Environment, Mobility, and International Law: A New Approach in the Americas

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Environment, Mobility, and International Law: 
A New Approach in the Americas 
David James Cantor* 

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. By contrast, 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, this Article derives 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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## Table of Contents

I. Introduction.......................................................................................................................... 265

II. The Environment-Mobility Nexus as a Legal Problem ..................................................... 268
    A. Understanding the Empirical Phenomenon................................................................. 269
    B. Defining the Legal Problem......................................................................................... 277
    C. Framing the Case Study of the Americas................................................................. 283

III. Empirical Dynamics in the Americas ......................................................................... 284
    A. International Movement Linked to Environmental Threats in the Americas .......... 285
    B. Other Forms of Environmental Impact on International Mobility ....................... 289

IV. International Protection Law in the Americas ............................................................ 291
    A. Disasters and International Protection.................................................................... 291
    B. An Alternative Legal Approach.............................................................................. 294

V. Immigration Law in the Americas ............................................................................... 297
    A. “Ordinary” Migration Categories............................................................................. 298
    B. “Exceptional” Migration Categories......................................................................... 302

VI. International Cooperation and Frameworks in the Americas.................................... 310
    A. Early Ad Hoc Actions............................................................................................... 311
    B. Promoting Frameworks for Cooperation................................................................. 312
    C. Subregional Frameworks: Approach and Scope..................................................... 315

VII. Conclusion...................................................................................................................... 320
I. INTRODUCTION

Global society appears ever more conscious of how environmental phenomena shape human mobility. 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. For example, in the context of climate change, the well-publicized risk posed to the ongoing viability of human settlement of small islands in the Pacific Ocean by rising sea levels fuels globalized concern that their populations will end up as “climate refugees.” 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 Americas, as recently as 2017, around 160,000 inhabitants of Puerto Rico fled to the United States mainland after the sudden devastation wrought on that island by Hurricane Maria, some temporarily and others on a more permanent basis. 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 such environmental phenomena, especially in the context of a process of global climate change, have prompted 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 as climate change mitigation and adaptation and also 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, the 2010 Cancun Agreement invites states to “enhance understanding, coordination and cooperation with regard to climate change

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1 The term “mobility” is used here to signal an emphasis on agency in movement, in other words, 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 Lazrus, The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu, 22 GLOB. ENV’T CHANGE 382 (2012).


induced displacement, migration and planned relocation.”\(^5\) 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.”\(^6\)

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.\(^7\) 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.\(^8\) They are complemented by the small number of extant judicial decisions that explore how existing international law rules on refugee status and human rights protection might apply to such scenarios.\(^9\) Overall, this body of

\(^5\) A Displacement Task Force was also created under the UNFCCC Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts in 2015. See 2010 Cancun Agreement, U.N. Doc. FCCC/CP/2015/10/Add.1. Yet, while 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. See generally 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).

\(^6\) Sendai Framework for Disaster Risk Reduction 2015–2030, U.N. Doc. A/CONF/224/CRP.1, ¶ 28, ¶ 30. Yet, while 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, e.g., U.N. OFFICE FOR DISASTER RISK REDUCTION, WORDS INTO ACTION GUIDELINES, (2017), https://perma.cc/UTF7-JAXK.

\(^7\) See supra notes 5–6.

\(^8\) 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, e.g., 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); ORGANIZATIONAL PERSPECTIVES ON ENVIRONMENTAL MIGRATION (Kerstin Rosenow-Williams & François Gemenne eds., 2016).

\(^9\) 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 and the Supreme Court of New Zealand. See Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689; Teitiota v. Chief Executive of the Ministry 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.

This Article 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 (Section II). 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 are displaced 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 the sinking islands in the Pacific. Section II 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 Article continues 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 (Section III). It then challenges the widely held assumption that states lack the legal tools to respond

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10 Benoît Mayer and François Crépeau 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. Benoît Mayer & François Crépeau, Introduction to Research Handbook on Climate Change, Migration and the Law 1 (Benoît Mayer & François Crépeau eds., 2017).

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 refugee and human rights law on “international protection” (Section IV) than in immigration law (Section V). The 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 Article also shows how these understandings are being actively promoted by intergovernmental bodies at the subregional level in the Americas (Section VI). 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 (Section VII).  

II. 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 inquiry in terms of international law. 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 Section 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.

12 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, supra note 10, at 49, 50. In this sense, it is not a “new” challenge needing “new” responses. See Etienne Piguet, Antoine Pécoud & Paul de Guchteneire, Migration and Climate Change, in MIGRATION AND CLIMATE CHANGE 1, 24 (Etienne Piguet et al. eds., 2011).

13 However, a couple of studies examine the issue in relation to the national law or policy of one country. See, 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).
A. 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.\textsuperscript{14} However, “[w]e 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.”\textsuperscript{15} 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,\textsuperscript{16} the evidence base has begun to expand over the last decade or so.\textsuperscript{17} In tandem, while the superficial engagement of many legal scholars with this empirical evidence is regularly criticized,\textsuperscript{18} 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 a causal relationship.\textsuperscript{19} Moreover, in general, these legal studies are concerned with causality in one direction only—in other words, environmental change as a cause of movement (although migration as a cause of environmental change is also considered by the social sciences).\textsuperscript{20} 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

\textsuperscript{14} Piguet et al., supra note 12, at 17–21.
\textsuperscript{15} Walter Kälín, The Climate Change-Displacement Nexus, BROOKINGS (July 16, 2008), https://perma.cc/J64H-G9HL.
\textsuperscript{16} Dominic Kniveton, Kerstin Schmidt-Verkerk, Christopher Smith & Richard Black, Climate Change and Migration: Improving Methodologies to Estimate Flows, 32–33 INT'L ORG. FOR MIGRATION RES. SERIES 1 (2008).
\textsuperscript{17} Stephen Castles, Concluding Remarks on the Climate Change-Migration Nexus, in MIGRATION AND CLIMATE CHANGE, supra note 12, at 415, 419–22.
\textsuperscript{18} This critique has been advanced by many scholars within and outside the field. See, e.g., 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? 1 (Univ. of Sussex, Working Paper No. 34, (2001), https://perma.cc/W3F4-X9XF.
\textsuperscript{19} See generally Calum T.M. Nicholson, Climate Change and the Politics of Causal Reasoning: The Case of Climate Change and Migration, 180 GEOGRAPHICAL J. 151 (2014).
\textsuperscript{20} See, e.g., RICHARD BLACK, REFUGEES, ENVIRONMENT AND DEVELOPMENT (1998).
probably shaped human mobility throughout history.\(^{21}\) 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).\(^{22}\)

Secondly, on the content of this causal nexus, legal scholars often adopt an “alarmist” or “maximalist” understanding of “environmental migration.”\(^{23}\) Rooted in natural sciences and security studies, this view uses deductive methods to forecast vast future waves of migration driven by environmental change.\(^{24}\) 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 level 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 interconnected factors influencing mobility.\(^{25}\) On this basis, “skeptical” 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.\(^{26}\) Others, though, attempt to transcend the divide by analyzing 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

\(^{21}\) Anthony Penna, The Human Footprint: A Global Environmental History 4–8, 56–58, 106–7 (2d ed. 2014). Indeed, environmental factors have been recognized by migration theories as early as the 1880s, although they only made a resurgence in the 1980s after references to them dwindled during much of the twentieth century. See Etienne Piguet, From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies, 103 ASS’N. AM. GEOGRAPHERS 148 (2013).


change. As the empirical evidence base grows, this approach seems to be gaining increasing acceptance.

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 the legal studies that adopt a mono-causal understanding of this nexus adopt a faulty premise. This view 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, the 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, an important question also arises about the extent to which such human factors can or should be accommodated in law.

Thirdly, many legal scholars frame the “environment” side of the nexus explicitly in terms of “climate change.” For some, this is a strategic gambit to raise the profile of the issue by linking it to powerful discourses on climate change. 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. Yet this

28 Castles, supra note 25, at 419–24; Piguet et al., supra note 12, at 5.
29 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, supra note 5, at 29; Mike Hulme, Attributing Weather Extremes to “Climate Change”: A Review, 38 PROGRESS PHYSICAL GEOGRAPHY 499 (2014); Kniveton et al., supra note 16.
30 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, e.g., MATTHEW SCOTT, CLIMATE CHANGE, DISASTERS, AND THE REFUGEE CONVENTION (2020); 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).
31 Gemenne, supra note 23, at 225.
32 Mayer, supra note 22, at 43–47.
33 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?, supra note 18, at 73; Giovanni Bettini, Sarah Louise Nash & Giovanna Gioli, One Step Forward, Two Steps Back? The Fading
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).34 Establishing the respective contribution to climate change of particular states adds a third additional layer of complexity.35 Despite these challenges, even some of those scholars who recognize the “multi-causality” of migration end up proposing solutions for “climate migrants” as if they were a definite and identifiable group of persons.36

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, which could be influenced by global warming, differs substantially from that of other environmental phenomena, such as volcanoes or earthquakes.37 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.38 For these reasons, some legal studies have instead sought to frame this side of the nexus in terms of broader concepts of the “environment.”39 Particularly since the late 2000s, scholars and policymakers have increasingly conceptualized the environment side of the nexus more broadly in terms of disasters, an approach that obviates many of the flaws of focusing solely on “climate change.”40

34 Walter Kālin, Conceptualising Climate-Induced Displacement, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 81, 85 (Jane McAdam ed., 2010).
35 Moreover, even if the contribution of particular states to climate change could be characterized 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. See Benoit Mayer, Climate Change, Migration and the Law of State Responsibility, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW, supra note 5, 238.
36 Mayer, supra note 18, at 97.
37 Mayer, supra note 22, at 12.
38 Id. at 26.
39 Id. at 12–16.
40 Kālin, supra note 34, at 85; Mayer, supra note 22, at 12–16 (arguing that, conceptually, “climate migration” is a component of “environmental migration” and cannot, and should not, be addressed...
disasters are widely understood as encompassing both sudden- and slow-onset events and 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 U.N. definition has particularities that need consideration in the mobility context. For instance, while it recognizes that a hazard need not have the potential for collective impact,⁴⁴ it requires that a “hazardous event” result in a serious collective impact in order to qualify as a

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⁴¹ For instance, U.N. 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” while a slow-onset disaster “emerges gradually over time.” See, e.g., U.N. Gen. Assembly, Rep. of the Open-Ended Intergovernmental Expert Working Group on Indicators and Terminology Relating to Disaster Risk Reduction, U.N. Doc. A/71/644, 13 (2016) [hereinafter U.N. Report]. 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 IAN 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.” 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 that Might Cause Human Displacements, in MIGRATION AND CLIMATE CHANGE, supra note 12, at 37.

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 U.N. 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 “[s]ituation or event, which overshadows local capacity, necessitating a request to national or international level for external assistance . . .; An unforeseen and often sudden event that causes great damage, destruction and human suffering.” Glossary, EM-DAT, https://perma.cc/4K6R-U8TY.

⁴⁴ The U.N. 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.” U.N. Report, supra note 41, at 18.
“disaster.” But do people really move in response only to “disasters” or do they also move because of perceived hazards? And which concept should we favor? Moreover, each rendering of the disaster concept also differs in how it classifies different hazards in terms of both their origins and types. For our purposes, this may complicate efforts to identify which particular hazards are to be treated as “environmental” in character (and whether by reference to origins or type). Indeed, the most consistent approach may be simply to treat all of the identified hazard types as essentially “environmental.”

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

45 The U.N. approach defines a “hazardous event” as the “manifestation of a hazard in a particular place during a particular period of time.” U.N. Report, supra note 41, at 20.

46 The U.N. approach views the origins of hazards as, respectively, “natural, anthropogenic or socionatural” locating both environmental degradation and climate change in the last category. U.N. Report, 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.” See Types of Disasters: Definition of Hazard, IFRC, https://perma.cc/K5AR-V1JX.

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.” Types of Disasters: Definition of Hazard, supra note 46. By contrast, the U.N. 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 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.” U.N. Report, supra note 41, at 19. A more recent U.N. document offers a still more diverse typology of hazards as geophysical, hydrological, meteorological, climatological, extra-terrestrial, environment degradation, biological, and technological. See U.N. Office for Disaster Risk Reduction, Technical Guidance for Monitoring and Reporting on Progress in Achieving the Global Targets of the Sendai Framework for Disaster Risk Reduction 172–73 (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 U.N. 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 “socionatural 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 The most recent U.N. approach includes geophysical, hydrological, meteorological, climatological, extra-terrestrial, environment degradation, biological, and technological hazards. U.N. Office for Disaster Risk Reduction, supra note 47. However, with reference to the origins of the hazards, the U.N. approach expressly excludes “armed conflicts and other situations of social instability or tension.” U.N. Report supra note 41, at 18.
some situations. 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, pointing to a need for distinct kinds of legal responses.

Meanwhile, on the “human mobility” side of the nexus, legal studies tend to privilege movement with an international character. 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. Many legal studies also seem to assume that movement caused by environmental factors will be from Global South to North. Moreover, they regularly cite the 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. Much of the legal literature also seems to assume that the movement has an essentially “forced” character, reflecting its framing of environmental change as a “push” factor.

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50 McAdam, supra note 40, at 247–49; Mayer, supra note 22, 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 12, at 6–12, 14–16. Indeed, the distinctions between the various forms of migration are not always neat. See generally Graeme Hugo, Lessons from Past Forced Resettlement for Climate Change Migration, in Migration and Climate Change, supra note 12, at 260.
52 Piguet et al., supra note 12, at 15. However, some of the “solutions” proposed are extended also to those internally displaced by climate change. See, e.g., David Hodgkinson, Tess Burton, Heather Anderson & Lucy Young, ‘The Hour When the Ship Comes In’: A Convention for Persons Displaced by Climate Change, 36 Monash U.L. Rev. 69 (2010); Frank Biermann & Ingrid Boas, Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, 10 Glob. Envt’l Pol. 60 (2010). Most legal studies, however, tend to treat internal displacement in this context as adequately addressed by the U.N. Guiding Principles on Internal Displacement.
53 On the former, see Khalid Koser, Climate Change and Internal Displacement: Challenges to the Normative Framework, in Migration and Climate Change, supra note 12, at 289. On the latter, those most vulnerable to the effects of climate change often do not have the resources to move internationally or 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 et al. eds., 2017).
54 Carol Farboko, Representation and Misrepresentation of Climate Migrants, in Research Handbook on Climate Change, Migration and the Law, supra note 5, at 67, 70–77; Piguet, et al., supra note 12, at 15; Gemenne, supra note 23, at 231–35.
55 Katrina M. Wyman, Ethical Duties to Climate Migrants, in Research Handbook on Climate Change, Migration and the Law, supra note 5, at 347. 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. See, e.g., Biermann & Boas, supra note 52. This may reflect wider stereotypes about this issue. See Simonelli, supra note 8, at 23–53.
56 Gemenne, supra note 23, at 253; Piguet et al., supra note 12, at 15.
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.  

Similarly, it is well recognized that we should avoid characterizing 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.

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.

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. 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 minimize the transmission of infection. Since these legal issues are

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57 See, e.g., Kälin, supra note 34, at 96.

58 Piguet et al., supra note 12, at 15–16; Richard Black et al., 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, available at The Coronavirus and Mobility Forum, COMPAS, https://perma.cc/6QVV-VL6G.

60 In the U.S., for example, the President issued a proclamation in April 2020 suspending entry into its territory for certain immigrants who may present risk to the U.S. labor market’s ability to recover from economic downturns related to the COVID-19 outbreak. Proclamation No. 10,014, 85 Fed. Reg. 23,441 (Apr. 22, 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 travelers 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 (Sept. 21, 2020), https://perma.cc/2S49-L6LA.

important in and of themselves, and they are 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.

B. 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 environment-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 inquiry. 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 to 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 built 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

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62 See, e.g., sources cited notes 83–90.

63 Platform on Disaster Displacement, State-led, Regional Consultative Processes: Opportunities to Develop Legal Frameworks on Disaster Displacement, in Climate Refugees: Beyond the Legal Impasse? 126
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

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 characterized 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 leveled 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

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64 Popp, supra note 63, at 230; see also Black et al., supra note 58, at 449.
65 Christel Couril, The Protection of “Environmental Refugees” in International Law, in MIGRATION AND CLIMATE CHANGE 359, 369–70 (Etienne Piguet et al. eds., 2011); Thekli Anastasiou, Public International Law’s Applicability to Migration as Adaptation, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE 172, 183–84 (Simon Behrman & Avidan Kent eds., 2018).
66 MCADAM, supra note 40, at 117.
67 Anastasiou, supra note 65, at 183–84.
68 MCADAM, supra note 40, at 117; Kälin, supra note 34, at 100.
in the Global South is largely absent from the analysis. Furthermore, the focus in these analyses on “international protection” provisions means that the wider provisions of national immigration law are also largely overlooked. 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”). Certainly, the extant treaties dealing, respectively, with refugees, statelessness, human rights, or the environment do not specifically address this situation. As will be discussed below, 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, by extension, of a gap in relation to their envisaged 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. In particular, they argue that the general gap in legal protection actually exists mainly in relation to the “legal status” of these persons, to aspects of their “admission [and] continued stay [in the reception country], and [to] protection against forcible return to their country of origin.”

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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 40, at 105, 107.

72 For exceptions, see text at note 96 below. “International protection” refers to the assumption of an obligation to provide protection to people who are outside their own country and face certain specified kinds of persecution or harm in that country but lack the protection of their own state.

73 See, e.g., WALTER KÄLIN & NINA SCHREPPER, UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES, No. 24: PROTECTING PEOPLE CROSSING BORDERS IN THE CONTEXT OF CLIMATE CHANGE: NORMATIVE GAPS AND POSSIBLE APPROACHES 4, 49–56 (2012); Christel Cournil, Les réfugiés écologiques: Quelle(s) protection(s), quel(s) statut(s) ?, 4 REVUE DU DROIT PUBLIC 1035 (2006).

74 See supra note 73; see also McAdam, supra note 40, at 39–98. McAdam equally dismisses the much-debated prospect of the international law on statelessness resolving the situation of “sinking” small island states. See McAdam, supra note 40, at 119–60.

75 See Kälín, supra note 34, 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, supra note 5, at 131, 131.

76 Platform on Disaster Displacement, supra note 63, at 145; Kälín, supra note 34, at 89. The recent comments of the UNHCR in Ioana Teitota v. New Zealand, U.N. Doc. CCPR/C/127/D/2728/2016, ¶¶ 9.11–14 (2020) 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.

Winter 2021
Among legal scholars, the gap in legal international 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. 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. 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. Yet those scholars not only underestimate the difficulty of distinguishing “forced” and “voluntary” movement in this context 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. 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 what the law ought to be (lex ferenda).” In other words, 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. On the one hand, certain scholars, particularly those from the international refugee and human rights law fields, argue in favor 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.

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77 See McAdam, supra note 40, at 36.
79 See Kalin & Schrepfer, supra note 73, at 62; Kalin, supra note 34, at 89–90, 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 supra note 25 and accompanying text.
81 See generally McAdam, supra note 40, at 98; McGregor, supra note 25.
82 See Mayer & Crépeau, supra note 10, at 13.
83 See supra note 30 and accompanying text. This approach can be discerned in Scott, supra note 30; Sanjula Weerasinghe, UNHCR Legal and Protection Policy Research Series, No. 39: In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change 109–10 (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, supra note 18, at 118, 121; Selwyn Fraser, Climate Persecutors: Climate Change Displacement and the International Community as
Some also propose the development of soft law instruments to provide temporary or similar protection to the broader class of persons fleeing environmental factors.\textsuperscript{84} Such proposals, often touted as merely a first step on the path to creating a new treaty dedicated to this challenge, also often creatively draw on, and develop, existing international law principles from the field of international protection law.\textsuperscript{85}

On the other hand, 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,\textsuperscript{86} although the idea is rightly dismissed by refugee law authorities as unworkable.\textsuperscript{87} Many others call for a new treaty, either standalone or under the framework of international environmental law, for which they provide draft proposals.\textsuperscript{88} At their

\textsuperscript{84} See Camilla Schlosn, \textit{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?}, supra note 18, at 243, 247–48; Elizabeth Ferris & Jonas Bergmann, \textit{Soft Law, Migration and Climate Change Governance}, 8 J. HUM. RIGHTS & ENV’T 6, 12 (2017); Tamara Wood, \textit{Developing Temporary Protection in Africa}, 49 FORCED MIGRATION REV. 23, 23 (2015); M

\textsuperscript{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. See, e.g., Garlick et al., supra note 83, at 121–22; Volker Türk, \textit{Temporary Protection Arrangements to Fill a Gap in the Protection Regime}, 49 FORCED MIGRATION REV. 40, 40–41 (2015); Wood, supra note 84, at 23–25; McAdam, supra note 40, at 256–66.


core, though, these proposals seek to promote status-based forms of international protection for their respective classes of refugee-like beneficiaries,\(^9\) 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 international protection or from international environmental law.\(^9\) None of the proposals have yet been taken up by states.\(^9\)

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.\(^9\) 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.\(^9\) 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.”\(^9\) 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 and their impact on countries that are particularly exposed to the risk of disaster.\(^9\) For instance, certain scholars working in the Pacific have begun to analyze climate mobility in the context of wider migration patterns and processes.\(^9\) As a result,

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\(^9\) See Christel Cournil, The Protection of “Environmental Refugees” in International Law, in Migration and Climate Change, supra note 12, at 359, 361–63 (listing scholarly proposals identified as sharing a concept of “protection” as their common basis).


\(^9\) 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 40, at 187–201.

\(^9\) See Mayer, supra note 22, at 31–35; Peter Penz, International Ethical Responsibilities to “Climate Change Refugees”, in Climate Change and Displacement: Multidisciplinary Perspectives, supra note 31, at 151, 152–54.

\(^9\) See Mayer, supra note 22, at 159–85.

\(^9\) Stephen Castles, Concluding Remarks on the Climate Change-Migration Nexus, in Migration and Climate Change, supra note 12, at 415, 425.

\(^9\) Id. at 424–26; see also Mayer, supra note 22, at 16–35.

they now argue that climate migration might be addressed “within existing international migration mechanisms,” and ask how immigration law in Australia and New Zealand could be tweaked, or how bilateral or regional arrangements may be developed, to accommodate future mobility linked to climate change.98

C. 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 Article aims to contribute to that core legal debate rather than to consider the legal implications of other aspects of this nexus, such as internal mobility linked to environmental factors.99 Nonetheless, this Article 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 non-nationals, or “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 international mobility in other ways. These insights provide a strong foundation for renewed consideration of key areas of the legal debate, such as the scope of existing legal protection, the nature of potential legal development in this field, and how to accommodate the multicausal nature of migration.

This Article interrogates these questions through a case study of the Americas. On the one hand, this approach reflects the contention that abstract analysis of international law at the global level has largely reached the limits of

97 Burson & Bedford, supra note 96, at 10; McAdam, supra note 40, at 201–11; Graeme Hugo, Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific, in Climate Change and Displacement: Multidisciplinary Perspectives, supra note 34, at 9, 33; see also Jon Barnett & Natasha Chamberlain, Migration as Climate Change Adaptation: Implications for the Pacific, in Climate Change and Migration: South Pacific Perspectives, supra note 63, at 51, 56; Richard Bedford & 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, supra note 63, at 89, 125.

98 See supra note 97 and accompanying text.

99 The existing human rights-based framework codified in the U.N. 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. See Kälin, supra note 34, at 93–94. However, elaboration of the norms may be needed in relation to durable solutions and accountability for climate change drivers. See 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, supra note 5, at 108, 119.
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 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. Certainly, like those in the Pacific, countries in the Americas are exposed regularly to sundry hazards. Yet, in other ways, the Americas are more diverse, comprising two continents with extensive land borders, in contrast to the small island states that make up most of the Pacific. Moreover, the Americas are twenty 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.

III. 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 this phenomenon’s existence, scope, and characteristics, often citing disjointed and rather particular examples as if they demonstrated some general trend. However, if we want to truly 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. Toward this end, the present Article 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, this Article 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

100 See supra note 97 and accompanying text.
102 See, for example, the empirical “scene-setting” in Simon Behman & Avidan Kent, Overcoming the Legal Impasse? Setting the Scene, in CLIMATE REFUGEES: BEYOND THE LEGAL IMPASSE?, supra note 18, at 3–6.
103 Calls for more robust engagement with the empirical evidence are made by some legal scholars. See, e.g., Mayer, supra note 18, at 90–91.
experience of international mobility in other ways that are important for the law to consider.

A. 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, floods, and earthquakes, and slow-onset events, such as drought, erosion, desertification, and glacier retreat that may be linked to climate change. 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. 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. 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 less significant than that of internal movement. Of course, given that the latter is predicted to increase with time, so may the former. These trends in the Americas accord with those in other regions of the world, suggesting that this region is not an anomaly in that respect.

104 See generally Raoul Kaenzig & Etienne Piguet, Migration and Climate Change in Latin America and the Caribbean, in PEOPLE ON THE MOVE IN A CHANGING CLIMATE: supra note 63, at 155. 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. Id. at 169.

105 Id. at 155; Piguet et al., supra note 12, at 6–12, 15–16.

106 Calculations by the author based on figures in INTERNAL DISPLACEMENT MONITORING CENTRE (IDMC), ANNUAL REPORTS 2019 (2019), https://perma.cc/AZ7S-3W7B, 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).

107 For instance, for the U.S. 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 EXPL. 1, 10 (2011)—and under temporary protected status in disaster contexts, suggest an average annual upper ceiling in the tens of thousands.


109 See Kaenzig & Piguet, supra note 104, at 171; Piguet et al., supra note 12, at 6–12, 15–16.
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. 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 neighboring country to escape the impact of the event or to access better shelter or aid on the other side of the border. The movement usually follows existing, well-established patterns of daily back-and-forth migratory crossings in border regions. Examples include north Guatemalans crossing the border into 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 seeking aid in accessible Argentinian towns. 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. 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.

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100 See Kaenzig & Piguet, supra note 104, at 171.
111 See Cantor, Cross-Border Displacement, supra note 11, at 17; Cantor, Law, Policy and Practice, supra note 11, at 12.
sometimes to other countries. 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. 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 migration out of the country from those areas is driven by spiraling livelihood pressures resulting from the combined impact of slow-onset environmental degradation with sudden-onset tropical storms.

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 household livelihood plans. 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. That data dovetails with other research showing that regular migration to the U.S. increases after severe storms in these countries, and also in Mexico, albeit only after a lag period of up to a year. Like the other two strands of movement, this one also tends to follow

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114 See Piguet et al., supra note 12, at 8–12.


116 This lag may reflect both the 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. See CANTOR, LAW, POLICY AND PRACTICE, supra note 11, at 12–13. Alternatively, 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. See McLeman, supra note 29, at 43–44.


traditional migration routes from the affected country.\textsuperscript{119} However, where the routes 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 such as the U.S. tried to close their borders after the 2010 earthquake.\textsuperscript{120}

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.\textsuperscript{121} Certainly, it seems that only in rare cases will these forms of movement be likely to satisfy the long-established legal bases for international protection by states.\textsuperscript{122} Equally, though, they do suggest that, while 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 the societal level.\textsuperscript{123} Rather, some movement also occurs preemptively 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, while 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.

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

\textsuperscript{119} 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, e.g., Kaenzig & Piguet, supra note 104, at 171.

\textsuperscript{120} Patricia Weis Fagen, Nansen Initiative, Receiving Haitian Migrants in the Context of the 2010 Earthquake, 27 (2013), https://perma.cc/7BBF-BYWA; Nikola Gütermann & Eve Schneider, The Earthquake in Haiti, in The State of Environmental Migration 39, 44 (François Gemenne et al. eds., 2011).

\textsuperscript{121} For instance, other scenarios might include movement away from communities that are exposed to the repeated impact of sudden-onset events.

\textsuperscript{122} See McAdam, supra note 40, at 52–98. See Section IV below for discussion of why the legal criteria for international protection are likely to be engaged only rarely by these circumstances.

\textsuperscript{123} On the U.N. 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.” See U.N. Report, supra note 41, at 14.
short-term and long-term impacts on mobility at the household level, even if their relative proximity as push factors for mobility may diminish over the long-term. In general, then, these conclusions point to a need for researchers to engage with the broader ways in which hazards impact human mobility, and to recognize that the occurrence of a “disaster” is but one way in which those 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 lawmakers 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 mobility options at the individual or household level.

B. 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 recognized 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 of movement by affected persons. More recently, though, some legal scholars have argued in favor of a broader conception of this causal nexus by pointing to the possibility that environmental factors might also shape mobility by acting as a “pull factor” due to the new opportunities created by climate change or by mitigation or adaptation activities. Building on those analyses, the present Article 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

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124 See, e.g., Kälin, supra note 34, at 84–92.
125 See Mayer, supra note 22, at 22–25.
relocated to other countries and the legal implications of such measures.\textsuperscript{126} However, data from the Americas verifies that organized 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.\textsuperscript{127} Such evacuations are often undertaken by a foreign state for its nationals unfortunate enough to be caught up in a serious disaster overseas. In the Americas, however, empirical data shows that nationals of the disaster-affected country have sometimes also been evacuated to other countries by those states. Examples include the evacuation to other Caribbean islands as well as to the U.K. and U.S. of most of the population of Montserrat when the volcano erupted in 1995 and certain profiles of Haitian nationals evacuated on medical or similar grounds by Canada, Mexico, and the U.S. after the 2010 Haiti earthquake.\textsuperscript{128} This raises the question of how the law treats such organized transfers in terms of travel, entry, and stay.

Crucially, studies of the Americas region show that disasters can impact a range of other legal aspects of international mobility for aliens.\textsuperscript{129} 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 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.


\textsuperscript{127} 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), https://perma.cc/A4RN-SPNF; Bahamas to Evacuate Islands in Path of "Irma", ASSOCIATED PRESS (Sept. 6, 2017), https://perma.cc/PSH7-ZCTZ.

\textsuperscript{128} CANTOR, LAW, POLICY AND PRACTICE, supra note 11, at 13.

\textsuperscript{129} Id. at 13–14 for these examples.
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, this Section will show that certain states have actually long recognized the challenge of international mobility caused by disasters and, initially at least, some 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 international protection adopted by states in the Americas.

A. Disasters and International Protection

At present, most states in the Americas are parties to the main binding U.N. treaties on refugee protection and have incorporated pertinent aspects of the “universal” refugee definition into national law. In Latin America, fifteen states have also incorporated the regional expanded refugee definition endorsed by the non-binding Cartagena Declaration into their national law. The Cartagena Declaration 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.”

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130 These U.N. treaties define 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 that country.” See Convention relating to the Status of Refugees art. 1A(2), July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); Protocol relating to the Status of Refugees art. 1(2)), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). The Caribbean is the exception in this region: only eight of thirteen states are parties to the Protocol and only four have incorporated the refugee definition into national law. See CANTOR, CROSS-BORDER DISPLACEMENT, supra note 11, at 64.

131 The Cartagena Declaration 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 § 3(3), Nov. 1984, reprinted in 3 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS: REGIONAL INSTRUMENTS 1196, 1197 (2007). Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay incorporate the expanded definition in national legislation.
of states, national law also provides for complementary forms of international protection based on non-refoulement standards in international human rights treaties. Non of these international instruments specifically mention the occurrence or risk of a “disaster” in the country of origin as a basis for international protection. Yet some legal scholars argue that these universal and regional treaty norms could be interpreted to provide international protection to persons fleeing disasters. Some limited practice exists in support of this proposal. For example, after the 2010 earthquake in Haiti, several Latin American states did recognize a small number of Haitians as refugees due to the violence unleashed by the disaster. 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.

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


132 Non-refoulement standards forbid the sending of a person to another country where they may face specific kinds of persecution or other serious harms. Alongside the well-established rules on the non-refoulement of refugees in refugee law, international human rights law prohibitions on sending a person to a territory where the risk of torture exists form the main source of “complementary” protection (in other words complementary to refugee protection) against refoulement for persons who may not qualify as refugees stricto sensu under refugee law. In the Americas, national law in countries such as Canada, Chile, Colombia, Costa Rica, Guatemala, Mexico, and the U.S. mostly reflects the non-refoulement standards expressed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, (entered into force June 26, 1987). See CANTOR, CROSS-BORDER DISPLACEMENT, supra note 11, at 41, 52–53.

133 See, e.g., KALIN & SCHREPFER, supra note 73, at 34 (arguing that the Cartagena Declaration definition may accommodate disaster-affected persons under the element relating to “other circumstances which have seriously disturbed public order”).

134 Mexico, Panama, Ecuador, and Peru recognized some Haitians as refugees under the definitions provided by one or other of these international instruments for refugee protection, based on the rise of insecurity in Haiti resulting from the 2010 earthquake. See CANTOR, LAW, POLICY AND PRACTICE, supra note 11, at 17–18.

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.\footnote{Cuba is the exception to this consensus. See Decreto No. 26, art. 80, July 19, 1978 (Cuba), https://perma.cc/F9MW-25VR [hereinafter Cuba Decree].} Indeed, in some states, national law expressly rules out such an interpretation.\footnote{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.” See Reglamento de la Ley Sobre Refugiados y Protección Complementaria [Regulations of the Law on Refugees and Complementary Protections] [RLRPC], art. 4(XI), Diario Oficial de la Federación [DOF] 21-02-2012 (Mex.), https://perma.cc/5ZDY-A6TF (author translation).} In practice, certain states have even gone so far as to channel asylum claims 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.\footnote{See, for example, Weerasinghe, supra note 83, at 64–75 for a discussion of the Brazilian procedural response to Haitian asylum seekers after the earthquake.} 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 come 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 U.S. expressly provided for different categories of “persons uprooted by catastrophic natural calamity” to be resettled to the U.S. as “refugees.”\footnote{See 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 27–30 (Ctr. for Glob. Dev., Working Paper 255, 2011), https://perma.cc/66TG-DKUW.} Moreover, during this early period, the U.S. 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 including, inter alia, persons who leave their country “due to cataclysm or other phenomena of nature.”\footnote{See Cuba Decree, supra note 136 (author translation).} 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.”\footnote{Cabinet Decision, Minute No. 4809, Nov. 16, 1979 (Trin. and Tobago).}
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 recognized 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 U.N. 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 U.N. 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 harmonization of national law with U.N. refugee treaty law. Although this observation cannot be generalized beyond these specific examples, it calls us to think more critically about the relationship between national and international law in responding to this challenge.

B. 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 U.S. 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.\(^{142}\) 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.\(^{143}\)

\(^{142}\) See note 70 and accompanying text.

At the individual level, access to TPS is usually limited to nationals of the designated country who are already present in the U.S. It thus serves principally to temporarily regularize the immigration status of persons present irregularly. In most cases, though, TPS 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 benefited a substantial number of persons. Thus, over 331,000 nationals of Honduras, Nicaragua, and El Salvador benefited from stay in the U.S. 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 U.S. 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.” 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. Indeed, it is not granted on the basis of any international obligation. Moreover, its relationship to “international protection” is somewhat

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144 See, e.g., Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476 (Jan. 21, 2010) (illustrating that, in this regard, the re-designation of Haiti in 2011 to offer access to TPS for Haitians who had been continuously residing in the U.S. from a date prior to one year after the earthquake is exceptional); see also Extension and Redesignation of Haiti for Temporary Protected Status, 76 Fed. Reg. 29,000 (May 19, 2011).

145 Attempts since 2017 by the Trump administration to terminate long-standing TPS designations for nationals of certain countries continue, at the time of writing, to be litigated before the U.S. courts. See, e.g., Ramos v. Nielsen, 336 F. Supp.3d 1075 (N.D. Cal. 2018), vacated and remanded by Ramos v. Wolf, 975 F.3d 872 (9th Cir. 2020). The attempts to terminate TPS were apparently pursued by the administration in the face of advice from the U.S. State Department that this would put national security, foreign relations, and the beneficiaries’ American-born children at risk. Nicole Narea, State Department Officials Warned Trump Not to Revoke Protections for Immigrants, Vox (Nov. 7, 2019), https://perma.cc/DMX2-23C3.

146 See generally JILL H. WILSON, CONG. RsCH. SERV., RS20844, TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES 2, 5 (2020) (illustrating that TPS has also been used for contexts of war); see also Temporary Protected Status, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Sept. 8, 2020), https://perma.cc/SF48-PMPD (providing full list of TPS countries and designation documentation).

147 § 1254a (b)(1)(C).
tenuous. For instance, while “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 U.S. 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 criticized TPS on those grounds, the analysis here is not intended to downplay its utility but to simply point 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 recognized. 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. 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.” 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.” 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.

148 See CANTOR, LAW, POLICY AND PRACTICE, supra note 11, at 37–40; see also Bill Frelick, What’s Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime, 8 J. MIGRATION & HUM. SEC. 42 (2020).

149 See Refugee Policy, ¶ 12(a)(iii), 13(f), 2009 (Jam.), https://perma.cc/U2RB-AT8Y.


V. 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.\(^{152}\) This partly reflects a perception that the situation of persons fleeing environmental threats is analogous to that of refugees, thus requiring international protection rather than immigration relief.\(^{153}\) 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.\(^{154}\) Indeed, most of the legal scholarship is quite dismissive of the role of national law in general.\(^{155}\) 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 common destination countries in the region such as Australia or New Zealand.\(^{156}\)

In the Americas, the insight that immigration law might accommodate international mobility linked to environmental threats represents an important starting point for analyzing 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.\(^{157}\) Indeed, the creation by the U.S. of an “environmental disaster” limb within TPS, which is essentially an immigration law provision for regularizing status in disaster contexts rather than a tool of international protection,\(^{158}\) in 1990 is just one early example of pertinent practice in this region. In Central America, for example, various states adopted legal

\(^{152}\) 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 to the promotion of mechanisms to receive persons displaced across borders by a disaster. See Cantor, CROSS-BORDER DISPLACEMENT, supra note 11, 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. See Michelle Yonetani, PLATFORM ON DISASTER DISPLACEMENT, MAPPING THE BASELINE: TO WHAT EXTENT ARE DISPLACEMENT AND OTHER FORMS OF HUMAN MOBILITY INTEGRATED IN NATIONAL AND REGIONAL DISASTER RISK REDUCTION STRATEGIES? 29–31 (2018), https://perma.cc/8MRL-ZHBQ.

\(^{153}\) See supra note 78 and accompanying text.

\(^{154}\) See supra note 72 and accompanying text.

\(^{155}\) See supra notes 65–71 and accompanying text.

\(^{156}\) See supra note 97–98 and accompanying text.

\(^{157}\) 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, e.g., Anastasiou, supra note 65, at 187–89.

\(^{158}\) See supra notes 143–148 and accompanying text.
decrees in 1998 to regularize the immigration status of irregular migrants from other countries in the region that had been devastated by the effects of Hurricane Mitch.\footnote{Decreto No. 27457-G-RE, Reglamento del Régimen de Excepción 1999, \textit{La Gaceta} [L.G.], Nov. 24, 1998 (Costa Rica), \url{https://perma.cc/NVB5-BC8R}; Decreto No. 94-98, 21 Dec. 1998, Para Ciudadanos Centroamericanos que se Encuentran en el Territorio Nacional, \textit{La Gaceta, Diario Oficial} [L.G.], 7 Jan. 1999 (Nicar.), \url{https://perma.cc/RHA8-X67Z}; Decreto Ejecutivo No. 34, Por el Cual se Dictan Algunas Medidas Administrativas para Legalizar la Residencia Definitiva de Nacionales de la Republica de Nicaragua, que se Encuentran Indocumentados en el País, \textit{Gaceta Oficial} [G.O.], Feb. 9, 1999 (Pan.), \url{https://perma.cc/DHZ2-EZQT}.} In Costa Rica alone, the resulting program regularized around 150,000 disaster-affected migrants.\footnote{ABELARDO MORALES GAMBOA, \textit{FLASCO, AMNISTIA MIGRATORIA EN COSTA RICA: ANÁLISIS DE LOS ALCAZARES SOCIALES Y DEL IMPACTO DEL RÉGIMEN DE EXCEPCIÓN MIGRATORIA PARA LOS INMIGRANTES DE ORIGEN CENTROAMERICANO EN COSTA RICA 31} (1999), \url{https://perma.cc/5NQ4-29E2}. 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 Article advances legal debate on the environment-mobility nexus on several points. Most importantly, it shows just how widespread the use of immigration law instruments and concepts to resolve these challenges is 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 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.\footnote{See supra Section IV.} 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.

A. “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, while 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.  

Even so, and despite the scant attention paid to these migration pathways in existing legal research on the environment-mobility nexus, this Article 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 U.S. from Central America and the Caribbean in the year after a sudden-onset disaster hits one of those countries. For slow-onset disasters, the documented increase in migration to the U.S. from parts of Mexico affected by such phenomena provides a similar indication. 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. 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, but in this region international mobility linked to environmental threats tends to follow existing migration routes and pathways where possible. 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, especially among those sectors of society that possess the resources to migrate internationally.

The fact that ordinary migration categories are capable of accommodating 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

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162 This is the case even for categories, such as those relating to seasonal labor 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 labor market of the receiving country.

163 See supra notes 116–119 and accompanying text.

164 See supra notes 112–113 and accompanying text.

165 See supra note 111 and accompanying text.


167 See examples supra Section III.
persons but more generally must also seek to ensure that states fairly apply these ordinary migration categories, especially in relation to disaster-affected countries.\textsuperscript{168} 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 nonnationals, 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.”\textsuperscript{169} 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.\textsuperscript{170} Meanwhile, the U.S. 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.\textsuperscript{171} Based on the periodic announcements reminding migrants of this policy, these relief measures

\textsuperscript{168} 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 \textit{Cantor, Cross-Border Displacement}, supra note 11, at 36, 47, 59.

\textsuperscript{169} \textit{Immigration and Refugee Protection Act}, S.C. 2001, c 27, s 25 (Can.), https://perma.cc/EYW7-M5EY.

\textsuperscript{170} 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. See \textit{Cantor, Law, Policy and Practice}, supra note 11, at 33–34.

seem to be applied mainly to those affected by natural disasters, not only overseas but also in the U.S. itself.\footnote{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 U.S. in 2017; California Wildfires in 2007 and 2018; Hurricane Florence in the U.S. in 2018; and the 2018 Typhoon Mangkhut in the Philippines. \textit{See Previous Special Situations, U.S. CITIZENSHIP & IMMIGR. SERVS.}, https://perma.cc/VMM3-HHQ9 (Nov. 26, 2018) (listing existing announcements of “temporary relief measures”).}

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.\footnote{\textit{CANTOR, LAW, POLICY AND PRACTICE}, supra note 11, at 32.} Likewise, in South America, Colombia regularized some Haitians arriving after the 2010 earthquake by flexibly applying work and student categories.\footnote{Id. at 33.} In the Caribbean, Dominica and Antigua and Barbuda relaxed certain eligibility requirements of the ordinary migration categories for Haitians in 2010.\footnote{Id. at 35.} 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.\footnote{CARIBBEAN MIGRATION CONSULTATIONS, 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 15 (2019), https://perma.cc/F9JC-KGPW.} 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 subregional 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.\textsuperscript{177} Some scholars have already argued in favor of extending free movement arrangements as a means of facilitating migration in the context of environmental threats.\textsuperscript{178} 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 subregional bloc. For instance, after Hurricane Maria devastated Dominica in 2017, the authorities in Trinidad and Tobago used the Caribbean Community, or CARICOM, short-term visa-free stay provision to shelter affected Dominicans.\textsuperscript{179} In tandem, Antigua and Barbuda, 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.\textsuperscript{180} Lacking disaster-specific provisions, these accords now seem to offer additional useful ordinary migration categories for states to apply in disasters.

B. “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, such as where an applicant lacks a substantive connection to the destination state or where a claim falls 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 analyze 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.

\begin{footnotesize}
\textsuperscript{177} 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 \textsc{Cantor, Cross-Border Displacement}, supra note 11, at 36–37, 47–48 and 59.

\textsuperscript{178} See, e.g., \textsc{Ama Francis, Colum. L. Sch. Sabin Ctr. for Climate Change L., Free Movement Agreements & Climate-Induced Migration: A Caribbean Case Study} 1, 2 (2019), https://perma.cc/ZF6K-MB88; \textsc{Wood, supra note 84}; \textsc{Black et al., supra note 58}, at 449.

\textsuperscript{179} \textsc{Francis, supra note 178}, at 18.

\textsuperscript{180} \textsc{Id., Antigua Prepares for Influx of Dominicans, St. Lucia Times} (Sept. 24, 2017), https://perma.cc/7J6S-L89A.
\end{footnotesize}
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.\(^\text{181}\) 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.\(^\text{182}\) 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 granted leave to stay.\(^\text{183}\) Crucially, across the Americas, states have exercised this kind of broad discretionary power 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.\(^\text{184}\) After Hurricane Irma in 2017, the U.S. unincorporated territory of Puerto Rico used inherent discretion to grant entry to thousands of people evacuated from the British Virgin Islands, Dutch Sint Maarten, and French Saint Martin.\(^\text{185}\) In Chilean law, a discretionary power to grant stay in cases outside the ordinary migration categories was applied to benefit a small number of Haitians after the earthquake.\(^\text{186}\)

However, these broad discretionary powers are also used to facilitate stay on a group basis. In some cases, this involves creating special regularization programs to which nationals of the disaster-affected country who are already present

\(^{181}\)See Cantor, Law, Policy and Practice, supra note 11, at 37-39.

\(^{182}\)For example, Colombian law provides for a power to authorize entry and stay on extraordinary grounds where this is necessary, see Decreto No. 1067, mayo 26, 2015, Diario Oficial [D.O.], art. 2.2.1.112.5 (Colom.), as modified by Decreto No. 1325, agosto, 12, 2016, https://perma.cc/3SG6-99AP. 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. See Ley No. 978/96, art. 146(g), June 27, 1996, (Para.), https://perma.cc/9BDQ-USAJ.

\(^{183}\)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, Cross-Border Displacement, supra note 11, at 60. On the mainland, the same is true for the former British colonies of Belize and Guyana. Id. at 37, 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, supra note 169, s 24(1) (Can.).

\(^{184}\)Cantor, Law, Policy and Practice, supra note 11, at 61.


\(^{186}\)Decreto No. 597 art. 49–50, Aprueba Nuevo Reglamento de Extranjeria, junio 14, 1984, Diario Oficial [D.O.] (Chile), https://perma.cc/GL7W-3GBA; see Cantor, Law, Policy and Practice, supra note 11, at 43.
irregularly in the destination country can apply. In 1998, Central American states created such regularization programs for migrants from countries affected by Hurricane Mitch.\textsuperscript{187} In 2010, similar one-off regularization programs were created for Haitians present in Ecuador and Venezuela, using broad immigration discretion based on, respectively, statutory and innate powers.\textsuperscript{188} Such powers have also been invoked to create legal measures that fall short of formal stay but which still 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.\textsuperscript{189} 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.\textsuperscript{190} 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 among countries,\textsuperscript{191} 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.”\textsuperscript{192} In

\textsuperscript{187} See \textit{supra} notes 158–159 and accompanying text.

\textsuperscript{188} Decreto No. 248, Feb. 9, 2010 (Ecuador), https://perma.cc/C8VB-8DFP; \textit{see also} CANTOR, LAW, POLICY AND PRACTICE, \textit{supra} note 11, at 37–39.

\textsuperscript{189} They include the U.S., Mexico, Bahamas, Dominican Republic, Jamaica, as well as the British Turks and Caicos Islands and the French Antilles territories of Martinique and Guadeloupe. See Michel Forst, \textit{Report of the Independent Expert on the Situation of Human Rights in Haiti}, Michel Forst, Addendum: Forced Returns of Haitians from Third States, at 6–7, U.N. Doc. A/HRC/20/35/Add.1 (June 4, 2012); CANTOR, CROSS-BORDER DISPLACEMENT, \textit{supra} note 11, at 38, 61, 63.

\textsuperscript{190} 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. \textit{See} CANTOR, LAW, POLICY AND PRACTICE, \textit{supra} note 11, at 40–41 (providing a discussion of how this played out for Haitians in Canada).

\textsuperscript{191} 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). \textit{See} CANTOR, LAW, POLICY AND PRACTICE, \textit{supra} note 11, at 38 n.207, 49 n.306, 60, 63 (concerning South America and the Caribbean).

\textsuperscript{192} 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 Eustatius, and Saba (Caribbean);
some countries, this concept is not defined further by national immigration law, leaving the potential for inclusion of disaster victims 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. 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. 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, similar to the law in the Dutch Antilles. In addition, this immigration law concept is articulated in several national refugee laws. 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.

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

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194 Ley No. 18.250, Ley de Migraciones, art. 44, 34(b), Dec. 27, 2008 (Uru.), https://perma.cc/X96P-X454 (author translation).


196 For the Dutch Antilles islands of Bonaire, Sint Eustatius, 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 oktober 2010, Stcr. 2010, § 2.3.6 (Neth.), https://perma.cc/4H6C-QZG5 (translation by author’s colleague).

197 See supra notes 149–151, 151 and accompanying text.

198 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. See CANTOR, LAW, POLICY AND PRACTICE, supra note 11, at 46.

Winter 2021 305
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. Although this last scenario may resemble a rule of international protection, its application is usually discretionary. 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. 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 in the country of origin, particularly those that have “a direct negative impact on the applicant such as . . .” natural disasters.

However, 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, with the tendency particularly accentuated in South America and North America but also becoming increasingly common in Central America. 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 favor 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

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199 For examples of these factors the national law of countries in Central America and South America, see CANTOR, CROSS-BORDER DISPLACEMENT, supra note 11, at 38–39, 49–51. For Canada, the applicable provision is the Immigration and Refugee Protection Act, s 25(1.21). Immigration and Refugee Protection Act, supra note 169, s 25 (Can.).


202 They are Argentina, Bolivia, Brazil, Canada, Ecuador, El Salvador, Guatemala, Mexico, Peru, and the U.S.

203 Currently, in the Caribbean, states are also reported to be considering how to make legal provision. See CARIBBEAN MIGRATION CONSULTATIONS, supra note 176, at 15.
consequences generated by natural or man-made environmental disasters.” Brazil authorizes “humanitarian reception” for a person from “any country in a situation of . . . major calamity [or] environmental disaster.” Ecuador gives stay for “humanitarian reasons,” including being “a victim of natural or environmental disasters.” Peru authorizes “humanitarian residence” where migration is due to “natural and environmental disasters.” Meanwhile, Bolivian law makes provision for the admission of persons at risk due to climate effects or disasters. Similarly, in North America, for the purpose of granting 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 integrity owing to . . . a duly accredited natural disaster” or that she is “victim of a natural catastrophe.” Albeit not expressly based on the concept of “humanitarian considerations,” immigration law in the U.S., as already mentioned, gives authorities the discretion to designate TPS for, inter alia, an “environmental disaster.” In Canada, national law likewise allows temporary

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208 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, Ley de Migración, art. 65, May 8, 2013 (Bol.), perma.cc/P2EV-ECD7 (author translation). 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.” Id. art. 4(16).


210 Lineamientos Generales para la Expedición de Visas que Emiten las Secretarías de Gobernación y de Relaciones Exteriores, Del Procedimiento para Solicitar Visa, Trámite 9, Criterios de Resolución a.i., Diario Oficial de la Federación [DOF] 10-10-2014 (Mex.) (author translation) [hereinafter General Guidelines for the Issuance of Visas].

211 See supra notes 142–146 and accompanying text.
suspension of removals, inter alia, due to an “environmental disaster resulting in a substantial temporary disruption of living conditions” in the country of origin.\textsuperscript{212}

More recently, in Central America, some states have adopted new immigration laws that also refer to disasters in exceptional migration categories based on humanitarian considerations. For example, in Guatemala, the existence of a “natural catastrophe in neighboring 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.\textsuperscript{213} 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-recognized 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 [or] environmental [disasters].”\textsuperscript{214}

Overall, 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 these tools are applied in practice. Yet, while some ordinary migration categories may provide permanent stay, exceptional migration categories mostly give temporary stay. The initial period varies between one year (for example, Costa Rica) and six years (for example, 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 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 favorable than those conferred by refugee status.\textsuperscript{215}

\textsuperscript{212} Immigration and Refugee Protection Regulations, SOR/2002-227, s 230 (Can.). For details of how this was applied in the Haitian case, see CANTOR, LAW, POLICY AND PRACTICE, supra note 11, at 40–41.

\textsuperscript{213} Decreto No. 44, Código de Migración, art. 68, Oct. 23, 2016 (Guat.), https://perma.cc/7FUB-ZFL5 (author translation).

\textsuperscript{214} Decreto No. 35, Reglamento de la Ley Especial de Migración y de Extranjería, art. 181(2), 181(7), May 24, 2019, 2019 (El Sal) (author translation).

\textsuperscript{215} 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.
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 that people who move in the context of both sudden- and 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.\(^\text{216}\) The implicit requirement of most states as a matter of law or practice is that a person must be directly and seriously affected by the disaster in order to benefit from the application of such special measures.\(^\text{217}\) This 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.”\(^\text{217}\) 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 refer to disaster situations as a basis for special measures gives any reason to think that slow-onset disasters fall outside their scope.\(^\text{218}\) It is also the case that several of these provisions refer to “calamities” or “catastrophes” alongside, or instead of, “disasters,”\(^\text{219}\) suggesting concepts which could equally include hazardous events more generally. Further, as to the origins of the events, these provisions

\(^{216}\) See supra note 50 and accompanying text.

\(^{217}\) See supra notes 190–214 and accompanying text. The same is true for similar provisions in national legislation on international protection. See supra notes 148–150 and accompanying text.

\(^{218}\) Indeed, the provision in Bolivian law specifically includes wider “climate effects.” See Ley No. 370, supra note 208, art. 65 (Bol).

\(^{219}\) Alongside the “disaster” concept, the provision in Brazilian law refers to “major calamity.” See Lei No. 13.445, supra note 205, art. 30. That in Mexican law refers to “catastrophe.” See General Guidelines for the Issuance of Visas, supra note 210. The provision in Guatemalan law refers to a “catastrophe” rather than a disaster. See Decreto No. 44, supra note 213, art. 68.
often refer to “natural” disasters or catastrophes, although many refer also, or instead, to “environmental” disasters or catastrophes. The latter concept appears to include events that are “man-made” in origin. 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 ultimately be contemplated.

VI. 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 level. This practice plays out principally in forums concerned with migration rather than international protection and at the level of subregional 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, while early forms of collective action represented ad hoc responses to the devastation wrought by certain very serious disasters, since the mid-2010s, several subregional 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 raise important questions about the future development of international law in this field.

220 The law in Mexico refers to natural disasters or catastrophes. See Ley de Migración, supra note 209, art. 41. While the law in Guatemala refers only to natural catastrophes. See Decreto No. 44, supra note 213, art. 68).

221 For the respective legal provisions in Ecuador, see Ley Orgánica de Movilidad Humana, supra 206, art. 58; Peru, see Decreto Legislativo No. 1350, supra 207, art. 29(2)(k); Bolivia, see Ley No. 370, supra note 208, art. 65; and El Salvador, see Decreto No. 35, supra note 214, art. 181, which refers to natural and environmental disasters.

222 For the respective legal provisions in the U.S., see supra notes 143–147 and accompanying text; and for Canada’s reference to “environmental” disasters, see Immigration and Refugee Protection Regulations, SOR/2002-227, s. 230.

223 For instance, the legal provision in Argentina refers to “natural or man-made environmental disasters.” See Law No. 25871, supra note 204, art. 24(h). The Bolivian provision adds “nuclear [or] chemical disasters or hunger” too. See Ley No. 370, supra note 208, art. 65.

224 Other legal studies appear to overlook the extent of such existing practice on precisely this issue at the international level in the Americas. See, e.g., Pires Ramos & de Salles Cavdeon-Capdeville, supra note 11.
A. Early Ad Hoc Actions

State practice at the subregional level is relatively well-established in the Americas. Certainly, state cooperation regarding the challenges of the international mobility posed by sudden-onset disasters is not new in this region. However, the early instances of state practice at the subregional 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 subregional forums responded to the devastation wrought by Hurricane Mitch. In 1998, for instance, the Meeting of Central American Presidents appealed for:

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

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

The mobility impact of Hurricane Mitch was also addressed by other subregional 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 specialized regular subregional 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 “made special mention of the adoption, by Costa Rica and the United States of America, of migration measures benefiting nationals of the countries affected by Hurricane Mitch.”

Both subregional 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.

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226 For Central American examples, see supra notes 159–160 and accompanying text. A copy of the declaration that was sent to the U.S. with a letter drawing attention to this plea appears to have influenced the granting of TPS. See Meeting of Central American Presidents, supra note 225, at 8.

Yet Hurricane Mitch is not the only disaster where such responsive collective action manifested itself. Indeed, subregional forums across the Americas also promoted these kinds 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 subregional 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.”

Likewise, the subregional 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 regularizes the migratory status of Haitian citizens resident in ALBA countries.” 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.

These examples demonstrate that, from the 1990s to the early 2010s, many states in the Americas participated in subregional 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 subregion 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 subregional forums sought to promote, on a humanitarian basis, the immigration regularization 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.

B. Promoting Frameworks for Cooperation

Since the mid-2010s, states in several subregional 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 subregional level. In this process, the influence

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230 See supra note 188 and accompanying text.
of external actors has been central to encouraging states to build in this way on past practice at national and subregional levels. That work was led initially by the Nansen Initiative (2012–2015)—a global intergovernmental process focused on disaster displacement—and is being continued by its successor initiative, the Platform on Disaster Displacement (PDD) (2016).\footnote{For a description of the approach, see Platform on Disaster Displacement, supra note 63, at 126, 141. \textit{See generally Jane McAdam, From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement, 39 UNIV. NEW S. WALES L.J. 1518 (2016).}} Even so, states in each subregion 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 subregional 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 recognizing 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.\footnote{The Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, 3, Dec. 3, 2014, https://perma.cc/2QSR-2VVS.} 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.”\footnote{Id. at Chapter Seven (Plan). The study was published by UNHCR and PDD in 2018. \textit{See generally Cantor, Cross-Border Displacement, supra note 11.}} That study, commissioned by UNHCR and the PDD (as successor to the Nansen Initiative), was published in 2018; it fed into the South American and Caribbean subregional processes described below. However, it seems that no further measures were taken at the regional level.\footnote{See generally Cantor, Cross-Border Displacement, supra note 11.}

In tandem, the Nansen Initiative had been working with states at the subregional level. In 2013, a Central America consultation recommended that a set of guidelines drawing on national practice be developed through the subregional RCM forum.\footnote{Nansen Initiative, Disasters and Cross-Border Displacement in Central America: Emerging Needs, New Responses 26 (2013), https://perma.cc/6UAA-JADZ.} On the proposal of Costa Rica, this was approved by
In 2016, based on a study commissioned by the Nansen Initiative, the RCM adopted nonbinding guidance on “Protection for Persons moving across Borders in the Context of Disasters.” 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 subregional forum of twelve South American states. In 2018, with support from the PDD, the SCM in turn adopted its own nonbinding “Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin.”

Since 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 Caribbean through the subregional migration forum of the Caribbean Migration Consultations (CMC). 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.” As a next step, those same states agreed on the need to “systematize approaches, harmonize them, and come up with consolidated policies through collaboration.” In the coming years, the creation of a similar subregional framework in the Caribbean, thus, looks like a possibility.
C. Subregional 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 subregions 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 approaches taken in the RCM Guide and the SCM Guidelines thus offer 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 approaches 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. The RCM Guide describes its normative framework as “effective practices” and gives significant detail on each, while the SCM sets out broader “general guidelines” on purported “minimum standards.” Yet, in reality, any difference lies merely in the greater or lesser degree of detail that each instrument provides 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. 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.” Rather, the instruments are intended only to “support the more effective and consistent use of existing law, policy and practice” by states. The

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244 See SCM GUIDELINES, supra note 240, at 15–16.
245 Id. at 28. Indeed, alongside the many examples throughout the text, this is one the orienting principles of the SCM Guidelines.
246 RCM GUIDE, supra note 238, at 8; see also SCM GUIDELINES, supra note 240, at 15, 25.
247 RCM GUIDE, supra note 238, at 8; see also SCM GUIDELINES, supra note 240, at 15.
body of 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.\^{248} This approach of building from existing national law and practice is distinct from other soft law instruments which either express aspirational norms lacking 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 subregion of favorably exercising their discretion in immigration matters where “humanitarian grounds,” such as a disaster exist.\^{249} Accordingly, each instrument also acknowledges that states retain the inherent discretion to adopt more generous approaches than those described in the subregional norms.\^{250} International obligations are acknowledged but are incorporated mainly as a set of parameters that may limit the extent to which states can decline to favorably exercise discretion in some situations, rather than the core legal basis for resulting measures.\^{251} 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.\^{252}

Thirdly, the norms in both instruments are rooted principally in the use of ordinary and exceptional migration categories.\^{253} Both guides distinguish the (humanitarian) protection afforded by these categories from international protection,\^{254} which each highlights as relevant to disaster displacement only in rare cases. Moreover, each instrument promotes active forms of cooperation

\^{248} See RCM GUIDE, supra note 238, at 9; SCM GUIDELINES, supra note 240, at 14–15.
\^{249} See RCM GUIDE, supra note 238, at 13; SCM GUIDELINES, supra note 240, at 20–25, 33.
\^{250} See RCM GUIDE, supra note 238, at 9; SCM GUIDELINES, supra note 240, at 15.
\^{251} See RCM GUIDE, supra note 238, at 13–15; SCM GUIDELINES, supra note 240, at 34.
\^{252} See RCM GUIDE, supra note 238, at 10–11; SCM GUIDELINES, supra note 240, 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. See RCM GUIDE, supra note 238, at 24–36; SCM GUIDELINES, supra note 240, 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. See, e.g., MIGRANTS IN COUNTRIES IN CRISIS INITIATIVE, GUIDELINES TO PROTECT MIGRANTS IN COUNTRIES EXPERIENCING CONFLICT OR NATURAL DISASTER (2016), https://perma.cc/9ZG5-FTV9.
\^{253} See RCM GUIDE, supra note 238, at 11–12; SCM GUIDELINES, supra note 240, at 34.
\^{254} See SCM GUIDELINES, supra note 240, at 24–25 (providing a broad definition of “protection” in Part 3.2, as compared with the emphasis on lack of protection in the definition of “international protection” and indeed “complementary protection” at Part 3.2).
between the host state and state of origin,\(^{255}\) including: bilateral measures to further cooperation and mutual assistance, especially where they share a border,\(^{256}\) 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.\(^{257}\) The SCM framework is expressly based on coordination between these two states,\(^{258}\) and it even posits a principle of “shared responsibility” between them, especially if both are SCM members.\(^{259}\) Thus, in each subregional 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 subregion 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.”\(^{260}\) Some interpretation of this concept is provided by the RCM Guide.\(^{261}\) The emphasis is squarely on the proximity and severity of the disaster’s impact on the individual, in light of any pre-existing vulnerabilities. In other words, unlike the established concepts of international protection, it is not based on a rupture in the political link between an individual and their state of origin or a risk of their fundamental human rights standards being violated there.

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.\(^{262}\) 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.”\(^{263}\) 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

\(^{255}\) 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. See RCM GUIDE, supra note 238, 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.” See SCM GUIDELINES, supra note 240, at 20, 22–23.

\(^{256}\) See RCM GUIDE, supra note 238, at 27–28; SCM GUIDELINES, supra note 240, at 31, 36–38.

\(^{257}\) See RCM GUIDE, supra note 238, at 16; SCM GUIDELINES, supra note 240, at 31.

\(^{258}\) See SCM GUIDELINES, supra note 240, at 15.

\(^{259}\) Id. at 22–23.

\(^{260}\) RCM GUIDE, supra note 238, at 15; see SCM GUIDELINES, supra note 240, at 31.

\(^{261}\) See RCM GUIDE, supra note 238, at 16.

\(^{262}\) Id.

\(^{263}\) Id. 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.” RCM GUIDE, supra note 238, at 16.
fundamental ways to the affected person’s decision to cross an international border.\textsuperscript{264} Otherwise, though, the terms of each instrument strongly suggest that the principal concern is with “disasters,” a concept defined by reference to the extant U.N. policy.\textsuperscript{265} 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 subregional instruments have already begun to shape state practice in the Americas. For example, in the RCM Guide, the principles on bilateral cooperation have been acted upon by some states. Costa Rica and Panama have broken new ground in the subregion 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.\textsuperscript{266} These include a set of draft Standard Operating Procedures (SOPs) for their respective disaster response systems to address cross-border displacement in disaster contexts.\textsuperscript{267} 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 by the two countries, again with the involvement of PDD.\textsuperscript{268} 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.\textsuperscript{269}

The two subregional 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 subregions have adopted significant new provisions of national law specific to the situation of disaster-affected non-nationals when

\begin{itemize}
\item \textsuperscript{264} See SCM GUIDELINES, supra note 240, at 16.
\item \textsuperscript{265} They thus reflect later and earlier versions of this concept in UN policy post- and pre-2016. See SCM GUIDELINES, supra note 240, at 24; RCM GUIDE, supra note 238, at 9–10. For a discussion of the U.N. approach to defining the concept, see supra notes 41, 44–49 and accompanying text.
\item \textsuperscript{266} See International Organization for Migration, Costa Rica and Panama Prepare for Cross-Border Disaster-Displacement, PLATFORM ON DISASTER DISPLACEMENT (Aug. 23, 2017), https://perma.cc/F53M-JC3M.
\item \textsuperscript{267} Government of Costa Rica/Government of Panama, Procedimientos Operativos para la atención de personas desplazadas a través de fronteras en contextos de desastre [Operating procedures for the care of cross-border refugees in the case of disaster] (May 2017) (copy on file with author).
\item \textsuperscript{268} Int'l Org. for Migration, Costa Rica and Panama Effectuate First Border Crossing Simulation, PLATFORM ON DISASTER DISPLACEMENT (Aug. 21, 2017), https://perma.cc/T8Q8-8FCA.
\item \textsuperscript{269} See Platform on Disaster Displacement, supra note 63, at 126, 141.
\end{itemize}
overhauling their immigration legislation. They are Guatemala (2016),270 Brazil (2017),271 Ecuador (2017),272 Peru (2017),273 and El Salvador (2019).274 Paraguay is also reported to be considering such provisions as it debates adoption of a new immigration law.275

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.276 At that conference, over 100 states from different regions endorsed these global guidelines.277 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.278 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.”279

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270 See Decreto No. 44, supra note 213, art. 68 (Guat.).
271 See Lei No. 13.445, supra 205, art. 30 (Braz.).
272 See Ley Orgánica de Movilidad Humana, supra 206, art. 58, 66(5) (Ecuador).
273 See Decreto Legislativo No. 1350, supra 207, art. 29 (Peru).
274 See Decreto No. 35, supra note 214, art. 181 (El Sal).
278 See NANSSEN INITIATIVE, supra note 276, at 21–22, 24, 26–27, ¶¶ 33–34, 38–40, 47–53, 64–65. See also NANSSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE, VOL. 2 42–48 (2015), https://perma.cc/WZY4-U6UJ (describing more fully the basis in existing practice). 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.
279 G.A. Res. 73/195, ¶¶ 18(1), 21(g) (Dec. 19, 2018). By contrast, the norms relating to disaster displacement are addressed only obliquely by the Global Compact on Refugees. See Rep. of the U.N. High Comm’r for Refugees, Global Compact on Refugees, ¶ 63, U.N. Doc. A/73/12 (Sep. 13, 2018).
This Article contributes to the debate on how international law should address international mobility in the context of environmental threats. As a whole, this Article illustrates how greater engagement with different kinds of evidence on 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 Article 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 Article 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 extends to countries in the Global South. As such, this Article 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 Article 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 its 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 existence 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. Instead, this Article shows that many states in this region have long recognized 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 subregions to develop harmonized 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, this Article 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—not 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? As this Article demonstrates, 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, 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 subregional level as a means to harmonize the approach in 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 subregional levels. In some forums, incorporating elements of the current approach into free movement arrangements looks like a distinct possibility. 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, its future development seems more likely to build on existing state practice than on the flights of fancy of us international law scholars. The law offers few truly blank canvases.

280 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 favorably 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 Rep. of the Int’l Law Comm’n, at 154–56, U.N. Doc. A/73/10 (2018).

281 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 subregional 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 while 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).