (28 September 1954) 360 UNTS 117, arts 1 and 7.

180 Convention on the Reduction of Statelessness (30 August 1961) 989 UNTS 175, arts 9 and 10.

aliens must be compatible with human rights standards.¹⁸¹ Thus aliens are entitled to enjoy the rights to life, family, culture, health, employment, housing and freedom of movement.

Accepting "environmental refugees" could be considered a just solution inasmuch as developed states accept the consequences of excessive energy consumption.¹⁸² However, refugee recognition is poor recompense for the loss of independent statehood. The "environmental refugee" concept has drawn criticism,¹⁸³ particularly where the underlying rationale is to compel developed states into observing the no-harm environmental rule.¹⁸⁴ By contrast, claims formulated in human rights terms do not depend upon government recognition but are inherent to the individual, avoid overly-strained definitions or reformulated concepts and may offer permanent resettlement rather than a temporary remedy.

Overall, a class of vulnerable individuals fleeing adverse environmental conditions is yet to assume legally-binding form.¹⁸⁵ Such individuals tend to lack protection under existing arrangements¹⁸⁶ and stand before immigration law as any other applicant unless recipient states waive legislative requirements for large influxes.¹⁸⁷ Distinguishing between individuals fleeing persecution and natural disaster victims may also be considered arbitrary and inhumane, particularly if such disasters threaten lives and acceptable living standards.¹⁸⁸ Interestingly, United States law formerly recognised individuals affected by "catastrophic natural calamity" as refugees.¹⁸⁹ Since the "common interests of humanity" have previously initiated novel lawmaking for individual

181 UNGA Resolution 40/144 (13 December 1985) art 2.

182 "Global Warming Could Create 150 Million Environmental Refugees – But the Countries Responsible are in No Hurry to Carry Their Share of the Costs" (15 October 2003) *The Guardian*.

183 Stephen Castles "Environmental Change and Forced Migration: Making Sense of the Debate" UN High Commissioner for Refugees Working Paper No 70 (Geneva, 2002) 7–8 and 10.

184 Richard Black "Environmental Refugees: Myth or Reality?" UN High Commissioner for Refugees Working Paper No 34 (Geneva, 2001) 2.

185 Pirkko Kourula *Broadening the Edges: Refugee Definition and International Protection Revisited* (Martinus Nijhoff Publishers, The Hague, 1997) 84.

186 "50m Environmental Refugees by End of Decade, UN Warns" (12 October 2005) *The Guardian*.

187 Marjoleine Zieck *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff Publishers, The Hague, 1997) 106.

188 Janet Parker "Victims of Natural Disasters in US Refugee Law and Policy" (1982) *Mich Yearbook Int Leg Stud* 137, 139.

189 See, for example, *In re Posarikovski* 12 *Immigration & Nationality Laws Administrative Decisions* 526 (1967).

benefit,¹⁹⁰ the "environmental refugee" concept could yet be incorporated within existing migration programmes.

In the interim, the human rights paradigm can pursue governmental accountability by affirming the obligations incumbent upon states through the rule of law. Importantly, by framing individual interests within a rights discourse, affected persons are entitled to active, free and meaningful participation in governmental decision-making. Good governance — a condition for protecting and promoting human rights — requires transparent, responsible, accountable and participatory government responses to popular needs and aspirations.¹⁹¹ For example, to ensure adequate housing, individuals must be afforded opportunities for genuine consultation¹⁹² and measures such as reasonable notice and full disclosure concerning proposed measures.

The supervisory machinery of the UN's human rights system may additionally prove useful. States are committed to promoting universal respect for and observance of human rights.¹⁹³ They accordingly become subject to positive or negative obligations to protect, promote and provide each right or abstain from violations. Furthermore, states must cooperate to solve socio-economic, cultural and humanitarian problems.¹⁹⁴ Complementary obligations of cooperation arise under international environmental law and international maritime law as much as human rights law.¹⁹⁵ The principle of good-neighbourliness may also be invoked.¹⁹⁶ Similarly, a productive interaction between the human rights and UNFCCC regimes, premised upon an appreciation of climate change impacts understood in human rights terms, can also be envisaged.

190 UN Department of Social Affairs *A Study of Statelessness* (New York, 1949) 23.

191 UN Human Rights Commission Resolution 2000/64 (26 April 2000), E/CN.4/RES/2000/64 para 1.

192 UN Human Rights Committee "General Comment No. 4 (1991) on the Right to Adequate Housing (Art 11(1) of the Covenant)" (12 December 1991) E/1992/23, para 8.

193 UNGA, above n 96, preamble.

194 Charter of the United Nations (26 June 1945) 59 Stat 1031, arts 1(3), 55–56.

195 UN Human Rights Committee "General Comment No. 3 on the Nature of States Parties Obligations (Art 2(1))" (14 December 1990) E/1991/23, para 14.

196 See for example Charter of the United Nations, above n 194 art 74, in relation to non-self-governing territories.

D Avoiding Ad Hoc Humanitarian Responses with Proactive Strategies Underpinned by Human Rights

Natural or man-made disasters can cause massive population displacements¹⁹⁷ and individuals lose independent means of support.¹⁹⁸ The need for an adequate, prompt and coordinated response to emergency situations involving loss of life and material destruction includes providing humanitarian assistance.¹⁹⁹ States are responsible for alleviating the human suffering resulting from natural disasters occurring on their territory.²⁰⁰ Abandoning victims is "an offence to human dignity".²⁰¹ Although states in close proximity can offer assistance where disasters are beyond the capacity of affected ones, humanitarian assistance is typically preconditioned by government consent following an appeal.²⁰²

Individuals affected by natural disasters continue to enjoy human rights including access to minimum acceptable levels of water, sanitation, food, clothing, shelter and medical attention.²⁰³ For some victims return is not a realistic option and other durable solutions, such as resettlement to other areas or local integration in areas of displacement, must be identified.²⁰⁴ Non-discriminatory treatment extends to all decisions concerning relocation or resettlement and families have the right

197 UN Secretary-General "Analytical Report on Internally Displaced Persons" (14 February 1992) E/CN.4/1992/23; Secretary-General Representative Mr Francis M Deng "Comprehensive Study on the Human Rights Issues Related to Internally Displaced Persons" (21 January 1993) E/CN.4/1993/35, para 29.

198 Sphere Project *The Humanitarian Charter and Minimum Standards in Disaster Response* (Geneva, 2005) <www.sphereproject.org> (accessed 26 January 2006).

199 UNGA Resolution 47/168 (22 December 1992) A/RES/47/168; Peter Walker "Victims of Natural Disaster and the Right to Humanitarian Assistance: A Practitioner's View" (1998) 325 *International Review of the Red Cross* 611.

200 UNGA Resolution 43/131 (8 December 1988) A/RES/43/131, preamble, para 2; UNGA Resolution 45/100 (14 December 1990) A/RES/45/100 preamble, para 3; UNGA Resolution 46/182 (19 December 1991) A/RES/46/182, annex, para 4.

201 UNGA Resolution 43/131, above n 200, preamble, para 8; UNGA Resolution 45/100, above n 200, preamble, para 6.

202 UNGA Resolution 43/131, above n 200, para 6; UNGA Resolution 45/100, above n 200, para 7; UNGA Resolution 46/182 (19 December 1991) A/RES/46/182, paras 3–7.

203 UN Secretary-General "Human Rights and Mass Exoduses" (1 September 2005) A/60/325, paras 19, 43.

204 *Ibid*, para 18.

to remain together.²⁰⁵ Disaster management may render it necessary to instigate a process of managed retreats from unusable areas to those offering security and opportunity.²⁰⁶

Reducing the risk of disaster is linked with adaptation to climate change.²⁰⁷ There is an urgent need to enhance the capacity of disaster-prone developing countries including SIDS.²⁰⁸ States Parties to the UNFCCC have been called upon to address climate change in accordance with its provisions and for the IPCC to assess adverse impacts upon the socio-economic systems of developing countries.²⁰⁹ AOSIS has moreover recognised the "indisputably close link" between natural disasters and sea level rise as well as the importance of linking disaster risk management with adaptation strategies.²¹⁰ The prevailing scientific consensus is that climate change is intensifying the number and severity of natural hazards.²¹¹ Although situation-specific measures can be adopted,²¹² the hazards anticipated require a more concerted and comprehensive approach to reducing the risks to human settlements.²¹³ In particular, donor governments are expected to finance preparatory activities within disaster-prone states.²¹⁴

From an individual's perspective, there is some support for a right to access humanitarian assistance.²¹⁵ Insofar as such a right exists, there will be a corollary obligation upon states to fulfil

205 Ibid, paras 46–49.

206 Geoff O'Brien and others "Climate Change and Disaster Management" (2006) 30(1) *Disasters* 64, 76.

207 World Conference on Disaster Reduction "Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters" (22 January 2005) A/CONF.206/L.2/Rev.1, para 19(c).

208 World Conference on Disaster Reduction "Hyogo Declaration" (22 January 2005) A/CONF.206/L.3/Rev.1, para 4.

209 UNGA Resolution 59/233 (22 December 2004) A/RES/59/233, para 8; UNGA Resolution 58/215 (23 December 2003) A/RES/58/215, para 6.

210 Tuvalu on behalf of the Alliance of Small Island States "Submissions from Parties" UNFCCC, Conference of the Parties-10 (16 December 2004) 4.

211 UN Office for the Coordination of Humanitarian Affairs *Disaster Reduction and the Human Cost of Disaster* (New York, 2005) 3, 7.

212 For example An Act for the Relief of Certain Distressed Aliens (1958) 72 Stat 1712 (USC).

213 UN Secretary-General "International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development" (21 September 2004) A/59/374, para 66.

214 UN Secretary-General "International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development" (12 August 2005) A/60/227, para 79.

215 For example UN Secretary-General Boutros Boutros-Ghali "Opening Statement for the World Conference on Human Rights" (14 June 1993) 17.

it, particularly given the relationship between natural disasters and humanitarian assistance.²¹⁶ However, humanitarian assistance is also embedded within the paradigm of state sovereignty, provided in accordance with the principles of humanity, neutrality and impartiality, and delivered in a non-discriminatory fashion.²¹⁷

Many states, including Australia, donate ad hoc humanitarian relief assistance as the circumstances require.²¹⁸ For example, Emergency Management Australia deployed medical, engineering and logistics teams and repatriated nationals following the Indian Ocean tsunami of 26 December 2004.²¹⁹ In the climate change context, one Australian official has observed that:²²⁰

I think that governments over periods of time have dealt with situations as they have emerged. In respect of representations about rising sea levels, there is nothing of prospect in any of the countries — in other words, although it is a genuine fear in those countries, it has not yet got to the point where you would need to act on it. There would be a situation of humanitarian response in those cases and it would be up to the government of the day to actually deal with that.

The population movements resulting from adverse environmental conditions are predicted, in the worst case scenario, to initiate armed conflict.²²¹ Disintegrating governmental authority and the magnitude of human suffering may threaten peace and security such that the Security Council has previously compelled states to allow unimpeded access for the provision of humanitarian assistance to affected individuals.²²² Since sea level rise is a slow-onset environmental risk, reactionary humanitarian initiatives as dictated by circumstances is an inadequate response, particularly given the likely repercussions within the Pacific.

216 See generally UN Secretary-General "The New International Humanitarian Order: Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations" (24 October 1990) A/45/587.

217 UNGA Resolution 46/182 (19 December 1991) A/RES/46/182.

218 "Howard Looks to Boost Earthquake Aid" (28 May 2006) *ABC News Online*.

219 Attorney-General's Department *Report for 2004–5* (Canberra, 2005) 101.

220 Foreign Affairs, Defence and Trade References Committee, Australian Senate *Reference: Australia's Relationship with Papua New Guinea and Pacific Island Nations* (27 March 2003) 371–373.

221 For example Idean Salehyan "Refugees, Climate Change, and Instability" Human Security and Climate Change Workshop (Oslo, 21–23 June 2005) 18 <www.gechs.org/downloads/holmen/Salehyan.pdf> (accessed 12 June 2006).

222 UNSC Resolution 794 (3 December 1992) S/RES/794, para 3; UNSC Resolution 898 (23 February 1994) S/RES/898 para 18; UNSC Resolution 918 (17 May 1994) S/RES/918, preamble; UNSC Resolution 925 (8 June 1994) S/RES/925, para 4; UNSC Resolution 929 (22 June 1994) S/RES/929.

The effective implementation of human rights can underpin a relatively more proactive vision for addressing adverse climate change impacts. Environmental conditions are an acknowledged cause of migration.²²³ Migration is the only realistic solution where climate change impacts render adaptation futile or impossible, especially for less developed states lacking capacity. However, the migration of displaced populations, particularly from natural disasters, has to date largely escaped intergovernmental attention.²²⁴ For example, the International Organisation for Migration (IOM) is only beginning to consider the long-term consequences of environmental forces including climate change.²²⁵

Consistent with the proposition that migration is initiated by prevailing environmental conditions,²²⁶ the increasingly uninhabitable conditions driven by sea level rise within the Pacific is expected to trigger "off-island migration".²²⁷ The resulting population movements to neighbouring states will be substantial.²²⁸ Environmental conditions will detrimentally affect the livelihoods of Pacific Islanders, depriving them of their human right to work.²²⁹ Implementing that right suggests managed migration as a prospective solution.

Migrants have historically been admitted into Australia, Canada, New Zealand and the United States for permanent resettlement.²³⁰ New Zealand, Australia and the United Kingdom have also

223 Art Hansen and Anthony Oliver-Smith "Introduction: Involuntary Migration and Resettlement: Causes and Contexts" in Art Hansen and Anthony Oliver-Smith (eds) *Involuntary Migration and Resettlement: The Problems and Responses of Dislocated People* (Westview Press, Boulder, 1982) 1.

224 International Organisation for Migration Council Steering Group "Towards Policy Coherence on Migration" (29 November 2005) IC/2005/13, para 12.

225 International Organisation for Migration "Statement on Sustainable Development" 2nd Committee, UNGA 60th Session (New York, 2 November 2005). See further International Organisation for Migration and UN High Commissioner for Refugees *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration* (Geneva, 21–24 April 1996).

226 Graeme Hugo "Environmental Concerns and International Migration" (1996) 30 *Int Migration Rev* 105; William Wood "Ecomigration: Linkages between Environmental Change and Migration" in Aristide Zolberg and Peter Benda (eds), *Global Migrants, Global Refugees* (Berghahn, New York, 2001) 42–61.

227 Stephen Leatherman "Shoreline Stabilization Approaches in Response to Sea-Level Rise: U.S. Experience and Implications for Pacific Island and Asian Nations" (1996) 92 *Water, Air, and Soil Pollution* 149.

228 E Moore and J Smith "Migration in Response to Climate Change" in *Greenhouse: Coping with Climate Change*, above n 17, 325.

229 ICESCR, above n 100, art 6.

230 International Organisation for Migration *World Migration Report* (Geneva, 2005).

previously formulated rehabilitation and resettlement plans for Pacific states such as Nauru.²³¹ New Zealand is particularly susceptible to population influxes from its Pacific Island territories,²³² having responsibility for Tokelau and constitutional links with Niue and the Cook Islands.²³³ Its Pacific access scheme is a guest worker arrangement that accepts individuals from Tuvalu, Kiribati, Tonga and Fiji provided applicants satisfy age, employment and health prerequisites. Canada is also conducting a phased migration programme with nationals from states including Vanuatu.²³⁴

Although migrant remittances are economically significant for home states,²³⁵ relocating individuals impairs their sustainable development through loss of productivity and skilled personnel.²³⁶ Hence a human rights orientation is not itself free from compromise. Furthermore, since human rights obligations are primarily owed to individuals subject to a state's territorial jurisdiction or control, their effective fulfilment in the circumstances of climate change will necessitate an extraterritorial application. Direct causal links must also be established between the adverse operational activities of developed states and personal exposure to serious, specific and imminent danger within PICTs.²³⁷ When transboundary harm is remote, human rights violations concerning life, health, family or privacy are more difficult to ascertain.²³⁸ Nevertheless, Nauru and Malaysia have previously invoked the right to life in the context of transboundary environmental harm and the Solomon Islands has identified the rights to life, food, water and a healthy environment.²³⁹ The Marshall Islands also invoked the right to life, particularly for present and future generations, in addition to access to productive resources and the human rights to a healthy

231 *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Counter-Memorial of Australia) (29 March 1993) para 532.

232 Intergovernmental Panel on Climate Change, above n 59, para 4.3.4.

233 Antony Hooper "Tokelau" in New Zealand Ministry for the Environment *Climate Change: Impacts on New Zealand* (Wellington, 1990) 238.

234 See generally Citizenship and Immigration Canada *Facts and Figures 2005: Immigration Overview: Permanent and Temporary Residents* (Montreal, 2005).

235 World Bank *The Economic Implications of Remittances and Migration* (Washington DC, 2006) ch 2.

236 UNGA Resolution 57/262 (28 February 2003) A/RES/57/262, preamble.

237 European Court of Human Rights, *Balmer-Schafroth v Switzerland* (1998) 25 EHRR 598 (ECHR).

238 Human Rights Committee "Communication No. 645/1995: Bordes and Temeharo v France" (22 July 1996) CCPR/C/57/D/645/1995.

239 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (Oral Pleadings) CR/95/27 (7 November 1995) para 9; Written Statement of Nauru (1995) 20–22; Written Statement of the Solomon Islands (1995) 77–92; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (Oral Pleadings) CR/95/32 (14 November 1995) paras 8, 10 and 16.

environment, family, housing and health.²⁴⁰ Thus the human rights framework can be expected to have an influential resonance in addressing the adverse impacts of climate change.

V CONCLUSIONS

Situated within a broader international legal landscape, the UNFCCC is not insulated from other potentially-applicable existing and emergent regimes. Thus natural disaster management is becoming increasingly prominent within that context as the prospect of inundation by sea level rise passes the "point of no return".²⁴¹ Individual-centric considerations including adequate living standards, good health, habitable human settlements and continued access to means of subsistence such as food and water remain dormant within the climate change regime and such factors suggest the appeal of invoking human rights solutions.

The prospect of evacuating individuals from life-threatening circumstances and abandoning PICTs undermines adaptation and sustainable development as effective long-term responses to climate change. Constructing sea defences, strategic retreat and community resettlement will figure more prominently when formulating measures of adaptation. A novel class of "environmental refugee" encounters the technical restrictions associated with framing refugee claims. Conversely, migration and resettlement are unenviable and disruptive long-term propositions that could become excuses for inaction by developed states on appropriate mitigation measures. Nor is a piecemeal application of human rights discourse (for example, favouring the right to work above the right to development) wholly satisfactory. Thus the unspoken seed of relocation will not germinate within intergovernmental negotiations for the foreseeable future. That said, to highlight the climate change issue within international fora, PICTs could investigate the environmental causes of migration within the IOM, instigate legal development within the human rights monitoring mechanisms of the UN system and continue to formulate appropriate declarations in regional ministerial conferences.²⁴² Other intergovernmental institutions could be assessed in terms of participants, decision-making processes, degree of developing country influence and receptivity to Pacific Islander concerns.

States are primarily responsible for effecting sustainable development, protecting individuals from adverse environmental circumstances and fulfilling the human rights of their nationals. However, corollary obligations of co-operation and mutual assistance arise for neighbouring states

240 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* CR/95/32, *ibid*, paras 22–23.

241 "Global Warming Unstoppable, But Still Chance to Stop Major Disasters, Scientists Say" (3 April 2006) *Associated Press*.

242 See further Eric Shibuya "'Roaring Mice Against the Tide': The South Pacific Islands and Agenda-Building on Global Warming" (1996–1997) 69(4) *Pacific Affairs* 541.

in light of prevailing factual conditions. The obligations to render humanitarian assistance following natural disasters and rescuing persons in distress at sea, thus ensuring the human rights to life and health, will assume increasingly greater importance given predicted sea level rise. Claims arising from an individual's status as an internally displaced person or refugee too tenuously depend upon state recognition. Acknowledging links between climate change and the effective implementation of human rights could underpin a novel international framework, reinvigorate global effort and yield productive initiatives such as the right to work and skilled migration programmes. That said, employing a human rights orientation to address adverse climate change impacts also heralds the compromises inherent within that paradigm and could only ever complement existing and emergent legal regimes. Nonetheless, a proactive, managed and orderly response that reduces the destabilising effects of mass displacement is far preferable to an ad hoc humanitarian response to an impending emergency situation. The application and universal enjoyment of human rights informs such a vision for the Pacific.