

DRAFT VERSION

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ENVIRONMENT, HUMAN MOBILITY AND INTERNATIONAL LAW: A NEW APPROACH IN THE AMERICAS

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Abstract: *The role of international law in regulating international movement in the context of global environment change and hazards remains a topic of intense debate among both legal scholars and practitioners. Yet, as this article shows, we have largely reached the limits of what existing international law methods and approaches can tell us about the future of the law in this area. Instead, this article draws on a detailed regional case study to offer a distinct perspective to that ongoing debate about the role and future of international law. Against the backdrop of emerging patterns of mobility linked to devastating environmental disasters in the Americas, it derives a striking set of new legal insights from in-depth analysis of a developing body of comparative and international legal practice by countries from across this key region.*

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Global society appears ever more conscious of how environmental phenomena shape ‘human mobility’.¹ The immobility enforced on populations by lockdowns in many countries as a response to the COVID-19 pandemic is only the most recent example. Yet environmental threats can also help to push the movement of persons. Thus, in the context of climate change, the well-publicised risk posed to the ongoing viability of human settlement of small islands in the Pacific Ocean by rising sea levels fuels globalised concern that their populations will end up as ‘climate refugees’.² But this long-term ‘sinking’ Pacific island scenario is but one of many scenarios where movement is shaped by environmental processes. Some reflect hazards that are more sudden-onset in character. For example, in the

¹ The term ‘mobility’ is used here to signal an emphasis on agency in movement, i.e. not only the act of movement itself but also the wider capacity to move, and to attempt to avoid importing implicit value judgments as to the voluntary or involuntary nature of such movement that are often implicit in the use of terms such as ‘migration’ or ‘displacement’.

² For a critical perspective, see Carol Farbotko & Heather Lazarus, *The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu*, 22 *Global Environmental Change* 382 (2012).

Americas, as recently as 2017, around 160,000 inhabitants of Puerto Rico fled to the United States (U.S.) mainland after the sudden devastation wrought on that island by Hurricane Maria, some temporarily and others more permanently.³ Indeed, a diverse range of environmental threats generates a far-reaching mobility impact on populations across the world. These are global challenges, both in the sense that few countries are immune to their effects and also in that such environmental phenomena and their consequences do not respect the territorial boundaries claimed by nation states and they are often cross-border in nature.

The risks posed by environmental phenomena, especially in the context of a process of global climate change, have served to prompt attempts by states, civil society and other actors to coordinate international action. This includes efforts to develop appropriate structures of international law in such fields, respectively, as climate change mitigation and adaptation and that of disaster risk management. More recently, normative frameworks in each of these fields have begun to directly acknowledge the human mobility dimensions of these environmental phenomena. Most prominently, under the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 2010 Cancun Agreement invites states to ‘enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation’.⁴ Likewise, in the disaster risk management field, the non-binding 2015 Sendai Framework for Disaster Risk Reduction calls on states to address ‘disaster-induced human mobility’, including by ‘transboundary cooperation’.⁵

Up to this point, the global frameworks calling for cooperation on human mobility challenges in the context of environmental threats offer little guidance on the form that such responses should take.⁶ In this regard, a largely ‘blank canvas’ appears to exist, waiting for legal development. Yet, as this article will show, a long-standing parallel body of legal research and debate seeks to fill this apparently blank canvas. Based on a preoccupation that existing international law does not adequately protect people who leave their countries due to environmental push factors, particularly those linked to climate change, these international law studies already articulate a diverse range of innovative potential solutions to this perceived ‘gap’ in the law.⁷ They are complemented by the small number of extant judicial

³ Jennifer Hinojosa & Edwin Meléndez, *Puerto Rican Exodus: One Year since Hurricane Maria*, BRIEFING: CENTER FOR PUERTO RICAN STUDIES (Sept. 5, 2018) at <https://centropr.hunter.cuny.edu/research/data-center/research-briefs/puerto-rican-exodus-one-year-hurricane-maria>.

⁴ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107 (entered into force Mar. 21, 1994); Decision 1/CP.16, paragraph 14(f), of the Conference of Parties (COP). A Displacement Task Force was also created under the UNFCCC Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts in 2015 (Decision 1/CP.21, paragraph 49). Yet, whilst climate-related mobility has become increasingly embedded as a topic of concern within the UNFCCC loss and damage mechanism, some suggest that its placement there may actually weaken efforts to promote climate-related mobility as a standalone issue and to develop consensus on responses, due to the particularities of that mechanism (Chloé Anne Vlassopoulos, *When Climate-induced Migration Meets Loss and Damage: A Weakening Agenda-setting Process?*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 376 (Benoît Mayer & François Crépeau eds., 2017) and more general concerns about its decreasing prominence within the wider UNFCCC process).

⁵ 2015 Sendai Framework for Disaster Risk Reduction, at, respectively, paragraph 28(d) and paragraph 30(l). Yet, whilst subsequent policy developing this DDR framework acknowledges the number of ‘permanently displaced people’ as a potential indicator for the ‘human impact’ and ‘economic impact’ of a disaster, specific guidance on measures to respond to such impact remains lacking. See, for example, United Nations Office for Disaster Risk Reduction (UNDRR), Words into Action Guidelines, 63 (2017).

⁶ See notes 4-5.

⁷ The parallel literature on the mandate and role of institutions at the international level will not be addressed here except as it bears on the question of international law development on the status of affected persons. See,

decisions that explore how existing international law rules on refugee status and human rights protection might apply to such scenarios.⁸ Overall, this body of scholarly insight and creative thinking represents a rich resource for states and other international actors as they consider how the global response to human mobility in the context of environmental threats might be further developed in the face of evidence that global warming is accelerating rapidly.

The present study contributes to this topical international law debate by offering a new perspective rooted in empirical evidence and legal practice from the region of the Americas. It starts by highlighting key features of the existing legal literature on what we might call the ‘environment-mobility’ nexus (Part I).⁹ It shows that most legal studies adopt a particular approach, focusing on how international law, usually at the global level, could be developed to address a perceived gap in protection for people who displace to other countries due to environmental push factors. However, it contends that we have largely reached the limits of what that methodology can tell us about the current or future role of law in this area. It suggests that studying the legal issues as they play out in practice in one specific region provides a useful complementary perspective. Moreover, as a region, the Americas offer a useful counterpoint to emerging legal scholarship with a regional focus on sinking islands in the Pacific.¹⁰ It leads us not only to revisit certain widely-held assumptions in the existing legal literature but also to reconsider the likely pathways for future development of international law in this field.

This case study starts by evaluating international mobility linked to environmental factors in the Americas to gain a sharper empirical understanding of where exactly the law might usefully act in this region (Part II). It then challenges the widely-held assumption that

for example, Sinja Hantscher, THE UNHCR AND DISASTER DISPLACEMENT IN THE 21ST CENTURY: AN ORGANIZATIONAL ANALYSIS (2019); Nina Hall, DISPLACEMENT, DEVELOPMENT, AND CLIMATE CHANGE: INTERNATIONAL ORGANIZATIONS MOVING BEYOND THEIR MANDATES (2016); Andrea C. Simonelli, GOVERNING CLIMATE INDUCED MIGRATION AND DISPLACEMENT - IGO EXPANSION AND GLOBAL POLICY IMPLICATIONS (2015); and contributions to ORGANIZATIONAL PERSPECTIVES ON ENVIRONMENTAL MIGRATION (Kerstin Rosenow-Williams & François Gemenne eds., 2016).

⁸ See, for example, the national judicial decisions on how international refugee law concepts are to be interpreted in relation to claims for asylum by persons fleeing climate change or disasters, including the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689 and the Supreme Court of New Zealand in *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107. The application of international human rights as protection against refoulement in the context of climate change was recently addressed by the United Nations Human Rights Committee (UNHRC) in *Ioane Teitiota v. New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (2020).

⁹ Benoît Mayer & François Crépeau, *Introduction*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 1, 1 (Benoît Mayer & François Crépeau eds., 2017) coined the idea of a ‘climate-mobility nexus’. That of an ‘environment-mobility nexus’ encapsulates a similar understanding that human mobility can be shaped in many different ways, and often indirectly, by environmental factors more broadly and not just climate change.

¹⁰ This study thus develops the relatively sparse legal literature on this topic in the Americas as a region. This includes David James Cantor, *Cross-border Displacement, Climate Change and Disasters: Latin America and the Caribbean*, PLATFORM ON DISASTER DISPLACEMENT (2018), at <https://disasterdisplacement.org/portfolio-item/brazil-declaration-study>; Erika Pires Ramos & Fernanda de Salles Cavedon-Capdeville, *Regional Responses to Climate Change and Migration in Latin America*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 262 (Benoît Mayer & François Crépeau eds., 2017); Nicolás Rodríguez Serna, *Human Mobility in the Context of Natural Hazard-related Disasters In South America*, NANSEN INITIATIVE (2015), at <https://www.nanseninitiative.org/central-america-consultations-intergovernmental/>; David James Cantor, *Law, Policy and Practice concerning the Humanitarian Protection of Aliens on a Temporary Basis in the context of Disasters*, NANSEN INITIATIVE (2015), at <https://www.nanseninitiative.org/central-america-consultations-intergovernmental/>.

states lack the legal tools to respond to such mobility by illustrating how pertinent provisions exist, and are used for that purpose in practice, by many states in the Americas. Crucially, such provisions are found less in the law on ‘international protection’ (Part III) than in immigration law (Part IV). This analysis of how states actually approach the issue in practice is helpful in that it adds an understanding not only of where international rules may be needed but also the specific form that they might take. The study also shows how these understandings are being actively promoted by intergovernmental bodies at the sub-regional level in the Americas (Part V). On the environment-mobility nexus, the findings support the view that the international law predicament will be resolved not by producing new legal or analytical concepts but by thinking differently about existing concepts (Part VI).¹¹

I. THE ENVIRONMENT-MOBILITY NEXUS AS A LEGAL PROBLEM

Legal scholarship is increasingly preoccupied with the challenge posed to human mobility by climate change and other environmental factors. Students of *international* law, in particular, have led this debate and most legal studies pursue the enquiry in terms of international law.¹² On its face, the fact that international law is at the core of this research agenda is hardly surprising. Indeed, climate change, the environment and human mobility are all global phenomena and thus seem appropriate topics for international law. Yet many legal studies are rooted in highly particular assumptions about the nature of both the underlying empirical phenomena and the resulting legal problem. This Part illustrates these assumptions by sketching out some of the main areas of legal debate. In this regard, it does not claim to be a comprehensive survey of the burgeoning literature on this topical concern. Rather, it builds on critical review of the existing legal scholarship to elucidate where and how a case study of the region of the Americas might advance the wider legal debate in this field.

Understanding the Empirical Phenomenon

The underlying empirical phenomenon is described using diverse overlapping and often competing terms, each loaded with assumptions about how states should respond.¹³ However, ‘we should not be distracted by semantic discussions with little practical meaning about whether to call affected persons “climate change refugees”, “environmental migrants” or something else’.¹⁴ Rather, analyses must focus on how the broad nexus between ‘environment’ and ‘mobility’ is constituted empirically across a range of contexts and forms. Although a paucity of robust empirical studies on this nexus was long a cause for concern,¹⁵

¹¹ Calum T.M. Nicholson, ‘Climate-Induced Migration’: Ways Forward in the Face of an Intrinsically Equivocal Concept, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 49, 50 (Benoît Mayer & François Crépeau eds., 2017). In this sense, it is not a ‘new’ challenge needing ‘new’ responses (Étienne Piguet, Antoine Pécoud & Paul de Guchteneire, *Migration and Climate Change*, in MIGRATION AND CLIMATE CHANGE 1, 24 (Étienne Piguet, Antoine Pécoud & Paul de Guchteneire eds. 2011)).

¹² However, a couple of studies that examine the issue in relation to the national law or policy of one country, e.g. Eric Omeziri & Christopher Gore, *Temporary Measures: Canadian Refugee Policy and Environmental Migration*, 29 REFUGE 43 (2014); Chelsea Krombel, *The Prospective Role of Temporary Protected Status: How Discretionary Designation has Hindered the United States’ Ability to Protect Those Displaced by Environmental Disaster*, 28 CONN. J. INT’L L. 153 (2012-13).

¹³ Piguet et al., *supra* note 11, at 17-21.

¹⁴ Walter Kälin, *The Climate Change-Displacement Nexus* (Jul. 16, 2008), at <https://www.brookings.edu/on-the-record/the-climate-change-displacement-nexus/>.

¹⁵ Dominic Kniveton, Kerstin Schmidt-Verkerk, Christopher Smith & Richard Black, *Climate Change and Migration: Improving Methodologies to Estimate Flows*, 33 MIGRATION RESEARCH SERIES 1 (2008).

the evidence base has begun to expand over the last decade or so.¹⁶ In tandem, whilst the superficial engagement of many legal scholars with this empirical evidence is regularly criticised,¹⁷ a growing number are now reflecting more seriously on the empirical research and its potentially far-reaching implications for understanding the role of law in this context. As a result, several important discussions about the empirical nature of the environment-mobility nexus can now be discerned as pertinent to shaping the approach and direction of legal studies.

Firstly, on the nature of the nexus between mobility and environmental factors, most legal studies frame it in terms of ‘causality’. In other words, the nexus is seen primarily as a causal relationship.¹⁸ Moreover, in general, these legal studies are concerned with causality in one direction only, i.e. environmental change as a cause of movement (although migration as a cause of environmental change is also considered by the social sciences).¹⁹ Likewise, the legal literature focuses squarely on adverse environmental conditions as a ‘push’ factor prompting people to leave the country of origin. Especially in the climate change context, it frames the resulting mobility as a ‘new’ challenge, although environmental adversity and change have probably shaped human mobility throughout history.²⁰ Yet this primary interest in how environmental conditions act as a ‘push’ factor for mobility has led legal researchers to overlook other pertinent ways in which environmental change can shape the experience of human mobility, including as a ‘pull’ factor for migrants (as for example, in places where new economic opportunities emerge as a result of certain climate change impacts).²¹

Secondly, on the content of this causal nexus, legal scholars often adopt a ‘maximalist’ or ‘alarmist’ understanding of ‘environmental migration’.²² Rooted in natural sciences and security studies, it uses deductive methods to forecast vast future waves of migration driven by environmental change.²³ The approach posits the nexus in ‘mono-causal’ terms, with environmental factors acting as the sole drivers of predicted movement. However, empirical evidence from local studies in the social sciences instead points to the ‘multi-causal’ nature of migration and shows how environmental change is often just one of many

¹⁶ Stephen Castles, *Concluding Remarks on the Climate Change-Migration Nexus*, in MIGRATION AND CLIMATE CHANGE 415, 419-422 (Étienne Piguet, Antoine Pécoud & Paul de Guchteneire eds. 2011);

¹⁷ This critique has been advanced by many scholars within and outside the field, including Benoît Mayer, *Who Are “Climate Refugees”? Academic Engagement in the Post-truth Era*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 89, 94 (Simon Behrman & Avidan Kent eds., 2018); Richard Black, *Environmental Refugees: Myth or Reality?*, 34 NEW ISSUES IN REFUGEE RESEARCH 1 (2001).

¹⁸ See, more generally, Calum Nicholson, *Climate Change and the Politics of Causal Reasoning: The Case of Climate Change and Migration*, 180 GEORGRAPHICAL J. 151 (2014).

¹⁹ For instance, see Richard Black, REFUGEES, ENVIRONMENT AND DEVELOPMENT (1998).

²⁰ Anthony Penna, THE HUMAN FOOTPRINT: A GLOBAL ENVIRONMENTAL HISTORY 4-8, 56-58, 106-7 (2nd ed., 2014). Indeed, environmental factors have been recognised by migration theories as early as the 1880s, although they made a resurgence only in the 1980s after references to them dwindled during much of the twentieth century (Étienne Piguet, *From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies*, 103 ANN. ASSOC. AM. GEOGRAPHERS 148 (2013)).

²¹ Benoît Mayer, THE CONCEPT OF CLIMATE MIGRATION: ADVOCACY AND ITS PROSPECTS 22-25 (2016).

²² See discussion by Gemenne, on which this paragraph draws (François Gemenne, *How They Became the Human Face of Climate Change: Research and Policy Interactions in the Birth of the “Environmental Migration” Concept*, in MIGRATION AND CLIMATE CHANGE 225, 230-239 (Étienne Piguet, Antoine Pécoud & Paul de Guchteneire eds. 2011)).

²³ See, for instance, Norman Myers and Jennifer Kent, ENVIRONMENTAL EXODUS: AN EMERGENT CRISIS IN THE GLOBAL ARENA (1995).

interconnected factors influencing mobility.²⁴ On this basis, ‘sceptical’ or ‘minimalist’ scholars have argued that, empirically, environmental factors cannot be isolated as a primary driver of movement, questioning whether ‘environmental migration’ really exists as distinct phenomenon.²⁵ Others, though, attempt to transcend the divide by analysing environmental factors as a ‘proximate’ cause of movement that, even if it does interact with other factors, may produce distinct forms of mobility, as in circumstances of ‘sudden or extreme’ environmental change.²⁶ As the empirical evidence base grows, this approach seems to be gaining increasing acceptance.²⁷

Such debate about the multi-causal nature of migration has crucial implications for legal scholarship. Certainly, empirical evidence of the multi-causal reality of movement suggests that legal studies that adopt a ‘mono-causal’ understanding of this nexus adopt a faulty premise. This matters, because the perception of a gap in legal protection in fact emerged from the ‘maximalist’ literature that assumes a distinct class of migrants forced to leave their homes as a result of environmental change can be identified for the purpose of intervention. However, even for those legal studies that frame environmental factors as but one ‘proximate’ cause of movement in this context, this question of how to accommodate the multi-causal nature of such mobility persists. On the one hand, it poses the question of just how ‘proximate’ such environmental factors need to be in order to be treated as a legally-significant ‘cause’ of movement. On the other hand, given that vulnerability to environmental threats is mediated by social, political and economic factors,²⁸ an important question also arises about the extent to which such human factors can or should be accommodated in law.²⁹

Thirdly, many legal scholars frame the ‘environment’ side of the nexus explicitly in terms of ‘climate change’.³⁰ For some, this is a strategic gambit to raise the profile of the

²⁴ Marion Borderon, Patrick Sakdapolrak, Raya Muttarak, Endale Kebede, Raffaella Pagogna & Eva Sporer, *Migration Influenced by Environmental Change in Africa: A Systematic Review of Empirical Evidence*, 41 DEMOGRAPHIC RESEARCH 491 (2019); Stephen Castles, *Environmental Change and Forced Migration: Making Sense of the Debate*, 70 NEW ISSUES IN REFUGEE RESEARCH 1 (2002); JoAnn McGregor, *Refugees and the Environment*, in GEOGRAPHY AND REFUGEES: PATTERNS AND PROCESSES OF CHANGE 157 (Richard Black & Robinson eds. 1993)

²⁵ See, for instance, Castles, *supra* note 24; Richard Black, *Environmental Refugees: Myth or Reality?*, 34 NEW ISSUES IN REFUGEE RESEARCH 1 (2001); William B. Wood, *Ecomigration: Linkages between Environmental Change and Migration*, in GLOBAL MIGRANTS, GLOBAL REFUGEES 42 (Aristide R. Zolberg and Peter Benda eds., 2001).

²⁶ See, for example, Astrid Suhrke, PRESSURE POINTS: ENVIRONMENTAL DEGRADATION, MIGRATION AND CONFLICT (1993); Graeme Hugo, *Environmental Concerns and International Migration*, 301 INTERNATIONAL MIGRATION REVIEW 105 (1996).

²⁷ Castles, *supra* note 24, at 419-424; Piguet et al., *supra* note 11, at 5.

²⁸ Robert McLeman, *Climate-related Migration and its Linkages to Vulnerability, Adaptation, and Socio-Economic Inequality: Evidence from Recent Examples*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 29 (Benoît Mayer & François Crépeau eds., 2017); Mike Hulme, *Attributing Weather Extremes to “Climate Change”: A Review*, 38 PROG. PHYS. GEOGRAPHY 499 (2014); Kniveton et al, *supra* note 15.

²⁹ For instance, some scholars have argued that underlying processes of discrimination in the social construction of vulnerability raise the prospect that affected persons may have a claim to refugee status. See, for example, Matthew Scott, CLIMATE CHANGE, DISASTERS, AND THE REFUGEE CONVENTION (2019); Bruce Burson, *Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition*, in ENVIRONMENT, FORCED MIGRATION AND SOCIAL VULNERABILITY 3 (Tamer Afifi & Jill Jäger eds., 2010). See also note 83 and accompanying text.

³⁰ François Gemenne, *How They Became the Human Face of Climate Change: Research and Policy Interactions in the Birth of the “Environmental Migration” Concept*, in MIGRATION AND CLIMATE CHANGE 225 (Étienne Piguet, Antoine Pécoud & Paul de Guchteneire eds. 2011).

issue by linking it to powerful discourses on climate change.³¹ For others, it is a matter of global justice that responsibility for resettling poor people forced out of their homes in the global South should fall on the states in the global North that contribute most to global warming.³² Yet this approach poses challenges for legal analyses. For instance, global warming seems to act on mobility by influencing more ‘proximate’ environmental drivers, such as storms, drought or desertification. If it is already difficult to empirically isolate the role of such ‘proximate’ environmental factors in pushing migration in any specific case, then climate change adds an additional layer of complexity, as it sits one step behind those drivers (and two if the link to human activities as a cause of climate change is also to be made).³³ Establishing the respective contribution to climate change of particular states adds a third additional layer of complexity.³⁴ Despite these challenges, even some of those scholars who recognise the ‘multi-causality’ of migration end up proposing solutions for ‘climate migrants’ as if they were a definite and identifiable group of persons.³⁵

Yet, even if such factual and legal determinations were possible in particular cases, this emphasis on ‘climate change’ alone has other conceptual limitations. Indeed, as a ‘push’ factor for mobility, it is not clear that the impact of climate-related phenomena that could be influenced by global warming differs substantially from that of other environmental phenomena, such as volcanoes or earthquakes.³⁶ Moreover, even for climate-related push factors such as storms or flooding, it is not obvious how events caused, or exacerbated, by climate change can be distinguished, in terms of their impact on human mobility, from those that are not.³⁷ For these reasons, some legal studies have instead sought to frame this side of the nexus in terms of broader concepts of the ‘environment’.³⁸ Particularly since the late 2000s, scholars and policymakers have increasingly conceptualised the ‘environment’ side of the nexus more broadly in terms of ‘disasters’,³⁹ an approach that obviates many of the flaws of focusing solely on ‘climate change’.⁴⁰ Indeed, ‘disasters’ are widely understood as

³¹ Benoît Mayer, THE CONCEPT OF CLIMATE MIGRATION: ADVOCACY AND ITS PROSPECTS 43-47 (2016).

³² Maxine Burkett, *Justice and Climate Migration: The Importance of Nomenclature in the Discourse on Twenty-First-Century Mobility*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 73 (Simon Behrman & Avidan Kent eds., 2018); Giovanni Bettini, Sarah Louise Nash & Giovanna Gioli, *One Step Forward, Two Steps Back? The Fading Contours of (In)Justice in Competing Discourses on Climate Migration*, 2 THE GEOGRAPHIC JOURNAL 348 (2016); François Gemenne, *One Good Reason to Speak of ‘Climate Refugees’*, 49 FORCED MIGRATION REVIEW 70 (2015); Laura Westra, Satvinder Juss & Tullio Scovazzi, TOWARDS A REFUGEE ORIENTED RIGHT OF ASYLUM (2015).

³³ Walter Kälin, *Conceptualising Climate-Induced Displacement*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 81, 85 (Jane McAdam ed., 2010).

³⁴ Moreover, even if the contribution of particular states to climate change could be characterised as internationally wrongful acts under international law, others argue that the principle of reparation in the law of state responsibility does not extend to a duty on responsible states to adopt particular policies in relation to climate migration, such as resettlement of affected individuals (Benoît Mayer, *Climate Change, Migration and the Law of State Responsibility*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 238 (Benoît Mayer & François Crépeau eds., 2017)).

³⁵ As noted by Mayer, *supra* note 17, at 97.

³⁶ Mayer, *supra* note 21, at 12.

³⁷ Mayer, *supra* note 21, at 26.

³⁸ Mayer, *supra* note 21, at 12-16, argues that, conceptually, ‘climate migration’ is a component of ‘environmental migration’ and cannot, and should not, be addressed in isolation. This is implicit also in those studies that seek to develop international law for the protection of ‘environmentally displaced persons’, ‘environmental refugees’ or on ‘environmental migration’ (see citations in note 88 below).

³⁹ Jane McAdam, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 240 (2012).

⁴⁰ Kälin, *supra* note 33, at 85. Mayer, *supra* note 21, at 12-16, argues that, conceptually, ‘climate migration’ is a component of ‘environmental migration’ and cannot, and should not, be addressed in isolation. Some raise the fear that states have proved resistant to addressing problems framed in terms of climate change (Michel Prieur,

encompassing both sudden- and slow-onset events but also as constituted not only by the manifestation of hazardous events but also by societal vulnerability to those hazards.⁴¹ On this approach, climate change remains relevant but takes a background role in causal terms, as a process that may exacerbate more immediate climate-related hazards in particular contexts.⁴²

The ‘disaster’ concept usefully foregrounds the more proximate environmental factors influencing human mobility. Yet it also raises questions. Crucially, different definitions of the ‘disaster’ concept exist, despite a similar overall approach.⁴³ Even the widely-used UN definition has particularities that need consideration in the mobility context. For instance, whilst it recognises that a ‘hazard’ need not have the potential for collective impact,⁴⁴ it requires that a ‘hazardous event’ results in a serious collective impact in order to qualify as a ‘disaster’.⁴⁵ But do people really move in response only to ‘disasters’ or also due to hazardous events and hazards and, if so, which concept should we favour? Moreover, each rendering of the disaster concept also differs in how it classifies different hazards in terms of both their ‘origins’⁴⁶ and ‘types’.⁴⁷ For our purposes, this may complicate efforts to identify

Towards an International Legal Status of Environmentally Displaced Persons, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 233, 241 (Simon Behrman & Avidan Kent eds., 2018).

⁴¹ For instance, UN policy defines a ‘disaster’ as ‘a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts’. A sudden-onset disaster is one ‘triggered by a hazardous event that emerges quickly or unexpectedly’, whilst a slow-onset disaster ‘emerges gradually over time’ (see, for example, United Nations General Assembly, Report of the Open-ended Intergovernmental Expert Working Group on Indicators and Terminology Relating to Disaster Risk Reduction, UN Doc. A/71/644, 13 (2016)). In short, disasters are never solely ‘environmental’ or ‘natural’ in character but equally reflect societal vulnerabilities to hazards that may be ‘natural’ or ‘man-made’. See also Ilan Kelman, DISASTER BY CHOICE: HOW OUR ACTIONS TURN NATURAL HAZARDS INTO CATASTROPHES (2020).

⁴² ‘A changing climate leads to changes in the frequency, intensity, spatial extent, duration, and timing of extreme weather and climate events, and can result in unprecedented extreme weather and climate events’ (see, for example, Intergovernmental Panel on Climate Change, MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION 7 (2012)). See also Martine Rebetez, *The Main Climate Change Forecasts the Might Cause Human Displacements*, in MIGRATION AND CLIMATE CHANGE 37 (Étienne Piguet, Antoine Pécout & Paul de Guchteneire eds. 2011).

⁴³ The different approaches reflect consensus that disasters result from the interaction between hazards and societal resilience to them but differ in other material aspects. For instance, compare the widely-endorsed UN definition of the ‘disaster’ concept (*supra* note 41) to that developed by the Centre for Research on the Epidemiology of Disasters (CRED) for its Emergency Events Database (EM-DAT), and apparently still used by the International Federation of Red Cross and Red Crescent Societies, which defines a disaster as ‘a situation or event which overwhelms local capacity, necessitating a request to a national or international level for external assistance; an unforeseen and often sudden event that causes great damage, destruction and human suffering’.

⁴⁴ The UN approach defines a ‘hazard’ as a ‘process, phenomenon or human activity that may cause loss of life, injury or other health impacts, property damage, social and economic disruption or environmental degradation’ (*supra* note 41, at 18).

⁴⁵ The UN approach defines a ‘hazardous event’ as the ‘manifestation of a hazard in a particular place during a particular period of time’ (*supra* note 41, at 20).

⁴⁶ The UN approach views the origins of hazards as, respectively, ‘natural, anthropogenic or sociatural’, locating both environmental degradation and climate change in the last category (*supra* note 41, at 18). By contrast, the CRED approach distinguishes between ‘natural’ and ‘technological or man-made’ hazards, locating environmental degradation under the latter, but treating climate change as an ‘aggravating factor’.

⁴⁷ Alongside ‘technological or man-made’ hazards (that include environmental degradation and pollution), the CRED approach sub-divides the hazards of ‘natural’ origin into geophysical, hydrological, climatological, meteorological and biological types. As noted above, climate change is not treated as a hazard in its own right but rather an ‘aggravating factor’. By contrast, the UN approach lists biological, environmental, geological, hydrometeorological and technological types of hazard without relating them to particular origins. Environmental degradation is listed under ‘environmental hazards’. However, this category is qualified by the

which particular hazards are to be treated as ‘environmental’ in character (and whether by reference to origins or types).⁴⁸ Indeed, the most consistent approach may be simply to treat all of the identified hazard types as essentially ‘environmental’.⁴⁹ Lastly, some scholars have expressed concern that the ‘disaster’-based approach risks introducing a false binary between slow- and sudden-onset events, which might end up privileging more easily-identifiable sudden-onset disasters and temporary forms of protection when more durable solutions could be required in some situations.⁵⁰ Such criticisms foreground important questions about whether disparate types of hazardous events might impact in different ways on mobility decisions or on any resulting patterns of movement and thus point to a need for distinct kinds of legal responses.⁵¹

Meanwhile, on the ‘human mobility’ side of the nexus, legal studies tend to privilege movement with an international character.⁵² This mirrors wider public concern, which engages mainly with the cross-border aspect of climate and disaster mobility. Yet empirical evidence suggests that international movement is a less significant form of mobility in this context, in terms of numbers and vulnerability, than internal displacement or enforced immobility.⁵³ Many legal studies also seem to assume that movement caused by environmental factors will be from global South to North.⁵⁴ Moreover, they regularly cite the

assertion that many of the processes that fall into it ‘may be termed drivers of hazard and risk rather than hazards in themselves, such as soil degradation, deforestation, loss of biodiversity, salinization and sea-level rise’ (*supra* note 41, at 19). A more recent UN document offers a still more diverse typology of hazards as geophysical, hydrological, meteorological, climatological, extra-terrestrial, environment degradation, biological and technological (UNISDR, Technical Guidance for Monitoring and Reporting on Progress in Achieving the Global Targets of the Sendai Framework for Disaster Risk Reduction, 172-3 (Dec. 2017)).

⁴⁸ In other words, it is necessary to decide how a focus on ‘environmental’ factors maps onto the different approaches to classifying hazards. For instance, on the UN approach, is it to be done by origin, in which case does the term ‘environmental’ cover only hazards of ‘natural’ origin or also those of ‘societal origin’ (or even those of ‘anthropogenic’ origin); or by type, in which case, does the term cover all types ('biological', 'geological' etc.) or only some (only ‘environmental’, for instance, or ‘not technological’)?

⁴⁹ On the most recent UN approach (*supra* note 47), this would include geophysical, hydrological, meteorological, climatological, extra-terrestrial, environment degradation, biological, and technological hazards. However, with reference to the origins of the hazards, the UN approach expressly excludes ‘armed conflict and other situations of social instability or tension’ (*supra* note 41, at 18).

⁵⁰ McAdam, *supra* note 39, at 247-249; Mayer, *supra* note 21, at 87-89.

⁵¹ For discussion of the empirical evidence in relation to the distinct climate-related hazards of (1) storms, rains and floods, (2) droughts and desertification, and (3) sea level rise, see Piguet et al., *supra* note 11, at 6-12 and 14-16. Indeed, the distinctions between the various forms of migration are not always neat (Graeme Hugo, *Lessons from Past Forced Resettlement for Climate Change Migration*, in MIGRATION AND CLIMATE CHANGE 260 (Étienne Piguet, Antoine Pécout & Paul de Guchteneire eds. 2011)).

⁵² Piguet et al., *supra* note 11, at 15. However, some of the ‘solutions’ proposed are extended also to those internally displaced by climate change (see, for instance, David Hodgkinson, Tess Burton, Heather Anderson & Lucy Young, ‘The Hour When the Ship Comes In’: A Convention for Persons Displaced by Climate Change, 36 MON. L.R. 69 (2010); Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVIRONMENTAL POLITICS 60 (2010)) but most legal studies tend to treat internal displacement in this context as adequately addressed by the UN Guiding Principles on Internal Displacement (see note 99).

⁵³ On the former, see Khalid Koser, *Climate Change and Internal Displacement: Challenges to the Normative Framework*, in MIGRATION AND CLIMATE CHANGE 289 (Étienne Piguet, Antoine Pécout & Paul de Guchteneire eds. 2011)). On the latter, the most vulnerable to the effects of climate change often do not have the resources to move internationally or even at all. See Dug Cubie, *In-Situ Adaptation: Non-Migration as a Coping Strategy for Vulnerable Persons*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS: LAW AND POLICY PERSPECTIVES 99 (Dimitra Manou, Andrew Baldwin, Dug Cubie, Anja Mihr & Teresa Thorp eds., 2017)).

⁵⁴ Carol Farbotko, *Representation and Misrepresentation of Climate Migrants*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 67, 70-77 (Benoît Mayer & François Crépeau eds., 2017); Piguet, et al., *supra* note 11, at 15; Gemenne, *supra* note 22, at 231-235).

predicament of ‘sinking’ Pacific islands as the archetypal empirical problem scenario for the law and, among international environmental lawyers, resettlement of the climate-displaced to the global North is often advanced as a solution.⁵⁵ Much of the legal literature also seems to assume that the movement has an essentially ‘forced’ character,⁵⁶ reflecting its framing of environmental change as a ‘push’ factor. Even where the potential for ‘voluntary’ movement is acknowledged, the main focus of legal studies remains on responding to the ‘forced’ aspects of mobility in this context.⁵⁷ Similarly, it is well-recognised that we should avoid characterising migration merely as a failure to adapt to environmental change, since movement is not only a reactive last-resort but can also be a proactive adaptive coping strategy.⁵⁸

Finally, returning briefly to the intersection between ‘mobility’ and ‘the environment’, it is important to acknowledge the recent surge of interest among scholars in how the coronavirus pandemic will shape the movement of persons globally.⁵⁹ In tandem, many governments around the world have imposed measures to strictly limit international movement into their territories, especially by non-nationals travelling from any territory where the virus appears to have been poorly contained.⁶⁰ On the one hand, the situation in 2020 is a stark illustration of the fact that the ‘environment-mobility’ nexus can manifest itself in diverse forms. On the other hand, it shows that their legal implications may differ. In this regard, epidemics and pandemics, as specific kinds of biological hazard, represent something of a special case. Given that human mobility within and between states is often one of the main vectors by which the hazard is transmitted to new communities, along with the attendant risk of disaster, they raise particular sets of questions in the mobility context around the legal framework for (exceptional) measures regulating or restricting entry and free movement to minimise the transmission of infection.⁶¹ Since these legal issues are important

⁵⁵ Katrina M. Wyman, *Ethical Duties to Climate Migrants*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 347 (Benoît Mayer & François Crépeau eds., 2017). It is evident too in the emphasis on legal proposals for international ‘resettlement’ of climate migrants that seem to presuppose the unavailability of internal mobility options (such as that by Biermann & Boas, *supra* note 52). This may reflect wider stereotypes about this issue, as observed by Simonelli, *supra* note 7, at 23-53.

⁵⁶ As noted by Gemenne, *supra* note 22, at 253; Piguet et al., *supra* note 11, at 15.

⁵⁷ See, for example, Kälin, *supra* note 33, at 96.

⁵⁸ Piguet et al., *supra* note 11, at 15-16; Richard Black, Stephen R. G. Bennett, Sandy M. Thomas & John R. Beddington, Climate Change: Migration as Adaptation, 478 NATURE 447, 449 (2011).

⁵⁹ See, for example, the contributions to the Coronavirus and Mobility Forum hosted by the Centre on Migration, Policy, and Society at the University of Oxford, UK at <https://www.compas.ox.ac.uk/project/the-coronavirus-and-mobility-forum/> (visited May 26, 2020).

⁶⁰ In the United States, for example, the president issued a proclamation in April 2020 suspending entry into its territory for certain immigrants who present risk to the United States labour market during the economic recovery following the COVID-19 outbreak (President of the United States of America, Proclamation 10014 (Apr. 22, 2020) 85 FR 23441, Apr. 27, 2020). Globally, it is reported that ‘nearly all’ states have imposed entry restrictions for persons travelling from territories where the virus has become widespread, with some temporarily prohibiting the entry of all non-citizens and non-residents. Moreover, ‘nearly all’ states have introduced additional health screening procedures at ports of entry, with ‘most’ requiring travellers from affected territories to be quarantined for a period of time on entry. Most countries also advise their nationals against non-essential international travel or to specific jurisdictions where the outbreak is more severe. See *Immigration Update: Coronavirus*, FRAGOMEN NEWS, May 25, 2020, at <https://www.fragomen.com/about/news/immigration-update-coronavirus>.

⁶¹ Among the many short legal analyses recently published on this topic see, for example, Adina Ponta, *Human Rights Law in the Time of the Coronavirus*, 24 ASIL INSIGHTS (Apr. 20, 2020) at <https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus>; Elspeth Guild, *EU Fundamental Rights, Human Rights and Free Movement in times of Covid19*, RLI BLOG, May 21, 2020, at <https://rli.blogs.sas.ac.uk/2020/05/21/eu-fundamental-rights-human-rights-and-free-movement-in-times-of-covid19/>; Bríd Ní Ghráinne, *Covid-19, Border Closures, And International Law*, May 4, 2020, at

in their own right, and separate from those relating generally to the entry and stay of people affected by other kinds of hazards, they deserve study in their own right and will not be addressed further here.

Defining the Legal Problem

Legal debate on the environment-mobility nexus is underpinned by certain assumptions about not only the nature of the underlying empirical situation but also the framing of the legal problem. This debate assumes the essential legal problem to be that the law does not adequately regulate the situation of persons who leave their country due to environmental factors, especially climate change. Implicit in that statement are *empirical* assumptions about which parts of the environmental-mobility nexus are important for legal regulation, as outlined above. But the way that legal scholarship addresses this perceived gap in the law also reflects certain *legal* assumptions about how that gap in the law is itself constituted and, ultimately, resolved. Those assumptions serve both to channel the resulting legal debate in particular directions and to eclipse other productive lines of enquiry. By elucidating these underpinning premises, we can better understand where and how a case study of the Americas might contribute to debate on legal responses to the environment-mobility nexus.

Firstly, legal scholarship reflects an international law standpoint. Indeed, in essence, this is a debate about international law. This focus on international law in particular is hardly surprising, since both migration and the environment are intuitively global phenomena. Naturally, it seems to follow that international mobility due environmental drivers, as a global problem, calls for an *international* legal response. Yet this conception of the legal problem as inherently one of international law shapes the resulting analyses. As the following discussion will show, not only is the problem framed as a gap in international law but also solutions to this problem are both located within international law and build from existing international law.⁶² Although international law at the global level is the focus of most legal studies, growing numbers of legal scholars now argue that new norms of international law are more likely to be developed at the regional or even bilateral level, at least in the first instance.⁶³ Cooperation of this kind at the regional level is seen as attractive to states since most migration is intra-regional in nature already, regions are likely to face similar kinds of environmental processes, and regional forms of international cooperation are already the *status quo* in most parts of the world.⁶⁴

https://www.dokumenty-iir.cz/Publikace/Reflections/reflection_Bríd%20Ní_04_2020_covid-19_DEF.pdf. For an example from international institutions, see United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and United Nations Special Rapporteur on the Human Rights of Migrants, *Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants* (May 26, 2020), at <https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>.

⁶² For examples, see notes 83-90 below.

⁶³ PDD, *State-led, Regional Consultative Processes: Opportunities to Develop Legal Frameworks on Disaster Displacement*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 126 (Simon Behrman & Avidan Kent eds., 2018); Karoline Popp, *Regional Policy Perspectives*, in PEOPLE ON THE MOVE IN A CHANGING CLIMATE 230 (Étienne Piguet and Frank Laczko eds., 2014); Philippe Boncour & Bruce Burson, *Climate Change and Migration in the South Pacific Region: Policy Perspectives*, in CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 5, 22 (Bruce Burson ed., 2010); Vikram Kolmannskog & Finn Myrstad, *Environmental Displacement in European Asylum Law*, 11 E.J.M.L. 313 (2009); Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 LAW AND POLICY 502 (2008).

⁶⁴ Popp, *supra* note 64, at 230; see also Black et al, *supra* note 58, at 449.

By contrast, law at the national level is seen as largely irrelevant by the legal literature. Even scholars who assess the few national law provisions on environmental displacement ultimately dismiss them as ‘ad hoc’ and ‘inadequate’,⁶⁵ ‘unpredictable’ in terms of application and status,⁶⁶ and full of ‘vague language’.⁶⁷ Such national law is further characterised as ‘inconsistent’ and ‘varying from one country to another’.⁶⁸ It is also said to lack ‘legal certainty’, as it is ‘not rooted in existing legal duties’ but relies on ‘discretion rather than legal obligation’.⁶⁹ Of course, many of these complaints about vague language, inconsistency and so on appear overstated since they could be levelled equally at international law. Likewise, the notion that national law cannot create legal rules and duties for the state concerned is simply incorrect. Moreover, it is notable that most scholars simply cite the same few protection provisions of national law from states in the global North.⁷⁰ As a result, national law from states in the global South is largely absent from the analysis.⁷¹ Furthermore, the focus in these analyses on ‘international protection’ provisions means that the wider provisions of national immigration law are also largely overlooked.⁷² This is a direct consequence of setting the legal debate so firmly within international law parameters: in contrast to the law on ‘international protection’, immigration law is not yet well-established as a distinct body of international law.

Secondly, the perception of a gap in international law is the starting point for most legal studies. It is clear that, in general, persons displaced across borders by environmental factors do not benefit from international legal guarantees relating to ‘refugees’ (or those on ‘migrant workers’).⁷³ Certainly, the extant treaties dealing, respectively, with refugees, statelessness, human rights or the environment do not specifically address this situation.⁷⁴ Many legal scholars seem to take this fact as sufficient evidence of a legal gap in relation to the ‘protection’ of such persons (and thus also, by extension, of a gap in relation to their

⁶⁵ Christel Cournil, *The Protection of “Environmental Refugees” in International Law*, in MIGRATION AND CLIMATE CHANGE 359, 369-70 (Étienne Piguet, Antoine Pécout & Paul de Gucheneire eds. 2011); Thekli Anastasiou, *Public International Law’s Applicability to Migration as Adaptation*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 172, 183-184 (Simon Behrman & Avidan Kent eds., 2018).

⁶⁶ McAdam, *supra* note 39, at 117.

⁶⁷ Anastasiou, *supra* note 65, at 183-4.

⁶⁸ Kälin, *supra* note 33, at 100; McAdam, *supra* note 39, at 117.

⁶⁹ Susan F. Martin, *Towards an Extension of Complementary Protection?*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 449, 449-50 (Benoît Mayer & François Crépeau eds., 2017); Anastasiou, *supra* note 65, at 183-4.

⁷⁰ This usually includes one or more of the following provisions: Temporary Protected Status in the United States; subsidiary protection provisions in Sweden (Aliens Act, SFS 2005: 716, Ch. 4, s. 2, para. 3) and Finland (Aliens Act, Act No. 301/2004, Apr. 30, 2004, s. 109(1)); the European Union Temporary Protection Directive (as a tool for harmonising national law); and, sometimes, temporary suspensions of removals such as those applied in the aftermath of the Haiti earthquake (see, for instance, Mayer & Crépeau, *supra* note 9, at 12; Martin, 2017, *supra* note 69, at 461-4; Vikram Kolmannskog & Lisetta Trebbi, *Climate Change, Natural Disasters, and Displacement: A Multi-Track Approach to Filling the Protection Gaps*, 92(879) I.R.R.C. 713, 727-8 (2010)). A somewhat wider range of provisions is cited by McAdam, *supra* note 39, at 99-118.

⁷¹ This may partly reflect the perception that the global North will be the recipient of arrivals in this context. As an exception, see the few counter examples from Africa and one from Argentina cited in passing by McAdam, *supra* note 39, at 107.

⁷² For exceptions, see text at note 97 below.

⁷³ See, among many, Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES (2012); Christel Cournil, *Vers une reconnaissance des ‘réfugiés écologiques’? Quelle(s) protection(s), quell(s) statut(s)?*, 4 REVUE DU DROIT PUBLIC 1035 (2006).

⁷⁴ Ibid. See also the discussion in McAdam, *supra* note 39, at 39-98. McAdam equally dismisses the much-debated prospect of the international law on statelessness resolving the situation of ‘sinking’ small island states (*ibid*, at 119-160).

envisioned need for ‘resettlement’ to the global North). However, some scholars argue for a narrower gap that exists only in respect of certain specific needs that are not covered by international human rights law, which continues to benefit such persons.⁷⁵ In particular, they argue that the general gap in legal protection actually exists mainly in relation to the ‘legal status’ of these persons and aspects of their ‘admission [and] continued stay [in the reception country] and protection against forcible return to the country of origin’.⁷⁶

Among legal scholars, the gap in legal standards also tends to be perceived in terms of an absence of ‘international protection’ for persons who flee their countries due solely to the impact of environmental factors.⁷⁷ This analogy with the situation of refugees (and other beneficiaries of international protection) is evident from the literature’s principal concern with persons unwillingly outside their country, recalling the ‘exilic bias’ of refugee law.⁷⁸ Some scholars even explicitly frame the legal problem in this context as an absence of international protection for ‘forced’ movements, with ‘voluntary migration’ simply left to the discretion of states in national law.⁷⁹ Yet those scholars not only underestimate the difficulty of distinguishing ‘forced’ and ‘voluntary’ movement in this context,⁸⁰ but also misrepresent the logic of international protection, which turns on prospective risk in the country of origin and a lack of national protection rather than the supposedly ‘forced’ quality of movement.⁸¹ Even so, they show that, analogous to the situation of refugees, the legal gap in relation to mobility on environmental grounds is conceived principally as one of ‘international protection’ under international law.

Thirdly, the legal debate is ‘not about the law as it exists (*lex lata*) but about the law as it should be (*lex ferenda*)’,⁸² i.e. the problem is largely accepted and the debate is really about solutions. In most cases, legal scholars turn to international law to close this legal gap. Two main methods are evident. Thus, certain scholars, particularly those from the international refugee and human rights law fields, argue in favour of more expansively interpreting existing norms of international law. Many of them advocate for interpreting international refugee definitions broadly to properly take account of how ‘human’ inputs also shape ‘natural’ disasters in any particular society.⁸³ Some also propose the development of

⁷⁵ Kälin, *supra* note 33, at 87-89. See also Siobhán McInerney-Lankford, *Climate Change, Human Rights and Migration: A Legal Analysis of Challenges and Opportunities*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 131 (Benoît Mayer & François Crépeau eds., 2017).

⁷⁶ PDD, *supra* note 63 at 145; Kälin, *supra* note 33, at 89. The recent comments of the UNHRC in *Teitiota v. New Zealand*, *supra* note 8, paras. 9.11-9.14 suggest that, in principle, the effects of climate change (and possibly other forms of environmental degradation) in an applicant’s country of origin could generate a sufficient threat to the right to life to prevent *refoulement* on human rights grounds, although that threat would have to be highly imminent. It would also not require states to grant admission or stay.

⁷⁷ McAdam, *supra* note 39, at 36.

⁷⁸ Gervase J.L. Coles, *The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry*, in HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW 195, 209 (Alan E. Nash ed., 1988).

⁷⁹ Kälin & Schrepfer, *supra* note 73, at 62; Kälin, *supra* note 33, at 89-90 and 95-96.

⁸⁰ This reflects the complex intermingling of environmental and human factors, including adaptation strategies and coping mechanisms, especially in the face of slow-onset processes (see note 24 above).

⁸¹ McAdam, *supra* note 39, at 98; McGregor, *supra* note 24.

⁸² Mayer & Crépeau, *supra* note 9, at 13.

⁸³ See text accompanying note 29. This approach can be discerned in Scott, 2019, *supra* note 29; Sanjula Weerasinghe, *In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change*, 39 UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES 1 (2018); Madeline Garlick, Marine Franck & Erica Bower, *Enhancing Legal Protection for People Displaced in the context of Disasters and Climate Change*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 118, 121 (Simon Behrman & Avidan Kent eds., 2018); Selwyn Fraser, *Climate Persecutors:*

soft law instruments to provide temporary or similar protection to the broader class of persons fleeing environmental factors.⁸⁴ Such proposals, often touted as merely a first step on the path to creating a dedicated new treaty on this challenge, also often creatively draw on, and develop, existing international law principles from the field of international protection law.⁸⁵

An alternative approach, more common among international environmental law scholars, proposes new treaty law to fill the legal gap. A few argue for amending the terms of existing treaties in the refugee field,⁸⁶ although the idea is rightly dismissed by refugee law authorities as unworkable.⁸⁷ Many others call for a new treaty, either standalone or under the framework of international environmental law, for which they provide draft proposals.⁸⁸ At their core, though, these proposals seek to promote status-based forms of international protection for their respective classes of refugee-like beneficiaries,⁸⁹ whether they are defined in the draft instruments as, variously, ‘environmentally displaced persons’, ‘climate migrants’, ‘persons displaced by climate change’ or ‘climate refugees’. Likewise, many of the new obligations that these proposals envisage in areas such as ‘resettlement’ and ‘distribution’ serve to reproduce or develop existing legal principles drawn from the law of

Climate Change Displacement and the International Community as Persecutor, 20 N.Z. J. ENVTL. L. 107 (2016); Christopher M. Kozoll, *Poisoning the Well: Persecution, the Environment, Refugee Status*, 15 COLO.J.INT'L ENVTL.L.& POL'Y 271 (2004).

⁸⁴ Camilla Schloss, *Cross-border Displacement due to Environmental Disaster: A Proposal for UN Guiding Principles to Fill the Legal Protection Gap*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 243 (Simon Behrman & Avidan Kent eds., 2018); Elizabeth Ferris & Jonas Bergmann, *Soft Law, Migration and Climate Change Governance*, 8 J.H.R.E. 6 (2017); Tamara Wood, *Developing Temporary Protection in Africa*, 49 FORCED MIGRATION REVIEW 23 (2015); McAdam, *supra* note 39, at 256-266.

⁸⁵ Several of these proposals focus on the provision of ‘temporary protection’ for people who flee disasters or climate change but do not qualify as refugees, e.g. Garlick, Franck & Bower, *supra* note 83, at 121-2; Volker Türk, *Temporary Protection Arrangements to Fill a Gap in the Protection Regime*, 49 FORCED MIGRATION REVIEW 40 (2015); Wood, *supra* note 84, McAdam, *supra* note 39, at 256-266;

⁸⁶ See, for example, Beatriz Felipe Pérez, *Beyond the Shortcomings of International Law: A Proposal for the Legal Protection of Climate Migrants*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 214, 223-4 (Simon Behrman & Avidan Kent eds., 2018); Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998).

⁸⁷ See, for example, McAdam, *supra* note 39, at 198-9; Bruce Burson, *Protecting the Rights of People Displaced by Climate Change: Global Issues and Regional Perspectives*, in CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 159, 160-1 (Bruce Burson ed., 2010); UNHCR, Climate Change, Natural Disasters and Human Displacements: A UNHCR Perspective (2009), 9, available at <https://www.unhcr.org/4901e81a4.pdf>.

⁸⁸ They include: the International Centre of Comparative Environmental Law, *Draft Convention on the Status of Environmentally Displaced Persons*, 4th version (Apr. 2018), at <https://cidce.org/en/deplaces-environnementaux-refugies-ecologiques-environmentally-displaced-persons/> (commentary by Prieur, *supra* note 40); the Protocol on Recognition, Protection and Resettlement of Climate Migrants proposed by Biermann & Boas, *supra* note 52; the Convention for Persons Displaced by Climate Change proposed by Hodgkinson et al., *supra* note 52; the international convention on climate refugees proposed by Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009); the global environmentally-based immigration visa program proposed by Kara Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection* 94 IOWA L. REV. 1107, 1135-6 (2008); regional agreements for climate refugees proposed by Williams, *supra* note 63; the Convention on the Protection of Environmentally Displaced Persons proposed by Dana Zartner Falstro, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 2001 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2001); the international convention on refugees proposed by Gregory S. McCue, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT'L ENVTL. L. REV. 151 (1994).

⁸⁹ See the range of scholarly proposals identified by Cournil as sharing a concept of ‘protection’ as their common basis (Christel Cournil, *The Protection of “Environmental Refugees” in International Law*, in MIGRATION AND CLIMATE CHANGE 359, 361-3 (Étienne Piguet, Antoine Pécoud & Paul de Guchteneire eds. 2011)).

international protection or from international environmental law.⁹⁰ None of the proposals have yet been taken up by states.⁹¹

Finally, as no clear ethical basis exists for privileging environmental factors over drivers of migration such as poverty, there is debate over whether such special protection can be justified.⁹² Rather than arbitrarily creating new regimes for a privileged few, some suggest that we should instead focus on fully promoting the basic human rights of all migrants without distinction.⁹³ Similarly, recognition of the way that environmental and human factors intertwine to shape vulnerability and mobility leads some to argue that a focus on protecting the displaced misses the bigger picture ‘that such migration is a consequence of the human insecurity imposed on the South in the current global order’.⁹⁴ These approaches suggest that mobility in this context cannot be addressed in isolation from the pressing need to respond to wider migration, environmental and development challenges.⁹⁵ For instance, certain scholars working in the Pacific have begun to analyse climate mobility in the context of wider migration patterns and processes.⁹⁶ As a result, they now argue that climate migration might be addressed ‘within existing international migration mechanisms’,⁹⁷ and ask how immigration law in Australia and New Zealand could be tweaked or bilateral or regional arrangements developed to accommodate future mobility linked to climate change.⁹⁸

Framing the Case Study of the Americas

Legal debate on the environment-mobility nexus revolves principally around the question of how to respond to international mobility shaped by environmental factors. As such, this study aims to contribute to that core legal debate rather than considering the legal implications of

⁹⁰ On the latter point, for example, see Avidan Kent & Simon Behrman, *FACILITATING THE RESETTLEMENT AND RIGHTS OF CLIMATE REFUGEES: AN ARGUMENT FOR DEVELOPING EXISTING PRINCIPLES AND PRACTICES* (2018).

⁹¹ The currently limited extent of formal state interest in creating a new treaty can be evidenced from the few examples cited in Prieur, *supra* note 40, at 237. See also McAdam, *supra* note 39, at 187-201.

⁹² Mayer, *supra* note 21, at 31-35; Peter Penz, *International Ethical Responsibilities to “Climate Change Refugees”*, in *CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES* 151 (Jane McAdam ed., 2010).

⁹³ Mayer, *supra* note 21, at 159-185.

⁹⁴ Stephen Castles, *Concluding Remarks on the Climate Change-Migration Nexus*, in *MIGRATION AND CLIMATE CHANGE* 415, 425 (Étienne Piguet, Antoine Pécoud & Paul de Guchteneire eds. 2011).

⁹⁵ Ibid, at 424-26; see also Mayer, *supra* note 21, at 16-35.

⁹⁶ See, for example, Bruce Burson & Richard Bedford, *Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific*, NANSEN INITIATIVE (2013), at <https://www.pacificclimatechange.net/document/clusters-and-hubs-toward-regional-architecture-voluntary-adaptive-migration-pacific>; Jon Barnett & Michael Webber, *Migration as Adaptation: Opportunities and Limits*, in *CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES* 37 (Jane McAdam ed., 2010); Catherine Locke , W. Neil Adger & P. Mick Kelly, *Changing Places: Migration’s Social and Environmental Consequences*, 42 ENVIRONMENT 24 (2000); Richard Black, *REFUGEES, ENVIRONMENT AND DEVELOPMENT* (1998); Graeme Hugo, *Environmental Concerns and International Migration*, 301 INTERNATIONAL MIGRATION REVIEW 105 (1996).

⁹⁷ Burson & Bedford, *supra* note 96; McAdam, *supra* note 39, at 201-211; Graeme Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in *CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES* 9, 33 (Jane McAdam ed., 2010) original emphasis. See also Jon Barnett & Natasha Chamberlain, *Migration as Climate Change Adaptation: Implications for the Pacific*, in *CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES* 51 (Bruce Burson ed., 2010); Richard Bedford and Charlotte Bedford, *International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu*, in *CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES* 89 (Bruce Burson ed., 2010).

⁹⁸ Ibid.

other aspects of this nexus, such as internal mobility linked to environmental factors.⁹⁹ Nonetheless, the study draws on insights from the preceding literature review as points of entry into the legal debate. Firstly, on the ‘mobility’ side of the nexus, it focuses on travel, entry and stay for aliens as the key challenge. Secondly, on the ‘environment’ side of the nexus, it focuses broadly on disasters and the underlying hazards rather than limiting the analysis to climate change alone. Thirdly, on causality, it addresses not only how such environmental factors contribute to displacement but also how they might impact on international mobility in other ways. This provides a strong foundation for renewed consideration of key areas of legal debate, such as the scope of existing legal protection, the nature of potential legal development in this field, and how to accommodate the multi-causal nature of migration.

The study interrogates these questions through a case study of the Americas. On the one hand, this reflects the contention that abstract analysis of international law at the global level has largely reached the limits of what it can contribute to advancing these kinds of legal debates. On the other hand, it takes seriously the observation by some scholars that international mobility linked to environmental factors, as well as the development of legal responses and cooperation by states, is most likely in practice to play out within particular regions rather than at the global level, at least initially. As a case study, the Americas offer a contrasting example to the oft-cited Pacific case.¹⁰⁰ Certainly, like the Pacific, countries in the Americas are exposed regularly to sundry hazards and are also home to significant populations of indigenous peoples. Yet, in other ways, the Americas are more diverse, comprising two continents with extensive land borders, as well as the small island states that make up most of the Pacific. Moreover, the Americas are 20 times more populous than the Pacific and contain not only some of the world’s largest and richest countries but also some of its poorest, as well as many others located in between these two extremes.

II. EMPIRICAL DYNAMICS IN THE AMERICAS

The gaps in protection identified by legal scholars writing on the environment-mobility nexus exist only in relation to the presumed reality of international movement caused by environmental threats in the country of origin. In other words, the legal problem corresponds to an assumed underlying empirical phenomenon. Yet many legal scholars seem merely to rely on vague and poorly-evidenced, even rather speculative, assertions about its existence, scope and nature, often citing disjointed and rather particular examples as if they demonstrated some general trend.¹⁰¹ However, if we want truly to assess the adequacy of the law in relation to specific empirical phenomena, such as the international movement of persons in the context of environmental push factors, then we need to engage more robustly with the growing body of natural and social science research on this topic.¹⁰² Toward this

⁹⁹ The existing human rights-based framework codified in the UN Guiding Principles on Internal Displacement is usually seen as sufficient to address the situation of people forcibly displaced by climate change within their own country (Kälin, *supra* note 33, at 94). However, elaboration of the norms may be needed in relation to durable solutions and accountability for climate change drivers (Elizabeth Ferris, *The Relevance of the Guiding Principles on Internal Displacement for the Climate Change-Migration Nexus*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 108 (Benoît Mayer & François Crépeau eds., 2017)).

¹⁰⁰ See, for example, note 97 above.

¹⁰¹ For a typical example, see the empirical ‘scene-setting’ in Simon Behrman & Avidan Kent, *Overcoming the Legal Impasse? Setting the Scene*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 3, 3-6 (Simon Behrman & Avidan Kent eds., 2018).

¹⁰² Calls for more robust engagement with the empirical evidence are made by some legal scholars. See, for example, Benoît Mayer, *Who are “Climate Refugees”? Academic Engagement in the Post-Truth Era*, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE? 89 (Simon Behrman & Avidan Kent eds., 2018).

end, the present study seeks to derive a more precise understanding of the environment-mobility nexus in the region of the Americas from the somewhat fragmentary research that exists thus far. From this point of entry, the study elucidates a few of the main ways in which disasters and hazards appear, firstly, to act as a push factor for diverse dynamics of international

movement in the Americas and , secondly, to shape the experience of international mobility in other ways that are important for the law to consider.

International Movement Linked to Environmental Threats in the Americas

Empirical research confirms that the diverse environmental threats to which countries in the Americas are exposed can act as a push factor for movement. Evidence of this impact exists for both sudden-onset events, such as storms, hurricanes, flooding and earthquakes, and slow-onset events, such as drought, erosion, desertification and glacier retreat that may be linked to climate change.¹⁰³ Social scientists have suggested that these different kinds of hazards produce distinct patterns of mobility in terms of duration, distance and character, although the evidence remains somewhat mixed.¹⁰⁴ Even so, the data is clear that sudden- and slow-onset disasters now push millions of incidents of internal movement by individuals in the countries of the Americas each year.¹⁰⁵ By contrast, data on international movement due to disasters are more fragmentary and not routinely collected. Yet as the following discussion shows, international movement linked to both slow- and sudden-onset events in this region is a present reality and not just an abstract legal concern, even if its scale seems rather less significant than that of internal movement.¹⁰⁶ Of course, given that the latter is predicted to rise with time,¹⁰⁷ so may the former. These trends in the Americas accord with those in other regions of the world,¹⁰⁸ suggesting that this region is not an anomaly in that respect.

As in other regions, such mobility is shaped by multiple, intersecting drivers, with environmental pressures often just one more push factor in contexts sometimes riven by deep inequality.¹⁰⁹ Even so, empirical evidence from the Americas suggests that at least three different strands of international movement pushed by environmental factors can be discerned. The most visible form of movement takes place shortly before or after a sudden-onset hazardous event is perceived as approaching, as people living near land borders may temporarily cross into the neighbouring country to escape the impact of the event or to access

¹⁰³ Raoul Kaenzig & Étienne Piguet, *Migration and Climate Change in Latin America and the Caribbean*, in PEOPLE ON THE MOVE IN A CHANGING CLIMATE 155 (Étienne Piguet and Frank Laczko eds., 2014). There are also areas of Suriname, Guyana and the Bahamas where the impact of sea-level rises on economic livelihoods could force migration in the future.

¹⁰⁴ Ibid; Piguet et al., *supra* note 11, at 6-12 and 15-16.

¹⁰⁵ Calculations by the author based on figures in Internal Displacement Monitoring Centre (IDMC), *Annual Reports*, 2008-2019, at <http://www.internal-displacement.org/>, suggest that, between 2008 and 2018, over 28.5 million reported instances of internal movement due to sudden-onset disasters linked to natural hazards occurred in the Americas region. Across the same time period, the figures for internal displacements by sub region are: Central America - 798,472; Caribbean – 6,705,000; North America – 9,851,300; South America – 11,184,180.

¹⁰⁶ For instance, for the United States as a key destination country, approximate calculations by the author of instances of immigration linked to disasters from other countries in the Americas, including those granted entry or stay under normal immigration categories (drawing on Onelica C. Andrade Afonso, *Natural Disasters and Migration: Storms in Central America and the Caribbean and Immigration to the U.S.*, 14 EXPLORATIONS 1 (2011)) and under TPS in disaster contexts, suggest an average annual upper ceiling in the tens of thousands.

¹⁰⁷ World Bank Group, *Internal Climate Migration in Latin America*, GROUNDSWELL – POLICY NOTE #3 (2018).

¹⁰⁸ Kaenzig & Piguet, *supra* note 103; Piguet et al., *supra* note 11, at 6-12 and 15-16.

¹⁰⁹ Kaenzig & Piguet, *supra* note 103, at 171.

better shelter or aid on the other side of the border. It usually follows existing well-established patterns of daily back-and-forth migratory crossings in border regions. Examples include north Guatemalans crossing to Mexico to better weather tropical storms, victims of flooding seeking respite by crossing from south Colombia to Ecuador or from Amazonian Bolivia and Peru to Brazil, and Chileans affected by earthquakes or mudslides in frontier zones that are cut off from other parts of Chile instead seeking aid in accessible Argentinian towns.¹¹⁰ Crucially, most people move temporarily to escape not only actual disasters but also perceived oncoming disasters or hazardous events.

Another strand of international movement in the Americas consists of those persons who leave their countries in the context of slow-onset disasters. The data shows that these persons, who are often from populations or social sectors whose livelihood depends on particular forms of agriculture, also tend to follow existing migration routes out of the country. For example, severe droughts linked to climatic factors are shown to increase migration from affected parts of rural Mexico to the U.S.¹¹¹ Similarly, slow-onset events linked to changing weather and rainfall patterns, soil erosion and other environmental degradation appear to have helped push migration from rural parts of the Dominican Republic and Haiti, sometimes to other countries.¹¹² Given that the impact of such slow-onset disasters is often mediated via social factors to a greater extent than for sudden-onset events, their role in driving mobility can be highly contextual.¹¹³ However, it is not always possible to differentiate the respective contribution of slow- and sudden-onset events to pushing movement, especially in locations where they overlap. For instance, research in some rural areas of Honduras and Haiti shows how international out-migration is driven by spiralling livelihood pressures resulting from the combined impact of slow-onset environmental degradation with sudden-onset tropical storms.¹¹⁴

Similar questions about how to frame the impact of disasters and hazards as a push factor for mobility emerge in evidence of a third form of international movement in the Americas that takes place up to a year or more after a sudden-onset disaster has occurred. This ‘delayed’ movement seems to be driven not so much by the hazard’s sudden and immediate disaster impact as by its enduring implications for the viability of long-term

¹¹⁰ Cantor, 2018, *supra* note 10 at 17; Cantor, 2015, *supra* note 10, at 12.

¹¹¹ Isabelle Chort & Maëlys de la Rupelle, *Determinants of Mexico-US Outward and Return Migration Flows: A State-Level Panel Data Analysis*, 53 DEMOGRAPHY 1453 (2016); Raphael J. Nawrotzki, Fernando Riosmena & Lori M. Hunter, *Do Rainfall Deficits Predict U.S.-Bound Migration from rural Mexico? Evidence from the Mexican Census*, 32 POPULATION RESEARCH AND POLICY REVIEW 129 (2013); Michelle Leighton, ENVIRONMENTAL DEGRADATION AND MIGRATION: THE U.S.-MEXICO CASE STUDY (1997). One study suggests that climate-related international migration from rural Mexico is predominantly undocumented (Raphael J Nawrotzki, Fernando Riosmena, Lori M. Hunter & Daniel M. Runfola, *Undocumented Migration in response to Climate Change*, 1 INTERNATIONAL JOURNAL OF POPULATION STUDIES 60 (2015)). Some suggest that temporary migration of up to two years is the predominant form of international migration by those affected by drought and desertification, rather than permanent migration (Michelle Leighton, *Drought, Desertification and Migration: Past Experiences, Predicted Impacts and Human Rights Issues*, in MIGRATION AND CLIMATE CHANGE 331, 349 (Étienne Piguet, Antoine Pécout & Paul de Guchteneire eds. 2011)).

¹¹² Stefan Alsher, *Environmental Degradation and Migration on Hispaniola Island*, 49 INTERNATIONAL MIGRATION 164 (2011); Lykke Andersen, Lotte Lund & Dorte Verner, *Migration and Climate Change*, in REDUCING POVERTY, PROTECTING LIVELIHOODS, AND BUILDING ASSETS IN A CHANGING CLIMATE: SOCIAL IMPLICATIONS OF CLIMATE CHANGE FOR LATIN AMERICA AND THE CARIBBEAN 195, 202 (Dorte Verner ed., 2010).

¹¹³ Piguet et al., *supra* note 11, at 8-12.

¹¹⁴ Alsher, *supra* note 112; David J. Wrathall, *Migration amidst Social-Ecological Regime Shift: The Search for Stability in Garífuna Villages of Northern Honduras*, 40 HUMAN ECOLOGY 583 (2012).

household livelihood plans.¹¹⁵ It is documented mainly in poorer and less-resilient Central American and Caribbean countries where a tropical storm or earthquake has had a particularly devastating effect on society and infrastructure at the national level.¹¹⁶ That data dovetails with other research showing that regular migration to the United States increases after severe storms in these countries, and also in Mexico, albeit only after a lag period of up to a year.¹¹⁷ Like the other two strands of movement, this one also tends to follow traditional migration routes from the affected country.¹¹⁸ However, where they are blocked, then it seems that new ones are forged, as with the new patterns of Haitian mobility that reoriented toward South American countries when some traditional Haitian migration destination countries tried to close their borders after the 2010 earthquake.¹¹⁹

This growing evidence base shows that environmental phenomena in the Americas do contribute to pushing diverse forms of international movement. Indeed, the three strands of movement identified here likely provide only a few pertinent examples of how the wider mobility dynamics play out.¹²⁰ Certainly, it seems that only in rare cases will these forms of movement be likely to satisfy the long-established notions legal bases for international protection by states.¹²¹ Equally, though, they do suggest that, whilst framing the empirical problem in terms of ‘disasters’ offers a useful point of entry for understanding how environmental factors influence human mobility, a limitation of the ‘disaster’ concept is that it describes only one way in which hazards can act as drivers of mobility. In this regard, the examples imply that people do not leave only due to the occurrence or risk of disasters at societal level.¹²² Rather, some movement also occurs pre-emptively due to the perceived potential impact of a hazard at the individual or household level, regardless of whether its collective impact at the societal level will result in a ‘disaster’. Likewise, other patterns of movement occur after the ‘disaster’ phase has passed, due to the hazard’s perceived longer-term or ongoing impact on the viability of individual or household livelihood strategies. In other words, whilst a hazardous event is a prerequisite for a ‘disaster’, the perceived or actual impact of a hazard or hazardous event at the household level can be sufficient to drive movement by the affected people, even in the absence of disaster conditions at the societal level.

¹¹⁵ This time-lag may reflect diminishing access to humanitarian aid in the disaster-affected country as the months pass and the time needed for households to collect the resources for travel (Cantor, 2015, *supra* note 10, at 12-13) or, if people are able to rebuild homes and replant crops during the initial recovery, households or household members may then migrate to seek alternative income sources (McLeman, *supra* note 28, at 43-4).

¹¹⁶ McLeman, *supra* note 28, at 43-4; Raphael J. Nawrotzki and Jack DeWaar, *Climate Shocks and the Timing of Migration from Mexico*, 38 POPULATION AND ENVIRONMENT 72 (2016); Andrade Afonso, *supra* note 106; Marlene Attzs, *Natural Disasters and Remittances: Exploring the Linkages between Poverty, Gender, and Disaster Vulnerability in Caribbean SIDS*, 61 UNU-WIDER RESEARCH PAPER 1, 9 (2008).

¹¹⁷ Parag Mahajan & Dean Yang, *Taken by Storm: Hurricanes, Migrant Networks, and U.S. Immigration*, CENTER FOR ECONOMIC STUDIES WORKING PAPERS 17-50 (2017); Andrade Afonso, *supra* note 106.

¹¹⁸ Social scientists have observed that international movements in this context tend to occur most frequently where pre-existing relationships of migration exist between the sending and receiving countries. See, for instance, Kaenzig & Piguet, *supra* note 103, at 171.

¹¹⁹ Patricia Weiss Fagen, *Receiving Haitian Migrants in the Context of the 2010 Earthquake*, NANSEN INITIATIVE (2013), at <https://www.nanseninitiative.org/central-america-consultations-intergovernmental/>; Nikola Gütermann & Eve Schneider, *The Earthquake in Haiti*, in THE STATE OF ENVIRONMENTAL MIGRATION 39 (François Gemenne, P Brücker & J Glaser eds., 2011).

¹²⁰ For instance, other scenarios might include movement away from communities that are exposed to the repeated impact of sudden-onset events.

¹²¹ See also McAdam, *supra* note 39, at 52-98.

¹²² On the UN approach, even the concept of ‘disaster risk’ is defined in terms of potential impact at the collective level on ‘a system, society or a community’ (*supra* note 41, 14).

These three strands of movement also suggest that any analytical distinction between sudden- and slow-onset disasters may prove less relevant for our purposes than the recognition that hazardous events and disasters can have both short-term and longer-term impacts on mobility at the household level, even if their relative proximity as push factors for mobility may diminish over the longer-term. In general, then, these conclusions point to a need for researchers to focus on the broader ways in which hazards impact on mobility, with ‘disasters’ but one way in which hazards can shape movement. But what does this mean for the law? Certainly, the ‘disaster’ concept was not designed to be applied as a legal basis for regulating movement. At the same time, it has definite advantages over concepts such as ‘climate change’ or ‘the environment’ that suggest its application to this legal context merits consideration. As a potential basis for regulating entry and stay by non-nationals, though, the empirical evidence suggests that law-makers will need to reflect carefully on whether to use the concept of ‘disasters’ strictly as a threshold that requires that a hazard has an impact at the collective level in the affected country or instead to advance a more granular approach to the wider ways in which ‘hazardous events’ or the underlying ‘hazards’ impact on mobility options at the individual or household level.

Other Forms of Environmental Impact on International Mobility

The legal literature is principally concerned with environmental factors as a driver of international mobility or ‘push factor’. It is recognised that this causality can play out in diverse scenarios – for instance, as a result of sudden-onset disasters, slow-onset disasters, the impact of climate on conflict over natural resources etc. – but the emphasis remains on how such phenomena act as drivers for movement by affected persons.¹²³ More recently, though, some legal scholars have argued in favour of a broader conception of this causal nexus by pointing to the possibility that environmental factors also might shape mobility by acting as a ‘pull’ factor due to the new opportunities created by climate change or by mitigation or adaptation activities.¹²⁴ Building on those analyses, the present study contends that engagement with the empirical evidence from the Americas discloses still other ways in which disasters may shape the phenomenon of international mobility. Moreover, these further configurations of the environment-mobility nexus pose particularly acute questions for the law, especially in relation to travel, entry and stay for affected persons.

Certainly, the evidence from the Americas confirms that not all international mobility in the context of environmental threats will take the form of a spontaneous movement by affected persons. In the Pacific region, scholars have long debated the prospect of inhabitants of ‘sinking’ small island states being relocated to other countries and the legal implications of such measures.¹²⁵ However, data from the Americas verifies that organised transfers of disaster-affected persons by states already take place in the form of evacuations carried out before or shortly after a sudden-onset disaster.¹²⁶ Such evacuations are often undertaken by a

¹²³ See, for example, Kälin, *supra* note 33, at 84-92.

¹²⁴ Mayer, *supra* note 21, at 22-25.

¹²⁵ See, for example, Bruce Burson, Walter Kälin, Jane McAdam & Sanjula Weerasinghe, *The Duty to Move People Out of Harm’s Way in the Context of Climate Change and Disasters*, 37 REFUGEE SURVEY QUARTERLY 379 (2018); Jane McAdam & Elizabeth Ferris, *Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues*, 4 C.J.I.C.L. 137 (2015).

¹²⁶ Evacuations can also involve internal movement, as with the 2017 precautionary wholesale mandatory evacuation by Antigua and Barbuda of the island of Barbuda and by the Bahamas of its southern islands. See Kate Lyons, *The Night Barbuda Died: How Hurricane Irma Created a Caribbean Ghost Town*, THE GUARDIAN, Nov. 20, 2017; - , *Bahamas to Evacuate Islands in path of “Irma”*, ASSOC. PRESS, Sep. 6, 2017.

foreign state for those of its nationals unfortunate enough to be caught up in a serious disaster overseas. However, in the Americas, empirical data shows that nationals of the disaster-affected country have sometimes also been evacuated to other countries by those states. Examples include the evacuations of the population of Montserrat when the volcano erupted in 1995 and certain profiles of Haitian nationals evacuated on medical or similar grounds after the 2010 earthquake by Canada, Mexico and the United States.¹²⁷ This raises the question of how the law treats such organised transfers in terms of travel, entry and stay.

Crucially, studies of the Americas region show that disasters can impact on a range of other legal aspects of international mobility for aliens.¹²⁸ Thus, where a disaster occurs in the country of origin, it may limit possibilities for return, whether voluntary or enforced, with particular legal implications in terms of removal and stay for nationals of that country. It may also reduce the flow of resources from family or businesses in the home country that are needed for the alien to support maintenance during studies or other lawful forms of stay in the host country. Likewise, where a disaster occurs in the host country, it may also impede the alien's basis for stay as a result of the death of the family member on whom legal status depends, the destruction of the business that provides the basis for a work permit or an inability to comply with immigration reporting restrictions due to damage to transport and communication infrastructures in the host country. The disaster may also reduce or interrupt the capacity of immigration authorities in the host country to process applications from aliens for travel, entry and stay. Overall, these scenarios suggest that the law needs to take a broader conception of the environment-mobility nexus if it is to adequately regulate international mobility in the context of environmental threats.

III. INTERNATIONAL PROTECTION LAW IN THE AMERICAS

International law scholarship treats international mobility in the context of environmental pressures as a new challenge that the existing law does not yet adequately address. Moreover, most contributors to this debate frame that legal gap, and its solution, principally in terms of international protection for affected persons. At first glance, recent practice in the Americas appears to confirm this point. Certainly, states rarely extend international protection to persons fleeing environmental threats, despite claims by scholars as to the relevance of certain regional legal instruments. Yet, a detailed analysis of legal practice in this region offers a more nuanced understanding. Crucially, it shows that states have actually long recognised the challenge of international mobility caused by disasters and, initially at least, dealt with it as a matter of refugee protection. Further, although this international protection approach waned as states in the Americas increasingly became integrated into the global refugee law regime, the underlying legal challenge was not discounted. Rather, a distinct new legal approach toward the entry and stay of persons affected by a disaster can be discerned in some of the national laws on refugees and 'protection' adopted by states in the Americas.

Disasters and International Protection

At present, most states in the Americas are parties to the main UN treaties on refugee protection and have incorporated pertinent aspects of their 'universal' refugee definition into national law.¹²⁹ In Latin America, fifteen states have also incorporated the 'regional'

¹²⁷ Cantor, 2015, *supra* note 10, at 13.

¹²⁸ Examples drawn from Cantor, 2015, *supra* note 10, at 13-14.

¹²⁹ This defines a 'refugee' positively as any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of

expanded refugee definition endorsed by the Cartagena Declaration into their national law.¹³⁰ In a small number of states, national law also provides for ‘complementary’ forms of international protection based on *non-refoulement* standards in international human rights treaties.¹³¹ Some legal scholars argue that these universal and regional treaty norms could be interpreted to provide international protection to persons fleeing disasters.¹³² Some limited practice exists in support of this proposal. Thus, after the 2010 earthquake in Haiti, several Latin American states did recognise a small number of Haitians as ‘refugees’ due to the violence unleashed by the disaster.¹³³ Similarly, the French territories of the Antilles and Guiana granted ‘subsidiary’ forms of complementary international protection to some Haitian asylum-seekers in light of the security and other risks generated by the earthquake.¹³⁴

Crucially, though, in each case where states in the Americas did grant international protection, whether under refugee law or complementary forms of international protection, this was conferred due to the breakdown in the institutions of national protection in Haiti and associated risks of violence generated by the disaster. The fact that such violence and the lack of national protection resulted from a disaster, as opposed to some other cause, was thus treated as legally irrelevant for the purposes of determining international protection. In fact, as a matter of national law, almost no state in the Americas treats a disaster as, *in itself*, a basis for international protection under ‘universal’ or ‘regional’ refugee definitions at the international level.¹³⁵ Indeed, in some states, national law expressly rules out such an interpretation.¹³⁶ In practice, certain states have even gone so far as to channel asylum claims

that country’. See Convention relating to the Status of Refugees, July 28, 1951, 189 UNTS 150, Art. 1A(2) (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267, Art. 1(2) (entered into force Oct. 4, 1967) [hereinafter Protocol]. The Caribbean is the exception in this region: only eight of 13 states are parties to the Protocol but only four have incorporated the refugee definition into national law and policy (Cantor, 2018, *supra* note 10, at 64).

¹³⁰ This defines ‘refugees’ also as ‘persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’. Cartagena Declaration on Refugees, Nov. 1984, Conclusion 3, *reprinted in* 2 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS: REGIONAL INSTRUMENTS 206, UN Sales No. GV.E.96.0.2 (1995) [hereinafter Cartagena Declaration]. Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru and Uruguay incorporate the expanded definition in national legislation and Costa Rica applies it in national law by order of the courts.

¹³¹ International human rights law prohibitions on *refoulement* to a territory where the risk of torture exists form the main source of ‘complementary’ obligations to those expressed by refugee law. In the Americas, national law in countries such as Canada, Chile, Colombia, Costa Rica, Guatemala, Mexico and the United States mostly reflects the standards expressed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85, Art. 3 (entered into force June 26, 1987). See Cantor, 2018, *supra* note 10, at 41 and 52–53.

¹³² See, for example, Kälin & Schrepfer, *supra* note 73, at 34, who argue that the Cartagena Declaration definition may accommodate disaster-affected persons under the element relating to ‘other circumstances which have seriously disturbed public order’.

¹³³ Mexico, Panama, Ecuador and Peru recognised some Haitians as refugees under the definitions provided by one or other instrument based on the rise in insecurity in Haiti resulting from the 2010 earthquake (Cantor, 2015, *supra* note 10, at 17–18).

¹³⁴ Cedric Audebert, *The Recent Geodynamics of Haitian Migration in the Americas: Refugees or Economic Migrants?*, 34 REVISTA BRASILEIRA DE ESTUDOS DE POPULAÇÃO 55, 61 (2017). The ‘subsidiary protection’ provided under European Union law is based ultimately on the *non-refoulement* protection provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, Art 3 (entered into force Sept. 3, 1953), to which France is also a party.

¹³⁵ Cuba is the exception to this consensus. See text at note 139 and following.

¹³⁶ For example, Mexico expressly interprets the ‘other circumstances which have seriously disturbed public order’ element of the Cartagena Declaration refugee definition as applicable only to ‘acts attributable to man’.

by nationals of a disaster-affected country out of the international protection procedures so they can be resolved instead under other legal provisions unrelated to international protection.¹³⁷ Thus, states in this region tend not to view persons fleeing a disaster as requiring international protection, except in certain specific cases where its impact includes clear risks of persecution or violence that fit with existing concepts of international protection. The fact of the disaster itself, though, is treated as legally irrelevant to determining international protection.

On its face, the current approach might seem to confirm the presumption that law in the Americas has yet to get to terms with the challenge of international mobility linked to environmental threats. However, a retrospective analysis of legal practice in this region shows that states have not always taken this approach to the application of international protection law. Indeed, between 1952 and 1980, national law in the United States expressly provided for different categories of ‘persons uprooted by catastrophic natural calamity’ to be resettled to the United States as ‘refugees’.¹³⁸ Moreover, during this early period, the United States was not alone in viewing the challenge of persons displaced by disasters as a matter of refugee protection. For instance, in 1978, Cuba adopted a definition of refugees as including, *inter alia*, persons who leave their country ‘due to cataclysm or other phenomena of nature’.¹³⁹ In 1979, the government of Trinidad and Tobago also contemplated the challenge of ‘refugees from natural disasters’ and decided that such cases ‘be decided, when the need arises, on the basis of the circumstances prevailing in Trinidad and Tobago at the particular period in time’.¹⁴⁰

These examples show that, contrary to the assumption by some legal scholars that international mobility linked to environmental threats represents a new legal gap, this challenge has long been recognised in the practice of certain states in the Americas. Indeed, the initial approach of those states to legally resolving the challenge by adopting unilateral and *sui generis* refugee definitions in national law waned only during the 1980s, as states across the Americas increasingly joined the UN refugee treaties and incorporated their ‘universal’ refugee definition in national law. As a result, in this region today, the earlier approach persists solely in Cuba, which remains outside the UN refugee treaty regime. The role played by international law in this shift in approach is noteworthy. In this instance, whereas the legal scholarship usually envisages a positive role for international law in extending international protection to persons fleeing disaster contexts, here it appears to have curtailed the protection available to such persons under existing national law and thus helped create a ‘gap’ as a result of promoting the harmonisation of national law with UN refugee treaty law. Although this observation cannot be generalised beyond these specific examples, it calls us to think more critically about the relationship between national and international law in responding to this challenge.

See Reglamento de la Ley sobre Refugiados y Protección Complementaria, Art. 4(XI) (Feb. 16, 2012), at www.diputados.gob.mx/LeyesBiblio/regley/Reg_LRPC.pdf, Mexico).

¹³⁷ See for example, the Brazilian procedural response to Haitian asylum-seekers after the earthquake (Sanjula Weerasinghe, *In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change*, 39 UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES 1, 64-75 (2018)).

¹³⁸ Royce Bernstein Murray & Sarah Petrin Williamson, *Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti*, 255 CENTER FOR GLOBAL DEVELOPMENT WORKING PAPER 1, 27-30 (2011).

¹³⁹ Decreto (Decree) No. 26, Art. 80 (Jul. 19, 1978), available at <http://juriscuba.com/wp-content/uploads/2015/12/Ley-migracion.reglamento-actualizada-2012.pdf>, Cuba.

¹⁴⁰ Cabinet Decision, Minute No. 4809 (Nov. 16, 1979), Trinidad and Tobago.

An Alternative Legal Approach

From the 1990s, an alternative legal approach to the challenge of international mobility linked to environmental threats can be discerned in the broader ‘international protection’ practice of certain states in the Americas. The creation of ‘temporary protected status’ (TPS) in the national law of the United States offers one prominent example. Indeed, legal scholarship routinely cites the ‘environmental disaster’ limb of TPS as one of a small number of protection provisions at the level of national law. This provision allows the U.S. authorities to designate a foreign state (or part of it) for TPS relief if:

- (i) there has been 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,
- (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
- (iii) the foreign state officially has requested designation under this subparagraph;¹⁴¹

At the individual level, access to TPS is usually limited to nationals of the designated country who are already present in the United States.¹⁴² It thus serves principally to temporarily regularise the immigration status of persons present irregularly. In most cases, though, TPS status has turned out to be anything but ‘temporary’, with the affected countries repeatedly re-designated for TPS owing to the continuation of unstable conditions.

Foreign countries are designated for TPS only relatively infrequently. However, over the years, the status has benefitted a substantial number of persons.¹⁴³ Thus, over 331,000 nationals of Honduras, Nicaragua and El Salvador benefitted from stay in the United States from TPS designations under this ‘environmental disaster’ limb following the 1998 Hurricane Mitch in Honduras and Nicaragua and the 2000 earthquake in El Salvador. Likewise, an additional 55,000 Haitian nationals received TPS in the United States after the 2010 earthquake in Haiti. The Haiti designation, though, was done under a separate TPS limb that requires instead that the U.S. authorities determine the existence of ‘extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety’, unless ‘permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States’.¹⁴⁴ The 1997 volcanic eruption in Montserrat was designated simultaneously under both this ‘extraordinary and temporary conditions’ limb and that relating to ‘environmental disaster’.

The TPS provision reflects the recognition that wider humanitarian circumstances beyond the rules of international protection law may legitimately be considered for stay.

¹⁴¹ Immigration and Nationality Act (INA), sec. 244(b)(1)(B) (Nov. 29, 1990), United States.

¹⁴² See, for example, Designation of Haiti for Temporary Protected Status (Jan. 21, 2010), Federal Register, Vol. 75, No. 13, United States. In this regard, the re-designation of Haiti in 2011 to offer access to TPS for Haitians who had been continuously residing in the United States from a date prior to one year *after* the earthquake is exceptional. See Extension and Redesignation of Haiti for Temporary Protected Status (May 13, 2011), Federal Register, Vol. 76, No. 97, United States

¹⁴³ Figures sourced from Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, CONGRESSIONAL RESEARCH SERVICE, RS20844 (2020), at <https://fas.org/sgp/crs/homesec/RS20844.pdf>. TPS has also been used for contexts of war. A full list of TPS countries and designation documentation, can be located at <https://www.uscis.gov/humanitarian/temporary-protected-status> (visited Apr. 21, 2020).

¹⁴⁴ INA, sec. 244(b)(1)(C), United States.

Indeed, it is not granted on the basis of any international obligation. Moreover, its relationship to ‘international protection’ is somewhat tenuous. For instance, whilst the ‘extraordinary and temporary conditions’ at least speaks to ‘protection’ concerns in terms of the ‘safety’ of returning nationals, the ‘environmental disasters’ limb turns on relations between the United States and the disaster-affected state and the latter’s capacity to ‘adequately’ receive returns. Moreover, even for disasters that meet the formal criteria for one or other limbs, no legal expectation exists that TPS will be designated. Nor can individuals apply for protection absent a determination of TPS for their country by the U.S. authorities, which remains at the complete discretion of the U.S. authorities. Although legal scholars have criticised TPS on those grounds,¹⁴⁵ the analysis here is not intended to downplay its utility but simply points out that it reflects a distinct legal approach not easily aligned with wider notions of international protection based on the severance of the protection relationship between individuals and their state of origin and an envisaged risk of serious harm if returned.

Most scholarship views TPS as an isolated example of states legislating for mobility in the disaster context. However, a brief review of national refugee law instruments in the Americas suggests that it actually forms part of a wider tendency to legislate for discretionary powers to allow entry and stay on broader humanitarian grounds, particularly where protection claims are not recognised. These powers have been used to benefit persons affected by disasters. In the Caribbean, for instance, the power to grant leave to remain to rejected asylum-seekers on ‘humanitarian grounds’ was applied by Jamaica to Haitians after the 2010 earthquake.¹⁴⁶ Similar powers exist in the refugee laws of the Cayman Islands and Montserrat in respect of rejected asylum-seekers who cannot be returned for ‘obvious and compelling reasons’.¹⁴⁷ Suriname allows a residence permit to be granted to a rejected asylum-seeker if ‘he cannot in the light of the social and political situation in his country of origin and his personal circumstances reasonably be required to return to that country’.¹⁴⁸ Like TPS, these provisions treat the disaster as an event that, in its own right, may engage broader humanitarian considerations for the entry and stay of persons who do not qualify for international protection. Rooted in the positive exercise of state discretion in immigration matters, these provisions in turn reflect a wider approach to addressing such situations in the broader immigration law of this region.

IV. IMMIGRATION LAW IN THE AMERICAS

The legal literature on the environment-mobility nexus largely overlooks how wider immigration law could address international mobility challenges linked to adverse environmental conditions.¹⁴⁹ This partly reflects a perception that the situation of persons

¹⁴⁵ See discussion in Cantor, 2015, *supra* note 10, at 37-40. More recently, also Bill Frelick, *What’s Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime*, 8 J. MIG. & HUMAN SECURITY 42 (2020).

¹⁴⁶ Refugee Policy, paras. 12(a)(iii) and 13(f) (2009), available at <https://www.refworld.org/pdfid/500000def.pdf>, Jamaica.

¹⁴⁷ Immigration Law, Law 34 of 2003, sec. 84(8) (rev. ed. Jul. 17, 2015), at www.immigration.gov.ky/portal/pls/portal/docs/1/12030142.PDF; Cayman Islands; Immigration Act, Laws of Montserrat ch 13:01, sec. 45(5) (rev. ed. Dec. 27, 2012), available at <https://www.refworld.org/docid/5a7c593f4.html>, Montserrat.

¹⁴⁸ Aliens Act 1991, Law 16 of 1992, Art. 17 (Jan. 16, 1992), available at <https://www.refworld.org/docid/3ae6b4fd0.html>, Suriname.

¹⁴⁹ The same is also true for disaster risk management law and policy frameworks. These mostly address cross-border mobility issues only in relation to the entry of personnel and assistance to a disaster-affected state, although some regional disaster risk management forums in the Americas have recently made general reference

fleeing environmental threats is analogous to that of refugees, thus requiring ‘international protection’ rather than immigration relief.¹⁵⁰ Yet it also reflects a tendency to view the problem and its solution in terms of international law, thus discounting the relevance of immigration law as a field constituted principally at the national level.¹⁵¹ Indeed, most of the legal scholarship is quite dismissive of the role of national law in general.¹⁵² Even so, in the Pacific region, certain scholars have argued that international movement linked to climate change could be accommodated within existing migration mechanisms at the bilateral or regional level or by making tweaks to national immigration law in Australia or New Zealand.¹⁵³

In the Americas, the insight that immigration law might accommodate international mobility linked to environmental threats represents an important starting point for analysing state practice. Yet, in contrast with the relative paucity of documented legal practice in other regions of the world, the use of immigration law to address this mobility challenge by states in the Americas is not merely a matter of speculation for the future.¹⁵⁴ Indeed, the creation by the United States of an ‘environmental disaster’ limb within TPS, which is essentially an immigration law provision for regularising status in disaster contexts rather than a tool of international protection,¹⁵⁵ in 1990 is just one early example of pertinent practice in this region. In Central America, for example, various states adopted legal decrees in 1998 to regularise the immigration status of irregular migrants from other countries in the region that had been devastated by the effects of Hurricane Mitch.¹⁵⁶ In Costa Rica alone, the resulting programme regularised around 150,000 disaster-affected migrants.¹⁵⁷ It thus seems that the use of national immigration law in the Americas to resolve mobility challenges linked to the environment already represents fairly long-standing practice by some states in this region.

This study of immigration law advances legal debate on the environment-mobility nexus on several points. Most importantly, it shows just how widespread is the use of immigration law instruments and concepts to resolve these challenges among states in the Americas. It starts by illustrating how ‘ordinary’ migration categories in national immigration law in this region have accommodated international mobility challenges linked to environmental factors. It then shows how a range of ‘exceptional’ migration categories have

to the promotion of mechanisms to receive persons displaced across borders by a disaster (Cantor, 2018, *supra* note 10 at 26-30). Yet such provisions seem to remain absent from disaster risk management frameworks at the national level in the Americas, except in Costa Rica (Michelle Yonetani, *Mapping the Baseline: To what Extent are Displacement and Other Forms of Human Mobility Integrated in National and Regional Disaster Risk Reduction Strategies?*, PLATFORM ON DISASTER DISPLACEMENT (2018), at <https://disasterdisplacement.org/portfolio-item/drrmapping>, at 29-31).

¹⁵⁰ See note 77 and corresponding text.

¹⁵¹ See note 72 and corresponding text.

¹⁵² See notes 65-71 and corresponding text.

¹⁵³ See note 97 and corresponding text.

¹⁵⁴ As such, this existing practice also provides a counterpoint to analyses that claim the security fears of states have prevented them from using immigration law to address mobility linked to environmental factors (see, for instance, Anastasiou, *supra* note 65, at 187-9).

¹⁵⁵ See text corresponding to notes 141-145 and following.

¹⁵⁶ Decreto No. 27457-G-RE (Nov. 24, 1998), at http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=1&nValor2=17242, Costa Rica; Decreto No. 94-98 (Dec. 21, 1998), Nicaragua; Decreto No. 34 (Feb. 5, 1999), at <https://docs.panama.justia.com/federales/decretos-ejecutivos/34-de-1999-feb-9-1999.pdf>, Panama.

¹⁵⁷ Abelardo Morales Gamboa, AMNISTÍA MIGRATOTIA EN COSTA RICA: ANÁLISIS DE LOS ALCANCES SOCIALES Y DEL IMPACTO DEL RÉGIMEN DE EXCEPCIÓN MIGRATORIA PARA LOS INMIGRANTES DE ORIGEN CENTROAMERICANO EN COSTA RICA, 31 (1999), available at <http://www.flacsoandes.edu.ec/libros/digital/43559.pdf>.

also been created and deployed by states to accommodate persons whose legal situation cannot be resolved by application of ‘ordinary migration categories’. Overall, this analysis reinforces the impression of a shift in this region away from treating such challenges as matters of international protection to an approach based on immigration law.¹⁵⁸ This means that, contrary to the assumptions of the existing legal scholarship, we cannot simply treat the regulation of mobility in this context as a blank canvas for international law. Rather, we must acknowledge that a distinctive legal approach to the problem already exists in the Americas and that it finds articulation among states not only in the global North but also in the global South.

‘Ordinary’ Migration Categories

A standard function of national immigration law is to codify and regulate access to what we might call ‘ordinary’ migration categories. These ordinary migration categories usually exist to facilitate migration that is based primarily on ‘pull’ factors in the country of destination or, in other words, an actual or prospective link on the part of the individual applicant with that country. Examples of short-term ordinary migration categories include such categories as visits or tourism, whilst longer-term ones include studies, employment or joining family in the country of destination. Thus, as a basis for travel, entry or stay by non-nationals, circumstances in the country of origin do not provide the principal rationale for these categories, which turns rather on certain forms of connection to the country of destination.¹⁵⁹ Even so, and despite the scant attention paid to these migration pathways in existing legal research on the environment-mobility nexus, this study shows that, in the Americas, they have accommodated mobility linked to environmental factors in a number of important ways.

Firstly, it is clear that these ordinary migration categories are used in practice by persons leaving a disaster-affected country as a way to enter or stay in another country. For sudden-onset disasters, the empirical data points to a spike in long-term regular migration to the United States from Central America and the Caribbean in the year after a sudden-onset disaster hits one of those countries.¹⁶⁰ For slow-onset disasters, the documented increase in migration to the United States from parts of Mexico affected by such phenomena provides a similar indication.¹⁶¹ In tandem, short-term ordinary migration categories have also provided a legal basis for entry by inhabitants of border regions fleeing the impact of an oncoming sudden hazardous event on their side of the border.¹⁶² In the Americas, the use of such ordinary migration categories has particular salience. Not only is this a region with significant intra-regional diaspora populations,¹⁶³ but in this region international mobility linked to environmental threats tends to follow existing migration routes and pathways where possible.¹⁶⁴ As a result, in the Americas, the prospect that people from a disaster-affected country might have family or other links to a destination country in this region is not remote,

¹⁵⁸ See Part III above.

¹⁵⁹ This is the case even for categories, such as those relating to seasonal labour migration, that aim also to provide a secondary benefit to countries of origin, such as development gains through remittances, skills acquisition and knowledge transfer, alongside the principal benefit of temporarily linking foreign workers to gaps in the labour market of the receiving country.

¹⁶⁰ See notes 115-118 and corresponding text.

¹⁶¹ See notes 111-112 and corresponding text.

¹⁶² See note 110 and corresponding text.

¹⁶³ Organization of American States, INTERNATIONAL MIGRATION IN THE AMERICAS: FOURTH REPORT OF THE CONTINUOUS REPORTING SYSTEM ON INTERNATIONAL MIGRATION IN THE AMERICAS (2017).

¹⁶⁴ See examples cited in Part II.

especially among those sectors of society which possess the resources to migrate internationally.

The fact that ordinary migration categories are able to accommodate a proportion of international movement linked to environmental push factors has far-reaching implications for debate about the legal ‘gap’ in relation to such mobility and its resolution. On the one hand, it suggests that less of a gap in the law exists in reality than may be assumed in the abstract. This also implies that ‘solutions’ must not focus exclusively on creating special new legal regimes for affected persons, but more generally must also seek to ensure that states fairly apply these ordinary migration categories, especially in relation to disaster-affected countries.¹⁶⁵ The imposition of undue restrictions on such migration categories might well have a greater negative impact on prospects for the entry and stay of persons affected by environmental threats than the absence of a dedicated ‘protection’ regime. On the other hand, in principle, the fact of the disaster is legally irrelevant to the application of the ordinary migration categories, which turn instead on links to the destination country. Indeed, in the Americas, States clearly treat that criterion as the principal basis for determining the entry or stay of non-nationals, rather than any particular kind of ‘push’ factor that may exist in the country of origin.

Secondly, for applicants affected by a disaster, some states in this region apply the formal criteria of these ordinary migration categories in a flexible manner. For instance, in Canada, immigration law allows the authorities to expedite applications under the ordinary migration categories, or waive one or more formal criteria, if justified by ‘humanitarian and compassionate considerations’.¹⁶⁶ This is applied in response to disaster situations, and, for some serious disasters, ‘special measures’ policies are adopted by the government that instruct officials to exercise these powers in order to expedite applications or waive formal criteria where requested by applicants ‘seriously and directly affected’ by the disaster.¹⁶⁷ Meanwhile, the United States standing policy of ‘temporary relief measures’ encourages immigration officials to exercise their innate discretion to expedite applications or waive the formal criteria for certain ordinary migration categories at the request of an individual applicant.¹⁶⁸ Based on the periodic announcements reminding migrants of this policy, these relief measures seem to be applied mainly to those affected by ‘natural disasters’, not only overseas but also in the United States itself.¹⁶⁹

¹⁶⁵ The use of visa regimes, which are often imposed on poorer countries that are more vulnerable to the impact of hazards, is a particular cause for concern. In the Americas, the countries whose nationals are most frequently required to secure a visa for lawful travel to another country within this region are Cuba, the Dominican Republic and Haiti, although many other poor countries in this region that are regularly affected by disasters do not experience such extensive visa requirements for travel in the Americas. See Cantor, 2018, *supra* note 10, at 36, 47 and 59.

¹⁶⁶ Immigration and Refugee Protection Act (IRPA), sec. 25 (2001), Canada.

¹⁶⁷ These ‘special measures’ policies have been adopted, *inter alia*, for the 1998 Turkey earthquake, the 2004 Asian tsunami, the 2010 Haiti earthquake and the 2013 Typhoon Haiyan in the Philippines (Cantor, 2015, *supra* note 10, at 33-34).

¹⁶⁸ See USCIS, Immigration Help Available to Those Affected by Natural Disasters, at <https://www.uscis.gov/news/alerts/immigration-help-available-those-affected-natural-disasters>. For comment, see Cantor, 2015, *supra* note 10, at 34-35.

¹⁶⁹ Situational ‘temporary relief measures’ have been announced, *inter alia*, for such disasters overseas as: tropical storms in the Caribbean in 2008; the 2010 Icelandic volcano eruption; the 2010 Chile earthquakes; Tropical Storm Agatha in Guatemala in 2010; the 2011 earthquakes and tsunami in Japan; extreme flooding in Central America in 2011; Hurricane Sandy in the Caribbean in 2012; Typhoon Haiyan in the Philippines in 2013; Hurricane Harvey in the United States in 2017; California Wildfires in 2007 and 2018; Hurricane

This flexible approach to the criteria for entry or stay under the ordinary migration categories is particularly codified in the law and policy of these global North states. However, as a legal practice in the Americas, the approach is also evident among states in the global South. In Central America, for example, Costa Rica has applied a broader understanding of the ‘family’ category than normally permitted by law so that Nicaraguans present irregularly but personally affected by a sudden-onset disaster in Nicaragua could stay lawfully as family members, with all the benefits of that regular status.¹⁷⁰ Likewise, in South America, Colombia regularised some Haitians arriving after the 2010 earthquake by flexibly applying work and student categories.¹⁷¹ In the Caribbean, Dominica and Antigua and Barbuda relaxed certain eligibility requirements of the ordinary migration categories for Haitians in 2010.¹⁷² In the 2017 hurricane season, territories such as Montserrat and the British Virgin Islands, also lifted immigration restrictions or waived visa requirements to facilitate entry by affected persons.¹⁷³ Overall, assimilating disaster-affected persons to ordinary migration categories has the advantage of access to ensuing regular status and rights. The states’ flexibility in this respect contrasts sharply with their rigid application of refugee law, supporting a view that they see mobility in this context principally as a matter of immigration law rather than international protection.

Thirdly, these migration pathways are also beginning to be shaped by free movement accords. At present, ‘citizens’ of certain sub-regional integration mechanisms in Central America, South America and the Caribbean benefit from specific forms of treaty-based free movement across borders within the respective bloc.¹⁷⁴ Some scholars have already argued in favour of extending free movement arrangements as a means of facilitating migration in the context of environmental threats.¹⁷⁵ Yet States in the Americas have already begun to use such free movement provisions specifically to facilitate entry and stay by nationals of a disaster-affected country in their sub-regional bloc. For instance, after Hurricane Maria devastated Dominica in 2017, the authorities in Trinidad and Tobago used the CARICOM short-term visa-free stay provision to shelter affected Dominicans.¹⁷⁶ In tandem, Antigua, Grenada, St Lucia and St Vincent also welcomed Dominicans under the OECS provision for entry and short-term stay, expediting those cases and waiving documentary requirements where documents had been lost in the disaster.¹⁷⁷ Lacking disaster-specific provisions, these accords now seem to offer additional useful ordinary migration categories for states to apply in disasters.

Florence in the United States in 2018; and the 2018 Typhoon Mangkhut in the Philippines. Announcements may be accessed at <http://www.uscis.gov/humanitarian/special-situations/previous-special-situations>.

¹⁷⁰ Cantor, 2015, *supra* note 10, at 32.

¹⁷¹ Ibid, at 33.

¹⁷² Ibid, at 35.

¹⁷³ Caribbean Migration Consultations (CMC), *Consultation towards a Framework for Regional Cooperation on Human Mobility in the context of Disasters and the Adverse Effects of Climate Change in the Caribbean* (2019) at https://caribbeanmigration.org/sites/default/files/report-climate_change_and_human_mobility_f_0.pdf, 15.

¹⁷⁴ Relevant mechanisms include, respectively, the System for Central-American Integration (SICA), the Common Market of the South (MERCOSUR) and, for the Caribbean, the Caribbean Community (CARICOM) and the Organization of Eastern Caribbean States (OECS). See Cantor, 2018, *supra* note 10, at 36-37, 47-48 and 59.

¹⁷⁵ Ama Francis, *Free Movement Agreements & Climate-induced Migration: A Caribbean Case Study* (2019) at columbiaclimatelaw.com/files/2019/09/FMAs-Climate-Induced-Migration-AFrancis.pdf; Wood, *supra* note 84; Black et al, *supra* note 58, at 449 .

¹⁷⁶ Francis, *supra* note 175, at 18.

¹⁷⁷ Ibid; -, *Antigua Prepares for Influx of Dominicans*, BARBADOS TODAY, Sept. 24, 2017, at <https://barbadostoday.bb/2017/09/24/antigua-prepares-for-influx-of-dominicans/>.

'Exceptional' Migration Categories

National law also often provides for what we might call ‘exceptional’ migration categories. These categories usually take the form of general legal provisions, or powers conferred on immigration officials, created to regulate special or exceptional situations that fall outside the ordinary migration categories. They are squarely concerned with areas of immigration law where states enjoy a wide sovereign discretion, as where an applicant lacks a substantive connection to the destination state or a claim under binding rules of international protection but other countervailing factors still exist. In the Americas, pertinent legal practice makes it clear that many states view disasters as precisely one such factor where special consideration may be required, in relation to the application not only of ordinary migration categories but also these exceptional migration categories. Given the diversity of legal systems and juridical perspectives across this region, it is appropriate to analyse exceptional migration categories, and their application to disaster situations, along a spectrum of ‘codification’ that reflects the different degrees to which they are expressly codified by national immigration law.

At one end of this spectrum, the discretionary power to resolve exceptional immigration cases takes the form of an inherent faculty not specifically codified by immigration legislation, as is apparently the case in Venezuela.¹⁷⁸ A little further along are states where the existence of this power is confirmed by immigration law but its scope is left open to the discretion of the national authorities, as in Colombia and Paraguay.¹⁷⁹ Similarly, in the Caribbean, the law in British overseas territories and former colonies often gives officials the discretion to postpone, or overlook, deciding whether a non-national falls into one of the categories of ‘prohibited’ immigrants who must be denied entry and instead grant leave to stay.¹⁸⁰ Crucially, across the Americas, states have exercised this kind of broad discretionary powers to grant entry or stay to disaster-affected persons on a case-by-case basis. In 2010, the Dominican Republic used apparently innate discretionary powers to grant entry to certain categories of Haitians affected by the earthquake on a humanitarian basis.¹⁸¹ After Hurricane Irma in 2017, the U.S. unincorporated territory of Puerto Rico used inherent discretion to grant entry to thousands of persons evacuated from the British Virgin Islands, Dutch Sint Maarten and French Saint Martin.¹⁸² In Chilean law, a discretionary power to

¹⁷⁸ See note 185 and corresponding text.

¹⁷⁹ For example, Colombian law provides for a power to authorise entry and stay on extraordinary grounds where this is necessary (Decreto 1067, Art. 2.2.1.11.2.5 (May 26, 2015), as modified by Decreto No. 1325, Aug. 12, 2016, at https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1067_2015.htm, Colombia). In Paraguay, the law gives the Director General a general discretionary power to ‘carry out other acts’ necessary with complying with the objectives of the immigration authorities (Ley No. 978, Art. 146(g) (Jun. 27, 1996), at https://www.aduana.gov.py/uploads/archivos/LEY%20N_%20978%20Migraciones.pdf, Paraguay).

¹⁸⁰ In the Caribbean, this is the case for Antigua and Barbuda, the Bahamas, Barbados, Dominica, Grenada, Jamaica, Saint Vincent and the Grenadines, and Trinidad and Tobago, as well as the British Overseas Territories of Anguilla, British Virgin Islands, Cayman Islands and Montserrat (see Cantor, 2018, *supra* note 10, 60). On the mainland, the same is true for the former British colonies of Belize and Guyana (*ibid*, 37 and 48). In Canada, officials can grant temporary resident status to persons who do not meet the requirements of the regular migration rules where they are ‘of the opinion that it is justified in the circumstances’ (Immigration and Refugee Protection Act, sec. 24(1)).

¹⁸¹ Cantor, 2015, *supra* note 10, at 61.

¹⁸² Alvin Baez, *Puerto Rico Opens Arms to Refugee from Irma’s Caribbean Chaos*, REUTERS, Sep. 13, 2017, at <https://uk.reuters.com/article/us-storm-irma-caribbean/puertorico-opens-arms-to-refugees-from-irmas-caribbeanchaos-idUKKCN1BO26P>; Joanna Walters, *US Virgin Islands Refusing Entry to Non-American Irma Evacuees, Survivors Say*, THE GUARDIAN, Sept. 12, 2017, at <https://www.theguardian.com/world/2017/sep/12/us-british-virgin-islands-hurricane-irmarefused-entry>.

grant stay in cases outside the ordinary migration categories was applied to benefit a small number of Haitians after the earthquake.¹⁸³

However, these broad discretionary powers are also used to facilitate stay on a group basis. In some cases, this involves creating special regularisation programmes to which nationals of the disaster-affected country who are already present irregularly in the destination country can apply. In 1998, Central American states created such regularisation programmes for migrants from countries affected by Hurricane Mitch.¹⁸⁴ In 2010, similar one-off regularisation programmes were created for Haitians present in Ecuador and Venezuela, using broad immigration discretion based on, respectively, statutory and innate powers.¹⁸⁵ Such powers have also been invoked to create legal measures that fall short of formal stay but which temporarily suspend removals to a disaster-affected country on a group basis. For instance, many states in the Americas drew on broad innate discretionary powers to temporarily suspend the removal of Haitians after the 2010 earthquake.¹⁸⁶ Overall, the breadth of such powers gives states considerable latitude in fixing the criteria for their application, as well as excluding individuals in relation to whom security- or crime-related concerns exist.¹⁸⁷ In practice, though, these broad powers of immigration discretion are exercised by states in the Americas to the benefit of nationals of a country devastated by a serious sudden-onset disaster.

Toward the other end of the ‘codification’ spectrum are those national laws that codify when this immigration discretion should be exercised positively. In the Americas, this usually turns on the existence of ‘humanitarian’ considerations in the individual case. Although the specific wording varies between countries,¹⁸⁸ the law of at least fifteen states in this region include an exceptional migration category based on some variation of the concept of ‘humanitarian considerations’.¹⁸⁹ In some countries, this concept is not further defined further by national immigration law, leaving the potential for inclusion of disaster victims

¹⁸³ Decreto No. 597, Arts. 49-50 (Jun. 14, 1984), *at* <https://www.leychile.cl/Navegar?idNorma=14516>, Chile. See Cantor, 2015, *supra* note 10, at 43.

¹⁸⁴ See notes 156-157 and corresponding text.

¹⁸⁵ Decreto No. 248 (Feb. 9, 2010), Ecuador. See, further, Cantor, Law, Policy and Practice, 37-39.

¹⁸⁶ They include the United States, Mexico, Bahamas, Dominican Republic, Jamaica, as well as the British Turks and Caicos Islands and the French Antilles territories of Martinique and Guadeloupe. See UNHRC, Report of the Independent Expert on the Situation of Human Rights in Haiti, Michel Forst, Addendum: Forced Returns of Haitians from Third States, UN Doc A/HRC/20/35/Add.1, 6-7 (2012); Cantor, 2018, *supra* note 10, at 38, 61 and 63.

¹⁸⁷ Nonetheless, certain profiles of person, such as those whose cases involve a national security or serious criminal element, are often deemed ineligible to benefit from these measures. For discussion of how this played out for Haitians in Canada, see Cantor, 2015, *supra* note 10, at 40-41.

¹⁸⁸ Examples from Central America include ‘exceptional humanitarian reasons’ (Panama – entry and stay); ‘humanitarian cause’ (Mexico – entry and stay); ‘humanitarian motives’ (Honduras – entry); ‘humanitarian reason’ (Costa Rica - entry); ‘humanitarian reasons’ (Guatemala – entry and stay; Honduras – stay; Mexico – travel and stay; Nicaragua – stay); ‘humanitarian visa’ (Mexico – travel; Nicaragua – entry and stay); ‘reasons of humanity’ (Costa Rica – stay). See Cantor, 2015, *supra* note 10, at 38, footnote 207. The same is true also for South America (*ibid*, 49, FN 306) and the Caribbean (*ibid*, 60, 63).

¹⁸⁹ By sub-region, those countries include: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama (Central America); Argentina, Bolivia, Brazil, Ecuador, Peru, Uruguay (South America); Trinidad and Tobago, the Dutch Antilles islands of Bonaire, Sint Eustasius and Saba (Caribbean); and Mexico (North America). For references to most relevant laws (except El Salvador and Canada), see Cantor, 2018, *supra* note 10, Annex D. In Canada, the authorities have the power to grant permanent resident status if ‘justified by humanitarian and compassionate considerations relating to the foreign national’ (Immigration and Refugee Protection Act, sec. 25(1)). In the new Salvadorean migration law, temporary resident status can be granted to persons who ‘for humanitarian reasons... justify a special treatment’ (Ley Especial de Migración y de Extranjería, Art. 109 (20) (Apr. 2, 2019), *at* www.migracion.gob.sv/servicios/descargables/informes-institucionales/, El Salvador).

open to official discretion in individual cases. This is true of the special residence permit that may be granted for ‘humanitarian reasons’ in Honduras and the extension of stay category for ‘humanitarian reasons’ in Nicaragua.¹⁹⁰ Likewise, the law in Uruguay allows entry as a temporary resident to be granted for ‘exceptional reasons... of a humanitarian character’ but does not define what that means.¹⁹¹ In the Caribbean, the law in Trinidad and Tobago allows leave to remain to be granted if ‘humanitarian considerations’ that warrant the granting of special relief from deportation exist,¹⁹² similar to the law in the Dutch Antilles.¹⁹³ In addition, this immigration law concept is articulated in several national refugee laws.¹⁹⁴ None of these laws further define the ‘humanitarian considerations’ concept but, in practice, such broad provisions have sometimes been applied by officials to persons affected by a disaster in their country of origin.¹⁹⁵

More commonly, though, and particularly in Latin American countries, national immigration law more closely defines the scope of ‘humanitarian considerations’ concept. This is usually done by reference to three general sets of circumstances, although it is important to point out that not all three are always codified in the law of any particular state. The circumstances are that the applicant is: (1) the ‘victim’ of serious adversity, such as grave crimes or human rights violations; or (2) ‘vulnerable’ in the destination country, due to factors such as age, gender, disability or ill health; or (3) ‘facing serious danger’ to life or integrity in the country of origin.¹⁹⁶ Although this last scenario may resemble a rule of international protection, its application is usually discretionary.¹⁹⁷ Disaster-affected persons are sometimes accommodated within such broad renderings of the ‘humanitarian considerations’ concept. For instance, in 2017, Haitians present irregularly in Argentina were granted stay under a general provision of this kind, which was interpreted as applying to ‘natural disasters and their effects’.¹⁹⁸ Likewise, the ‘humanitarian and compassionate’ considerations provision of Canadian law is interpreted as a test of ‘unusual and undeserved or disproportionate hardship’, to be determined by reference to factors that include conditions

¹⁹⁰ Decreto No. 208-2003, Art. 39(13) (Dec. 31, 2004), at [inm.gob.hn/Ley_de_Migraciones_y_extranjeria,Honduras\[1\].pdf](http://inm.gob.hn/Ley_de_Migraciones_y_extranjeria,Honduras[1].pdf), Honduras; Decreto No. 31-2012, Art. 50 (Sep. 20, 2012), available at <https://www.refworld.org/>, Nicaragua.

¹⁹¹ Ley No. 18250, Art. 44 (and Art. 34B on residency) (Dec. 27, 2008), at <https://legislativo.parlamento.gub.uy/temporales/leytemp3890202.htm>, Uruguay.

¹⁹² Immigration Regulations, Laws of Trinidad and Tobago ch 18:01, sec. 28(1)(b) and 28(2) (rev. ed. Dec. 31, 2016), at https://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/18.01.pdf, Trinidad and Tobago.

¹⁹³ For the Dutch Antilles islands of Bonaire, Sint Eustasius and Saba, an official who has doubts about refusing entry may refer the case to the immigration authorities in the Netherlands who can decide to grant entry due to, *inter alia*, ‘compelling humanitarian reasons’, although this concept is not further defined (*Circulaire toelating en uitzetting Bonaire, Sint Eustatius en Saba Rijksdienst Caribisch Nederland Immigratie- en Naturalisatiedienst Oktober 2010 Afkortingenlijst CTU-BES*, sec. 2.3.6 (Oct. 2010), at <https://wetten.overheid.nl/BWBR0028837/2019-10-01>, Netherlands).

¹⁹⁴ See notes 146-148 and corresponding text.

¹⁹⁵ For instance, in Honduras, the authorities were preparing to receive Haitians in the aftermath of the 2010 earthquake using these provisions, although none actually arrived (Cantor, 2015, *supra* note 10, at 46).

¹⁹⁶ For examples of these factors the national law of countries in Central America and South America, see Cantor, 2018, *supra* note 10, at 38-39, 49-51. For Canada, the applicable provision is Immigration and Refugee Protection Act, sec. 25(1.21).

¹⁹⁷ See below.

¹⁹⁸ Disposición DI-2017-1143-APN-DNM#MI, preamble (Mar. 15, 2017), at <https://www.refworld.org.es/docid/5d7fd13ba.html>, Argentina.

in the country of origin, particularly those that have ‘a direct negative impact on the applicant such as ... natural disasters’.¹⁹⁹

However, for our purposes, the opposite end of this ‘codification’ spectrum actually consists of the growing number of immigration law provisions in the region that specify disasters as a ‘humanitarian consideration’ or otherwise as the basis for an exceptional migration category. Ten states across the Americas take this approach,²⁰⁰ with the tendency particularly accentuated in South America and North America but also becoming increasingly common in Central America.²⁰¹ The ubiquity of these provisions supports the analysis that states in the Americas view international mobility linked to environmental factors not through the lens of international protection, but principally through the lens of immigration law as an integral expression of their asserted sovereign right to determine who is allowed entry and stay in the territory of the state, treating the humanitarian impact of disasters as a legal basis for exercising state discretion in favour of affected persons. Starting with South America, national immigration law in Argentina stipulates that transitory residence for ‘humanitarian reasons’ can be granted to those who ‘temporarily cannot return to their countries of origin... due to consequences generated by natural or man-made environmental disasters’.²⁰² Brazil authorises ‘humanitarian reception’ for a person from ‘any country in a situation of... major calamity [or] environmental disaster’.²⁰³ Ecuador gives stay for ‘humanitarian reasons’, including being ‘a victim of natural or environmental disasters’.²⁰⁴ Peru authorises ‘humanitarian residence’ where migration is due to ‘natural and environmental disasters’.²⁰⁵ Meanwhile, Bolivian law makes provision for the admission of persons at risk due to climate effects or disasters.²⁰⁶

Similarly, in North America, for the purpose of granting of a humanitarian visa to a non-national outside the country, Mexico defines ‘humanitarian reasons’ as meaning that the person seeking to travel to Mexico ‘finds herself in a situation of danger to her life or

¹⁹⁹ Citizenship and Immigration Canada, *The Humanitarian and Compassionate Assessment: Hardship and the H&C Assessment* (rev. ed. Jul. 24, 2014), at <http://www.cic.gc.ca/english/resources/tools/perm/hc/processing/hardship.asp>.

²⁰⁰ They are Argentina, Bolivia, Brazil, Canada, Ecuador, El Salvador, Guatemala, Mexico, Peru and the United States See references below.

²⁰¹ Currently, in the Caribbean, states are also reported to be considering how to make legal provision (CMC, *supra* note 173, at 15).

²⁰² Ley No. 25871, Art. 24(h) (Dec. 17, 2003), at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/90000-94999/92016/texact.htm>, Argentina; Decreto 616/2010, Art. 24(h) (May 3, 2010), at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/165000-169999/167004/norma.htm>, Argentina.

²⁰³ Lei No. 13445, Art. 30 (May 24, 2017), at www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13445.htm, Brazil; Decreto No. 9199, Art. 145 (Nov. 20, 2017), at www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/Decreto/D9199.htm, Brazil).

²⁰⁴ Ley Orgánica de Movilidad Humana, Arts. 58 and 66(5) (Jan. 5, 2017), at <https://www.aduana.gob.ec/wp-content/uploads/2017/05/Ley-Organica-de-Movilidad-Humana.pdf>, Ecuador; Decreto Ejecutivo No. 111, Art. 55 (Aug. 3, 2017), at https://www.cancilleria.gob.ec/wp-content/uploads/2018/05/reglamento_ley_de_movilidad_humana_reformado_abril_2018.pdf, Ecuador.

²⁰⁵ Decreto Legislativo No. 1350, Art. 29(2)(k) (Jan. 6, 2017), at https://www.migraciones.gob.pe/wp-content/uploads/2018/03/ley1350_migraciones_reglamento.pdf, Peru.

²⁰⁶ The law charges the Bolivian migration authorities to ‘make viable, as necessary, the admission of populations displaced by climate effects, when a risk or threat to their lives may exist, where those are due to natural causes or environmental, nuclear [or] chemical disasters or hunger’ (Ley No. 370, Art. 65 (Nov. 13, 2017), at www.migracion.gob.bo/documentos/PDF/Ley_N_997.pdf, Bolivia). The law in Bolivia provides a unique definition of ‘Climate Migrants’ as ‘[g]roups of persons who are forced to displaced from one State to another due to climate effects, when a risk or threat to their life may exist, whether due to natural causes, environmental, nuclear [or] chemical disasters or hunger’ (*ibid*, Art. 4(16)).

integrity owing to... a duly accredited natural disaster'²⁰⁷ or that she is 'victim of a natural catastrophe'.²⁰⁸ Albeit not expressly based on the concept of 'humanitarian considerations', immigration law in the United States, as already mentioned, does give authorities the discretion to designate TPS for, *inter alia*, an 'environmental disaster'.²⁰⁹ In Canada, national law likewise allows temporary suspension of removals, *inter alia*, due to an 'environmental disaster resulting in a substantial temporary disruption of living conditions' in the country of origin.²¹⁰ More recently, in Central America, some of the states that have adopted new immigration laws also refer to disasters in exceptional migration categories based on humanitarian considerations. Thus, in Guatemala, the existence of a 'natural catastrophe in neighbouring countries, which obliges the persons or group of persons to flee for their lives' is listed among the 'humanitarian reasons' for legal entry and stay.²¹¹ In El Salvador, factors to be taken into account by immigration officials in deciding temporary resident applications based on 'humanitarian reasons' specifically include, *inter alia*, the existence of an 'internationally-recognised crisis' or that any non-national who does not meet the criteria for an ordinary migration category is in 'a situation of vulnerability or danger to life owing to ... natural disasters, environmental [disasters]...'.²¹²

Overall, then, legal practice in the Americas shows that surprisingly few states have not applied such exceptional migration categories as a matter of national immigration law to accommodate disaster-affected persons whose legal situation cannot be resolved via ordinary migration categories. Indeed, there is no real absence of legal tools to resolve the challenge of entry and stay in light of prevailing humanitarian considerations in this mobility context, and they are applied in practice. Yet, whilst some ordinary migration categories may provide permanent stay, exceptional migration categories mostly give temporary stay. The initial period varies between one year (e.g. Costa Rica) and six years (e.g. Panama), although this is normally renewable and can offer a pathway to longer forms of stay under ordinary migration categories. Such stay also usually affords standard the entitlements to work and access services specified by immigration law in that country. Indeed, in many countries, these immigration categories provide a defined regular status, a period of stay and a range of rights no less favourable than those conferred by refugee status.²¹³

Finally, the legal practice in the Americas raises a question about the kinds of environmental threats that such measures accommodate. Here, the empirical evidence shows

²⁰⁷ Ley de Migración, Arts. 41 and 116(l)(b) (May 25, 2011; rev. ed. Jul. 3, 2019), at www.diputados.gob.mx/LeyesBiblio/pdf/LMigra_030719.pdf, Mexico.

²⁰⁸ Lineamientos Generales para la expedición de visas que emiten las secretarías de Gobernación y de Relaciones Exteriores, eighteenth general provision, procedure 9, second resolution criteria, insert (a)(ii) (Oct. 8, 2014), at <https://sre.gob.mx/images/stories/marconformativodoc/dof101014.pdf>, Mexico.

²⁰⁹ See notes 141-144 and corresponding text.

²¹⁰ Immigration and Refugee Protection Regulations, SOR/2002-227, Reg. 230 (Jun. 11, 2002), at <https://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/>, Canada. For details of how this was applied in the Haitian case, see Cantor, 2015, *supra* note 10, at 40-41.

²¹¹ Decreto 44-2016, Art. 68 (Oct. 12, 2016), at igm.gob.gt/wp-content/uploads/2017/09/10978.pdf, Guatemala.

²¹² Decreto No. 35: Reglamento de la Ley Especial de Migración y de Extranjería, Arts 181(2) and 181(7) (May 24, 2019), at <https://www.transparencia.gob.sv/institutions/dgme/documents/reglamento-de-la-ley-principal>, El Salvador.

²¹³ Although they do not benefit from any specific guarantee against *refoulement*, such issues do not easily arise in the disaster context. Indeed, most disaster migrants in the Americas do not strictly require 'protection' from their own state by another state. Likewise, the mere fact of a disaster does not automatically turn removal into *refoulement*, only where disaster conditions are so serious that human rights standards will anyway temporarily prohibit removals. Finally, disaster migrants already established in the destination country may also be protected indirectly from any return or potential *refoulement* by due process guarantees in law against the arbitrary expulsion of aliens.

that people who move in the context of sudden- or slow-onset disasters have both been accommodated under ordinary migration categories. However, where the disaster is expressly contemplated as a basis for entry or stay, whether in the flexible application of ordinary migration categories or via exceptional migration categories, the legal practice in the Americas suggests that such provisions are mostly applied by national immigration authorities to resolve the situation of persons affected by major sudden-onset disasters. On its face, this seems to confirm the preoccupation of scholars that persons who migrate as a result of the impact of slow-onset disasters will be denied access to such special measures because the link to mobility is easier to establish in the context of sudden-onset disasters.²¹⁴ The implicit requirement of most states as a matter of law or practice that a person must be directly and seriously affected by the disaster in order to benefit from the application of such special measures might seem to further reinforce this risk, since that link seems more straightforward to evidence in situations of sudden-onset disasters as compared to slow-onset processes.

At the same time, many of the national law provisions underpinning these special measures (under both ordinary and exceptional migration categories) do not refer expressly to a ‘disaster’ but rather to broader ‘humanitarian considerations’.²¹⁵ In principle, then, they do not rule out the application of these special measures to persons affected, on the one hand, by slow-onset disasters, or, on the other, by sudden- or slow-onset hazards or hazardous events that have not resulted in a disaster at the societal level. Moreover, not one of the provisions that do refer to disaster situations as a basis for special measures gives any reason to think that slow-onset disasters fall outside their scope.²¹⁶ It is also the case that several of these provisions refer to ‘calamities’ or ‘catastrophes’ alongside, or instead of, ‘disasters’,²¹⁷ suggesting concepts which could equally include hazardous events more generally. Further, as to the origins of the events, these provisions often refer to ‘natural’ disasters or catastrophes,²¹⁸ although many refer also,²¹⁹ or instead,²²⁰ to ‘environmental’ disasters or catastrophes. The latter concept appears to include events that are ‘man-made’ in origin.²²¹ In short, although the current practice may be to apply special measures mainly to persons who are seriously and directly affected by major sudden-onset disasters linked to natural hazards, relevant national law provisions suggest that a broader set of scenarios may be contemplated ultimately.

V. INTERNATIONAL COOPERATION AND FRAMEWORKS IN THE AMERICAS

In the Americas, state practice in relation to the challenge posed by international mobility linked to environmental adversity also takes the form of joint action at the international

²¹⁴ See note 50 and corresponding text.

²¹⁵ See notes 188-212 and accompanying text. The same is true for similar provisions in national legislation on refugees and international protection. See notes 146-148 and accompanying text.

²¹⁶ Indeed, the provision in Bolivian law specifically includes wider ‘climate effects’. See note 206.

²¹⁷ Alongside the ‘disaster’ concept, the provision in Brazilian law refers to ‘major calamity’ and that in Mexican law refers to ‘catastrophe’. The provision in Guatemalan law refers to a ‘catastrophe’ rather than a disaster. See, respectively, notes 203, 208 and 211.

²¹⁸ The law in Mexico refers to ‘natural’ disasters or catastrophes and that in Guatemala refers to ‘natural’ catastrophes. See, respectively, notes 207 and 211.

²¹⁹ The respective legal provisions in Ecuador, Peru, Bolivia and El Salvador refer to ‘natural’ and ‘environmental’ disasters. See, respectively, notes 204, 205, 206 and 2012.

²²⁰ The respective legal provisions in the United States and Canada refer to ‘environmental’ disasters. See, respectively, notes 209 and 210.

²²¹ For instance, the legal provision in Argentina refers to ‘natural or man-made environmental disasters’. See note 202. The Bolivian provision adds ‘nuclear [or] chemical disasters or hunger’ too. See note 206.

level.²²² This practice plays out principally in forums concerned with migration rather than international protection and at the level of sub-regional initiatives rather than regional or global forums. Crucially, the main focus of such joint action is on promoting appropriate legal responses to the challenge by participating states at the level of national law rather than creating new treaty law. However, the scope of cooperative ambition has increased over time. Thus, whilst early forms of collective action represented *ad hoc* responses to the devastation wrought by certain very serious disasters, since the mid-2010s, several sub-regional forums have been engaged in developing normative frameworks that promote more predictable responses at the level of national law. As yet, states appear to be content with this form of international action and no serious efforts have been made to ‘harden’ the legal character of these frameworks through creating treaties. Even so, the existence and scope of these frameworks raises important questions about the future development of international law in this field.

Early Ad Hoc Actions

State practice at the sub-regional level is relatively well-established in the Americas. Certainly, state cooperation on the international mobility challenges posed by sudden-onset disasters is not new in this region. However, the early instances of state practice at the sub-regional level tend to involve the collective recognition of the international mobility consequences of certain extremely serious sudden-onset disasters and the promotion of suitable responses at the level of national law. This is evident in the way that states in such sub-regional forums responded to the devastation wrought by Hurricane Mitch. In 1998, for instance, the Meeting of Central American Presidents appealed for:

...the understanding of the International Community [sic] in order that a general amnesty be conceded to undocumented Central American immigrants who currently reside in different countries, with the objective of avoiding their deportation and, consequentially, greater aggravation of the current situation of our countries.²²³

At the national level, this declaration by the four most-affected states facilitated the designation of TPS for Hondurans and Nicaraguans by the United States as well as the adoption of special measures for affected persons in national immigration law by various Central American states.²²⁴

The mobility impact of Hurricane Mitch was also addressed by other sub-regional forums, albeit also in an *ad hoc* or responsive manner. Thus, in early 1999, the matter was raised by states participating in the Regional Conference on Migration (RCM), a specialised regular sub-regional forum for facilitating joint discussion and action on shared migration challenges among a wider constituency of eleven member states, mostly from North and Central America. In the resulting Communication, the RCM member states specially endorsed ‘the adoption of migratory measures for the benefit of nationals of the countries

²²² Other legal studies appear to overlook the extent of such existing practice on precisely this issue at the international level in the Americas (see, for example, Pires Ramos & Cavdeon-Capdeville, *supra* note 10).

²²³ Meeting of Central American Presidents, *Reunión Extraordinaria de Presidentes Centroamericanos: Declaración Conjunta, Comalapa, El Salvador* (Nov.9, 1998), at 3.

²²⁴ For Central American examples, see notes 156-157 and corresponding text. A copy of the declaration that was sent to the United States with a letter drawing attention to this plea appears to have influenced the granting of TPS. See *Letter from Central American Presidents to William Clinton, President of the United States of America* (Nov. 9, 1998), at <http://goo.gl/gG1rtP>.

affected by hurricane Mitch on the part of Costa Rica and the United States of America'.²²⁵ Both sub-regional forums, then, called not only for a common response on the part of states to the international challenges posed by this particularly serious disaster but also for the use of national immigration law by relevant states to resolve those challenges.

Yet Hurricane Mitch is not the only disaster where such responsive collective action manifested itself. Indeed, sub-regional forums across the Americas also promoted this kind of special immigration law measures as a form of collective response to the overwhelming impact of the 2010 Haiti earthquake. For instance, in 2010, the twelve states which at that time comprised the sub-regional Union of South American Nations (UNASUR) adopted a collective decision to promote 'joint actions'. That UNASUR decision specifically exhorted 'those Member States that still have not applied special processes of migratory regularisation for the benefit of Haitian citizens to do so'.²²⁶ Likewise, the sub-regional Bolivarian Alliance for the Peoples of Our Americas (ALBA), comprised at that time of nine mostly left-leaning governments, called on member states to 'decree a migratory amnesty that regularises the migratory status of Haitian citizens resident in ALBA countries'.²²⁷ As a result, several states that were involved in one or both forums went on to adopt special migratory measures into national law for the benefit of Haitians present irregularly on their territories.²²⁸

These examples demonstrate that, from the 1990s to the early 2010s, many states in the Americas did in fact participate in sub-regional forums that took joint action on international mobility linked to environmental adversity. The responsive and ad hoc nature of such action is immediately apparent. It manifested only following the occurrence of extremely serious sudden-onset disasters that posed humanitarian challenges suddenly across the pertinent sub-region on a significant scale. On the mobility aspect of these challenges, they were clearly seen through the prism of immigration law rather than international protection. In particular, these sub-regional forums sought to promote, on a humanitarian basis, the immigration regularisation of nationals of the affected state who were present irregularly elsewhere. As such, the joint action taken by states during this period was thus oriented toward encouraging a common response at the national law level, in the form of special migratory measures, rather than creating new international frameworks for the future.

Promoting Frameworks for Cooperation

Since the mid-2010s, states in several sub-regional forums in the Americas have been working to develop normative frameworks for promoting a more predictable response at the national level to future disaster displacement and cooperation between states at the sub-regional level. In this process, the influence of external actors has been central to encouraging states to build in this way on past practice at national and sub-regional levels. That work was led initially by the Nansen Initiative (2012-15) – a global intergovernmental process focused on disaster displacement – and is being continued by its successor initiative, the Platform on

²²⁵ RCM, *Comunicado Conjunto, IV Conferencia Regional sobre Migración* (Jan. 26-29, 1999), at fourth paragraph.

²²⁶ Union of South-American Nations (UNASUR), *Solidaridad de UNASUR con Haití: Decisión de Quito* (Feb. 9, 2010), at sixth paragraph.

²²⁷ Bolivarian Alliance for the Peoples of Our America (ALBA), *Plan para la contribución solidaria de los países del ALBA al esfuerzo de reconstrucción de Haití* (Jan. 25, 2010), proposal 6 (migration).

²²⁸ See note 185 and corresponding text.

Disaster Displacement (PDD) (2016).²²⁹ Even so, states in each sub-region have clearly drawn on the expertise and other resources offered by this external actor to shape normative tools that they view as useful in responding to the challenges posed by potentially increasing levels of international mobility linked to disasters.

The development of the pertinent sub-regional frameworks in the Americas has taken place mainly in interstate forums concerned with cooperation on migration issues rather than international protection. Nonetheless, in 2014, engagement by the Nansen Initiative at the regional level resulted in Latin American and Caribbean states recognising the ‘challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause in the region’ in the Brazil Declaration on Refugees.²³⁰ The accompanying Brazil Plan of Action of 2014 called on the office of the United Nations High Commissioner for Refugees (UNHCR) to prepare a study on this theme in order to facilitate ‘regional cooperation’.²³¹ That study, commissioned by UNHCR and the PDD (as successor to the Nansen Initiative) and published in 2018, fed into the South American and Caribbean sub-regional processes described below. However, it seems that no further measures were taken at the regional level.

In tandem, the Nansen Initiative had been working with states at the sub-regional level. In 2013, a Central America consultation recommended that a set of guidelines drawing on national practice be developed through the sub-regional RCM forum.²³² On the proposal of Costa Rica, this was approved by the RCM.²³³ In 2016, based on a study commissioned by the Nansen Initiative,²³⁴ the RCM adopted non-binding guidance on ‘Protection for Persons moving across Borders in the Context of Disasters’.²³⁵ A similar process in South America, initiated in 2015, led to a proposal by Chile to develop guidelines through the South American Conference on Migration (SCM), a sub-regional forum of 12 South American states.²³⁶ In 2018, with support from the PDD, the SCM in turn adopted its own non-binding ‘Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin’.²³⁷

From 2019, the PDD (as successor to the Nansen Initiative) has sought to build on this engagement elsewhere in the Americas by supporting a similar process of consultation in the

²²⁹ For a description of the approach, see PDD, *supra* note 63, at 126 and 141. See also Jane McAdam, *From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement*, 39 U.N.S.W.L.J. 1518 (2016).

²³⁰ Brazil Declaration and Plan of Action, Dec. 3, 2014, thirty-second paragraph (Declaration), available at <https://www.refworld.org/docid/5487065b4.htm>.

²³¹ Ibid, Chapter Seven (Plan). The study (Cantor, 2018, *supra* note 10) was published by UNHCR and PDD in 2018.

²³² Nansen Initiative, *Disasters and Cross-Border Displacement in Central America: Emerging Needs, New Responses* (2013) at <http://goo.gl/2H1C9W>, Conclusions.

²³³ RCM, Declaración: Por una Región Libre de Trata de Personas- XIX Reunión Viceministerial de la Conferencia Regional sobre Migración (Jun. 26-27, 2014) decisión 6.

²³⁴ Cantor, 2015, *supra* note 10.

²³⁵ RCM, *Protection for Persons moving across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries* (2016) [hereinafter RCM Guide]

²³⁶ The process within the SCM was initiated in 2016. However, this built on a regional workshop with South American states that was convened in Quito during 2015 by the government of Ecuador, the Nansen Initiative and the Refugee Law Initiative of the School of Advanced Study, University of London.

²³⁷ South American Conference on Migrations (SCM), *Lineamientos regionales en materia de protección y asistencia a personas desplazadas a través de fronteras y migrantes en países afectados por desastres de origen natural* [Regional guidelines on protection and assistance for persons displaced across borders and migrants in countries affected by natural disasters] (2018) [hereinafter: SCM Guidelines]

Caribbean through the sub-regional migration forum of the Caribbean Migration Consultations (CMC).²³⁸ In 2019, at the first Caribbean consultation, the 2018 UNHCR study requested by Latin American and Caribbean states in the 2014 Brazil Plan of Action was presented to participants. The participating states framed the new challenges at regional and national levels as a priority ‘in a context of increased migration and displacement linked with climate change and disasters’.²³⁹ As a next step, those same states agreed on the need to ‘systematize approaches, harmonize them, and come up with consolidated policies through collaboration’.²⁴⁰ In the coming years, the creation of a similar sub-regional framework in the Caribbean thus looks like a possibility.

Sub-regional Frameworks: Approach and Scope

The guidelines adopted by the RCM and the SCM represent a significant addition to state practice. They reflect the views and approval of the large number of participating states in the sub-regions of North and Central America (through the RCM) and South America (through the SCM). Equally, as a result, their guidance extends to that same range of member states across the Americas. Moreover, as the first international instruments expressly oriented toward regulation of international mobility in the context of disasters, they provide a crucial indication of how states in this region legally frame these aspects of the environment-mobility nexus. The approach taken in the RCM Guide and the SCM Guidelines thus offers useful insight into how, in the future, international law may come to relate to the challenges posed by international mobility in the context of environmental adversity.

There is considerable consistency in the approach adopted by both the RCM Guide and the SCM Guidelines. Those points of convergence give an important indication of how states frame the key issues. At the outset, though, certain drafting differences between the two instruments must be acknowledged. Most crucially, they differ in how the guidance is presented. Thus, the RCM Guide describes its normative framework as ‘effective practices’ and gives significant detail on each, whilst the SCM sets out broader ‘general guidelines’ on purported ‘minimum standards’.²⁴¹ Yet, in reality, this difference is merely one of more or less detail on the norms affirmed. The scope of intervention that each instrument envisages differs somewhat too. The RCM Guide mainly addresses immigration and consular authorities on measure for the benefit of affected persons post-disaster. That scenario is covered by the SCM Guidelines but they also promote a ‘whole of government’ approach to avoid the risk of displacement from the outset.²⁴² In this sense, the SCM Guidelines have broader scope.

Nonetheless, on the key question of how host states should regulate international mobility in the context of disasters, the instruments are highly consistent in their approach. Firstly, they evidence a view by states that new international law norms are not required. They do not ‘create a new set of state obligations, extend existing state obligations, or require that new laws be passed’.²⁴³ Rather, the instruments are intended only to ‘support the more effective and consistent use of existing law, policy and practice’ by states.²⁴⁴ The body of

²³⁸ CMC, *supra* note 173.

²³⁹ Ibid, at 10.

²⁴⁰ Ibid, at 10.

²⁴¹ See SCM Guidelines, Part 2.1, at 15, and Part 2.2, at 16.

²⁴² SCM Guidelines, Part IV. Indeed, alongside the many examples throughout the text, this is one the orienting principles of the SCM Guidelines, see Part III.1 – ‘Enfoque de todo el gobierno’, at 23.

²⁴³ RCM Guide, Part I,I, at 8. See, similarly, SCM Guidelines, Part 2.2, at 15, and Part 3.2 – ‘Protección’, at 25.

²⁴⁴ RCM Guide, Part I,I, at 8. See, similarly, SCM Guidelines, Part 2.2, at 15.

existing national law in member states is thus seen as sufficient to respond to the challenges of this scenario. In tandem, such national law is also affirmed as the main basis for the resulting normative frameworks, which merely provide guidance on how to apply it.²⁴⁵ This approach of building from existing national law and practice is distinct from other soft law instruments that either express aspirational norms that lack a firm basis in existing law or interpret ‘hard’ rules of international law in their application to a particular group or theme.

Secondly, both the RCM Guide and the SCM Guidelines treat this area as principally a matter of immigration law. The frameworks are primarily built upon the national practice of states in each sub-region of favourably exercising their discretion in immigration matters where ‘humanitarian grounds’ such as a disaster exist.²⁴⁶ As such, each instrument also acknowledges that states retain the inherent discretion to adopt more generous approaches than those described in the sub-regional norms.²⁴⁷ International obligations are acknowledged but are incorporated mainly as a set of parameters that may limit the extent to which states can decline to favourably exercise discretion in some situations, rather than the core legal basis for resulting measures.²⁴⁸ Moreover, both instruments address the legal challenges not only for people arriving due to a disaster in their own country, but also for people already outside their own country who are affected by a disaster there or by a disaster in the country in which they are living or through which they are transiting.²⁴⁹

Thirdly, the norms in both instruments are rooted principally in the use of ‘regular’ and ‘exceptional’ migration categories.²⁵⁰ Both guides distinguish the (humanitarian) ‘protection’ afforded by these categories from ‘international protection’,²⁵¹ which each highlights as relevant to disaster displacement only in rare cases. Moreover, each instrument promotes active forms of ‘cooperation’ between the host state and state of origin,²⁵² including: bilateral measures to further cooperation and mutual assistance, especially where they share a border;²⁵³ and, in ‘solidarity’ with a country of origin that lacks capacity to receive returns, granting entry or stay to persons only tangentially affected by a disaster (see

²⁴⁵ RCM Guide, Part I.II.ii, at 9; SCM Guidelines, Part 2.1, at 14, and Part 2.2, at 15.

²⁴⁶ RCM Guide, Part II.I and II.I.A, at 13; SCM Guidelines, Part 3.1 – ‘Soberanía y ejercicio de la discrecionalidad en asuntos migratorios’, at 20, Part 3.2 – ‘Medidas de protección humanitaria’, at 25, and Part 5.3, at 33.

²⁴⁷ RCM Guide, Part I.III.iii, at 9; SCM Guidelines, Part 2.2, at 15.

²⁴⁸ RCM Guide, Part II.I.B, at 13-15; SCM Guidelines, Part 5.3, at 34.

²⁴⁹ RCM Guide, Part I.III.B, at 10-11; SCM Guidelines, Part 2.2, at 16. Indeed, each instrument sets out a range of relevant principles and norms relating to protection and assistance for migrants in a disaster-affected country (RCM Guide, Part III, at 24-36; SCM Guidelines, Part VI, at 39-42). These norms correlate with those described by another migration-oriented set of guidelines, on migrants in countries in crisis, prepared at the global level by the International Organization for Migration with input from states (*Migrants in Countries in Crisis Initiative, Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster* (2016), available at <https://micicinitiative.iom.int/guidelines>).

²⁵⁰ RCM Guide, Part I.III.C, at 11-12; SCM Guidelines, Part 5.3, at 34.

²⁵¹ See, for example, the broad definition of ‘protection’ provided by the SCM Guidelines, Part 3.2 – ‘Protección’, at 24-25, as compared with the emphasis on lack of protection in the definition of ‘international protection’ and indeed ‘complementary protection’ at Part 3.2 – ‘Protección internacional’ and ‘Protección complementaria’, at 25.

²⁵² For instance, the RCM Guide describes the elements of the ‘cooperative humanitarian response’ among RCM member states as including the exchange of information, requests to apply humanitarian protection measures to affected nationals and other forms of bilateral cooperation (Part IV, at 27-28). The SCM Guidelines describe a range of cooperative measures between affected SCM member states based on the principles of ‘international cooperation’ and ‘co-responsibility’ (Part 3.1 – ‘Cooperación y solidaridad internacional’ and ‘Corresponsabilidad’, at 20 and 22-23).

²⁵³ RCM Guide, Part IV.I, at 27-28; SCM Guidelines, Parts 5.1, 5.4 and 5.5, at 31 and 36-38.

below).²⁵⁴ The SCM framework is expressly based on coordination between these two states,²⁵⁵ and it even posits a principle of ‘shared responsibility’ between them, especially if both are SCM members.²⁵⁶ Thus, in each sub-regional forum, it seems that states do not generally view the situation of disaster-affected persons through an ‘international protection’ lens.

Finally, neither the RCM Guide nor the SCM Guidelines attempt to create a new legal status. Rather, they simply distil from the legal practice of states in each sub-region a consensus approach to when the discretion to allow entry or stay on humanitarian grounds should usually be positively exercised in disaster contexts. This is when the person is ‘directly and seriously affected by the disaster’.²⁵⁷ Some interpretation of this concept is provided by the RCM Guide.²⁵⁸ The emphasis is squarely on the proximity and severity of the disaster’s impact on the individual, in light of any pre-existing vulnerabilities (i.e. rather than a rupture in their political link with the state of origin or the risk of human rights standards being violated as for international protection). The interpretation in the RCM Guide of a disaster’s ‘direct’ impact as a ‘sudden and severe change’ suggests slow-onset disasters are not included.²⁵⁹ This is confirmed by the guide’s affirmation that it applies only to disasters ‘caused in part or in whole by a sudden and serious natural hazard’.²⁶⁰ By contrast, the SCM Guidelines expressly include other slow-onset disasters and events ‘that may be associated with adverse effects of climate change’ when they contribute in fundamental ways to the affected person’s decision to cross an international border.²⁶¹ Otherwise, though, the terms of each instrument strongly suggest that the principal concern is with ‘disasters’, a concept defined by reference to the extant UN policy.²⁶² As such, it seems that hazards or hazardous events that do not reach the implicit threshold for societal impact will fall generally outside the scope of the guidance and be left purely to the discretion of national state authorities.

Despite their recent adoption, these two sub-regional instruments have already begun to shape state practice in the Americas. Thus, in the RCM Guide, the principles on bilateral cooperation have been acted upon by some states. For instance, Costa Rica and Panama have broken new ground in the sub-region of Central America by developing from earlier drafts of the RCM Guide shared by PDD a set of bilateral mechanisms and policies to manage displacement and disaster risks.²⁶³ These include a set of draft Standard Operating Procedures (SOPs) for their respective disaster response systems to address cross-border displacement in disaster contexts.²⁶⁴ The structure, principles and rules in the SOPs are based directly on the RCM Guide. Simulation exercises to put the SOPs into practice have been carried out jointly

²⁵⁴ RCM Guide, Part II.II.A, at 16; SCM Guidelines, Part 5.1, at 31.

²⁵⁵ SCM Guidelines, Part 2.1, at 15.

²⁵⁶ SCM Guidelines, Part 3.1 – ‘Corresponsabilidad’, at 22-23.

²⁵⁷ RCM Guide, Part II.II.A, at 15; SCM Guidelines, Part 5.1, at 31.

²⁵⁸ RCM Guide, Part II.II.A, at 16.

²⁵⁹ Ibid.

²⁶⁰ RCM Guide, Part I.III.A, at 9-10. At the same time, it extends the concept of ‘directly and seriously affected by the disaster’ to situations where ‘in rare cases an imminent [disaster] creates a substantial risk to [the person’s] life or safety in the country of origin’ (*ibid*, Part II.II.A.i, at 16).

²⁶¹ SCM Guidelines, Part 2.2, at 16.

²⁶² They thus reflect later and earlier versions of this concept in UN policy post- and pre-2016. SCM Guidelines, Part 3.2, at 24; RCM Guide, Part I.III.A, at 9-10. For a discussion of the UN approach to defining the concept, see notes 41 and 44-49.

²⁶³ PDD, ‘Costa Rica and Panama Prepare for Cross-Border Disaster-Displacement’, 23 August 2017, <https://disasterdisplacement.org/costarica-and-panama-prepare-for-cross-border-disasterdisplacement>.

²⁶⁴ Government of Costa Rica/Government of Panama, *Procedimientos Operativos para la atención de personas desplazadas a través de fronteras en contextos de desastre* (May 2017).

by the two countries, again with the involvement of PDD.²⁶⁵ Similarly, the RCM Guide facilitated coordination between Costa Rica and Nicaragua to allow 150 Nicaraguans to cross the border and shelter in Costa Rica from the effects of Hurricane Otto in 2016.²⁶⁶

The two sub-regional instruments, and the processes that led to their adoption, also seem to have encouraged states in Central and South America to incorporate national law provisions to specifically regulate the entry and stay of persons affected by a disaster when revising their immigration laws. Since the Nansen Initiative started work on its consultations in those regions in 2013, at least five states in these sub-regions have adopted significant new provisions of national law specific to the situation of disaster-affected non-nationals when overhauling their immigration legislation. They are Guatemala (2016), Brazil (2017), Ecuador (2017), Peru (2017) and El Salvador (2019).²⁶⁷ Paraguay is also reported to be considering such provisions as it debates adoption of a new immigration law.²⁶⁸

Finally, the legal practice of states in the Americas has also had an impact on policy development at the global level. In 2015, the Nansen Initiative presented an Agenda for the Protection of Cross-border Displaced Persons in the context of Disasters and Climate Change (Protection Agenda) which, based on seven regional consultations with states and other actors, sets out norms for responding to cross-border disaster displacement.²⁶⁹ At that conference, over one hundred states from different regions endorsed these global guidelines.²⁷⁰ However, on closer study, it is evident that the approach and many of the more novel norms described by the Protection Agenda for ‘protecting cross-border disaster-displaced persons’ are derived principally from state practice in the Americas.²⁷¹ Even so, in 2018, the approach in the Protection Agenda was endorsed by the Global Compact for Safe, Orderly and Regular Migration as a basis for developing ‘coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters’.²⁷²

²⁶⁵ Government of Costa Rica/Government of Panama, Ejercicio de simulación binacional Costa Rica – Panamá en materia de protección de personas desplazadas a través de fronteras en contextos desastre (21-22 August 2017).

²⁶⁶ PDD, *supra* note 63, at 126 and 141.

²⁶⁷ See, respectively, notes 211, 203, 204, 205 and 212.

²⁶⁸ Ministerio del Interior – Dirección General de Migraciones, ‘Presentan propuesta de reforma de la ley migratoria nacional al Poder Legislativo’ (Aug. 9, 2016), at <http://www.migraciones.gov.py/index.php/noticias/presentan-propuesta-de-reforma-de-la-ley-migratoria-nacional-al-poder-legislativo>, Paraguay.

²⁶⁹ Nansen Initiative, *Agenda for the Protection of Cross-border Displaced Persons in the context of Disasters and Climate Change* (2015), at <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>.

²⁷⁰ Nansen Initiative, More than 100 governments affirm broad support to better protect people displaced across borders by disasters and the effects of climate change, 14 October 2015, <https://www.nanseninitiative.org/more-than-100-governments-affirm-broad-support-to-better-protect-people-displaced-across-borders-by-disasters-and-the-effects-of-climate-change/>.

²⁷¹ See Nansen Initiative, *supra* note 269, Vol. I, Part One, at 21-22, 24, 26-27, particularly paragraphs 33-34, 38-40, 47-53 and 64-65. See also Nansen Initiative, *supra* note 269, Vol. II, at <https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf>, Annex II.C, at 42-48, where the basis in existing practice is more fully described. The majority of these practices come from the Americas and were described in the background studies for consultations and workshops convened by the Nansen Initiative in that region.

²⁷² Global Compact for Safe, Orderly and Regular Migration, paras. 18(l) and 21(g) (Dec. 19, 2018), available at <https://refugeesmigrants.un.org/migration-compact>. By contrast, the norms relating to disaster displacement are addressed only obliquely by the Global Compact on Refugees, para. 63 (Dec. 18, 2018), available at https://www.unhcr.org/gcr/GCR_English.pdf.

VI. CONCLUSIONS

This case study of the Americas contributes to debates on how international law should address international mobility in the context of environmental threats. As a whole, it illustrates how greater engagement with different kinds of evidence on, respectively, the empirical dynamics of movement and existing legal practice by states in one region may shed light on broader questions about the current and future role of international law in shaping this response. The contention that legal scholars working on this aspect of the law should reflect more carefully on the empirical framing of the assumed underlying problem is not new. In this regard, the present study merely adds new elements to existing scholarship on the implications of the empirical data on environmental threats and human mobility. However, it also makes a more ambitious claim, namely that discussion of the role of international law in this field cannot be divorced entirely from proper consideration of existing legal practice at the national level. In other words, legal scholars interested in how, in cross-border contexts, international law could or should address ‘environmentally displaced persons’, ‘climate refugees’ or ‘the disaster-displaced’ – to use only a few contemporary terms – cannot continue to discount national legal practice as if it were irrelevant. What, then, are the principal implications of this case study of the Americas for our understanding of international law development in response to this perceived legal problem?

On the underlying empirical dynamics, beyond the much-cited risk posed by rising sea levels in the Pacific, the growing evidence base from the Americas confirms that international mobility in this region is already being shaped by sudden-onset events, such as hurricanes, storms, earthquakes, volcanic eruptions and flooding, as well as slow-onset processes, such as desertification and droughts. It has been argued here that, although the concept of ‘disasters’ is a useful starting point for understanding how these events contribute to the movement of persons, a broader focus on the underlying ‘hazards’ and ‘hazardous events’ may better capture the wider ways in which these phenomena can shape mobility, even where a ‘disaster’ does not result at societal level. In tandem, contrary to assumptions in the legal literature that the resulting movement is an issue only for the global North, data from this region show that some of this movement also takes place to countries in the global South. As such, this study contends that the legal practice and perspectives of global South states need to be incorporated alongside those of states in the global North in considering the development of law in this field. Moreover, beyond a narrow focus on movement ‘pushed’ by hazards, this study of the Americas demonstrates how such hazards, in countries of destination and transit as well as countries of origin, impinge on international mobility issues in other legally-relevant ways. Indeed, the risk is that, if we continue to frame the issue as one of extending ‘international protection’ to persons fleeing disaster-affected countries, we lose sight of the fact that similar legal gaps in relation to travel, entry and stay also exist for non-nationals whose mobility is affected by hazards in countries of destination and transit. We also risk stretching refugee law, and wider concepts of international protection, to breaking point.

On the framing of the legal problem, it is true that international law only tangentially regulates the international mobility-related challenges of travel, entry and stay of non-nationals in the context of environmental threats. However, the fact of a ‘gap’ in international law does not mean that no law exists. Nor does it imply that proposed solutions to the problem can start from a blank canvas. This study of the Americas instead shows many states in this region have long recognised the challenges involved and also developed legal responses at the national level to accommodate affected persons. At least for the Americas,

this body of legal practice robustly challenges the contention in much of the legal literature that national law can simply be dismissed as irrelevant or as comprised merely of isolated ‘protection’ provisions in the national law of states in the global North. Rather, a broadly similar legal approach to these mobility challenges is evident in national laws across this region, including among states in the global South. On the one hand, this existing practice raises a question about the role of international law and its added value to the existing response in this region, especially in light of international efforts in some sub-regions to develop harmonised guidance on such legal practice. On the other hand, given that it is states that are the creators of international law, a better understanding of the ways in which they already see the pertinent challenges, and respond to them in law, offers an insight into how those existing views and practice might influence the development of international law in the future.

In this respect, the study establishes that most states in the Americas treat the challenges principally as a matter of immigration law rather than international protection. This is not to say that the latter body of law is not applied where environmental events unleash persecution or violence, but simply that it is done by reference to the latter phenomena rather than the disasters themselves. In general, though, the travel, entry and stay of persons affected by environmental threats is resolved not by application of the law on international protection (or that on the environment) but by immigration law and cooperation with the state of origin. For persons with a link to the destination country, ordinary migration categories offer a pathway for mobility, and a criterion for differentiation among the wider universe of migrants, the importance of which is often overlooked in the legal literature. The fact that states have been prepared to flexibly apply these categories to ‘disaster’-affected persons, in contrast to the rigid application of refugee law, indicates how strongly states see immigration law as the appropriate medium of response. Even for those who lack such a link with the destination country, a surprisingly wide range of states have used exceptional migration categories in immigration law, and similar provisions for humanitarian discretion in national refugee law, to facilitate entry and stay for affected persons. In both cases, the pertinent criterion is usually that the individual is ‘seriously and directly affected’ by the disaster. Immigration law may be largely overlooked by the legal literature, since it is not well-established in international law, but, in practice, it represents the main framework for response by states in the Americas.

What, then, of international law? This study shows that, at least in the Americas, the problem is not an absence of legal tools. Indeed, in this region, the basic elements of the approach in national law have quite a high degree of consistency. This raises the important question of whether similar legal practice can be discerned in other regions of the world. Yet, for the development of international law, even this discrete body of national legal practice in the Americas raises the prospect that these provisions provide evidence of emerging norms of ‘regional’ custom,²⁷³ and they are already influencing policy at the global level. That consistency is seen also in how the existing national practice has been distilled and elaborated in soft law frameworks at the sub-regional level as a means to harmonise the approach in

²⁷³ The fact that these provisions are rooted in the discretion of states to regulate their immigration affairs may raise a question about whether such legal practice truly reflects *opinio juris*, as an element of international custom. However, the codification in national law of a power to favourably resolve these types of cases, and its exercise in practice by the state concerned according to the terms of its law, may suggest that states perceive the creation of such powers as a matter of legal obligation. For discussion of the concept of ‘regional’ or ‘particular’, as opposed to ‘general’, international custom, see International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc A/73/10, 154-156 (2018).

participating states. Looking to the future, this suggests that grand proposals for new global treaties on international protection or environmental law to address the legal implications of such mobility are less likely to gain traction with states in this region than efforts to develop the existing approach in international immigration law at the regional or sub-regional levels. In some forums, incorporating elements of the current approach into free movement arrangements looks like a distinct possibility.²⁷⁴ Overall, then, it seems that international law may still have a role to play in shaping the response to international mobility linked to environmental factors. However, for better or worse, in the Americas and elsewhere too, its development seems more likely to build on existing state practice than on the flights of fancy of us international law scholars. After all, the law offers few truly blank canvases.

²⁷⁴ This analysis is bolstered by a recent example of practice from outside the Americas region. In February 2020, the Intergovernmental Authority on Development (IGAD), an African sub-regional interstate forum took precisely this step, endorsing a free movement agreement that integrates specific immigration-based provisions that require states parties to allow citizens of fellow IGAD member states to enter their territory ‘in anticipation of, during or in the aftermath of disaster’, and to facilitate the extension of stay for such disaster-affected persons whilst return to their country of origin ‘is not possible or reasonable’. See Protocol on Free Movement of Persons in the IGAD Region, Feb. 25, 2020, Art 16 (awaiting entry into force) [copy on file with author].