

Square Pegs in Round Holes: The Case of Environmentally Displaced Persons and the Need for a Specific Protection Regime in the United States

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I. INTRODUCTION

On January 12, 2010, a massive earthquake struck the island nation of Haiti, with the earthquake's epicenter located only sixteen miles from the capital of Port-au-Prince, a city that is home to approximately

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900,000 people.¹ Haitians fleeing the devastating effects of the earthquake joined the Yanomami people of the eroding Brazilian rainforest, Ukrainians living around the Chernobyl nuclear plant, Indian communities affected by the Bhopal chemical disaster, Nicaraguan villages whose homes were destroyed in Hurricane Mitch, Ethiopians leaving their country due to drought and lack of potable water, and Nigerians migrating to other areas of Africa to escape a rapidly increasing population: these are individuals who have been called, in turn, environmental refugees, climate refugees, environmentally motivated migrants, but who in this Article will be referred to as environmentally displaced persons (EDPs).² While the exact number of individuals who migrate, either within their home countries or across international borders, to escape the aftermath of natural disasters and the effects of climate change cannot be reliably calculated, maximalist statisticians predict that approximately 150 to 200 million people may become displaced as a consequence of climate change by the year 2050.³

These estimates indicate that climate-related disasters will likely result in numerous mass-migration events in the upcoming decades. As a major immigrant-receiving country, the United States can expect to receive a high percentage of EDPs in the aftermath of major environmental events. While the United States has pledged its protection to EDPs, as evidenced by its ratification of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention),⁴ the 1967 Protocol Relating to the Status of Refugees (1967 Refugee Protocol),⁵ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture),⁶ as well as other international protection-based treaties, it must still consider the

1. Amanda A. Doran, *Where Should Haitians Go? Why "Environmental Refugees" Are up the Creek Without a Paddle*, 22 VILL. ENVTL. L.J. 117, 117 (2011); *Haiti Population Statistics*, GEOHIVE, <http://www.geohive.com/entry/haiti.aspx?levels=Ouest> (last visited Apr. 15, 2014).

2. See Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention To Protect Persons and Preserve the Environment*, 13 COLO. J. INT'L ENVTL. L. & POL'Y (Y.B.) 1, 4-6 (2002); Doran, *supra* note 1, at 119; Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, U.N. HIGH COMM'R FOR REFUGEES (UNHCR) 11 (Feb. 2012), <http://www.refworld.org/pdfid/4f38a9422.pdf>.

3. Kälin & Schrepfer, *supra* note 2, at 11. The Norwegian Refugee Council's Internal Displacement Monitoring Center found that almost 95 million people were internally displaced by sudden-onset disasters during the period from 2008 to 2010. *Id.* at 11-12. In 2010, 38.3 million people experienced displacement as a result of climate-related disasters, compared to the 4 million who experienced displacement for non-climate-related issues. *Id.* at 12.

4. July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].

5. *Done* Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Refugee Protocol].

6. Dec. 10, 1984, 1465 U.N.T.S. 85.

challenges that a mass-migration event could pose to national security when agreeing to provide assistance to these EDPs. Despite the growing incidence of displacement as a result of environmental crises, the United States has yet to adopt a specific form of immigration for the individuals who are displaced in these events.

In the wake of environmental disasters, the United States has used existing forms of immigration relief, such as temporary protected status (TPS) and humanitarian parole, to allow displaced individuals to resettle within the country.⁷ However, these forms of relief merely grant EDPs temporary, incomplete solutions that fall short of responding to the full breadth of their problem. As a result, the United States is currently faced with a choice in the wake of environmental disasters: it can either provide unpredictable, ill-fitting ad hoc protection to EDPs, or it can turn them away. Furthermore, the national security screening procedures vary considerably depending on the type of relief the United States chooses to provide to EDPs, opening the possibility that individuals who pose a threat to the country's safety may be admitted under protection-based programs.

Therefore, in the face of the real likelihood of an environmentally motivated mass-migration event and the simultaneous need to protect its national security, the United States should adopt a new form of immigration relief specifically offering both temporary and permanent assistance to individuals fleeing natural disasters. Before any further analysis or proposals can be undertaken, however, some limiting principles are needed. The reason this Article will employ the term "environmentally displaced persons" is that the terms "environmental migrants" and "environmental/climate refugees" imply certain legal consequences that do not necessarily comport with reality.⁸

Additionally, while causes of environmental displacement can include such myriad reasons as land erosion, desertification, deforestation, global warming, and industrial disasters,⁹ the new form of relief proposed here will be available to individuals fleeing only two types of environmental events: sudden-onset extreme weather events—such as hurricanes, earthquakes, tsunamis, and tornadoes—and slower-onset environmental devastations that will render a country or a major portion

7. The United States has not funneled these individuals through the asylum system because people who flee their homes for environmental reasons do not qualify as refugees for the purpose of receiving asylum in the United States for reasons that will be discussed in Parts II and III of this Article. See RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 95-96 (2d ed. 2009).

8. See *infra* Part II.B for a discussion on this terminology and its implications.

9. Kälén & Schrepfer, *supra* note 2, at 13-16; Falstrom, *supra* note 2, at 4.

of a country entirely nonexistent, such as rising sea levels threatening small island nations. This limitation is intended to stem the flow of environmentally motivated mass migration; individuals fleeing these kinds of disasters are in much more dire and immediate need of assistance, and their plight cannot be solved through alternative mitigation efforts. Furthermore, through the use of climate forecast and meteorology, these kinds of environmental events are more easily predicted, and the numbers of people who may be affected by a certain kind of event in a particular geographic area may be estimated with more certainty, allowing immigrant-receiving countries to better prepare.

Finally, given the global nature of these concerns, this Article recognizes the need for a broader international effort to address climate change, engage in on-the-ground remediation of existing environmental concerns such as desertification and deforestation, and prepare for mass migration resulting from these forms of slower-onset environmental events. However, while this Article discusses the current dearth of international protection measures for EDPs, it does not address any specific proposals for international reforms. Acknowledging these limitations, the proposal contained within this Article for a U.S. immigration program for certain EDPs will both protect those EDPs most in need of assistance and ensure that U.S. national security concerns are addressed.

Part II of this Article will discuss the growing trend of EDPs, both internationally and in the United States. It will outline the influx of people into the United States who are fleeing, in particular, extreme weather events as well as the irreversible effects of environmental events. It will then highlight the national security challenges that accompany any mass-migration event, the likes of which occur following natural disasters of this kind, and examine the existing international legal regime for addressing the needs of EDPs.

Part III will examine the comparative approaches that major immigrant-receiving countries, including the United States, employ when faced with an influx of EDPs. Such approaches include the temporary-protection approach, the quasi-asylum approach, the humanitarian approach, and the discretionary approach. This comparative examination will pave the way for Part IV, which will propose a U.S. approach to specifically address the issue of EDPs, a regime that will incorporate both the real protection needs of EDPs and the national security concerns of the United States. In proposing this regime, this Article will outline the Nansen Initiative's aspirational structure as a starting point for a U.S.

EDP-protection program. Finally, the Article will address the necessary components of the proposed U.S. approach to EDPs.

II. THE GROWING TREND OF EDPs

A. *The Influx of People Fleeing Natural Disasters and Climate-Related Crises*

“Human migration as a result of environmental change is not a new phenomenon. [It] is considered ‘one of the oldest coping strategies’ in the face of life-threatening environmental crises.”¹⁰ The 2010 earthquake in Haiti highlighted a quintessential question that must be considered in the aftermath of environmental catastrophes: in addition to meeting the basic health and survival needs of the victims and addressing the requirements of rebuilding a devastated country, how can the international community find places for the newly displaced victims to live during the decades-long rebuilding process?¹¹ While it is unclear how many people will be displaced or will migrate due to the effects of natural disasters, when such migration will occur, and where the disasters will strike, it is clear that migration following such disasters is a continuing phenomenon that has yet to be addressed on a widespread scale.¹² The distances people move when they are displaced vary significantly depending on the dynamics of the displaced group itself, the type and speed of onset of the environmental disaster, and the preexisting circumstances facing the group at the time.¹³ An initial difficulty in addressing the trend of environmental displacement is the many definitions, typologies, and conceptualizations of the problem.¹⁴

Additional difficulties exist in determining the extent of the nexus between climate change and human mobility; therefore, three considerations should be taken into account from the start.¹⁵ First, while climate change itself does not necessarily trigger migration, its effects—such as natural disasters, environmental degradation, and rising sea levels—have

10. Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 713, 717 (2012) (citations omitted).

11. See Doran, *supra* note 1, at 118.

12. Kälén & Schrepfer, *supra* note 2, at 11-12.

13. Falstrom, *supra* note 2, at 4-7.

14. See Richard Black, *Environmental Refugees: Myth or Reality?* 1 (UNHCR, Working Paper No. 34, Mar. 2001); Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System To Protect Climate Refugees*, GLOBAL ENVTL. POL., Feb. 2010, at 60, 62.

15. Kälén & Schrepfer, *supra* note 2, at 5-6.

the potential to do so.¹⁶ Second, it is difficult, and in some cases impossible, to establish a direct causal link between climate change and a particular climate-related event specifically triggering migration; whether the displaced populations would have moved absent the event or whether the event was the but-for cause of the movement is difficult to determine with existing statistical and scientific methods.¹⁷ Finally, even where a direct causal link between climate change and a specific environmental event exists, as in the case of rising sea levels, migration is multicausal, so the actual likelihood of the disaster triggering population movement depends on a combination of three elements: the intensity, scope, and frequency of the environmental hazard; the vulnerability of affected populations to such an event; and the capacity of the affected population to cope with the aftermath of the disaster.¹⁸

However, despite these calculation complications, some generalized examples of environmental displacement illustrate the magnitude of the problem. While the United States may be best able to meet the challenges of environmental displacement if it limits its offer of relief to only victims of extreme weather events and environmental degradation that rises to the level of total destruction, a brief description of the varied causes of environmental migration will highlight the extent that EDPs are flooding the international immigration framework in overwhelming numbers. For example, in eastern Europe and the provinces of the former Soviet Union, Soviet-era practices pertaining to agriculture and nuclear testing resulted in the displacement of over 270,000 people escaping soil degradation and desertification in the first half of the 1990s.¹⁹ In the same region, particularly in the former Soviet Republic of Kazakhstan, between 1949 and 1989, nearly 500 nuclear bombs were exploded (150 above ground), and almost 160,000 people chose to leave the area for fear of exposure to toxic radiation.²⁰

Outside of the context of poor Soviet agricultural and proliferation practices, EDPs have emerged from every continent. In the Americas, environmental displacement has occurred in Central and South America on account of both natural disasters affecting unprotected communities, such as Hurricane Mitch in Nicaragua, and the profit-driven industrial/agricultural practices of multinational corporations operating

16. *Id.* at 6.

17. *Id.*

18. *Id.*

19. Falstrom, *supra* note 2, at 4-5.

20. *Id.* at 5.

in the region.²¹ In Asia, the Chinese Three Gorges Dam Project, the largest project of its kind in the world, continues to unfold despite the past displacement of thousands of people and the projected displacement of millions more before the project's completion.²² In Africa, years of drought and unsustainable agricultural practices combined with a large, primarily poverty-stricken population and frequent natural disasters have crippled many African nations.²³ As a result, Africa produces a disproportionate number of the world's EDPs.²⁴ Lastly, the island chain of Tuvalu has already lost one of its ten islands to rising sea levels, and climatologists predict that the country's other nine islands will become fully submerged within the next fifty years.²⁵ Knowing that its eventual extinction is inevitable, Tuvalu's government has devised relocation plans for its approximately 11,000 residents, but neighboring New Zealand and Australia have not pledged to accept Tuvalu's entire population, and the international community has not otherwise planned for the eventuality of Tuvalu's demise.²⁶

The number of long-term international migrants—individuals residing in foreign countries for more than one year—has risen steadily in the past four decades, from only 75 million persons in 1965 to 175 million in 2002.²⁷ In response to the increasing number of migrants emigrating due to climate-related reasons, Lester Brown, the founder of the Worldwatch Institute, coined the term “environmental refugee” in the late 1970s.²⁸ The term gained popularity with its inclusion in a 1985

21. *Id.*

22. *Id.* at 6.

23. *Id.* For example, Ethiopia and Somalia have suffered from widespread drought and Nigeria from a suffocating level of population growth with severe environmental degradation. *Id.* at 6-7.

24. *Id.* at 4, 7. See Black, *supra* note 14, for a discussion on specific instances of desertification, rising sea levels, and environmental conflicts.

25. Doran, *supra* note 1, at 130-31; see also Kara K. Moberg, *Extending Refugee Definitions To Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1109-12 (2009); Christine Cha-Sartori, *Environmental Refugees: The Latest Enterprise of Corporate Social Responsibility*, 34 HOUS. J. INT'L L. 109, 122-23 (2011); Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT'L L.J. 607, 632-33 (2009).

26. Doran, *supra* note 1, at 131; see also Moberg, *supra* note 25, at 1109-12.

27. Susan F. Martin et al., *Impact of Asylum on Receiving Countries* 1 (U.N. Univ., Discussion Paper No. 2003/24, Mar. 2003). These statistics originated with the United Nations Population Division. The industrialized states belonging to the Organisation for Economic Co-operation and Development (OECD) experienced a significant growth in their immigrant populations in the 1990s. Between 1986 and 2000, the number of international migrants living in the United States, France, Germany, Canada, Australia, and the United Kingdom increased by almost thirty million people. *Id.*

28. Doran, *supra* note 1, at 123.

United Nations Environment Programme (UNEP) report.²⁹ The term describes people who are forced to migrate from their homelands because environmental conditions made it too dangerous to stay.³⁰ However, the legitimacy of classifying these people as “environmental refugees” has been subject to criticism because the traditional definition of “refugee” applies specifically to persons seeking refuge from targeted, discriminatory persecution or violence.³¹

The initial definitional debate concerned not only the misuse of the term “refugee,” but also what the definition needed to include in order to maximize protection for the target populations.³² A consensus emerged that the definition needed to address (1) the causes of migration, namely the type of environmental harm or impact that would qualify a person as one deserving protection; (2) the type of migration, specifically whether it was voluntary or forced, temporary or permanent, and transnational or internal; and (3) the appropriate terminology, given that the word “refugee” was legally inaccurate.³³

In order to attempt to incorporate all of these concerns, scholars Fabrice Renaud, Janos Bogardi, Olivia Dun, and Koko Warner offer a threefold typology for categorizing environmentally related mass movement.³⁴ They divide the wide range of EDPs into “environmentally motivated migrants,” who leave a steadily deteriorating environment to preempt the worse; “environmentally forced migrants,” who must leave in order to avoid eventual complete devastation; and “environmental

29. Biermann & Boas, *supra* note 14, at 62. The UNEP report defined “environmental refugees” more broadly, as “people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.” *Id.* (internal quotation marks omitted). UNEP’s Essam El-Hinnawi, the author of this report, identified three categories of environmental displacement: “(1) people temporarily displaced due to natural hazards . . . who return [after] rehabilitat[ion];” (2) people permanently displaced due to environmentally risky development projects; and “(3) people displaced, temporarily or permanently, due to progressive or gradual deterioration of environmental conditions.” Naser, *supra* note 10, at 733.

30. Doran, *supra* note 1, at 119.

31. *See id.* Because environmentally forced migrants do not fit within the traditional definition of “refugee,” a number of other terms have emerged to amend the incorrect assumption that the term “environmental refugee” implies. *Id.* These terms change with almost each individual author.

32. *See* Kälin & Schrepfer, *supra* note 2, at 28 (discussing the terminological inventions of “environmental refugees,” “climate refugees,” and “environmental migrants” and the need to clarify the terminology).

33. Biermann & Boas, *supra* note 14, at 63. The 2011 Nansen Initiative Conference, to be discussed *infra* Part IV.A, noted the lack of an agreed-upon terminology and stressed that misleading and inaccurate terms such as “climate refugee” or “environmental refugee” must be abandoned. Kälin & Schrepfer, *supra* note 2, at 28.

34. Naser, *supra* note 10, at 734.

refugees,” who must flee immediately in response to natural disasters, such as a flood or hurricane.³⁵ However, while these three categories attempt to both incorporate all the reasons why people migrate and distinguish among those populations, they do not fully encapsulate the populations that the solution proposed here, which aims to provide protection to those migrants in the most immediate need, seeks to assist. Therefore, the term “environmentally displaced persons,” or “EDPs,” is used here and defined as those persons who must leave their home countries either immediately in response to extreme weather events, such as hurricanes or earthquakes, or to avoid environmental degradation that will result in the total devastation of their home countries, ultimately leaving them stateless.

Despite the controversy surrounding the terminology, an examination of the correlations between significant environmental events and the resulting migration rates indicates that environmental devastation is a predominant factor in forced migration.³⁶ The link between natural disasters and forced migration is possibly the easiest to establish; weather catastrophes such as the Indian Ocean tsunami of 2004, Hurricane Katrina in 2005, and the 2010 Haitian earthquake made remaining in their homelands impossible for victims of those disasters.³⁷ In June 2011, António Guterres of the United Nations High Commissioner for Refugees (UNHCR) made a statement concerning the dire need of the international community to redefine its response to natural disasters and the resulting displacement and urging countries to adopt new measures to cope with climate-induced displacement within and across borders.³⁸ As the international organization with primary responsibility for addressing the needs of the world’s refugees, the UNHCR recognized that natural disasters are growing in frequency and intensity and that this phenomenon is linked to the longer-term process of climate change, which creates the potential for increasing human movement.³⁹ Guterres declared, “[T]he [issue of climate change and displacement is] the defining challenge of our times [and] the international community has

35. *Id.*

36. Doran, *supra* note 1, at 129. A recent study established a link between desertification and migration in Northern Africa and between Mexico’s soil erosion and mass migration of Mexican populations to the United States. *Id.*

37. *Id.* at 129 & n.93 (“Hurricane Katrina displaced 1.5 million people, while the 2004 tsunami displaced 2 million people and the Haitian earthquake displaced about 2 million people.”).

38. *UNHCR Urges States To Redefine Response to Climate-Induced Displacement*, UNHCR (June 6, 2011), <http://www.unhcr.org/4decc5276.html>.

39. *Id.* However, Guterres noted that much of this movement would likely occur within national borders. *Id.*

hitherto lacked the political will to establish effective mechanisms to reduce the pace of climate change.”⁴⁰

While the exact magnitude of the problem of EDPs is disputed (largely due to the underlying dispute concerning the existence of climate change at all), widespread agreement exists that climate change has an impact on the movement of persons and that the number of displaced persons and migrants is expected to rise as the impacts of climate change become more intense and more frequent.⁴¹ Migration out of areas affected by natural disasters is a common response given the lack of access to material assistance and protection and the general unavailability of necessities and human security in postdisaster zones.⁴² However, the ability to develop political responses to the future problem of EDPs requires a clearer assessment of the likely number and origin of such persons.⁴³ It must be noted that all current predictions fall victim to numerous methodological problems, which create rather pessimistic estimates.⁴⁴ First, identifying the relevant populations is quite a challenge because those organizations and individuals tasked with making such predictions cannot agree on the relevant definitions, such as “climate” or “environment,” and, as mentioned above, cannot decide what to call the populations they are trying to quantify.⁴⁵ Second, many studies use broad concepts of what constitutes an EDP, typically adopting the UNEP definition; these broad concepts naturally invite high estimates.⁴⁶ Third, many assessments build on generalized assumptions about human behavior that may be plausible but are difficult to apply in formulations.⁴⁷ Fourth, some of these assessments do not account for changes in human behavior and possible human improvements to the environmental

40. *Id.* (internal quotation marks omitted).

41. Kälén & Schrepfer, *supra* note 2, at 5. For example, economic theories of migration also support the asserted links between the independent, disruptive effect of extreme weather events and migration. See Onelica C. Andrade Afonso, *Natural Disasters and Migration: Storms in Central America and the Caribbean and Immigration to the U.S.*, EXPLORATIONS: U.C. DAVIS UNDERGRADUATE RES. J. 3 (2011), http://undergraduateresearch.ucdavis.edu/explorations/2011/docs/Andrade_final_print%20version.pdf. “Many scientists predict an increase in natural disasters, including severe storms, [and a] larger number of people are expected to migrate due to extreme [weather events].” *Id.* at 13. “[Such] migration may be more permanent due to the long-lasting and, in some cases, irreversible effects of these [events].” *Id.*

42. Asmita Naik et al., *Migration, Development and Natural Disasters: Insights from the Indian Ocean Tsunami*, INT’L ORG. FOR MIGRATION 38 (2007), http://www.preventionweb.net/files/8646_MRS30.pdf.

43. Biermann & Boas, *supra* note 14, at 67.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

challenges they face, i.e., alternatives to migration.⁴⁸ Finally, environmental degradation linked to climate change is one reason for people to migrate, but as noted above, it is not the only reason, and many studies do not take such other motivations into account.⁴⁹ However, given these statistical limitations, current estimates expect an additional 200-250 million EDPs by the year 2050.⁵⁰ The largest percentages of these populations are likely to be forced to leave their homes due to extreme weather events.⁵¹ Over the past thirty years, these disasters have increased threefold.⁵² The United Nations International Strategy for Disaster Reduction estimated that in 2008 alone, approximately 20.2 million people were displaced due to extreme weather events.⁵³

B. *The National Security Challenges of Mass Migration*

The high proportion of EDPs that migrate into the United States, Australia, and certain EU Member States necessitates a discussion of the challenges that such a mass-migration event can pose to the national security of the countries that receive the vast majority of the world's international migrants. As of 2011, a staggering 983,000 asylum seekers have applied for refugee status, and that number is expected to increase steadily in coming years; this statistic excludes the individuals arriving in countries illegally or legally through nonasylum programs.⁵⁴ Major immigrant-receiving countries are beginning to feel the effects of

48. *Id.* at 68. The Foresight report notes a similar weakness in current predictions. It is almost impossible to distinguish a group of EDPs, either now or in the future, because a deterministic approach erroneously assumes that all or at least a significant proportion of people living in at-risk zones will migrate. Foresight, *Migration and Global Environmental Change*, GOV'T OFFICE FOR SCI. 8 (2011), <http://www.bis.gov.uk/assets/foresight/docs/migration/11-1116-migration-and-global-environmental-change.pdf>. This assumption neglects the role that humans take in dealing with the environmental changes in their communities and ignores other constraining factors that may influence migration flows. *Id.*

49. Biermann & Boas, *supra* note 14, at 68. “[I]n most cases migration is a response to the increase in poverty and limited employment opportunities caused by natural disasters, [rather than a reaction to the hazard itself].” Naik et al., *supra* note 42, at 39. Whether or not migration increases after a natural disaster depends on multiple factors—such as poverty, the scale of the disaster, the disaster’s immediate impact—the aid response, and the likelihood of a repeat disaster. *Id.*

50. Biermann & Boas, *supra* note 14, at 68. For example, the International Organization for Migration (IOM) estimates that there will be 200 million EDPs by 2050. Afonso, *supra* note 41, at 1; *see also* Atapattu, *supra* note 25, at 610-13.

51. Biermann & Boas, *supra* note 14, at 68.

52. Naser, *supra* note 10, at 736.

53. *Id.* It is possible, however, that such a large percentage of migration is attributed to these kinds of natural disasters because sudden-onset disasters are easily identifiable, easily observed, and often reported by the media. *Id.*

54. Cha-Sartori, *supra* note 25, at 136.

environmental displacement, with the European Union now considering the potential destabilizing consequences a matter of national security.⁵⁵ The German Advisory Council on Global Climate Change has warned that EU Member States must improve their immigration policies with preemptive measures to stem the flow of environmental migration.⁵⁶

An initial consideration requires analysis of the fiscal impact of such widespread migration. Many countries fear that environmental migration will cause an inundation of immigrants, which will tax and deplete the resources of the host state.⁵⁷ In the United States, the most readily measureable impact of mass migration is the cost to taxpayers to maintain an immigration system and an adjudication mechanism to process the influx of people.⁵⁸ It is illogical to restrict these systems because they are necessary to maintain some element of control over the people entering the United States, but the increased numbers of immigrants arriving in the United States after a natural disaster, coupled with the already extremely high numbers of individuals entering the United States either legally or illegally, certainly places a burden on the United States' finances.⁵⁹ According to a 1995 International Centre for Migration Policy Development study, the most recent comprehensive study on the fiscal impact of asylum, the worldwide processing costs for asylum applicants alone accounted for \$167 million, which included the funding of admissibility procedures, legal representation for asylum seekers, and return of rejected applicants.⁶⁰ This astronomical number neglects the costs of processing other classes of immigrants, let alone the costs of processing people in a mass-migration event when an immigrant-receiving country is flooded with a large number of disaster victims in a short period of time.⁶¹

In addition to the burden on resources that a mass-migration event would pose, consider also the impact that such a high number of asylum

55. *Id.*

56. *Id.*

57. *Id.* at 138.

58. See Martin et al., *supra* note 27, at 4.

59. *Id.*

60. *Id.* High costs in the United States result from the number of people that the United States admits and the extremely complex method of processing, which can take anywhere from eight to fifty-two months. Cha-Sartori, *supra* note 25, at 139; see also Cha-Sartori, *supra* note 25, at 139 (claiming that the United States spent \$938.7 million in first-costs to resettle 96,924 refugees, the higher cost including not only processing costs but also direct living costs for the refugees themselves). However, findings concerning the international costs of asylum are possibly skewed by the large number of persons from the former Yugoslavia who were granted temporary protection without going through an adjudication of an asylum application in the early and mid-1990s. Martin et al., *supra* note 27, at 4.

61. See Martin et al., *supra* note 27, at 4.

seekers could have on foreign policy and national security.⁶² Arguments addressing the national security concerns are rampant, such that fully rehashing those issues is beyond the purview of this Article, but no discussion on the creation of a visa-type program that would allow the admission of new entrants into the United States could be undertaken without a cursory mention of the intersection of immigration and national security. With regard to national security, an argument typically arises when individuals who wish to harm the United States seek to enter the country protected under humanitarian grants, such as asylum, TPS, and humanitarian parole.⁶³

In order to prevent individuals who pose a threat to the United States from legally entering the country, the Immigration and Nationality Act of 1952 (INA) includes numerous security-related grounds of inadmissibility, including recently expanded provisions related specifically to terrorism.⁶⁴ Since 2008, the “other” inadmissibility grounds (i.e., not based on public charge, illegal presence, or labor certification) have climbed to such a height that they now comprise the leading grounds of denial of legal permanent resident (LPR) applications; these “other” grounds include inadmissibility based on national security and terrorism.⁶⁵ While much discussion has ensued over the breadth and expansion of the security- and terrorism-related inadmissibility grounds,⁶⁶ these provisions are far from dispensable. As Steven Camarota, the Director of Research at the Center for Immigration Studies, stated, “Terrorists have even used America’s humanitarian tradition of welcoming those seeking asylum [to enter the United States].”⁶⁷ Therefore, any proposals for either remedying the existing programs or creating a new program for EDPs must address the United States’ national security concerns and apply the security- and terrorism-related grounds of inadmissibility to EDPs applying for entry into the United States.

62. See *id.* at 11 (“Asylum seekers—*en masse* or individually—can impact a state’s foreign policy and national security.”).

63. See *id.* at 14; *National Security*, CTR. FOR IMMIGRATION STUDIES, <http://www.cis.org/NationalSecurity> (last visited Apr. 15, 2014).

64. See Immigration and Nationality Act of 1952 § 212(a), 8 U.S.C. § 1182(a) (2012); RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41104, IMMIGRATION VISA ISSUANCES AND GROUNDS FOR EXCLUSION: POLICY AND TRENDS 9 (2010).

65. RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42988, U.S. IMMIGRATION POLICY: CHART BOOK OF KEY TRENDS 10 (2013).

66. See WASEM, *supra* note 64, at 13; *National Security*, *supra* note 63.

67. *National Security*, *supra* note 63.

C. *The International Regime for Protecting EDPs*

Despite the increased incidence of EDP migration and the myriad of national security challenges that a mass-migration event after a natural disaster can pose to an immigrant-receiving country, the existing international protection regime to address the needs of both EDPs and their receiving countries is hazy at best and nonexistent at worst. The relevant legal areas involved in regulating the cross-border movement of persons include international human rights law, international refugee law, the Convention on the Status of Stateless Persons (Stateless Persons Convention), and the various regional legal structures on refugee protections.⁶⁸ The protections offered to refugees under the 1951 Refugee Convention and the 1967 Refugee Protocol are very specific, and current international human rights and environmental law do not offer any similar protections to EDPs.⁶⁹ In fact, no agency has assumed responsibility for persons displaced across borders in the context of climate change, and the major organizations that could assume such responsibility, such as the UNHCR, have specifically disclaimed it.⁷⁰ Thus, no legal regime confers upon EDPs a status that mandates state obligations, and the current legal regimes provide only marginal protection to these populations.⁷¹

The protections contained within the international human rights law regime derive from a number of international treaties and indirectly protect refugees merely as a class of people deserving of human rights.⁷² As such, the primary source of international protection for EDPs would likely derive from the international refugee law regime.⁷³ The 1951 Refugee Convention and its 1967 Refugee Protocol represent the first and leading international protection mechanisms for refugees and offer guidelines for states parties to follow in adopting their own asylum systems.⁷⁴ The definition of “refugee” in article 1A(2) of the 1951 Refugee Convention contains three key elements, all of which must be met in order for an individual to be classified as a refugee and thus

68. Kälin & Schrepfer, *supra* note 2, at 26.

69. Falstrom, *supra* note 2, at 9; Biermann & Boas, *supra* note 14, at 73-74.

70. Kälin & Schrepfer, *supra* note 2, at 44; *see* Falstrom, *supra* note 2, at 13.

71. Biermann & Boas, *supra* note 14, at 74.

72. *See generally* Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998).

73. *See* Kälin & Schrepfer, *supra* note 2, at 29-31.

74. *See* 1951 Refugee Convention, *supra* note 4; 1967 Refugee Protocol, *supra* note 5; *see also* Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, UNHCR (Sept. 2012), <http://www.refworld.org/docid/50474f062.html>.

qualify for the protections offered under the Convention.⁷⁵ These three elements are (1) the presence outside the country of origin; (2) due to a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion; and (3) an inability or unwillingness to avail oneself of the protection of one's country.⁷⁶

“[The] international refugee law [regime] was not conceived to protect persons displaced across borders [due to natural disasters], even though they flee particular dangers and therefore may find themselves in a refugee-like situation.”⁷⁷ The “refugee” definition in article 1A(2) specifically requires that the persecution an individual suffers be particularly directed toward that individual *on account of* race, religion, nationality, membership of a particular social group, or political opinion.⁷⁸ While natural disasters have become increasingly powerful in recent years, hurricanes and earthquakes are still not capable of targeting specific people based on a discriminatory determination. It is difficult to conceive how the term “refugee” could apply to EDPs.⁷⁹ Even the UNHCR has stated that those individuals displaced from their homes for environmental reasons are not considered refugees; its 1979 *UN Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Refugee Convention and the 1967 Refugee Protocol* explicitly excludes victims of natural disasters from acquiring refugee protection.⁸⁰ As such, in most situations, EDPs do not qualify as refugees and thus do not merit the protections of international refugee law.⁸¹

75. 1951 Refugee Convention, *supra* note 4, art. 1A(2).

76. *Id.*; see also Christopher M. Kozoll, *Poisoning the Well: Persecution, the Environment, and Refugee Status*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 271, 278-87 (2004) (providing an in-depth explanation of the three elements).

77. Kälin & Schrepfer, *supra* note 2, at 31; see also Cha-Sartori, *supra* note 25, at 117-22.

78. 1951 Refugee Convention, *supra* note 4, art. 1A(2).

79. Falstrom, *supra* note 2, at 12.

80. *Id.* at 13; Moberg, *supra* note 25, at 1114. The UNHCR stated:

[R]efugees are distinguished by the fact that they lack the protection of their state and therefore look to the international community to provide them with security. Environmentally displaced people, on the other hand, can usually count upon the protection of their state, even if it is limited in its capacity to provide them with emergency relief or longer-term reconstruction assistance.

Falstrom, *supra* note 2, at 12 (citation omitted).

81. Kälin & Schrepfer, *supra* note 2, at 31. However, in certain climate-related cases, the elements of the refugee definition may be fulfilled. For example, disasters may be converted into a form of persecution if authorities deny any kind of assistance or protection to certain people because of one of the 1951 Refugee Convention grounds and as a consequence expose them to treatment amounting to persecution. *Id.* at 32. Furthermore, situations of violence or armed conflict triggered by disputes over shrinking natural resources may constitute persecution if

States parties to the 1951 Refugee Convention may interpret their definition of refugee to extend asylum protections to EDPs, but thus far, no country has chosen to do so.⁸²

Regional refugee-protection regimes occasionally offer protection to a wider variety of individuals by defining “refugee” broader than the 1951 Refugee Convention. For example, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa contains in its “refugee” definition:

[E]very person who, owing to external aggression, . . . foreign domination or *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁸³

Furthermore, the 1984 Cartagena Declaration on Refugees⁸⁴ and the 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries⁸⁵ (1994 Arab Refugee Convention) also include broader definitions of refugees.⁸⁶ The 1994 Arab Refugee Convention’s definition “encompasses persons who unwillingly took refuge abroad ‘because of the occurrence of *natural disasters*.’”⁸⁷ In addition, the EU Temporary Protection Directive provides for the possibility of “giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin.”⁸⁸ While these provisions were initially included to protect persons displaced by generalized violence, EDPs still may fall within these categories.⁸⁹ Therefore, EDPs who fall within one of these regional protection regimes may qualify as refugees even though they do not qualify as refugees at the international level.⁹⁰

persecutory measures are based on one of the 1951 Refugee Convention grounds. *Id.* at 33; see also Kozoll, *supra* note 76, at 298-99.

82. Moberg, *supra* note 25, at 1115-16.

83. Convention Governing the Specific Aspects of Refugee Problems in Africa, *done* Sept. 10, 1969, 1001 U.N.T.S. 45 (emphasis added).

84. *Done* Nov. 22, 1984, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b36ec&skip=0&query=Cartagena>.

85. *Adopted* 1994, <http://www.refworld.org/docid/4dd5123f2.html> [hereinafter 1994 Arab Refugee Convention].

86. Kälin & Schrepfer, *supra* note 2, at 26.

87. *Id.* (quoting 1994 Arab Refugee Convention, *supra* note 85, art. 1).

88. Council Directive 2001/55/EC, art. 1, 2001 O.J. (L 212) 12-23; see also Kälin & Schrepfer, *supra* note 2, at 26-27.

89. See Moberg, *supra* note 25, at 1116.

90. See Kälin & Schrepfer, *supra* note 2, at 26-27.

The Stateless Persons Convention⁹¹ has some limited relevance to EDPs deriving from low-lying island states threatened by rising sea levels:⁹²

Statelessness describes a factual situation . . . of being without a nationality. Statelessness does not necessarily emerge or alter when people cross borders in the wake of climate-related [events], but may emerge when the loss of all territory results in the end of statehood as could be the case of inundated small island states. . . . In case[s] of loss of nationality with the end of statehood, a situation of de jure statelessness would emerge in which the [Stateless Persons Convention] would apply with its minimal protection.⁹³

The Stateless Persons Convention provides for some of the rights associated with legal status, but it remains silent on the issue of admission to any other country.⁹⁴ Therefore, it fails to address the primary problem that people displaced from submerged island states would face.⁹⁵

The proposed solutions to the EDP conundrum can be divided into two basic approaches: the integration approach, which seeks to solidify the definition of EDPs and include that definition in the existing notion of refugees, and the creation approach, which seeks to abandon the attempt to stretch existing refugee law and instead create new immigration programs for EDPs.⁹⁶ Within the integration approach, numerous scholars support expanding the refugee definition contained in the 1951 Refugee Convention to extend its protections to EDPs.⁹⁷ Proponents of the integration approach believe that “[i]f the international community can agree on a definition of [EDPs], the U.N. and participating countries may be more willing to include [EDPs] in their asylum [and refugee-protection] programs.”⁹⁸ These scholars distinguish “environmental refugees” from “environmentally forced migrants” only by the immediacy of the necessary migration.⁹⁹ “Refugees” are individuals who must move immediately because of environmental destruction, while

91. Convention on the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

92. Kälin & Schrepfer, *supra* note 2, at 37.

93. *Id.*

94. *Id.* at 37-38.

95. *Id.*

96. See Doran, *supra* note 1, at 133-34.

97. See *id.* at 133; Moberg, *supra* note 25, at 1128-35.

98. Doran, *supra* note 1, at 133.

99. See *id.*

“forced migrants” may have more time before relocation becomes necessary.¹⁰⁰

However, opponents argue that an expansion of the definition would devalue the current protections for the many individuals who qualify as refugees under the present definition.¹⁰¹ Further, the vast majority of EDPs are internally displaced, and as such, an expansion of the refugee definition would not even apply to them.¹⁰² Finally, only a limited expansion of the definition would be possible given the enormous number of EDPs; applying the 1951 Refugee Convention to all EDPs would severely overextend the international refugee law regime.¹⁰³ Currently, many EDPs could instead be conceptualized as internally displaced persons who would fall under the authority of the UNHCR and the Guiding Principles on Internal Displacement of the Office of the High Commissioner for Human Rights.¹⁰⁴

On the other hand, proponents of the creation approach claim that instead of trying to force the square peg of EDPs into the round hole of the existing refugee definition, a better solution is to create a new protection regime specifically for EDPs.¹⁰⁵ Under this new system, all countries would share the burden of supporting EDPs, and “new visa-type programs would allow [participating] countries to start fresh and tailor their new programs to the particular needs of [EDPs].”¹⁰⁶ A U.S. approach to EDPs should fall into this approach because the creation of an EDP-specific visa-type program would be able (at least potentially) to grant EDPs relief without overextending existing asylum structures and flooding the pool of refugees needing asylum.¹⁰⁷ This new regime would also avoid any confusion with terminology; while the asylum system may be an inspiration for a new EDP-specific visa-type program, the terminology would be different in order to distinguish EDPs from

100. *Id.* But see Moberg, *supra* note 25, at 1128 (“[E]xpanding protection under the refugee definition would require governments to modify a definition that has not changed since its promulgation in 1951.”).

101. David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees,”* 16 GEO. INT’L ENVTL. L. REV. 209, 215 (2004).

102. *See id.* at 215-16.

103. *Id.* at 216; Moberg, *supra* note 25, at 1128-31.

104. Biermann & Boas, *supra* note 14, at 73-74.

105. *See* Doran, *supra* note 1, at 134. For example, Falstrom proposes that the international community should create a new convention based on the Convention Against Torture that offers both temporary protection and long-term prevention. *See* Falstrom, *supra* note 2, at 18. Moberg, on the other hand, proposes the creation of an environmentally based visa program, which would offer protection to both EDPs who are already displaced and persons who would potentially be displaced for environmental reasons. Moberg, *supra* note 25, at 1135.

106. Doran, *supra* note 1, at 134.

107. *See id.*

traditional refugees under the 1951 Refugee Convention and eliminate the existing misunderstandings and confusions that exist among the scholarship on EDPs.¹⁰⁸

Creation approach proponents have identified some guiding principles for a sui generis regime governing EDPs.¹⁰⁹ These principles include planned relocation and resettlement, resettlement rather than temporary status, collective rights for local populations, international assistance for domestic measures, and international burden sharing.¹¹⁰ For populations seeking collective protection in the wake of an environmental disaster, inclusion in a list of populations “in need of relocation due to [natural disasters]” or “threatened by having to relocate due to complete [environmental degradation]” would trigger specific rights and support mechanisms, including voluntary resettlement programs and, especially in the case of small island states, organized transnational migration.¹¹¹

Creation approach proponents recognize that dealing with the resettlement of potentially millions of EDPs over the course of the next fifty years will require not only a new legal regime but also international agencies to assume the responsibility of dealing with this task.¹¹² Given the myriad causes of environmental displacement at the international level (although the U.S. approach proposed here solely addresses displacement resulting from extreme weather events and environmental degradation resulting in total country destruction), a single agency likely could not be tasked with exclusively dealing with EDPs.¹¹³ Instead, a network of implementing agencies under the authority of a coordinating agency would be more appropriate to provide their areas of specific expertise to the multifaceted issue of EDPs.¹¹⁴

The last, slightly tangential, approach to addressing EDPs concerns not refugee law but environmental law, focusing on being proactive and avoiding future environmental triggers.¹¹⁵ Such an approach would nip the bud of EDPs by addressing the environmental causes of displacement.¹¹⁶ This kind of approach is undeniably necessary at an international level; given the global nature of climate change, only

108. *See id.*

109. Biermann & Boas, *supra* note 14, at 75-76.

110. *Id.*

111. *Id.* at 77-78.

112. *Id.* at 79.

113. *Id.*

114. *Id.*

115. *See* Doran, *supra* note 1, at 134-35.

116. *See id.*

international commitment and cooperation can strive to eliminate the causes of environmental degradation.¹¹⁷ However, proposals of this kind are better suited to discussions on environmental law, with refugee law merely reaping the benefits. Furthermore, the political will to engage in this kind of widespread climate change mitigation has been lackluster: for example, a fund created after U.N. climate talks in Poznan, Poland, to help developing states deal with climate-related threats received only \$80 million in contributions from industrialized states—“a miniscule amount considering the magnitude of the problem.”¹¹⁸

In a wider sense, adaptation measures must address both protection of and assistance for people who have been negatively affected by environmental disasters.¹¹⁹ As the main international actors, states bear the primary duty to protect EDPs because they are bound by human rights law.¹²⁰ However, while adaptation to all variety of climate change-related issues remains on the international agenda, international discussions have neglected protection dimensions thus far.¹²¹ The heads of organizations of the United Nations Inter-Agency Standing Committee (IASC), the coordinating body of the U.N. humanitarian agencies and major international humanitarian civil society consortia, addressed an April 2009 letter to the Executive Secretary of the United Nations Framework Convention on Climate Change (UNFCCC) asking the UNFCCC to acknowledge and address the humanitarian consequences of climate change, including displacement and migration, in the hoped-for successor to the Kyoto Protocol.¹²² However, despite this call to action, no international body has responded with any real vigor.¹²³ Given the general lack of international will to address either EDPs specifically or climate change as a general trend, a U.S. approach to EDPs, based on the lessons learned from existing methods of protecting such populations, that does not require international cooperation may be the most effective and time-efficient method for confronting the problem.

117. *Id.* at 135.

118. Cha-Sartori, *supra* note 25, at 140.

119. Kälin & Schrepfer, *supra* note 2, at 21.

120. *Id.*

121. *Id.*; see also Moberg, *supra* note 25, at 1128 (noting the trend to narrow, rather than broaden, the protection and immigration solutions offered under refugee and asylum law).

122. Kälin & Schrepfer, *supra* note 2, at 21.

123. See *id.*

III. COMPARATIVE APPROACHES OF MAJOR IMMIGRANT-RECEIVING COUNTRIES TO THE PROBLEM OF EDPs

A. *The Temporary-Protection Approach*

In response to the growing trend of EDPs, many countries have promulgated provisions regarding assistance and protection of persons affected by natural disasters within their borders, including internally displaced persons, in their disaster-management legislation.¹²⁴ Furthermore, evidence suggests that some states have admitted and received EDPs as a temporary measure on an ad hoc basis due solely to humanitarian concerns and not in response to obligations under existing domestic law or policy or even a regional or international treaty.¹²⁵ The temporary-protection approach for persons displaced to other countries therefore constitutes a predominant theory for dealing with EDPs in lieu of protection regimes that offer permanent admission in cases where return is impermissible, impossible, or unreasonable.¹²⁶ For example,

The Finnish Aliens Act . . . provides for subsidiary protection—subsidiary to granting asylum—to aliens in need of international protection because of an environmental disaster, and temporary protection [of three years] to foreigners in need of it and who are unable to return due to massive displacement as a result of an environmental disaster.¹²⁷

The Swedish Aliens Act contains a similar provision, which promises the entitlement to a residence permit.¹²⁸ Furthermore, Argentina “adopted legislation providing access to provisional residence permits for people who might not be able to return to their country of origin because of a natural or environmental disaster.”¹²⁹ These models share the commonality that their grant of temporary or subsidiary protection is based not on legal entitlement, but rather on the humanitarian discretion of competent authorities.¹³⁰

The EU Temporary Protection Directive is an exceptional mechanism designed to respond to mass influxes on account of armed conflict or endemic violence, but it could possibly be activated to respond to the sudden influx following environmental disasters, given

124. *Id.* at 45.

125. *Id.*

126. *See id.* at 58-59.

127. *Id.* at 45-46 (footnote omitted).

128. *Id.* at 46.

129. *Id.* (internal quotation marks omitted).

130. *Id.*

that article 2(c)'s application scope is not exhaustive.¹³¹ During the drafting of the Directive, Finland sought to include the recognition of "persons who have had to flee as a result of natural disasters," but the other Member States rejected this proposition, with Belgium and Spain acknowledging that no international legal instrument on refugees mentioned such situations.¹³² Nevertheless, when the Directive was concluded in 2004, the United Kingdom delegation stated that the Directive would "ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war *and natural disasters*."¹³³ Despite the speculation that this statement caused concerning the possible reach of the Directive to EDPs, no discussion has subsequently taken place to formally expand the instrument to cover these populations.¹³⁴

Perhaps the most well-formulated temporary-protection regime exists in the United States. With the 1990 Immigration Act (IMMACT90), Congress amended the INA to establish TPS as a form of short-term protection.¹³⁵ IMMACT90 sets forth criteria for the extension of temporary protection to people from certain countries experiencing political or environmental turmoil.¹³⁶ During periods of civil war, economic upheaval, or natural disasters, the United States Attorney General, in consultation with other agencies, may exercise their discretion to allow nationals of the countries experiencing those various forms of upheaval to remain in the United States.¹³⁷ Such an upheaval must result in a substantial but temporary disruption of living conditions, and the foreign state, temporarily unable to handle the care of its own nationals, must officially request TPS designation.¹³⁸ Individuals who are illegally present in the United States may apply affirmatively for TPS and receive work authorization.¹³⁹ Those who are undergoing removal proceedings at the time of a declaration of TPS will have their cases put

131. Council Directive 2001/55/EC, art. 2(c), 2001 O.J. (L 212) 12-23; JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 102 (2012).

132. *Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons*, at 4 & n.2, COM (2000) 303 final (Feb. 16, 2001); MCADAM, *supra* note 131, at 102.

133. MCADAM, *supra* note 131, at 102 (emphasis added) (quoting Press Release, U.K. Home Office, U.K. Plans in Place To Protect Victims of Humanitarian Disasters (Dec. 20, 2004) (internal quotation marks omitted)).

134. *Id.*

135. Immigration Act of 1990, Pub. L. No. 101-649, sec. 302, § 244A (b)(1)(B), 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1254a (2012)).

136. *Id.*

137. *Id.* § 244A(a)-(b).

138. *Id.* § 244A(b)(1)(B).

139. *See id.* § 244A; BOSWELL, *supra* note 7, at 94-95.

on hold, while those who were already ordered removed will have their removal stayed until the situation has stabilized.¹⁴⁰ TPS is a form of prosecutorial discretion, meaning that immigrants from countries experiencing upheaval become eligible for protection only upon a specific declaration by the Attorney General that their country is eligible.¹⁴¹

In 1998, Hurricane Mitch, one of the most destructive hurricanes in history, devastated large parts of Honduras and Nicaragua.¹⁴² Despite Central America's history of strong hurricanes, Hurricane Mitch marked the first time that the United States granted TPS to immigrants due to a hurricane.¹⁴³ The Attorney General again authorized TPS for nationals of El Salvador following a 2001 earthquake.¹⁴⁴ Realizing the growing trend of environmental upheaval, in 2007, the United States utilized a category of TPS specifically for victims of natural disasters, extending TPS to natural disaster victims from Honduras, Nicaragua, and El Salvador.¹⁴⁵ This category allows the U.S. Attorney General to offer TPS in the event of "an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected."¹⁴⁶ Furthermore, an additional basis of TPS applies when there are "extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety."¹⁴⁷ This final category may allow the Attorney General to offer TPS in the event of an environmental catastrophe other than a flood, drought, epidemic, earthquake, or natural disaster. However, the requirement that such condition be temporary seems to eliminate rising sea levels from the list of possible bases for TPS, given that its effects would be the permanent destruction of territory and not a temporary disruption of state services.

In addition, TPS requires that "a person must be physically present in the United States on the date of the designation and meet the requirements set forth in announcements issued by the [Department of

140. See Immigration Act of 1990 sec. 302, § 244A; BOSWELL, *supra* note 7, at 94-95.

141. See Immigration Act of 1990 sec. 302, § 244A; BOSWELL, *supra* note 7, at 94-95.

142. Afonso, *supra* note 41, at 1-2.

143. *Id.* at 2; see also Kälin & Schrepfer, *supra* note 2, at 45.

144. BOSWELL, *supra* note 7, at 95.

145. 8 U.S.C. §§ 1254a, 1254(b)(1)(B) (2012); Moberg, *supra* note 25, at 1127; *Ambassador Glazon Confirms TPS Extension*, SAN SALVADOR, <http://SanSalvador.usembassy.gov/secretary-chertoff.html> (last visited Apr. 15, 2014).

146. 8 U.S.C. § 1254a(b)(1)(B).

147. *Id.* § 1254(b)(1)(C).

Homeland Security].”¹⁴⁸ This requirement may not prove a barrier to those who can migrate quickly, but may prove difficult to those whose mobility is limited.¹⁴⁹ For example, the aforementioned Nicaraguan earthquakes occurred on August 23 and October 18, 1998.¹⁵⁰ TPS for Nicaraguans was designated on January 5, 1999, so victims of the Nicaraguan earthquake had to find their way to the United States by that day in order to qualify for TPS.¹⁵¹ This is not a debilitating requirement, but it may prove challenging nonetheless. However, TPS may be beneficial to EDPs fleeing disasters that will require more long-term rehabilitation due to the possibility of extension. The initial grant of TPS typically lasts from six to eighteen months, but the Attorney General retains the discretion to extend TPS for any period of time.¹⁵² In the Nicaraguan case, although the Attorney General first announced the grant of TPS in 1999, on April 3, 2013, he announced the extension of TPS for Nicaraguans until January 5, 2015.¹⁵³

TPS may be a valid option for protecting EDPs, but it may also be a smart choice from a national security standpoint because it includes procedures to ensure that those persons that the United States permits to remain in the country, even if they entered illegally, do not pose a national security threat. First, persons with a felony or two or more misdemeanor convictions are ineligible for TPS.¹⁵⁴ Individuals who are inadmissible for reasons of national security or terrorism are also ineligible for TPS.¹⁵⁵

148. BOSWELL, *supra* note 7, at 95 & n.80 (“Notice of grants and extension of TPS are also made available in the *Federal Register*.”).

149. See MCADAM, *supra* note 131, at 101.

150. See *Significant Earthquakes of the World*, U.S. GEOLOGICAL SURVEY (1998), http://earthquake.usgs.gov/earthquakes/eqarchives/significant/sig_1998.php.

151. See *Temporary Protected Status Designated Country: Nicaragua*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e64f3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=e64f3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited Apr. 15, 2014).

152. BOSWELL, *supra* note 7, at 95.

153. See *Temporary Protected Status Designated Country: Nicaragua*, *supra* note 151; Extension of the Designation of Nicaragua for Temporary Protected Status, 78 Fed. Reg. 20,128 (Apr. 3, 2013).

154. 8 U.S.C. § 1254a(c)(2)(B) (2012).

155. *Id.*; see also *id.* § 1158(b)(2)(A). More than half of the TPS application requires an applicant to attest that they have not engaged in any conduct that would render them inadmissible. See *Form I-821, Application for Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/files/form/i-821.pdf> (last visited Apr. 15, 2014). Most of the grounds of inadmissibility that would render an applicant ineligible may be waived for humanitarian purposes, family unity, or if it is in the public’s interest, but these grounds are waived very infrequently. See 8 U.S.C. § 1254a(c)(2)(A).

However, despite these advantages, TPS may not be the ideal method of protecting EDPs. A grant of TPS depends entirely on the discretion and goodwill of the Attorney General because without their designation, TPS is unattainable.¹⁵⁶ Furthermore, while the United States has currently extended TPS to eight countries,¹⁵⁷ the only designations of TPS eligibility on the basis of an environmental catastrophe have been granted in the Western Hemisphere to countries with relative proximity to the United States.¹⁵⁸ The Attorney General chose not to extend temporary protection to India and Pakistan's 2.6 million EDPs after a 2004 tsunami and a 2005 earthquake.¹⁵⁹ There have also been calls for TPS to be extended to the victims of natural disasters in Peru, Pakistan, Sri Lanka, India, Indonesia, Thailand, Somalia, Myanmar, Malaysia, the Maldives, Tanzania, Seychelles, Bangladesh, and Kenya, but the Attorney General failed to designate those countries.¹⁶⁰ "TPS only applies to applicants from a foreign country that has officially requested recognition as temporarily inadequate to provide its nationals with a safe return based on the premise that the country will, in the future, provide the applicant with a safe return."¹⁶¹ Tuvalu, for example, would be unable to promise that it could provide its citizens with safe return once sea levels fall from dangerous heights; Tuvaluans, therefore, may not be eligible for TPS in the United States.¹⁶² Finally, as implied in the title, TPS is only temporary, despite the possibility of an extension.¹⁶³ Recipients of TPS are not precluded from applying for other, more permanent forms of immigrant status,¹⁶⁴ but a grant of TPS offers nothing more than a stay of removal and a tolerance for the physical presence of certain populations for a fixed period of time. Recipients of TPS are

156. See 8 U.S.C. § 1254a; Moberg, *supra* note 25, at 1127; BOSWELL, *supra* note 7, at 95.

157. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> (last visited Apr. 15, 2014). These countries are El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria. *Id.*

158. *Id.* These countries are El Salvador, Haiti, Honduras, and Nicaragua. The most recent grant of TPS based on an environmental catastrophe occurred in 2010 when Attorney General Eric Holder issued TPS for Haitians following the devastating earthquake. Trisha Marczak, *Environmental Refugees Growing in Numbers Without Real Solution*, MINT PRESS NEWS (Aug. 21, 2012), <http://www.mintpressnews.com/environmental-refugees-growing-in-numbers-without-real-solution/35688>; MCADAM, *supra* note 131, at 101.

159. Moberg, *supra* note 25, at 1127.

160. MCADAM, *supra* note 131, at 101; RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 5 (2011).

161. Moberg, *supra* note 25, at 1127; see also 8 U.S.C. § 1254a(b)(1)(B).

162. See *infra* Part II.A, for a discussion of Tuvalu.

163. BOSWELL, *supra* note 7, at 95.

164. *Temporary Protected Status*, *supra* note 157; BOSWELL, *supra* note 7, at 96.

ineligible to adjust their status to that of LPR without a special act of Congress.¹⁶⁵

B. *The Quasi-Asylum Approach*

As discussed above, EDPs categorically do not qualify as refugees under the 1951 Refugee Convention.¹⁶⁶ As a result, various domestic refugee-protection regimes similarly do not offer asylum or refugee status to EDPs. The EU Qualification Directive, which provides the framework for individual protection in the EU, contains no specific language on protection from environmental disasters, although the European Convention on Human Rights' "inhuman or degrading treatment" provision may open a small window of opportunity.¹⁶⁷ Deliberations during the drafting of the Qualification Directive show that including environmental disasters as a ground of subsidiary protection was not seriously considered.¹⁶⁸

The U.S. laws on asylum and refugee protection also largely track the 1951 Refugee Convention definition of "refugee," thereby requiring a well-founded fear of persecution on account of race, religion, national origin, membership of a particular social group, or political opinion.¹⁶⁹ Other forms of removal related to asylum, such as withholding of removal, track this same definition.¹⁷⁰ While at the time the United States adopted the 1951 Refugee Convention definition of "refugee" the Senate intended to extend the definition "to include aliens who have been . . . forced to flee their homes as a result of serious natural disasters, such as earthquakes, volcanic eruptions, tidal waves, and in any similar natural catastrophes," the definition has never been interpreted as offering protection to such persons.¹⁷¹ At this point, it is unlikely that the United States will provide EDPs with asylum protection because in 2007, it began to utilize a form of TPS specifically for natural disaster victims.¹⁷² Therefore, the availability of asylum for EDPs has largely been rejected worldwide.

165. MCADAM, *supra* note 131, at 101

166. *See infra* Part II.C.

167. *See* MCADAM, *supra* note 131, at 103.

168. *Id.*

169. *See* 8 U.S.C. § 1101(a)(42)(A) (2012); 1951 Refugee Convention, *supra* note 4, art. 1 A(2); BOSWELL, *supra* note 7, at 83; Moberg, *supra* note 25, at 1118-22.

170. *See* 8 U.S.C. § 1231(b)(3); BOSWELL, *supra* note 7, at 83.

171. Moberg, *supra* note 25, at 1126-27 (quoting S. REP. NO. 89-748, at 17 (1965) (internal quotation marks omitted)).

172. *Id.* at 1127.

Nevertheless, some states at least nominally recognize the availability of asylum-like protection for EDPs. For instance, the Swedish asylum law extends protection to people who are “unable to return to the[ir] country of origin because of an environmental disaster.”¹⁷³ To this day, however, that provision has not been used.¹⁷⁴ The Finnish asylum law also provides humanitarian protection to people who cannot return to their countries of origin as a result of an environmental catastrophe, but again this provision has yet to be used.¹⁷⁵ While the Swiss asylum law does not expressly mention victims of environmental disasters, its temporary admission and subsidiary protection laws could be interpreted to accommodate such people.¹⁷⁶ Finally, Argentina adopted a new immigration law in 2010 to provide access to provisional residence permits for individuals who cannot return to their home countries due to a natural or environmental disaster.¹⁷⁷ A number of other legislatures have called for an extension of both domestic and international refugee law to offer protection to EDPs.¹⁷⁸ Nevertheless, these limited examples remain the exception rather than the rule; it is generally wise to disregard asylum and refugee law as it exists today as a source of protection for EDPs.

C. *The Humanitarian Approach*

Humanitarian schemes to address the needs of EDPs tend to emerge on an ad hoc basis. A number of countries provide some form of protection to people fleeing natural disasters on a case-by-case basis, preferring ad hoc humanitarian responses that allow for individual determinations instead of either forcing EDPs into ill-fitting existing schemes or creating an entirely new approach for EDPs.¹⁷⁹ The desire to offer humanitarian protection may arise from special historical or cultural links to the displaced populations; for example, many countries in Africa

173. 4 ch. 2 § UTLÄNNINGSLAG [Aliens Act] (Svenskförtattningssamling [SFS] 2005:716) (Swed.); MCADAM, *supra* note 131, at 104.

174. MCADAM, *supra* note 131, at 104.

175. 6 ch. 88a § ULKOMAALAIKSLAKI [Aliens Act] (323/2009) (Fin.); MCADAM, *supra* note 131, at 104.

176. MCADAM, *supra* note 131, at 105.

177. Law No. 616/2010, May 6, 2010, [31.898] B.O. 6 (Arg.); MCADAM, *supra* note 131, at 105.

178. MCADAM, *supra* note 131, at 105. For example, in 2006, the Belgian Senate adopted a resolution calling for Belgium to agitate in the United Nations for the recognition of EDPs. *Id.* Similarly, in 2007, the new Australian Labor Party-led government proposed the creation of a Pacific Rim coalition to accept EDPs. *Id.* at 106.

179. *See id.* at 106-07.

offered special protection to Haitians following the 2010 earthquake.¹⁸⁰ Usually, though, such a response is “emergency protection after a particular event, rather than pre-emptive protection for projected longer-term impacts.”¹⁸¹

Absent an international mechanism for protecting EDPs in the aftermath of a natural disaster, the UNHCR has called upon states “to provide discretionary responses in situations of natural disaster[s].”¹⁸² Following the 2004 Indian Ocean tsunami, the UNHCR recommended a halt on the return of all displaced persons to the affected areas.¹⁸³ In response, the United Kingdom suspended involuntary returns of failed asylum seekers to India, Sri Lanka, Thailand, and Indonesia.¹⁸⁴ Canada and Australia expedited permanent and temporary visa applications for people from the affected regions.¹⁸⁵ Similarly, even without a specific call to action, France, Canada, and the Dominican Republic voluntarily eased their immigration rules following the 2010 Haitian earthquake.¹⁸⁶ However, substantive rights do not necessarily accompany the grant of the right to remain, and these kinds of ad hoc responses are likely not sustainable given the lack of predictability and the inability of a receiving state to monitor properly all of the people it may be admitting in its decision to focus on humanitarianism.¹⁸⁷

In the United States, both large-scale and individual parole have been used over the years to address humanitarian situations.¹⁸⁸ However, since the enactment of the Refugee Act of 1980,¹⁸⁹ the use of humanitarian parole has been significantly reduced.¹⁹⁰ In fact, a primary motivation for the enactment of the Refugee Act was to regularize the admissions process for refugees, including the preference for refugee visas rather than parole to deal with humanitarian crises.¹⁹¹ Nevertheless,

180. *Id.* at 107. The President of Senegal offered to resettle displaced Haitians as descendants of African slaves. See Scott Baldauf, *Haitians to Africa? Senegal Resettlement Plans Gain Steam*, CHRISTIAN SCI. MONITOR (Feb. 2, 2010), <http://www.csmonitor.com/World/Africa/2010/0202/Haitians-to-Africa-Senegal-resettlement-plans-gain-steam>.

181. MCADAM, *supra* note 131, at 107.

182. *Id.* at 109. In analyzing the efficacy of this call to action, it may be best to set aside judgment of the UNHCR for imposing such a responsibility on state actors when it has expressly disclaimed the responsibility itself.

183. *Id.*

184. *Id.* at 109-10.

185. *Id.* at 110.

186. *Id.*

187. *See id.*

188. BOSWELL, *supra* note 7, at 32.

189. Pub. L. No. 96-212, 94 Stat. 102.

190. BOSWELL, *supra* note 7, at 32.

191. *Id.*

humanitarian parole remains for people who do not qualify for asylum but who nevertheless merit protection for urgent humanitarian reasons or significant public benefit.¹⁹² Individuals admitted into the United States under humanitarian parole may remain in the United States for the period of time that corresponds with the length of the emergency or humanitarian situation.¹⁹³ Anyone can apply for humanitarian parole, but a grant of parole does not offer any form of permanent status or any pathway to such status.¹⁹⁴ Furthermore, humanitarian parole applications are far more informal than applications for either TPS or asylum and as such do not contain the same preliminary national security safeguards.¹⁹⁵

D. *The Discretionary Approach*

Finally, the last approach to providing protection to EDPs involves discretionary grants of status for individual claimants.¹⁹⁶ This approach largely mirrors the humanitarian approach, but humanitarian grants of protection are usually group-based while discretionary grants are on an individual basis.¹⁹⁷ Because each state has different requirements as to eligibility for discretionary protection, the applicability of discretionary grounds to EDPs varies from jurisdiction to jurisdiction.¹⁹⁸ Some mechanisms are only activated when an asylum application has failed; others consider the length of time that a person has already spent in the country.¹⁹⁹ Some status offers are temporary, which does not address the problem facing those who are permanently displaced.²⁰⁰ In short, each discretionary program differs depending on the specific political circumstances of the country offering the program.

In Austria, residence permits are available for temporary stays while establishment permits are available for possible permanent relocation; both permits automatically consider the possible humanitarian situation of each individual applicant.²⁰¹ In Belgium, leave of stay due to exceptional circumstances may be granted in certain situations, such as

192. See 8 U.S.C. § 1182 (2012).

193. *Questions & Answers: Humanitarian Parole*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/archive/archive-news/questions-answers-humanitarian-parole> (last visited Apr. 15, 2014).

194. *Id.*

195. *See id.*

196. *See* MCADAM, *supra* note 131, at 112.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

practical or legal impossibility of return.²⁰² Denmark offers humanitarian status, either temporary or permanent, if “essential considerations of a humanitarian nature conclusively warrant it.”²⁰³ Furthermore, Germany provides for temporary suspension of deportation, measured in six-month increments, for unsuccessful asylum seekers who must remain in Germany due to humanitarian considerations or public interests.²⁰⁴

However, discretionary approaches suffer from the same problems as humanitarian grants of protection. Discretionary grants of status do not allow for accurate predictions of migration trends; the number of individuals admitted to a given country on humanitarian parole or other discretionary grants of status in one year does not necessarily indicate the number of individuals who will be granted the same status in the next year. Discretionary grants also allow a country to overlook potential national security concerns that it would seriously consider within a more structured form of relief, such as asylum. Therefore, the humanitarian/discretionary approaches generally operate as a Band-Aid on a bullet hole—adequate solutions in the moment but unsustainable and impracticable in the long term.

IV. PROPOSALS FOR A U.S. APPROACH TO EDPs

A. *The Nansen Initiative as an Aspirational Starting Point*

Given that the relevant international actors have disclaimed responsibility for EDPs and the various domestic regimes for either temporary or permanent resettlement of EDPs resemble a poorly constructed patchwork quilt, an entirely new regime in line with the creation approach may be the most effective solution to address the resettlement of EDPs. While an overarching effort to reform the international legal system pertaining to refugee protection has not yet been undertaken to extend such protections to EDPs, in 2012, a number of countries either experiencing environmental devastation or receiving the victims of such devastation collaborated to address for the first time the global concerns of climate-related migration.²⁰⁵ The Nansen Initiative emerged from this collaboration, and its tenets for creating a worldwide protection agenda for EDPs should serve as an aspirational starting point for a domestic U.S. EDP-protection regime.²⁰⁶

202. *Id.*

203. *Id.*

204. *Id.* at 113; *see also id.* at 112-14 (discussing similar programs in additional countries).

205. *Work Plan*, NANSEN INITIATIVE 1-2 (Apr. 29, 2013), http://www.nanseninitiative.org/sites/default/files/Nansen%20Initiative%20Work%20Plan_0.pdf.

206. *See id.*

In October 2012, the governments of Switzerland and Norway established the Nansen Initiative to build consensus on a global protection agenda that would address the needs of persons displaced across borders in the context of natural disasters, including those triggered by the effects of climate change.²⁰⁷ While still not completely formulated, the global protection agenda is expected to consist of the following three core pillars: “1) international cooperation and solidarity, 2) standards for the treatment of people displaced across borders, and 3) operational responses.”²⁰⁸

The Nansen Initiative envisions a bottom-up, inclusive consultative process, proposed to occur over the next two or three years, that seeks the involvement from numerous stakeholders—including civil society, academia, and public and private sectors—to determine a global solution to the EDP problem.²⁰⁹ The Nansen Steering Group is comprised of Australia, Bangladesh, Costa Rica, Germany, Kenya, Mexico, Norway, the Philippines, and Switzerland; this group and other member states support the goals of the Nansen Initiative.²¹⁰ As such, the Nansen Initiative represents the first time that such a variety of international stakeholders have gathered to conceive an international, ground-up answer to how to resettle EDPs.²¹¹

The Nansen Initiative’s Work Plan outlines the international organization’s main objectives. First, it seeks to raise awareness about disaster-induced cross-border displacement.²¹² Second, it strives to forge partnerships and foster international cooperation.²¹³ Third, it works to build consensus at the regional level on current challenges, potential standards, and examples of best practices.²¹⁴ Finally, it plans to adopt and disseminate a protection agenda on disaster-induced cross-border displacement.²¹⁵ To date, the Nansen Initiative has made some progress at achieving these objectives and boasts a number of key accomplishments.²¹⁶ For example, the Nansen Initiative Secretariat was established in Geneva to develop the architectural structure of the organization, which includes the Steering Group, the Consultative Committee, and the

207. *Id.*

208. *Id.* at 1.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 2.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 3.

Group of Friends of Nansen Initiative.²¹⁷ The Nansen Initiative has also raised its own visibility by participating in global and international conferences and making its plans and research publicly available.²¹⁸ It has identified and engaged key stakeholders in the process, primarily gaining the support of additional member states.²¹⁹ Finally, it held its first regional consultation in the Pacific in late May 2013, where it discussed human mobility, natural disasters, and climate change in that region as well as solutions—particularly for threatened small island nations—at the community, national, regional, and international levels.²²⁰ The Nansen Initiative hosted another consultation in Central America in November 2013.²²¹ The participants acknowledged the need for cross-border cooperation in the face of natural disasters, recognizing the widespread displacement across national boundaries that results from such disasters in the region. They determined that return and reintegration into one's place of origin is the preferred long-term solution to environmental displacement, but they also agreed that the legal gap in protections available to EDPs has resulted in an ad hoc protection system that member states must address.²²² The Nansen Initiative plans to host additional consultations in the Horn of Africa, southeast Asia, and south Asia.²²³

The Conclusion Document from the Nansen Initiative Pacific Consultation of May 2013 (Conclusion Document) includes areas of improvement for a national plan for temporary and/or permanent resettlement of EDPs.²²⁴ While the Nansen Initiative prides itself in helping particular regions plan for the specific problems that they face, some general guiding principles can be derived from its recommendations for improvements at the national level. First, it encourages review of existing admission and immigration policies to allow people affected by natural disasters and climate change to migrate

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*; *Conclusions: Nansen Initiative Pacific Regional Consultation*, NANSEN INITIATIVE 2-3 (May 24, 2013), <http://www.nanseninitiative.org/sites/default/files/Conclusion%20Document%20Nansen%20Initiative%20Pacific%20Consultation.pdf>.

221. *See Disasters and Cross-Border Displacement in Central America: Emerging Needs, New Responses*, NANSEN INITIATIVE (Dec. 2013), <http://www.nanseninitiative.org/sites/default/files/Conclusions%20Central%20American%20Consultation%20in%20English.pdf>.

222. *Id.*

223. *Consultations*, NANSEN INITIATIVE, <http://www.nanseninitiative.org/consultations> (last visited Apr. 15, 2014).

224. *Conclusions: Nansen Initiative Pacific Regional Consultation*, *supra* note 220, at 2.

voluntarily to another country.²²⁵ It also suggests the introduction of new mechanisms for temporary or permanent protection for people displaced from another country in the aftermath of a natural disaster, leaving the specifics to the individual countries.²²⁶ While especially considerate of the strong community ties of Pacific island nations, the Nansen Initiative's suggestion that states review existing citizenship laws to ensure that they allow for dual nationality as a measure to help safeguard EDPs' cultural identity could be applied in any situation where EDPs originate in countries with varied cultural or indigenous histories (such as Central America).²²⁷ Thus, while the Nansen Initiative's proposals and suggestions, either from its generalized Work Plan or the Conclusion Document from its first regional consultation, remain more on the vague, purely aspirational end of the reform spectrum, its basic principles provide some guidance on both the need for domestic reforms and the spirit that those reforms should embody.

Furthermore, the Nansen Initiative's Conclusion Document identified what should be a key priority for international actors, one which immigrant-receiving countries will need to address at the international level: burden sharing.²²⁸ The Nansen Initiative first suggests discussions regarding resources being made available within existing or new international financial mechanisms to cover the costs and investments related to displacement and planned relocation.²²⁹ It then directly urges states and relevant international actors to develop more appropriate normative frameworks to provide for the protection needs of EDPs.²³⁰ While the Conclusion Document was specifically directed at environmental displacement, the participants in the Pacific Consultation recognized the need for international cooperation to share the burden of the EDP flood that is currently entering—and in the future will increasingly enter—the worldwide immigration flow.

Numerous scholars addressing all aspects of environmental migration discuss the importance that burden sharing will have for both an overarching international system and more discerning domestic systems.²³¹ For example, Amanda Doran recognizes that all countries must share the burden of supporting EDPs, much as they do in the

225. *See id.*

226. *Id.*

227. *Id.*

228. *See id.* at 3.

229. *Id.*

230. *Id.*

231. *See* Doran, *supra* note 1, at 134; Moberg, *supra* note 25; Biermann & Boas, *supra* note 14.

traditional refugee asylum system.²³² Frank Biermann and Ingrid Boas also include international burden sharing as a key principle for a *sui generis* regime for governing the EDP crisis.²³³

Kara Moberg proposes a twist on the traditional system of burden sharing, in which the burden rests more heavily on the wealthier nations that are better able to sustain those populations.²³⁴ While the notion of spreading the burden based on the wealth of the receiving nation is not novel, Moberg further suggests that the number of immigration visas for EDPs should be allocated in proportion to the percentage of greenhouse gas emissions that those countries produce, requiring the highest emitters to provide the most visas to current or future EDPs.²³⁵ As a result, the countries that are most likely to be causing climate change (however that is measured) will bear the costs of supporting the EDPs that their poor environmental practices produce.²³⁶ Setting aside the ill-advised notion that human beings should be used as a punishment for countries that some unknown entity determines are the root of the evil, Moberg's proposal and those of other scholars acknowledge that burden sharing must play a key role in any international efforts to create a global protection agenda for EDPs.

Burden sharing in the case of the refugee asylum systems poses some challenges due to the lack of predictability with which statistical analysis can determine how many people will flee their countries and apply for asylum.²³⁷ However, burden sharing of EDPs may in some cases be easier to arrange. As Mostafa Mahmud Naser noted, displacement caused by sudden-onset disasters is fairly easy to predict and identify because such disasters are easily observed, often predicted by meteorologists, and reported by the media.²³⁸ With modern weather technology, scientists can predict when and where a natural disaster, such as a hurricane or earthquake, is likely to occur.²³⁹ Therefore, should the international community decide to undertake the necessary widespread effort to create a protection mechanism for EDPs, it could seek the input of meteorological organizations, such as the United States Geological

232. Doran, *supra* note 1, at 134.

233. Biermann & Boas, *supra* note 14, at 76.

234. See Moberg, *supra* note 25, at 1135-36.

235. See *id.* at 1136.

236. *Id.*

237. See Kälin & Schrepfer, *supra* note 2, at 11.

238. Naser, *supra* note 10, at 736.

239. See *Natural Hazards*, U.S. GEOLOGICAL SURVEY, http://www.usgs.gov/natural_hazards (last modified Sept. 11, 2013). The United States Geological Survey employs emerging technologies, including satellite transmissions, to predict the likelihood of such extreme weather events as earthquakes, landslides, volcanic eruptions, wildfires, and floods/droughts. See *id.*

Survey, to determine how many people would be displaced if a weather event of a certain magnitude were to strike any particularly vulnerable location. Furthermore, in cases such as Tuvalu where an entire island nation is likely to disappear completely, a prediction of the number of displaced individuals merely tracks the population of the state. Given the relative ease with which the number of displaced people could be calculated given a small amount of concerted effort, burden sharing could (and should) become a major component of an international EDP-protection regime.

B. The Necessary Components of a U.S. Approach to EDPs

Using the Nansen Initiative's objectives and general proposals as a starting point for the key elements that must be included in a domestic EDP-protection regime, a U.S. EDP-protection program must encompass both humanitarian considerations (such as those embodied in asylum and TPS systems) and preliminary national security safeguards to ensure that individuals who wish to harm the United States cannot enter the country as EDPs. Biermann and Boas's principles for a sui generis regime for governing EDPs²⁴⁰ and the comparative analysis of the various approaches to EDP migration²⁴¹ serve as guiding principles for the creation of a U.S. EDP-protection program. The comparative analysis reveals that both the asylum and TPS systems should provide components of the EDP-protection visa program; the humanitarian and discretionary approaches embody the right spirit of protection but are too ad hoc to be an effective solution.²⁴²

While many of Biermann and Boas's principles are most applicable to an international protection system, such as their proposals for international burden sharing and planned relocation/resettlement, some of the principles can be directly subsumed into a domestic system.²⁴³ For example, an essential component of a U.S. EDP-protection program is the proper balance between resettlement and temporary protection.²⁴⁴ Currently in the United States, asylum is the primary method to obtain permanent resettlement while TPS remains the principal means of obtaining short-term assistance.²⁴⁵ Both systems have their merits, but an

240. See Biermann & Boas, *supra* note 14, at 75-79.

241. See *infra* Part III.

242. See *infra* Part III.C-D.

243. See Biermann & Boas, *supra* note 14, at 75-76.

244. See *id.* at 75.

245. See 8 U.S.C. § 1101(a)(42)(A)-(B) (2012); MCADAM, *supra* note 131, at 100; Kälin & Schrepfer, *supra* note 2, at 45.

EDP-protection program should not be so mutually exclusive as to offer either permanent resettlement *or* temporary protection. This visa-type program should combine elements from both systems, with the only preliminary eligibility requirements being (1) that the individual has been displaced from their home in the aftermath of a natural disaster or as a result of an irreversible environmental event and (2) that the individual is not inadmissible or is eligible for a humanitarian waiver on the ground of inadmissibility.

The Senate correctly decided not to expand the definition of “refugee” to include individuals who were forced to flee their homes as a result of serious natural disasters, as it contemplated and then rejected when the United States adopted the 1951 Refugee Convention.²⁴⁶ The United States is already overwhelmed with asylum applicants under the existing definition; approximately 74,000 individuals applied for asylum in 2011, a 33% increase from approximately 55,000 applicants in 2010.²⁴⁷ The asylum system contains no quotas or maximum numbers of applicants, so each year the number of asylum applicants may continue to increase.²⁴⁸ The inclusion of an entirely new class of people who do not meet the underlying requirement of the traditional definition of “refugee,” which requires eligible applicants be specifically targeted for persecution either by a state or in the absence of state protection,²⁴⁹ would overwhelm the already overextended asylum system.

A new EDP-protection program should, however, retain some vestiges of the asylum system. For example, every individual who is granted asylum may apply for adjustment of status to LPR one year after that grant.²⁵⁰ Under the current patchwork approach in the United States, EDPs have no possibility of adjustment to LPR or citizen status because they are not eligible for asylum and their current options, namely TPS and humanitarian parole, do not offer such pathways.²⁵¹ EDPs who are offered permanent protection in the United States should be able to adjust to LPR and eventually citizen status where appropriate.

246. See Moberg, *supra* note 25, at 1126-27.

247. *Asylum Claims in Industrialized Countries Up Sharply in 2011*, UNHCR (Mar. 27, 2012), <http://www.unhcr.org/4f7063116.html>. Asylum claims have been increasing around the world; an estimated 441,300 asylum claims across forty-four countries were recorded in 2011 compared to 368,000 in 2010. *Id.*

248. See BOSWELL, *supra* note 7, at 90.

249. 8 U.S.C. § 1101(a)(42)(A).

250. 8 C.F.R. § 1209.2(a) (2013); BOSWELL, *supra* note 7, at 91. The original asylum statute contained an annual quota of 10,000 asylees who could apply for adjustment each year, but the REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g), 119 Stat. 231, 305, removed that quota. BOSWELL, *supra* note 7, at 91 n.51.

251. See MCADAM, *supra* note 131, at 101.

However, not all EDPs should be able to seek permanent relocation to the United States under the new program. It is not in the international interest for large numbers of people to abandon their home countries permanently in the aftermath of a natural disaster, essentially abandoning large swaths of territory that could not hope to recover with such a major loss of human capital. For some EDPs, such as people from Tuvalu, return may not be possible after their home countries are subsumed by the sea, but the preference in a U.S. EDP-protection program should be for short-term visas that require individuals to return to their countries of origin to assist in the rebuilding process. It is not entirely out of the question, however, that the devastation in a country may be so great that initially a grant of permanent residency visas appears to be the only solution, but upon the passing of time, the conditions improve in the country such that EDPs could safely return. In such cases, an element of the current U.S. asylum system would give the U.S. government the ability to require the return of EDPs to their homes: the doctrine of changed circumstances. In the U.S. asylum system, “changed circumstances” refers to “circumstances materially affecting the applicant’s eligibility for asylum,” including but not limited to changes in conditions in the applicant’s country of origin.²⁵² Under the doctrine, an applicant who was not previously eligible can later apply for asylum on the basis of changed circumstances, and the government may also use changed circumstances to deny an asylum application.²⁵³ In the EDP context, the United States could deny an individual’s application for either an initial visa or an adjustment of status on the basis that changed circumstances in the applicant’s home country render that country safe enough for return. Nevertheless, such a determination should also take into consideration such factors as the extent of the applicant’s ties to the United States and human rights obligations.

Due to the numerous considerations with asylum that have little relevance or applicability to environmental displacement, the asylum system should not be the only inspiration for a U.S. EDP-protection program. TPS provides guidance on a temporary-visa program specifically for EDPs. Some form of TPS is the primary method that most immigrant-receiving countries have adopted to respond to the

252. 8 C.F.R. § 1208.4(a)(4)(i)(A); *see also* 8 U.S.C. § 1158(a)(2)(D).

253. *See* Kristina Gasson, *How Changed Circumstances Can Affect Your Asylum Eligibility*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-changed-circumstances-can-affect-your-asylum-eligibility.html> (last visited Apr. 15, 2014).

influx of arriving EDPs.²⁵⁴ The provision of temporary residency permits may be the most effective way to provide short-term protection to individuals displaced by natural disasters from which the affected country hopes to recover. A grant of TPS also provides for work authorization in the United States, which allows EDPs to provide for their families and economically contribute to the country that granted them protection.²⁵⁵

TPS as it currently exists, however, is onerous and unpredictable. The decision to activate TPS for a specific population of people following a particular event lies entirely within the discretion of the Attorney General;²⁵⁶ until the Attorney General decides to grant TPS, an EDP cannot apply for it. Therefore, EDPs who may qualify for TPS absent this activation requirement, such as victims of the 2004 Indian Ocean tsunami, may not receive TPS if the Attorney General does not designate them as eligible for protection.²⁵⁷ A new temporary-visa program for EDPs should exist independently of any specific designation of eligibility; this program would both allow any eligible EDP to apply for a visa at any time and remove the burden from the Attorney General of making a specific designation.

Furthermore, TPS requires that in order to be eligible for relief, the applicant must be physically present in the United States on a designated day.²⁵⁸ As mentioned above, this requirement may prove onerous to people who cannot migrate to the United States within the limited time frame.²⁵⁹ A new EDP-protection program should eliminate this requirement; as long as an individual applicant could prove that they had been displaced from their home as a result of a natural disaster or the irreversible effects of an environmental event and was not otherwise inadmissible, they should be eligible for a temporary EDP visa. In addition, TPS requires that the foreign country experiencing the destruction officially request recognition as temporarily unable to provide its population with safe return.²⁶⁰ This requirement should be eliminated entirely for a new EDP visa, either temporary or permanent. Finally, TPS does not provide a path to LPR or citizen status.²⁶¹ Using the

254. See Kälin & Schrepfer, *supra* note 2, at 45-46, 58-59; McADAM, *supra* note 131, at 100-02.

255. See 8 U.S.C. § 1254a(1).

256. See *id.* § 1254a; BOSWELL, *supra* note 7, at 94-95.

257. See Moberg, *supra* note 25, at 1127.

258. 8 U.S.C. § 1254a(c)(1)(a); see also BOSWELL, *supra* note 7, at 95.

259. See *infra* Part III.A.

260. 8 U.S.C. § 1254a(b)(1)(B); see also WASEM & ESTER, *supra* note 160, at 2.

261. WASEM & ESTER, *supra* note 160, at 2-3.

same interpretation of the changed circumstances doctrine that the U.S. government would use for individuals granted a permanent EDP visa,²⁶² the government could permit an EDP who was previously granted a temporary EDP visa to transition their status to that of a permanent visa holder upon a determination that a country whose reconstruction initially appeared plausible is now unable to recover from the environmental destruction. Once an EDP possessed a permanent visa, they would be eligible after an established period of time to adjust their status to that of LPR and eventually citizen.

Therefore, a U.S. EDP-protection program should contain two separate visas: one that offers a pathway to LPR and citizenship status (similar to a grant of asylum but with different eligibility requirements) and one that offers protection only during the period of reconstruction in the EDP's home country (without the onerous designation requirements of TPS and with the possibility of transitioning to a permanent visa). Furthermore, both the asylum and TPS systems contain extensive national security limitations on eligibility.²⁶³ Because both asylum and TPS are protection-based forms of immigration relief, certain grounds of inadmissibility, such as the public-charge ground, may be waived to ensure family unity, to serve the public interest, or for purely humanitarian reasons.²⁶⁴ However, certain grounds of inadmissibility—particularly those that exclude controlled-substance traffickers, Nazis, or individuals who pose a security, foreign policy, or terrorist risk to the United States—may never be waived.²⁶⁵

These elements of the asylum and TPS systems should be incorporated in the new EDP-protection program. The grounds of inadmissibility that do not involve the need to exclude dangerous individuals from the United States, in particular the public-charge ground, should be waived in the case of EDPs due to the great protection needs of such populations. However, despite the protection needs of EDPs and the emergency nature of their situation, the United States should not be required to compromise its national security concerns on humanitarian grounds. Therefore, the same grounds of inadmissibility that are not waivable for asylum and TPS should not be waivable for the new EDP-protection program.

262. See 8 U.S.C. § 1158; 8 C.F.R. § 1208.4(a)(4)(i)(A) (2013).

263. See 8 U.S.C. § 1158(b)(2) for the grounds of inadmissibility applicable to asylum and § 1254a(c)(2) for the grounds of inadmissibility applicable to TPS. See also BOSWELL, *supra* note 7, at 90, 96.

264. See 8 U.S.C. §§ 1157(c)(3), 1254a(c)(2)(A); BOSWELL, *supra* note 7, at 90, 96.

265. See 8 U.S.C. §§ 1157(c)(3), 1254a(c)(2)(A); BOSWELL, *supra* note 7, at 90, 96.

Using these components of both the asylum and TPS systems, the United States' most developed forms of humanitarian relief, to create an innovative EDP-protection program, which would provide the environmentally displaced with either a temporary or a permanent visa depending on their individualized situations, is the most effective method of addressing the growing concern of EDPs flooding the immigration flow across the world. Rather than continuing to attempt to box EDPs into protection programs that were not initially intended to deal with either the large numbers of EDPs or the growing instances of severe environmental destruction, this new program would allow the U.S. immigration system to consider each case of environmental displacement within the context of a regime that was established specifically to deal with the problem.

As a preliminary solution, such a program should be available only to those individuals fleeing an extreme weather event, such as a hurricane, or the irreversible effects of an environmental event, such as rising sea levels that subsume an entire island nation. These individuals have the most immediate and drastic needs and should thus be offered the first round of protection. However, given climate change trends and the increasing displacement of individuals for environmental reasons other than such events, including desertification or overpopulation, the new program should be gradually extended over time to provide protection to more of the people who suffer the negative repercussions of environmental devastation.

V. CONCLUSION

In the wake of natural disasters that are increasing in both intensity and frequency, the international immigration pool is flooded with hundreds of thousands of people fleeing environmental devastation. Estimates of the number of people who will be displaced as a consequence of climate change soar to approximately 150-200 million people by the year 2050.²⁶⁶ Despite this trend of new EDPs seeking refuge across borders, neither the international community nor the United States has adopted a specific form of immigration relief for individuals who are displaced due to natural disasters and other environmental events.

The United States and its fellow major immigrant-receiving countries, such as Australia and certain EU Member States, have employed existing forms of relief, such as TPS, quasi-asylum systems,

266. Kälin & Schrepfer, *supra* note 2, at 11.

humanitarian parole, and other discretionary forms of protection, to effectuate either temporary or permanent resettlement for EDPs. However, none of these existing forms of relief are entirely well-fitting or appropriate for the unique situations of EDPs. Therefore, the United States should adopt a new approach to offer both temporary and permanent relief specifically to individuals fleeing either extreme weather events or the irreversible effects of environmental events. Such a system should embody the spirit of the existing humanitarian forms of relief, but also include the necessary national security safeguards to ensure that EDPs who may pose a danger to the United States are not able to take advantage of the United States' humanitarian grant of protection. The proposals in this Article for a U.S. EDP-protection program will help ensure that the United States does not have to face a Hobson's choice between extending relief to bona fide victims and protecting its own security.