

THE
NANSEN
INITIATIVE

DISASTER-INDUCED CROSS-BORDER DISPLACEMENT



LAW, POLICY AND PRACTICE CONCERNING THE HUMANITARIAN PROTECTION OF ALIENS ON A TEMPORARY BASIS IN THE CONTEXT OF DISASTERS

BACKGROUND PAPER

**States of the Regional Conference on Migration and Others in the Americas
Regional Workshop on Temporary Protection Status and/or Humanitarian
Visas in Situations of Disaster**

San José, Costa Rica, 10-11 February 2015

Dr David James Cantor

DISASTERS
CLIMATE CHANGE AND
DISPLACEMENT  EVIDENCE
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Human Rights Consortium
SCHOOL of ADVANCED STUDY
UNIVERSITY OF LONDON

Refugee
Law
Initiative

ACKNOWLEDGEMENTS



The generous donation of time and knowledge by each of the experts interviewed is gratefully acknowledged here. As such, the author would like to express his special gratitude to all of those who participated in, or facilitated, the interviews.

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Finally, special acknowledgment is given to the role played by the Economic and Social Research Council in supporting the broader research project within which the author was able to carry out this investigation ('Pushing the Boundaries: New Dynamics of Forced Migration and Transnational Responses in Latin America' [grant number ES/K001051/1]).

The project is funded
by the European Union
with the support of
Norway and Switzerland



Schweizerische Eidgenossenschaft
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Confederazione Svizzera
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Federal Department of Foreign Affairs FDFA

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1. INTRODUCTION

This study undertakes a review of existing law, policy and practice on the humanitarian protection of aliens on a temporary basis in times of disaster by States of the Regional Conference on Migration (RCM) – Belize, Canada, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States of America (USA) – as well as selected countries from South America. It has been commissioned by the Nansen Initiative as a background paper to inform the *Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disaster* that will take place in February 2015 in Costa Rica.¹

The theme of the study results from the second Nansen Initiative Regional Consultation on *Disasters and Cross-Border Displacement in Central America: Emerging Needs, New Responses*, which took place in San José, Costa Rica, on 2 – 4 December 2013.² Participants in the Consultation reported that a diverse set of temporary protection mechanisms had been used in the region and beyond to respond to cross-border displacement generated by disasters caused by natural hazards.³ Equally, the participants recommended that these mechanisms be strengthened by addressing gaps in their use, identifying the RCM as a suitable forum for continuing this regional dialogue and developing guidelines. On the proposal of Costa Rica, the XIX Vice-Ministerial Meeting of the RCM in June 2014 approved the holding of the February 2015 Workshop, which will be funded by the Nansen Initiative.⁴

1.1 CONCEPTUAL CONTEXT FOR THE STUDY

The Nansen Initiative consultative process has confirmed that persons displaced in the context of disasters – whether internally and across international borders – have particular protection needs linked to the type of natural hazard and the involuntary nature of their movement.

The examples are legion. In the case of displacement following a sudden-onset disaster, people may flee without essential legal documents such as identity cards and marriage certificates, or documents may be destroyed. During flight, displaced people may become separated from family members or caregivers, woman and children in particular may be more at risk of sexual

¹ Nansen Initiative, 'Terms of Reference for Consultancy: Development of Guidelines for Humanitarian Visa and Temporary Protection Status in Times of Disasters' (2014).

² Nansen Initiative, 'Disasters and Cross-Border Displacement in Central America: Emerging Needs, New Responses', Nansen Initiative Regional Consultation, San José, Costa Rica, 2-4 December 2013 (2013) Conclusions <http://goo.gl/2H1C9W>.

³ The Nansen Initiative uses the concept of 'disasters' linked to natural hazards, rather than 'natural disasters' in recognition of the fact that a natural hazard does not inevitably develop into a disaster, but is dependent upon a number of factors. According to the UN International Strategy on Disaster Reduction (UN ISDR) a 'disaster' is defined as a 'serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources'. The concept of 'natural hazards' refers to '[n]atural process or phenomenon that may cause loss of life, injury or other health impacts, property damage, loss of livelihoods and services, social and economic disruption, or environmental damage'. <http://www.unisdr.org/we/inform/terminology>

⁴ Regional Conference on Migration, 'Declaración: Por una Región Libre de Trata de Personas', XIX Reunión Viceministerial de la Conferencia Regional sobre Migración, 26-27 June 2014 (2014) decisión 6.

and gender based violence, or displaced people may face a heightened risk of being trafficked or smuggled. Displaced people may also need emergency shelter, and access to health services, education, and psycho-social counselling. Sometimes the need for ongoing humanitarian assistance is underestimated, with assistance needed months or even years after the disaster. Upon return, displaced individuals or communities may find that their right to enjoy their land and property rights has been affected in their absence. Displacement may also result in discrimination and limited access to participation and consultation in planning processes for disaster relief and recovery.

Even so, when the displacement following a rapid-onset disaster takes place across an international border, an additional and distinct set of protection needs and challenges are brought into play. These relate principally to the questions of (i) admission, (ii) status during stay, and (iii) the search for durable solutions to their situation of displacement, which the Nansen Initiative has identified as key protection gaps. At the same time, there is no international or regional legal regime that explicitly addresses cross-border displacement in disaster contexts, nor are there universally-applied criteria to determine, in the context of disasters, when a movement could be characterised as forced across international borders for the purposes of international law.⁵ This is a global challenge that presents itself in every region of the world and to which the present study seeks to contribute.

1.2 STRUCTURE OF THE STUDY

The study is structured according to a set of pertinent sub-themes, which are dealt with sequentially. Thus, **section 2** pinpoints relevant features of empirical patterns of international migration and displacement related to disasters in the Americas as a means of giving appropriate context to the legal discussion that follows. It draws a vital set of distinctions between the different types of human mobility in response to rapid-onset disasters, particularly between ‘trans-border’ displacement and displacement ‘abroad’, with attendant consequences for the kinds of legal responses that are appropriate in each case.

Section 3 examines the existing framework of international protection law in the Americas that is comprised of both refugee and complementary protection concepts in international and domestic law in order to assess its potential relevance to persons outside their country as

a consequence of disasters. This provides an important point of reference for the sections that follow since humanitarian concerns – and those of ‘protection’ by other States – whether temporary or otherwise, are often conceived as falling principally under this body of law, rather than under the wider field of migration law that governs the entry and stay of aliens on the basis ordinarily of family, work or other such connections to the country.

The following sections turn to examine this broader framework of migration law. **Section 4** begins by examining how regional inter-governmental organisations in the Americas have addressed migration in the context of disasters. Sections 5-8 focus on domestic migration law provisions. **Section 5** explores the use of ‘regular’ migration law to respond to the impact of disasters overseas on human mobility. **Section 6** then looks at migration law responses that are based on a generalised or group approach. By contrast, **section 7** considers the plethora of migration law responses that adopt an individualised approach. Finally, **section 8** considers the situation of persons affected by a disaster on the territory of a third State in which they are already present as aliens.

Section 9 draws together these strands of analysis by way of a summary of key findings and conclusion.

1.3 NOTES ON TERMINOLOGY AND METHODOLOGY

Building upon paragraph 14(f) of the UN Framework Convention on Climate Change’s (UNFCCC) Cancun Outcome Agreement, the Nansen Initiative uses the term ‘human mobility’ to describe three categories of movement: (forced) displacement, (predominantly voluntary) migration, and (voluntary or forced) planned relocation. The Nansen Initiative specifically addresses the protection needs of people displaced across international borders in the context of disasters associated with natural hazards, with migration and planned relocation addressed from the perspective of preventing displacement or finding durable solutions to displacement.

Due to the multi-causal nature of human mobility in the context of both slow- and sudden-onset disasters, the tipping point between a forced and voluntary movement can be difficult to pinpoint. This is especially true in the case of slow-onset disasters, when displacement arises as a consequence of a gradual erosion of resilience. In com-

⁵ Drawing on Article 1(A)2 of the Refugee Convention, Kälin proposes that a ‘person displaced across borders by the effects of climate change as a person in need of international protection’ should meet the following criteria: (i) ‘Outside the country of origin or habitual residence’; (ii) ‘Danger to life, limb or health as a consequence of the effects of climate change or the nature of the response, or the lack thereof, by competent authorities in the country of origin or habitual residence’; and (iii) ‘Unable or unwilling to avail oneself of the assistance and protection of the country of origin or habitual residence.’ He suggests that these criteria be interpreted based upon a ‘returnability’ test that analyses the ‘permissibility, feasibility (factual possibility) and reasonableness of return’ (see W. Kälin, ‘Conceptualising Climate-Induced Displacement’ in J. McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishers 2012).

parison, the forced nature of a population movement in the context of a sudden-onset disaster such as an earthquake is easier to recognize, although other factors such as poverty and lack of preparedness contribute to whether displacement occurs. Finally, the cumulative effect of a series of smaller, sudden-onset disasters can also lead to displacement over time. Yet the distinction between voluntary and forced movements is important not only because international law sometimes requires such precision,⁶ but also because the nature of the movement influences a person's ability to successfully settle at their destination,⁷ which may in turn determine their need for additional assistance and future plans, such as any desire to return.

The Nansen Initiative Central American Regional Consultation identified the absence of criteria to identify who should be eligible for humanitarian visas used to admit people displaced by disasters as a major area of concern in the region. Therefore, because this study provides an overview of existing legal norms and standards in the Americas, it uses the term 'migration' in a broad sense to refer both to voluntary and forced movements, as well as providing a description of the categories of persons who have benefited from the various measures applied in disaster contexts. Indeed, the study largely uses the terms 'migration', 'displacement' and 'movement' synonymously, as a means to refer to human mobility, and without seeking to imply any distinction between them in terms of their purportedly voluntary or involuntary overtones.

Moreover, it should be noted that the study avoids use of the term 'humanitarian visa' except where it appears expressly in a country's domestic law.⁸ This is because many of the provisions lumped under this heading do not actually provide for visas, but rather for permission to enter or stay in the country; in some cases, they even take the form of a visa waiver. The use of the term 'humanitarian visa' in a generic fashion thus not only muddies the water but also shifts attention away from wider measures that are – or could be – used to provide humanitarian protection to aliens on a temporary basis. Moreover, the term 'humanitarian visa' has a specific sense in European law that is narrower than its intended field of reference in the Americas,⁹ which may generate further confusion.

Finally, in terms of methodology, it is important to emphasise that the topic of this study is one on which little academic – or other secondary – literature exists. The bulk of the study has thus involved significant original research. For the most part, this has involved identification and investigation into a range of primary normative sources that take a written form, such as legislation and policy. However, not all migration law and policy in the Americas is publicly accessible, and details of implementation even less so. The study has thus benefitted substantially also from interviews with experts in different countries who have provided input on displacement dynamics and also national law and policy.¹⁰ By common agreement, this has taken the form of 'background' information to which the name of the individual is not expressly linked in this study.¹¹

1.4 ACKNOWLEDGMENTS

The generous donation of time and knowledge by each of the experts interviewed is gratefully acknowledged here. As such, the author would like to express his special gratitude to all of those who participated in, or facilitated, the interviews.

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⁶ Kälin, 'Conceptualising Climate-Induced Displacement'.

⁷ G. Hugo, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific' in J. McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishers 2012).

⁸ See below, section 7.2.2.

⁹ See, for instance, U. Iben Jensen, *Humanitarian Visas: Option or Obligation?*, Study prepared for the European Parliament, Committee on Civil Liberties, Justice and Home Affairs (European Union 2014).

¹⁰ A list of interviewees is provided as an appendix to the study. Where requested by the interviewee, their names and identification details have been anonymised.

¹¹ Thus, where a published footnoted source is not provided for an evidentiary claim made in this study, it should be assumed that the information derives from an interview with one of the persons listed in the appendix.



2. MIGRATION AND DISASTERS IN THE AMERICAS

The legal analysis of mechanisms currently used within the Americas for the humanitarian protection of aliens on a temporary basis requires an adequate understanding of the empirical phenomenon in response to which such procedures are – or may, in the future, be – used. This section therefore examines the existing literature on international displacement and migration flows in the Americas and their relationship to disasters caused by natural hazards.

To do so, it draws upon a distinction between slow-onset and rapid-onset disasters that is prevalent in the literature. The objective of this section is to establish – for this particular region – the patterns and dynamics of international displacement to which humanitarian measures may be addressed. The analysis suggests that different types of flows exist, for which different legal/policy responses may be appropriate.

2.1 SLOW-ONSET DISASTERS

Slow-onset disasters contribute to generating population movement in the Americas. The academic literature suggests that these environmental processes particularly

affect rural populations participating in subsistence activities that may be more susceptible to the negative impact of slow-onset disasters.¹² Indeed, in Bolivia, Chile, the Dominican Republic, Ecuador, Haiti, Mexico and Peru, contemporary migration flows take place from degraded rural areas to the main cities of these countries – to provincial, state or national capitals – or abroad.¹³ Moreover, detailed case studies of rural communities level show how slow-onset disasters such as desertification and drought caused by changing weather and rainfall patterns, soil erosion and other forms of environmental degradation contribute to international (as well as internal) population movement from the Dominican Republic,¹⁴ Ecuador,¹⁵ Haiti,¹⁶ Honduras¹⁷ and Mexico.¹⁸

¹² See the useful recent review of the literature on international migration and the environment undertaken by R. Obokata, L. Veronis and R. McLeman, 'Empirical Research on International Environmental Migration: A Systematic Review' (2014) 36 *Population and Environment* 111, 118.

¹³ L. Andersen, L. Lund and D. Verner, 'Migration and Climate Change' in D. Verner (ed), *Reducing Poverty, Protecting Livelihoods, and Building Assets in a Changing Climate: Social Implications of Climate Change for Latin America and the Caribbean* (World Bank 2010), 202.

¹⁴ S. Alscher, 'Environmental Degradation and Migration on Hispaniola Island' (2011) 49 *International Migration* 164.

¹⁵ O. Álvarez Gila, A. Ugalde Zaratiegui and V. López de Maturana, 'Migration and Environment in Los Ríos, Ecuador (1997-2008)' (2010) 4 *Journal of Identity and Migration Studies* 136, 152; C.L. Gray, 'Gender, Natural Capital and Migration in the Southern Ecuadorian Andes' (2010) 42 *Environment and Planning* 678; C.L. Gray, 'Environment, and Rural Out-Migration in the Southern Ecuadorian Andes' (2009) 37 *World Development* 457.

¹⁶ Alscher, 'Environmental Degradation'.

¹⁷ D.J. Wrathall, 'Migration Amidst Social-Ecological Regime Shift: The Search for Stability in Garifuna Villages of Northern Honduras' (2012) 40 *Human Ecology* 583.

¹⁸ M. Leighton-Schwartz and J. Notini, 'Desertification and Migration: Mexico and the United States' (1994) *U.S. Commission on Immigration Reform Research Paper* <https://www.utexas.edu/lbj/uscir/respapers/dam-f94.pdf>; S. Alscher, 'Environmental Factors in Mexican Migration: The Cases of Chiapas and Tlaxcala' in T. Afifi and J. Jäger (eds), *Environment, Forced Migration and Social Vulnerability* (Springer 2010) 172; S. Feng, A. Krueger and M. Oppenheimer, 'Linkages Among Climate Change, Crop Yields and Mexico-U.S. Border Migration' (2010) 107 *Proceedings of the National Academy of Sciences of the United States of America* 14257; K. Schmidt-Verkerk, '"Buscando La Vida" – How Do Perceptions of Increasingly Dry Weather Affect Migratory Behaviour in Zacatecas, Mexico?' in T. Afifi and J. Jäger (eds), *Environment, Forced Migration and Social Vulnerability* (Springer 2010); R.J. Nawrotzki, F. Riosmena and L.M. Hunter, 'Do Rainfall Deficits Predict U.S.-Bound Migration from Rural Mexico? Evidence from the Mexican Census' (2013) 32 *Populations Research and Policy Review* 129.

The emerging academic consensus describes these slow-onset disasters as contributing to wider existing migration patterns and following ‘traditional’ routes in the Americas, rather than creating their own new routes and trends.¹⁹ Most of this population movement is thus internal, and studies suggest that the low capital assets of many rural populations serve to limit mobility to short distances, even at times of environmental stress.²⁰ Nonetheless, rural migrants with greater social and financial assets may be expected to migrate greater distances, including overseas.²¹ Moreover, for rural communities living close to a border, even short-distance displacement may take them into another country.²² More generally, familial connections with migrants outside the country and previous experience of international migration both emerge as significant factors that facilitate the international movement of households and communities affected by slow-onset disasters.²³ This is consistent with global trends.²⁴

Indeed, it is important to appreciate that slow-onset disasters are rarely the sole or even direct cause of international (or internal) population movement from affected communities in the Americas.²⁵ Thus, the impact of slow-onset disasters on the decision to migrate often seems to be as an indirect or aggravating factor, e.g. as with the economic consequences of crop loss experienced at the household level.²⁶ Moreover, household resilience to slow-onset disasters is itself modulated through a wider set of ‘non-environmental’ contextual factors of an economic, social or political character, such as the existence and accessibility of governmental and other support structures in that same location or elsewhere in the country.²⁷ The role played by slow-onset disasters in contributing to displacement from these communities in the Americas is thus far from straightforward and often highly context-dependent.

The literature also describes international population movement as a result of the combined impact of both slow- and rapid-onset disasters. This is particularly so for rural communities in Haiti and Honduras where the effects of not only slow-onset environmental degradation but also rapid-onset tropical storms make life there unviable.²⁸ The interaction of both forms of disaster promotes displacement as, on the one hand, slow-onset processes act to reduce people’s resilience to the negative impact of rapid-onset events and, on the other, the damage caused by rapid-onset disasters accelerates longer-term environmental degradation. In such cases, we should be aware that drawing a bright line between international displacement due to slow-onset disasters and that caused by fast-onset disasters may not be desirable or even possible.

The fact that slow-onset disasters are processes that occur over relatively lengthy periods of time can mean that tying international movement from affected communities to these phenomena in any direct or immediate way is a complicated exercise. They also interact with other social processes in relatively complex ways. These factors can make it challenging to isolate them as a direct catalyst of trigger for displacement from affected communities. Governments may well be able to draw on environmental and social science analysis to predict where such flows are likely to take place over the medium- to long-term, and thus to plan for them. However, given the apparently irreversible nature of these processes, it is clear that migration law and policy dealing with humanitarian protection of aliens on a temporary basis have not been used by States in the Americas to address slow-onset disasters. They are thus absent from the remainder of this report, although the possibility that slow-onset natural hazards could reach a humanitarian crisis phase is acknowledged.

¹⁹ See, for example, the sources cited below in this sub-section.

²⁰ Obokata et al, ‘Empirical Research’, 118.

²¹ Andersen et al, ‘Migration and Climate Change’, 200; Alscher, ‘Environmental Degradation’, 182-183. Note, however, that at the individual level the role of land ownership in facilitating international migration appears highly context-specific (Obokata et al, ‘Empirical Research’, 124): in some cases, it represents a source of capital for potential international migrants (Gray, ‘Gender, Natural Capital’ and ‘Environment and Rural Out-Migration’); elsewhere it limits mobility by tying the owner to the land (Andersen et al, 2010, p200). The same seems to be true for educational achievement: thus, in the Dominican Republic, international migrants tend to have lower educational achievement (Alscher, ‘Environmental Degradation’, 124); by contrast, in Ecuador, education has a greater positive association with international migration than internal migration (Obokata et al ‘Empirical Research’, 124).

²² Obokata et al, ‘Empirical Research’, 118.

²³ See, for example, Wrathall, ‘Migration Amidst Social-Ecological Regime Shift’; Schmidt-Verkerk, ‘“Buscando La Vida”’, 110-111.

²⁴ See, for instance, the study of Bangladesh in J. McAdam and B. Saul, ‘Displacement with Dignity: Climate Change, Migration and Security in Bangladesh’ (2010) 53 *German Yearbook of International Law* 1.

²⁵ This also appears to be the case more generally at the global level (Obokata et al, ‘Empirical Research’, 119).

²⁶ Obokata et al, ‘Empirical Research’, 119-129.

²⁷ Obokata et al, ‘Empirical Research’, 121, referring to Alscher, ‘Environmental Degradation’. For a famous and detailed comparative example, see analysis of how the potential famine in the context of drought in Ethiopia was greatly intensified by political factors in the country (A. de Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (Indiana University Press 1997)).

²⁸ See, respectively Alscher, ‘Environmental Degradation’, and Wrathall, ‘Migration Amidst Social-Ecological Regime Shift’.

2.2 RAPID-ONSET DISASTERS

A range of different rapid-onset disasters affect the Americas and population movement as a response to these disasters has been well-documented. Unsurprisingly, this has largely taken the form of internal displacement and migration within the affected countries.²⁹ Nonetheless, existing studies do show that some of these rapid-onset disasters also lead to increased out-migration from affected countries, including in such cases as: volcanic eruptions, notably the 1995 eruption on the island of Montserrat; tropical storms in the Caribbean and Central America,³⁰ such as the 1998 Hurricane Mitch;³¹ earthquakes, including those in 2000 in El Salvador³² and in 2010 on Haiti.³³ Finally, it would seem that certain rapid-onset disasters elsewhere in the world may have the potential to bring international migrants to the region, as with the 2004 Asian tsunami and the 2013 Philippine Typhoon Haiyan.

The data on human mobility in the context of rapid-onset disasters caused by natural hazards in the Americas is decidedly fragmentary and lacking in detail, even compared with the relatively limited studies of how slow-onset disasters, including those caused by environmental degradation, may contribute to international migration. Nonetheless, one feature, based on such data as currently exists for the Americas, is that the international movement resulting from rapid-onset disasters is not confined to rural populations (as seems to be the case, for example, with migration resulting from slow-onset disasters). Rather, rapid-onset disasters in the Americas affect urban and rural populations to a greater or lesser degree depending on the nature of the hazard, e.g. volcano, storm, flooding, earthquake. Whilst some populations are undoubtedly more exposed to certain natural hazards, this responds to their geographical location (for example, living on a seismic fault-line or close to a volcano) rather than their rural character or the nature of their subsistence activities. As a result, the demography of persons migrating in the aftermath of a

disaster appears more varied than those migrating due to slow-onset environmental processes.

Regardless, at least in the first instance,³⁴ those migrants who leave their country in the aftermath of a rapid-onset disaster seem to follow well-established regular and irregular routes for international migration based on wider political and economic factors.³⁵ To this extent, it appears that the nature of migration due to rapid-onset disasters coincides with that of migration influenced by slow-onset disasters. Yet, an important point of contrast is that the environmental factor usually plays a more direct and easily identifiable role in triggering the decision to displace for rapid-onset disaster migrants. Indeed, on a global level, it is well-recognised that rapid-onset disasters cause surges in migration from that country,³⁶ a tendency that has been adequately demonstrated in the specific context of the Americas.³⁷

Moreover, based on existing scholarship and case studies drawn from the interview data, the international displacement generated by rapid-onset disasters appears to fall largely into one of two categories:

(i) short-term immediate movement across a contiguous land border by individuals fleeing or directly affected by a rapid-onset natural disaster, most often by persons living in a part of the country from which the border is accessible ('trans-border displacement');³⁸ and

(ii) longer-term patterns of movement, often towards more distant countries, by individuals from across a country very severely affected by a rapid-onset natural disaster ('displacement abroad').

Separating out these two categories for the purposes of facilitating our analysis should not, however, blind us to the reality that real-life disasters may generate both forms of movement or otherwise serve to blur the lines between these analytical categories.

²⁹ See for example, Internal Displacement Monitoring Centre, *Global Estimates 2014: People Displaced by Disasters* (2014) <http://www.internal-displacement.org/assets/publications/2014/201409-global-estimates.pdf>.

³⁰ O.C. Andrade Afonso, 'Natural Disasters and Migration: Storms in Central America and the Caribbean and Immigration to the U.S.' (2011) 14 *Explorations* 1.

³¹ D. Reichmann, 'Honduras: The Perils of Remittance Dependence and Clandestine Migration' (2013) Migration Policy Institute <http://www.migrationpolicy.org/article/honduras-perils-remittance-dependence-and-clandestine-migration>.

³² M. Attz, 'Natural Disasters and Remittances: Exploring the Linkages between Poverty, Gender, and Disaster Vulnerability in Caribbean SIDS' (2008) 61 *UNU-WIDER Research Paper* 1, 9.

³³ P. Weiss Fagan, 'Receiving Haitian Migrants in the Context of the 2010 Earthquake' (2013) <http://goo.gl/EQioaw>.

³⁴ See further below.

³⁵ This is the case for all of the examples and studies cited thus far in the study (see text and footnotes above).

³⁶ Obokata et al, 'Empirical Research', 121.

³⁷ See, for example, Andrade, 'Natural Disasters'.

³⁸ The term 'trans-border' displacement is used here to distinguish the concept from broader and more generic terminology of 'cross-border' displacement utilised by the Nansen Initiative.

2.2.1 Trans-border displacement

Trans-border displacement due to rapid-onset disasters resulting from natural hazards builds upon broader patterns of backwards-and-forwards migration between the border regions of neighbouring countries. This short-distance movement seems largely to respond to the perception of stronger possibilities for temporary protection and support on the other side of the border. In some cases, this reflects the better chance of finding safety or institutional support in the other country, whether in the form of access to shelters and humanitarian assistance, medical treatment for injuries sustained or some other form. In other cases, entry to the territory of the other country simply allows the persons fleeing their country to put sufficient distance between themselves and the epicentre of the anticipated hazard.

The examples of this form of displacement in the Americas are many. This is the case of northern Guatemalans who cross into Mexico in anticipation of being better able to weather an oncoming tropical storm on that side of the border, and also of victims of widespread flooding in southern Colombia who cross into northern Ecuador. Elsewhere, the difficulty of internal migration from remote border regions affected by disasters is outweighed by the relative ease of access to safe locations on the other side of the border, as in the case of Chileans who have crossed into Argentina following the devastation wrought by mudslides and earthquakes in certain frontier zones of Chile. It can also be evidenced in the immediate aftermath of the 2010 earthquake in Haiti as affected and frightened Haitians massed on the border with the Dominican Republic with a view to seeking assistance and support.

2.2.2 Displacement abroad

By contrast, displacement ‘abroad’ due to rapid-onset disasters builds on the broader existing economic and political migration patterns among the general population of that country, rather than specific border dynamics. This form of displacement is thus principally towards more stable and prosperous countries where communities of migrants of that nationality have established themselves and found work. As such, persons displacing abroad due to rapid-onset disasters follow traditional regular and irregular migration routes to such countries within the region as the USA, Canada and Costa Rica (and some go even further afield to join

communities in Europe). Where these traditional routes are blocked, desperation may lead migrants to forge new routes.³⁹ This was the case for those sectors of Haitian society that started to migrate to Brazil, and even other countries of South America, as a response to the difficulties of accessing the USA, Canada and French Guyana after the earthquake.⁴⁰

In the case of the Americas, it is important also to appreciate that – in contrast to trans-border displacements – displacement abroad seems to occur because the destruction wrought by the rapid-onset disaster cannot be absorbed at the national level within the country. In other words, both support efforts and internal relocation are inadequate to support the livelihood expectations of a proportion of the population.⁴¹ In consequence, these sorts of population movements occur predominantly and most intensively from countries that were resource-scarce and less resilient before the disaster occurred and where these challenging conditions were suddenly and dramatically exacerbated by a rapid-onset disaster, e.g. El Salvador, Haiti, Honduras and Nicaragua,⁴² illustrating the multi-causal nature of the phenomenon. Conversely, this generalised international movement is distinctly less apparent in prosperous countries even after regular and severe disasters caused by natural hazards such as hurricanes in the USA or earthquakes in Chile.

A final important point to emerge from the literature review is that the displacement abroad caused by a disaster may not always be immediate. The point is strongly brought home by a report produced by the International Organization for Migration based on its work in Central American countries shortly after Hurricane Mitch in 1998:

Although the first surveys do not show significant increases in internal or external migratory flow after the natural disaster this behaviour is considered normal given the expectations that international aid has generated for the majority of the people affected.

Broad sectors of the displaced population are receiving food and basic health care, while awaiting a solution to their housing problem or support to go back to work. However, as time goes by and their social and economic re-establishment is not achieved, they will become more anxious and, therefore, will consider the idea of emigrating to look for better opportunities outside their communities or their countries.⁴³

³⁹ In some cases, economic factors play an important role as greater resources are needed to hire an agent and to travel greater distances.

⁴⁰ See, for example, Weiss Fagan, ‘Receiving Haitian Migrants’.

⁴¹ This argument is made in compelling terms for Haiti by Weiss Fagan (ibid.).

⁴² Regression results demonstrate an increase in legal immigration to the US from countries in Central America and the Caribbean in the year after a severe storm has hit a country and – crucially – that where GDP per capita is low, there is more migration to the US from that country (Andrade, ‘Natural Disasters’, 12).

⁴³ Regional Conference on Migration, ‘Activities of the International Organization for Migration, IOM, related to the consequences of Hurricane Mitch in Central America’, Document prepared by the IOM for the IV Regional Conference on Migration, San Salvador, 26-29 January 1999 (1999).

These paragraphs emphasise that the effects of the destruction wrought by a disaster may not be immediate, especially where some level of international aid is present. Indeed, this will normally be the case where a disaster is severe enough to prompt people to look for options outside the country to re-establish their lives. This was seen equally in Haiti, where the displacement abroad triggered by the effects of the disaster continued long after the aftershock of the earthquake had died away.⁴⁴

2.2.3 The nature of displacement

Displacement due to rapid-onset disasters – particularly displacement abroad – thus often has a strong economic component. Certainly this is not always the case, as with those who cross a border to escape the life-threatening consequences of a storm or who seek medical attention in a neighbouring country for injuries sustained during a disaster. However, even where it is so, the trigger for movement is a sudden deterioration in basic living conditions and access to basic services caused by circumstances beyond the individual's control. Thus, the international displacement produced by rapid-onset disasters is fundamentally dissimilar from typical economic migration. Although the persons displaced may follow the same routes as those forged by traditional migration flows from that country, the cause of the displacement has a distinct character rooted in the direct effects of the disaster. Moreover, unlike with slow-onset disasters, here the disaster is straightforwardly identifiable as the trigger or catalyst for displacement. As a result, most of the humanitarian protection responses adopted by States in the Americas to deal with the displacement and migration-related consequences of disasters have been directed towards rapid-onset disasters.

2.3 EVACUATION

Evacuation across an international border of persons adversely affected by a disaster has, on occasion, taken place in the Americas. For instance, the population of Montserrat was evacuated following the 1995 volcano. Likewise, in the immediate aftermath of the 2010 Haiti earthquake, certain profiles of Haitian nationals were evacuated by Canada, Mexico and the USA.⁴⁵ This small flow of 'migration' responds to sudden-onset disasters and occurs alongside broader 'displacement abroad' in this context, but with the crucial difference that it

is less a spontaneous reaction by affected persons and more often an intervention in the affected country by more prosperous countries in the region. Even so, there is considerable overlap between the two categories, not least in the form of the special measures adopted by destination States towards them.⁴⁶

2.4 ALIENS AFFECTED BY A DISASTER IN THEIR COUNTRY OF ORIGIN

In the Americas, disasters not only trigger international movement by affected persons but also impact upon the situation of migrants from the affected country who are present on the territory of another State in the region. As aliens, these persons may enjoy one or other form of regular migration status in the country in which they find themselves, which may be more or less precarious depending on the provisions of the regular or exceptional migration category on which basis this status has been granted.⁴⁷ Equally, some persons may be present but without the benefit of a regular migratory status of their own and may even lack their own national documents. This situation may result from the person's irregular entry, overstaying the expiry of the period of stay granted, or a rescinding by the authorities of his/her migration status on some ground.

A range of different potential humanitarian needs may therefore be identified for these aliens, depending very much on the individual circumstances, but resulting directly from the effects of the disaster in their country of origin. For instance, persons with a regular migration status may no longer be able to comply with the relevant requirements under migration law, as with students who find themselves unable to demonstrate the usual requisite level of financial support from their family back home due the sudden destructive effects of a rapid-onset disaster. A disaster in the country of origin may equally have this kind of negative impact on applications by aliens for regularisation of their irregular migratory status, or adjustment from one regular migration category to another, that are still awaiting a decision from the national authorities.

A related set of considerations are the potential protection and humanitarian concerns generated by a rapid-onset disaster for aliens who may have to travel back to their country of origin imminently, whether as a

⁴⁴ The need to collect sufficient resources to migrate may also lead to this time-lag effect as a result of the time involved in collecting savings, fundraising or awaiting the arrival of resources sent by family members or others.

⁴⁵ Due to its temporary nature, one might also consider the circular temporary migration scheme instituted for Colombian individuals from rural communities affected by severe floods, and which allowed them to work temporarily in Spain in designated agricultural professions as a form of 'evacuation', albeit of the non-emergency kind (for details, see T. Rinke, 'Temporary and Circular Labor Migration between Spain and Colombia' in F. Gemmene, P. Brückner and D. Ionesco (eds), *The State of Environmental Migration 2011* (IDDRI-IOM 2012) 25-34).

⁴⁶ See, in this regard, Camp Coordination and Camp Management Cluster, *The MEND Guide: Comprehensive Guide for Planning Mass Evacuations in Natural Disasters: Pilot Document* (2008) http://www.globalccmcluster.org/system/files/publications/MEND_download.pdf.

⁴⁷ See below for the distinction between 'regular' and 'exceptional' migration categories (sections 5-8).

result of the expiry of their period of stay in the country, the discovery of their irregular status, or the enforcement of an existing removal or deportation decision. Where the disaster is very severe in its effects, then the return to their country of such persons may – depending on the facts of the individual case and/or the general country situation – generate real protection concerns based on the risk to their physical safety, which may sometimes be sufficient to trigger the application of national and international rules for international protection. Equally, on a general basis, the State in which the aliens find themselves may decide that the circumstances in the affected country are such as to call for a stay in such enforcement actions, whether on a purely humanitarian basis, or in solidarity with the affected State, or a mix of both factors. In practice, States in the Americas have frequently adopted a range of special measures to deal with aliens in their territory who are affected by a disaster in their country of origin.⁴⁸

2.5 ALIENS AFFECTED BY A DISASTER IN THE COUNTRY IN WHICH THEY ARE PRESENT

In the Americas, disasters also affect aliens who find themselves on the territory of an affected State. Questions have thus arisen concerning such issues as: their access to emergency shelter and assistance provided by the territorial State during or in the immediate aftermath of the disaster (such as for Guatemalans in southern Mexico during tropical storms); temporary relief from immigration enforcement during the same time period whilst the emergency situation continues (as for irregular, mostly Central American, migrants in the southern USA during tropical storms); and eligibility for compensation or relocation for long-term irregular migrants whose homes and property has been damaged as a result of disasters (such as for Nicaraguans in Costa Rica).

In the literature, there is the suggestion that when disasters occur in the Americas, they tend to affect migrants more severely than nationals of the State.⁴⁹ This is not only because migrants lower down the socio-economic

ladder are ‘increasingly likely to live in hazard-prone locations’, but also because they are less likely to have the resources to prepare for a disaster, especially if they are harder to reach with preparedness warnings due not only to their location but also to language issues.⁵⁰ They may also encounter problems in accessing shelter and aid as a result of discrimination based on the myth that aliens – especially those in an irregular migratory situation – do not possess rights.

Migrants affected by a rapid-onset disaster in the territory of the State in which they find themselves may also face particular challenges in maintaining their connection with their country of nationality origin. For instance, both regular and irregular migrants who are caught up in disaster situations may face obstacles in accessing consular services, which may be necessary to facilitate their repatriation (or, in the worst case, that of their remains), negotiate release from an employment contract in order to return home, or provide general consular assistance in the case of irregular migrants. Equally, such migrants may also face particular challenges in reaching their families in other countries in order to reassure them of their safety. These obstacles have sometimes been overcome by using the international network of bodies such as the International Red Cross/Crescent Movement that is rooted in innumerable local communities across the Americas.⁵¹

Although these challenges all arise from rapid-onset disasters, it can be seen that they bring challenges in both the long- and short-term for access to protection and assistance, and most acutely in the case of irregular migrants.⁵² In the Americas, these aliens also face an additional set of challenges in accessing assistance in disaster contexts due to their irregular situation.⁵³ On the one hand, this may make them ineligible for government aid. On the other, even where this is not the case, they may be too fearful of the possible consequences in terms of prosecution and/or removal of revealing their irregular migration status to approach the authorities for assistance. The vulnerability of aliens in disaster situations is thus particularly heightened for those whose status is irregular.

⁴⁸ See below (sections 5-7)

⁴⁹ See Organization of American States Permanent Council, Special Committee on Migration Issues, ‘Migrants in Disaster Situations’, OAS Doc No OEA/Ser.G CE/AM-X/09 (21 January 2009).

⁵⁰ See Organization of American States Permanent Council, Special Committee on Migration Issues, ‘International Federation of Red Cross and Red Crescent Societies: Cooperation on Needs and Contributions of Migrants in Disaster Situations; presented by the [IFRCRCS] for the meeting of January 27, 2009’, OAS Doc No OEA/Ser.G CE/A</INF.50/09 (27 January 2009).

⁵¹ *Ibid.*

⁵² The International Law Commission (ILC) has begun elaborating a set of draft articles on the Protection of Persons in the Event of Disasters (for the most recent iteration, see ILC, ‘Protection of Persons in the Event of Disasters: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading’, UN Doc A/CN.4/L.831 (15 May 2014)). However, as yet, they do not deal specifically with the challenges identified here.

⁵³ OAS Special Committee on Migration Issues, ‘Migrants in Disaster Situations’.

2.6 CONCLUSION

This survey points to a number of salient features that must be taken into account as we move to consider questions of law and policy. Firstly, international displacement generated by disasters caused by natural hazards tends to follow traditional patterns of international movement for persons of that nationality. However, the environmental factor is much more directly identifiable as the trigger for movement where the disaster is rapid rather than slow in onset. As such, we will see that the body of migration law, policy and practice by States in the Americas is directed towards the consequences of the former rather than the latter form of disaster.

Secondly, a broad distinction can also be drawn between: (i) short-term immediate movement across a contiguous land border by individuals fleeing or directly affected by a rapid-onset natural disaster, most often by persons living in a part of the country from which the border is accessible ('trans-border displacement'); and (ii) longer-term patterns of movement by individuals from across a country very severely affected by a rapid-onset natural disaster, often towards more distant countries, particularly those that have served as a basis for economic migration from that country or safe haven at times of political instability ('displacement abroad'). It will be important to keep the broadly different characteristics of these two types of movement in mind when assessing State law and policy since they may require different types of humanitarian responses.

Thirdly, to the extent that the migration flows caused by rapid-onset disasters have an economic aspect to them, this is atypical and based on the sudden destruction of infrastructure and livelihoods inflicted by the disaster. In addition, although the point has not been specifically developed here, this destruction may also result in a situation of insecurity in the affected country as governmental and social institutions break down in the short- or even medium term, as was the case in Haiti. Those fleeing may thus also have the need for protection against these forms of harm as well. This point is taken up again in the section of the report dealing with refugee law.

Fourthly, there is the need to consider other migratory situations alongside these flows. The use of evacuation of persons injured by a disaster where inadequate medical facilities exist in the country is one example. However, it can largely be subsumed within the legal and policy responses of States towards international movement, which is what States do in practice. Other special situations that require detailed consideration are those of: (i) aliens who are present in the territory of a State that is not their own but are affected by a disaster in their country of origin; and (ii) aliens who find themselves in a State affected by a disaster and for whom special measures may be appropriate, especially if the persons have an irregular status. These scenarios will be considered later in different sections of the report.

Finally, the nature of these flows indicates strongly the need for a regional response when such rapid-onset disasters occur in the Americas. This is required in pragmatic terms to avoid the risks that a sudden new flow of migrants in need of protection and assistance is dealt with simply through a piecemeal beggar-thy-neighbour approach. Moreover, differences in national approaches between States have the potential to be exploited by those criminal elements that make a profit from exploiting populations at times of instability through schemes to smuggle and traffic vulnerable persons.

The next section turns to consider the framework of refugee law in the Americas as a means of responding to international population movement caused by rapid-onset disasters.



3. REFUGEE LAW AS A MEANS OF PROVIDING HUMANITARIAN PROTECTION ON A TEMPORARY BASIS

Refugee law constitutes an appropriate starting point for a survey of the legal and policy tools used by States to respond to migration caused by disasters. The emphasis on protection in this body of law chimes with the envisaged needs of these displaced persons. As such, some commentators have suggested that the development of refugee law at the global level would be the appropriate method for addressing these migration flows.⁵⁴ There is, though, a strong wave of countervailing opinion that points to the reasons why refugee law as is not an appropriate receptacle for this endeavour.

This section contributes tangentially to the debate by assessing the domestic refugee law provisions of States across the Americas. In particular, this section explores whether these provision have been – or could be – used to provide humanitarian protection on a temporary basis to persons fleeing a country due to a rapid-onset natural disaster. The question is anything but academic: in most States that are faced with aliens affected by a sudden rapid-onset natural disaster overseas, the national refugee office is almost immediately asked for a view on whether such persons are refugees.

The broad analysis in this section thus comprehends not only refugee protection in its narrow sense of law concerned with that specially-delimited category of person labelled ‘the refugee’. It also examines relevant provisions of State’s domestic law that are concerned with ‘international protection’ more broadly. This includes consideration of specific modalities of temporary protection, as well as those of ‘complementary’

protection based on human rights law. While these forms of protection are temporary in the Americas context, all are provided by obligation and not discretion.

3.1 1951 CSR

All States in the Americas – except Cuba and several small Caribbean island States – are parties to the principal international treaties on refugees, the 1951 Convention relating to the Status of Refugees (Refugee Convention) and/or its 1967 Protocol.⁵⁵ With these exceptions, all other States of the Americas are thus bound directly by the rules in these treaties. As a matter of law, each of these States has incorporated relevant refugee law principles into their domestic legislation and has established procedures for the determination of refugee status.⁵⁶

⁵⁴ There is a relatively extensive academic literature on this topic. For a couple of more recent examples that propose a new treaty for the benefit of persons displaced on the basis of environmental factors, and which draw inspiration from refugee law, see B. Docherty and T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review* 349; and M. Prieur, ‘Draft Convention on the International Status of Environmentally-Displaced Persons’ (2010) 4243 *The Urban Lawyer* 247. See also the critique formulated by J. Mc Adam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23 *International Journal of Refugee Law* 2.

⁵⁵ Alongside Cuba, these exceptions are Barbados, Guyana, Granada and Saint Lucia.

⁵⁶ This is the case in North, Central and South America. Note, though, that refugee legislation and refugee status determination procedures are scarce in the Caribbean. Only Jamaica and the Dominican Republic have adopted legislation in this area and only the Bahamas, Jamaica, the Dominican Republic and Trinidad and Tobago have refugee status determination procedures.

The dominant view among States is that persons who cross an international border on account of disasters will not qualify as refugees under the definition of the term ‘refugee’ provided by these treaties, i.e.:

[a 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...

On its face, the view that fleeing from a natural disaster does not engage the refugee definition is clearly correct.⁵⁷ As the Supreme Court of **Canada** observed two decades ago in *Canada (AG) v Ward*:

... the international community did not intend to offer a haven for all suffering individuals. The need for “persecution” in order to warrant international protection, for example, results in the exclusion of such pleas as ... those of victims of natural disasters, even when the home state is unable to provide assistance...⁵⁸

In the Americas, these *obiter dicta* comments remain persuasive and were recently cited with approval by the **Canadian** Immigration and Refugee Board in order to deny refugee status to a Japanese asylum-seeker fearing exposure to the health hazards resulting from the earthquake, tsunami and resulting Fukushima radiation leak in Japan.⁵⁹

Nonetheless, a few Haitian students who applied for asylum in **Panama** in the aftermath of the 2010 earthquake were recognised as refugees under the Refugee Convention. Similarly, some Haitians claiming asylum in **Peru** following the earthquake received refugee status. However, the basis of their recognition as individual refugees was not the earthquake directly but rather a well-founded fear of persecution by non-State actors that arose from the vacuum of governmental authority after the earthquake in Haiti. Immediately after the earthquake, the Peruvian authorities reportedly assessed with

a great degree of latitude, only returning to carry out more strict assessment of the elements of such claims in more recent years.

Those recognised as refugees in these countries – or any country in the Americas that is party to the Refugee Convention or Protocol – would be entitled to the rights and benefits specified in those treaties,⁶⁰ including the benefit of the principle of *non-refoulement*,⁶¹ as well as to a number of years of authorised stay in the territory on the basis of domestic legislation.⁶² Even those merely soliciting this status would be protected against *refoulement* and given some form of temporary admission.⁶³ Nonetheless, the exclusion criteria in Article 1F of the Refugee Convention would prevent this status from being granted to any individuals in respect of whom there are serious grounds to believe that they have committed one of the specified serious crimes.

3.2 1984 CARTAGENA DECLARATION

The Americas also benefit from a regional complementary refugee definition in the 1984 Cartagena Declaration on Refugee that expands the concept regionally to include:

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.

The Cartagena Declaration is not a treaty and its commendation of this complementary definition to States in the region is purely exhortatory. Even so, a significant number of States in Central and South America have incorporated this expanded refugee concept, or a version of it, in their domestic law. These are: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador,⁶⁴ El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.⁶⁵ In these States, persons whose situ-

⁵⁷ See, however, the argument advanced by B. Burson, ‘Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition’ in T. Afifi and J. Jäger (eds), *Environment, Forced Migration and Social Vulnerability* (Springer 2010).

⁵⁸ Supreme Court of Canada, *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689.

⁵⁹ Immigration and Refugee Board (Canada), File number VB1-01229.

⁶⁰ Refugee Convention, Article 2-34.

⁶¹ Refugee Convention, Article 33.

⁶² For instance, this would be for one year, renewable, in both Panama (Decreto Ejecutivo No. 23 (Panama), 10 February 1998, Article 50) and Peru (Ley No. 27891 (Peru), 20 December 2002, Article 22).

⁶³ For instance, in Panama, this would be in the form of temporary stay for up to six months (Decreto Ejecutivo No. 23, Article 38). In Peru, the period of stay is indefinite (Ley No. 27891 (Peru), Article 5(2)).

⁶⁴ The continued applicability of the Cartagena Declaration definition in Ecuador’s domestic legal sphere in spite of its excision from the most recent domestic legislation (Decreto No. 1182 (Ecuador), 30 May 2012) was recently confirmed by Ecuador’s Constitutional Tribunal in its *Sentencia No. 002-0254*, 12 September 2014).

⁶⁵ For an analysis of how this definition has been applied in practice, see M. Reed-Hurtado, ‘The Cartagena Declaration on Refugees and the Protection of Persons Fleeing Armed Conflict and Other Situations of Violence in Latin America’ (2013) *UNHCR Legal and Protection Policy Research Series*.

ation engages the Cartagena definition are recognised as refugees and treated in accordance with the standards of the Refugee Convention.

It has been a point of some debate whether disasters engage the Cartagena definition's last situational element of 'other circumstances which have seriously disturbed public order'. If so, then persons whose 'lives, safety or freedom' have been threatened such as to cause them to flee their country would be entitled to recognition as refugees under the Cartagena definition.⁶⁶ However, here again, the prevailing view among States applying this provision is that disasters do not as such engage the expanded Cartagena refugee definition. The rationale for this view is that the serious disturbances of public order that are referred to by the 'other circumstances' element of the definition must have a connection with the institutional or political world of men.⁶⁷

Yet some Haitians applying for asylum in these countries following the 2010 earthquake have been recognised by States in Central and South America as refugees under the terms of the Cartagena definition. In **Ecuador**, for example, a small number of asylum claims from Haitians were recognised under the Cartagena definition. The rationale was that the 'other circumstances' element is engaged not by the earthquake directly but rather the breakdown in law and order that it generated. In other words, the Ecuadorian authorities took the view that the insecurity, violence and disrupting of police and justice structures amounted to 'a serious disturbance of public order'. Similarly, **Mexico** also recognised some asylum claims from Haitians fleeing from zones affected by the earthquake on this ground due to the lack of protection and increased insecurity faced by these individuals.

3.3 OTHER INDIVIDUALISED REFUGEE DEFINITIONS

The distinctive political vision of **Cuba** means not only that it has declined to adhere to universal or regional instruments on refugee protection, but also that it has adopted its own *sui generis* refugee definition in national legislation.⁶⁸ The pertinent 1978 Regulations thus define as 'refugees':

...those aliens and persons lacking citizenship whose entry to the national territory is authorised due to leaving their country owing to social or warlike calamity, due to cataclysm or other phenomena of nature and who will remain temporarily in Cuba, until normal conditions are re-established in their country of origin.⁶⁹

As such, victims of disasters may qualify *prima facie* as refugees under Cuban domestic law. The provision regulates the entry, stay and return of beneficiaries, whom it defines as 'temporary residents' expressly permitted to undertake paid work.⁷⁰ A decision by the Council of Ministers to grant entry to a refugee is communicated by the Ministry of External Relations to the Department of Immigration and Aliens in order that an entry visa (for those outside the country) or a temporary residence permit (for those inside the country) can be issued.⁷¹ Spouses and minor children of such temporary residents are permitted to enter in their company.⁷²

Given the extent to which Cuba treats these questions as a matter of national security and thus secrecy, it is difficult to establish whether this provision has been applied to persons fleeing from disasters. Nonetheless, reports suggest that the small group of persons that Cuba received from Montserrat following the 1995 volcanic eruption – most of whom were children needing medical treatment – were admitted provisionally as 'refugees' under this legislation. However, the same protection does not appear to have been extended to Haitians who found themselves in Cuba after the 2010 earthquake and were temporarily unable to return home.

⁶⁶ See D.J. Cantor and D. Trimiño Mora, 'A Simple Solution to War Refugees? The Latin American Expanded Definition and its relationship to IHL' in D.J. Cantor and J.F. Durieux (eds), *Refugee from Inhumanity? War Refugees and International Humanitarian Law* (Martinus Nijhoff 2014). For analysis of a similar provision in the African context, see T. Wood, 'Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts', Report Prepared for the Nansen Initiative (2014) 29-42.

⁶⁷ Whether a 'man-made' natural disaster would engage the definition thus remains an open question.

⁶⁸ This legislation provides in the same article for 'political asylees' [*asilados políticos*], a category that is based on the concept of 'persecution' and covers at least some of the same ground as the Conventional refugee definition.

⁶⁹ Edición actualizada del Decreto No. 26, Reglamento de la Ley de Migración (Cuba), de 19 de Julio de 1978 in the Gaceta Oficial, No. 44, 16 October 2012, 1373-1387, Article 80.

⁷⁰ Article 80.

⁷¹ Article 81, as modified by Decreto No. 305 (Cuba), 11 October 2012.

⁷² Article 85.

3.4 MASS INFLUX PROVISIONS

An important feature of contemporary refugee legislation in a number of countries in Central and South America is the existence of provisions addressed to mass influx situations. UNHCR offices in the Americas have encouraged the inclusion of these provisions and often their content is inspired by UNHCR Executive Committee recommendations on mass influx. This mass influx legislation is of particular interest for the present study since some of these provisions are framed in terms of temporary protection.⁷³

Certain countries tie the mass influx mechanisms directly to the refugee concept, i.e. the mechanism is activated by the mass arrival of persons meeting the refugee definition in pertinent legislation. Thus, in **Mexico**, the authorities are permitted to make a group determination of refugee status where a mass influx of persons meeting the refugee definition occurs.⁷⁴ Likewise, in **El Salvador**, authorities have the power to declare members of a mass movement to be '*prima facie*' refugees where that definition is met and individual status determination cannot be carried out.⁷⁵ A similar situation prevails in **Chile**, where authorities can adopt special refugee status determination procedures – either *prima facie* or by groups – when a mass influx impedes individual examination of claims.⁷⁶

The common feature of these three scenarios is that the national law responds to a mass influx situation by allowing the government to determine the refugee status of group members by alternative procedures. Once done, though, the legal protection afforded to the beneficiaries is precisely that to which refugees are entitled. These procedures may well prove useful in responding administratively to mass influxes from countries where the effects of a natural disaster permit the qualification of relevant sections of the population as refugees.⁷⁷ However, consistent with international best practice, they do not subject these refugees to a special regime of temporary protection, nor do they seek to broaden the categories of international protection beyond those expressed in their domestic refugee law.

By contrast, a number of States in Central and South America have developed alternative legal approaches to mass influx situations that are based instead on the idea of providing temporary protection to persons who may not be *stricto sensu* refugees. This is seen most clearly in **Panama**, which created a new legal status known colloquially as 'temporary humanitarian protection' [*protección temporal humanitaria*] (PTH) in its domestic refugee law of 1998.⁷⁸ As this is an anomalous example in the Americas of a legal figure approximating closely to a restrictive European concept of 'temporary protection', and has been developed in quite some detail in the legislation and also applied in practice, a closer examination of Panamanian PTH status is merited here.⁷⁹

The legal figure of PTH was created by Panama to deal with the possibility of a mass influx into its Darien province due to increased conflict in the neighbouring Colombian department of Chocó. This, in fact, occurred and the status was applied in 2005 to over 800 Colombians registered in the province of Darien by a joint Colombian-Panamanian census undertaken in 2004.⁸⁰ Yet, unlike the legislation in Chile, El Salvador and Mexico, Panama's refugee law purports to authorise the authorities to respond to a mass influx situation by setting aside its potential 'refugee' character and deal with it instead through temporary protection measures based on the special 'humanitarian' status of PTH. Indeed, Panama's refugee law states explicitly that PTH beneficiaries do not possess the rights and benefits of 'persons formally recognised' as refugees under the Refugee Convention.⁸¹

As it persists over time, the ability of the authorities to ignore the refugee character and rights of persons who objectively possess that status is objectionable from an international refugee law standpoint. Nonetheless, on its face, PTH status arguably applies to a broader range of persons. Indeed, the activation of this legal figure demands only a determination on the part of the Executive that 'a mass influx of persons illegally or irregularly entering the country in search of protection' has taken place. The *ratione personae* scope of this measure is thus not constrained by the refugee definition or any additional legal considerations, other perhaps than that their

⁷³ See also the recent guidelines produced on this topic by UNHCR, e.g. UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements' (February 2014) <http://www.refworld.org/docid/52fba2404.html> and UNHCR, 'Guidelines on Prima Facie Recognition of Refugee Status' (forthcoming 2015).

⁷⁴ Ley Sobre Refugiados y Protección Complementaria (Mexico), Diario Oficial, 27 January 2011, Article 26.

⁷⁵ Decreto No. 918 (El Salvador), Diario Oficial No. 148, Tomo 36, 14 August 2002, Article 53; Decreto No. 79 (El Salvador), Diario Oficial No. 165, Tomo 368, 7 September 2005, Article 34.

⁷⁶ Ley No. 20430 (Chile), Diario Oficial, No. 39636, 15 April 2010, 8-10, Article 42; Decreto No. 837 (Chile), 17 February 2011, Article 59.

⁷⁷ See discussion of individualised refugee status determination above. In this respect, it is noteworthy also that all three countries have incorporated the broader Cartagena definition (see <http://goo.gl/DTW2lw>).

⁷⁸ Decreto Ejecutivo No. 23 (Panama), 10 February 1998, Title II, Chapter I. Its official name is 'provisional humanitarian protection status' [*estatuto humanitario provisional de protección*] but this is less widely used.

⁷⁹ This status is incorporated in a section of the refugee law that deals expressly with persons 'needing temporary protection' (ibid., Title II).

⁸⁰ UNHCR, 'Panamá: Comisión reconoce la condición de refugiado a 65 casos especiales' (3 January 2014) <http://goo.gl/sptazn>.

⁸¹ Decreto Ejecutivo No. 28, Article 81.

protection be required for ‘humanitarian reasons’.⁸² The breadth of the provision thus permits its application on humanitarian grounds to any mass influx of persons seeking protection. In principle, this could include mass influxes of persons to Panama due to disasters, although no such situation has thus far arisen.

The measure is firmly ‘collective’ and thus dependent on a determination by the Executive. The terms of the law imply that where the limited criteria needed to trigger the PTH provisions are met, then the Executive branch must make such a determination, i.e. as an obligation rather than a right.⁸³ Following such a determination, the practice has been to institute a census to identify and register the individual beneficiaries. This was done jointly with the authorities of the State of origin, in this case Colombia. Indeed, the Panama law expressly envisages a role for the State of origin, requiring the Executive to put in place bilateral mechanisms with the other State with a view to facilitating return in conditions of safety and dignity, as well as the possibility of resettling the most vulnerable persons elsewhere.⁸⁴

PTH measures are envisaged explicitly as temporary. The initial duration is limited to two months, counted from the date of the influx, during which time the emphasis is upon competent organs of the State – coordinated by the national refugee office – negotiating the return of PTH beneficiaries to their country in safety and dignity or their resettlement in a third country.⁸⁵ The Executive is instructed to seek burden-sharing arrangements with UNHCR, third States and other organisations, in addition to seeking their material, financial and technical support in providing for the PTH beneficiaries during their time in Panama.⁸⁶ The legislation makes it clear that extension of the period of temporary protection by the Executive is ‘exceptional’.⁸⁷ However, in practice, PTH status for Colombians was renewed many times due to unfavourable conditions in Chocó department. Eventually, some six years after

PTH status was first granted, the Panamanian government adopted a long-awaited law in 2011 to allow the remaining 400-or-so PTH beneficiaries in Panama to apply for permanent residency.⁸⁸

While awaiting return or resettlement, PTH beneficiaries are admitted temporarily to Panama but without a commitment on the part of the government to provide permanent settlement.⁸⁹ They should benefit from provisional application of the principles of *non-refoulement*, non-rejection at the border and no sanction for irregular entry.⁹⁰ PTH status also entails rights to: receive the aid required to satisfy basic necessities, including the provision of food, shelter and basic hygiene and health services, in conditions of safety; and maintain the unity of the basic nuclear family unit.⁹¹ Places of reception will also be provided, subject to the capacity of the State to offer them.⁹² UNHCR is also permitted access to PTH beneficiaries subject to certain conditions.⁹³

Crucially, though, PTH status does not encompass the right to work in Panama, reflecting its ultimately temporary orientation. Moreover, the Executive has a duty to set limitations on the freedom of movement of PTH beneficiaries.⁹⁴ The status is not limited by exclusion clauses and, as such, the restrictions on movement in Panama was viewed originally as a crucial means of preventing armed or criminal elements that might enter the country as part- or under cover – of a mass influx from infiltrating beyond the border zone. In practice, Colombian PTH beneficiaries were thus restricted to a narrow border strip of Darien province and were required to request special permission from the authorities even to make occasional visits to the capital city or other parts of the country.

The detailed PTH legal regime thus represents an interesting and anomalous case study of a restrictive ‘temporary protection’ model applied in the Americas. Yet it was designed to address a form of cross-border displace-

⁸² Ibid., Article 86.

⁸³ Indeed, the national refugee office – part of the Ministry of Government and Justice – is required to periodically review the flows of persons entering Panama in search of protection in order to identify if any flow merits a collective determination to trigger PTH measures (ibid., Article 86).

⁸⁴ Ibid., Article 85.

⁸⁵ Ibid., Articles 86 and 87.

⁸⁶ Ibid., Article 85.

⁸⁷ Ibid., Article 87.

⁸⁸ Ley 81 (Panama), 13 December 2011. Those 65 Colombians who missed initial registration as PTH beneficiaries but found themselves in the same position were recognised by the Panamanian authorities as refugees and thus to eventual permanent residency also (UNHCR, ‘Panamá: Comisión reconoce la condición de refugiado a 65 casos especiales’).

⁸⁹ Ibid., Articles 82 and 83.

⁹⁰ Ibid., Article 82.

⁹¹ Ibid., Article 83(1)-(2).

⁹² Ibid., Article 84.

⁹³ Ibid., Article 81.

⁹⁴ Ibid., Article 84.

ment that posed a real concern at that time, namely mass influx across the Darien border due to conflict in Colombia. In view of the changing nature of the Colombian conflict and the increased control of the Darien border by Panama, discussion is beginning to take place about reforming the Panamanian refugee law to reorient this provision towards more contemporary realities. One of the key features up for discussion is the continuing utility of the legal figure of PTH and the form that it should take in the future in order to effectively address the new flows of international forced migrants arriving in Panama, such as the Haitians post-2010.

Panama represents the only case in which ‘temporary protection’ measures located in a refugee law have been applied in practice to a mass influx situation in the Americas. Nonetheless, there are a number of other countries in Central and South America that have incorporated the figure of temporary protection within their refugee legislation. Even if the legislation has not been applied, they represent important additional examples of how such concepts of temporary protection have been framed broadly in order to apply to mass influx situations that may not have a ‘refugee’ character but are made up instead of persons requiring protection on some other ground.

Thus, **Venezuela’s** refugee law defines ‘mass influx’ as the arrival at its borders of ‘groups of persons in need of protection that are fleeing from the same country, making it difficult to immediately determine the reasons that caused their movement’.⁹⁵ In such situations of mass influx, the Venezuelan State guarantees: admission of these persons to the national territory; the provision of humanitarian assistance to satisfy their basic necessities (provided in collaboration with international institutions); and their non-return under any circumstances.⁹⁶ The Venezuelan Armed Forces located on the borders are directed to provide full collaboration to the national refugee office, the Public Ministry and the Public

Ombudsman in giving humanitarian assistance to the persons whilst they remain on Venezuelan territory.⁹⁷

However, the Venezuelan refugee legislation contemplates three distinct types of mass influx. One of these is comprised of ‘persons who wish to claim asylum as refugees in Venezuela’.⁹⁸ Plainly, the emergency measures identified above can thus be utilised where the flow has a ‘refugee’ character. In this case, the law specifies that such persons must be processed under the regular refugee status determination procedures.⁹⁹ By contrast, the other two types of mass influx involve cross-border movements by persons who may not be refugees, specifically: ‘persons that use the national territory as a transit point to enter again the territory from which they came’ and ‘persons that wish to remain temporarily in Venezuelan territory and who do not wish to claim asylum as refugees’.¹⁰⁰ In principle, these categories could thus include persons fleeing the effects of disasters.

The latter category is expressly characterised by Venezuelan refugee law as ‘temporary protection’.¹⁰¹ Groups benefitting from ‘temporary protection’ must be identified as such by a formal act of the national refugee office, which explains the cause of their movement and a register of the persons protected.¹⁰² Such persons benefit from temporary protection so long as the reasons causing their movement continue to exist.¹⁰³ This can be for a maximum of 90 days, extendable by the national refugee office for a further 90 days if conditions subsist.¹⁰⁴ Yet the voluntariness of their decision to leave Venezuela must be documented in a formal act drafted by the national refugee office in coordination with UNHCR.¹⁰⁵ In this scenario – and also in that of ‘transit’ – the Venezuelan State is required to coordinate attention and assistance with the authorities of their country of origin.¹⁰⁶

Similarly, **Peruvian** refugee legislation provides for a ‘temporary protection’ status separate from refugee status to be applied to cases of ‘mass influx in an illegal

⁹⁵ Ley Orgánica sobre Refugiados o Refugiadas y Asilados o Asiladas (Venezuela), 13 September 2001, Article 32. In recent years, Venezuela also apparently applied a temporary protection regime to the influx by displaced members of a Colombian indigenous population.

⁹⁶ *Ibid.*, Article 33.

⁹⁷ *Ibid.*, Article 37.

⁹⁸ *Ibid.*, Article 32(3).

⁹⁹ *Ibid.*, Article 36. Curiously, unlike the refugee law of Chile, El Salvador and Mexico, the Venezuelan refugee law thus appears not to allow the determination of refugee status by group or prima facie procedures in mass influx situations (unless they are subsumed under the ‘temporary protection’ provisions detailed below). Presumably they benefit only from the broader guarantees provided by the law during mass influx.

¹⁰⁰ *Ibid.*, Article 32(1) and (2) respectively.

¹⁰¹ Decreto No. 2491: Reglamento de la Ley Orgánica sobre refugiados o refugiadas y asilados o asiladas (Venezuela), 4 July 2003, Articles 21-23.

¹⁰² *Ibid.*, Article 23.

¹⁰³ *Ibid.*, Article 21.

¹⁰⁴ *Ibid.*, Article 22.

¹⁰⁵ Ley Orgánica sobre Refugiados o Refugiadas y Asilados o Asiladas (Venezuela), Article 34. The act must be notified also to the Public Ministry and the Public Ombudsman (*ibid.*).

¹⁰⁶ *Ibid.*, Article 35.

or irregular manner by persons seeking protection'.¹⁰⁷ For the mechanism to be triggered, the national refugee office – in coordination with the Ministry of External Relations and with the support of UNHCR – is required to make a '*prima facie* qualification' of the situation and register of the 'protection applicants'.¹⁰⁸ However, where a positive *prima facie* determination is made, Peru reserves the right to deny, cease or cancel 'temporary protection' status for any persons with respect to whom there are serious reasons for considering that they have committed certain specified serious classes of crimes.¹⁰⁹

Temporary protection status in Peru is granted in three monthly renewable blocks.¹¹⁰ The scope of protection is almost identical to that provided by PTH status in Panama.¹¹¹ 'Temporary protection' status in Peru thus encompasses the principles of *non-refoulement*, non-rejection at the border and no sanction for illegal or irregular entry.¹¹² Likewise, beneficiaries receive: the necessary assistance to meet their basic human needs, including the provision of food, shelter and basic hygiene and health services, in conditions of security; and the maintenance of the unity of the basic nuclear family.¹¹³ Towards this end, the national refugee office coordinates the identification of sites, reception procedures, responsibilities of local authorities and international technical and financial assistance.¹¹⁴ According to the particularities of each case and the capacity of the State, it is also empowered to impose limitations on the free movement of beneficiaries for reasons of security and well-being.¹¹⁵

The Peruvian temporary protection mechanism replicates the Panamanian law in clarifying that provision of the status does not commit the State to provide permanent settlement in its territory.¹¹⁶

However, unlike those in Venezuelan and Panamanian law, it does not expressly engage with the possibility of return nor does it provide for a role for the country of origin. In circumstances where temporary protection status has lasted a year, though, the Peruvian refugee regulations require the Ministry of External Relations to undertake an evaluation of the situation with the objective of achieving a permanent solution to the case of mass influx, 'with the support of the international community'.¹¹⁷ Some element of eventual burden-sharing thus seems envisaged beyond possible international assistance in providing technical and financial support during temporary protection.¹¹⁸

The concept of 'temporary protection' also appears implicitly in the mass influx provisions of refugee legislation in **Costa Rica** and **Bolivia**. The relevant provisions of Costa Rican and Bolivian refugee law are much less detailed than those of the other States surveyed and, in essence, serve only to provide a legal basis for the competent national authorities to establish a set of mechanisms to guarantee protection in mass influx situations.¹¹⁹ Moreover, in the case of both Costa Rica and Bolivia, it is less clear than for the other countries surveyed here whether the mass influx provisions apply to refugees only, or to a distinct broader class of persons, since the relevant laws both refer only to the situation of 'mass influx, or imminent risk of mass influx, to the country by persons needing international protection'.¹²⁰ Neither provision is regulated further nor been applied in practice.

Finally, there is the concept of 'temporary protected status' in the domestic law of the **USA**. However, for reasons that will become apparent, that legal figure will be fully described and addressed in a later section that deals with discretionary measures for regularising the status of persons in-country on a humanitarian basis.¹²¹

¹⁰⁷ Ley No. 27891 (Peru), 20 December 2002, Article 35.

¹⁰⁸ Reglamento de la Ley del Refugiado (Peru), 23 December 2002, Article 35.

¹⁰⁹ *Ibid.*, Article 40. These grounds are plainly inspired by Article 1F of the Refugee Convention and specify: '(a) Serious common crimes in the country of origin, especially those of drug-trafficking and terrorism; (b) War crimes and crimes against humanity according to the terms defined by the Rome Statute of the International Criminal Court' (*ibid.*).

¹¹⁰ Ley No. 27891 (Peru), Article 35.

¹¹¹ See text above.

¹¹² Reglamento de la Ley del Refugiado (Peru), Article 36.

¹¹³ Ley No. 27891 (Peru), Article 35; Reglamento de la Ley del Refugiado (Peru), Article 37.

¹¹⁴ Ley No. 27891 (Peru), Article 36; Reglamento de la Ley del Refugiado (Peru), Article 38.

¹¹⁵ Reglamento de la Ley del Refugiado (Peru), Article 38.

¹¹⁶ *Ibid.*, Article 36.

¹¹⁷ *Ibid.*, Article 39.

¹¹⁸ *Ibid.*, as per Article 36(b).

¹¹⁹ Decreto No. 36831-G (Costa Rica), 28 September 2011, Article 145; and Ley No. 251: Ley de protección a personas refugiadas (Bolivia), 20 June 2012, Article 31.

¹²⁰ *Ibid.*

¹²¹ See below.

3.5 REFUGEE RESETTLEMENT PROGRAMS

The Americas have long been an important region for taking refugees from third countries for resettlement. These resettlement programmes exist alongside the framework of refugee law and policy that addresses the spontaneous arrival of foreign individuals (and groups) seeking asylum. Of course, they are usually oriented towards providing permanent asylum, rather than temporary protection, in the country of resettlement for the refugee beneficiaries. However, a short study of these programmes as they stand at present is in order to the extent that the criteria that they adopt for selecting beneficiaries may extend to persons affected by disasters.

The USA is by far the leading country for refugee resettlement at the global level. Interestingly, between 1952 and 1980, the USA adopted a unilateral approach to defining the categories of refugees whom it would accept for resettlement to the USA among which it included one category that referred expressly to persons (from non-Communist countries) who were affected by disasters.¹²² In 1952, for instance, this category was defined as ‘persons uprooted by catastrophic natural calamity as defined by the President’.¹²³ In 1953, the refugee definition was revised to include

any person... who because of natural calamity... is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.¹²⁴

In 1965, the category reverted to ‘persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode’.¹²⁵ This was envisaged as a relief measure to allow conditional entry to the USA where aliens were forced to flee their homes due to serious natural hazards such as earthquakes, volcanic eruptions and tidal waves.¹²⁶

Despite occasional applications by aliens for conditional entry on the basis of these provisions,¹²⁷ they were never utilised by the USA, apparently due to the governmental perception that facilitating resettlement to the USA was less appropriate than providing aid *in situ*.¹²⁸ Nonetheless, special legislation was adopted by the USA in 1958 – and renewed in subsequent years – to allow many thousands of Portuguese citizens living in the Azores Islands and affected by a series of earthquakes and volcanic eruptions in 1957 to be admitted to the USA as refugees.¹²⁹ However, from 1980 onwards, the USA has eliminated such unilateral refugee definitions from its legislation and instead used the Refugee Convention refugee definition as the basis for its resettlement programme. Since then, the USA’s Refugee Admissions Program (RAP) has not been used to resettle victims of disasters, whether located inside or outside their country of origin.

Canada also has a long-standing and generous programme for refugee resettlement. Since 1976, the Canadian legislation has employed the Refugee Convention refugee definition as a basis for refugee resettlement in the ‘Convention Refugee Abroad Class’.¹³⁰ A broader class of persons in a ‘refugee-like’ situation but not meeting the Convention definition may also be resettled in the ‘Country of Asylum Class’. Entry to the latter programme is based on a determination that a person who is outside his/her country is in need of resettlement because s/he is ‘seriously and personally affected by civil war, armed conflict or massive violation of human rights’ in that country.¹³¹ Although the effects of a natural disaster might conceivably result in a massive violation of human rights, it appears that neither of the current Canadian resettlement programmes has been used to resettle victims of disasters to Canada.

In Central and South America, resettlement programmes have been instituted and operated by a number of States both independently and within the regional framework of the 2004 Mexico Declaration and Plan of Action. The criteria applied for resettlement through these programmes reflect the refugee defini-

¹²² R. Bernstein Murray and S. Petrin Williamson, ‘Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti’ (2011), 255 *Center for Global Development Working Paper 1* <http://www.cgdev.org/content/publications/detail/1425143>, 27-30.

¹²³ *Ibid.*, 28, referring to the 1952 Immigration and Nationality Act (USA).

¹²⁴ *Ibid.*, 28, referring to the 1953 Refugee Relief Act (USA), Pub. L. No. 83-203, 67 Stat. 400, section 2(a).

¹²⁵ *Ibid.*, 28, referring to 1952 Immigration and Nationality Act (USA), 8 U.S.C. 1153(a)(7) (1964 ed., Supp. V), section 203(a)(7)(B).

¹²⁶ *Ibid.*, 29.

¹²⁷ See, for example, *Matter of Pasarikovski*, Interim Decision No. 1814, 27 November 1967 <http://www.justice.gov/eoir/vll/intdec/vol12/1814.pdf>; also *Matter of Ugricic*, Interim Decision 2211, 13 October 1972 <http://www.justice.gov/eoir/vll/intdec/vol14/2211.pdf>. Both applications were denied on the basis that the US President had not defined the terms ‘catastrophic natural calamity’.

¹²⁸ Bernstein Murray and Petrin Williamson, ‘Migration as a Tool’, 29.

¹²⁹ *Ibid.*, 29, referring to the 1958 Azorean Refugee Act (USA), Pub. L. No. 85-892, 2 September 1958.

¹³⁰ Immigration and Refugee Protection Regulations (Canada) (SOR/2002-227), 11 June 2002, Regulation 145.

¹³¹ Immigration and Refugee Protection Regulations (Canada), Regulation 147.

tions adopted by the participating countries in their national laws dealing with spontaneous asylum applications. No cases involving resettlement of victims of disasters have been identified. Overall, it is important to emphasise that these resettlement programmes, like those in the USA and Canada, are discretionary in the sense that they are not based on a clear legal obligation. As such, their continuance, scope and focus could be modified.

3.6 COMPLEMENTARY PROTECTION

It is well-established that the prohibition in international human rights law on torture, inhuman and degrading treatment or punishment extends to prevent a State from sending an alien to a country where s/he runs a real risk of being subjected to such treatment or where there is a risk of arbitrary deprivation of his/her life. The relevant rule appears expressly in the 1984 Convention Against Torture (CAT),¹³² and the 1985 Inter-American Convention to Prevent and Punish Torture.¹³³ It has been read into the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1969 American Convention on Human Rights (ACHR)¹³⁴ and the 1948 American Declaration on the Rights and Duties of Man (ADHR)¹³⁵ by the international human rights bodies tasked with the interpretation of these instruments. Regional human rights law in the Americas also prohibits sending an alien to a territory where, echoing the terms of the Refugee Convention, 'his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions'.¹³⁶ Such human rights-based prohibitions on expulsion are said to provide 'complementary protection' to that guaranteed by refugee status.¹³⁷

Excepting a few Caribbean islands,¹³⁸ all States in the Americas are bound by one or more of the above-men-

tioned international instruments and thus also a prohibition on sending an alien to face the proscribed ill-treatment. However, relatively few have adopted domestic law to incorporate the rule.¹³⁹ The study will thus focus upon the approach adopted by these few States where domestic law expressly provides some form of complementary protection based on such human rights considerations and may thus offer the possibility of temporary protection against removal to a country affected by a disaster.

Commentators have suggested that these rules of complementary protection may, in some circumstances, serve to require States not to effect the removal of an alien to a territory where the risk to his/her person results from a disaster or its effects.¹⁴⁰ These analyses have tended to focus on the human rights law instruments of either global or European scope. The former are clearly relevant to many countries of the Americas and similar arguments could equally be posited for the Inter-American human rights instruments referred to above. However, no human rights treaty body in the Americas or beyond has yet seen fit to expressly address the way in which such international human rights provisions might apply to persons resisting removal to disaster situations. As such, it is appropriate to examine the practice of States in the Americas.

In the Americas, most domestic law provisions are narrowly drafted in a way that would tend to forestall their application to the risks posed by disasters. Thus, the USA domestic regulations implementing the CAT require the withholding (or, in certain cases, deferral) of removal only where an alien would more likely than not to be subjected to torture.¹⁴¹ By contrast, **Canada** allows aliens to qualify for complementary protection as 'persons in need of protection' on an individual basis not only where the risk of torture exists but also where there is a risk to their life or a risk of cruel and unusual

¹³² Articles 3 and 16.

¹³³ Article 13, fourth paragraph, refers to this principle in the context of extradition.

¹³⁴ Articles 5. The applicability of Article 5 has been confirmed by the Inter-American Court of Human Rights in its recent Advisory Opinion on *Rights and Guarantees of Children in the Context of Migration and/or In Need of International Protection*, No. OC. 21-14, Series A, No. 21, 19 August 2014, paragraph 226.

¹³⁵ Article I. See D.J. Cantor and S. Barichello, 'The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?' (2013) 17 *International Journal of Human Rights* 689, 692; and at 691 for an explanation of why the ADHR standards are considered binding.

¹³⁶ ACHR, Article 22(8).

¹³⁷ For wider discussion of the concept, see J. McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

¹³⁸ At present, the exceptions appear to be Cuba, St Lucia and St Vincent, although the last two are arguably bound by the provisions of the ADHR as member States of the OAS (see above).

¹³⁹ For 'monist' States, which are common in Central and South America, lack of incorporation in itself is not problematic since the international norm can usually be relied upon directly in the domestic legal system. The challenge in those countries, though, is instead the lack of regulation by domestic law, which may lead to the same result in practice.

¹⁴⁰ See, for example, J. McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards' (2011) *UNHCR Legal and Protection Policy Research Series*, 15-36.

¹⁴¹ Code of Federal Regulations (USA), title 8, sections 208.16-18 and 1208.16-18.

treatment or punishment.¹⁴² However, these latter limbs are expressly limited by the legal requirements that the risk is ‘not faced generally by other individuals in or from that country’ nor ‘caused by the inability of that country to provide adequate health or medical care’.¹⁴³ In both cases, protection will not be available to persons fleeing disasters or their effects.¹⁴⁴

The refugee laws of **Chile, Colombia** and **Mexico** – similar to the Canadian legislation – also contain specific provisions for granting international protection based on a threat to the life of the alien or a risk not only of torture but equally of cruel, inhuman or degrading treatment or punishment.¹⁴⁵ The crucial difference is in the form of protection. Thus, whereas the Chilean legislation only provides for a bar on removal, the Mexican legislation details a complementary protection status complete with associated rights, and the Colombian legislation (somewhat confusingly) qualifies the person as a ‘refugee’. However, at least in the cases of Colombia and Mexico, the practice has been to apply this protection purely for harms imposed at the hands of other humans and not to generalised risk arising from situations such as disasters caused by natural hazards.

Additionally, there are a number of States in the Americas that have adopted legislation that seems to refer to a human rights-based principle of non-return. However, they seem to place it in the context not of complementary protection, but rather State discretion to admit or allow stay on humanitarian grounds.¹⁴⁶ This is arguably the case for **Argentina, Bolivia, Costa Rica** and **Nicaragua**. These examples thus tend to raise questions about the basis on which such provisions are to be applied, i.e. on the basis of a mandatory rule based on international human rights obligations or merely to guide a broader discretionary function of State officials. Given the interpretative challenge that these provisions pose, they are thus dealt with more appropriately in the context of broader humanitarian measures to facilitate entry or stay in the country.

Finally, whereas the provisions analysed above have all dealt with complementary protection on an

individualised basis, it is important to signal that the **Canadian** legislation also permits the concept of ‘persons in need of protection’ to be applied on a group basis.¹⁴⁷ It should be noted, however, that the provision – unlike most of those canvassed here – is really based on the exercise of governmental discretion rather than a duty to grant protection based on human right law. It is therefore addressed in more detail in **section 7** of this study.¹⁴⁸ Conversely, there is a ‘public policy class’ provision in Canadian law that is framed as an exercise of ministerial discretion on public policy grounds in individual cases. As such, it is described in more detail in **section 7** of this study.¹⁴⁹ However, in practice, it has been used on a class basis to provide a form of complementary protection to persons in a refugee-like situation and thus deserves mentioning in these terms here.

3.7 CONCLUSIONS

The foregoing analysis produces a number of important insights. Firstly, it is clear that whilst States do not generally see aliens as refugees by mere virtue of a disaster in their country of origin, some of them are prepared to look more closely at the *effects* of the disaster. There are thus good examples of where States in the Americas have granted refugee status under either the Refugee Convention or Cartagena Declaration definition to persons from a country affected by a disaster based on the disaster’s impact in terms of increased insecurity, temporary inadequacy of State protection and the actions of those preying on the vulnerable.

Secondly, despite some degree of openness towards treating persons thus affected by the disaster as refugees, it is fair to say that States in the Americas have thus far not been prepared to extend complementary protection to such individuals. This appears to reflect the rather narrow conception of complementary protection that is prevalent for different reasons across the region. Of course, this is not to say that human rights law cannot or should not play a more active role in describing the

¹⁴² See, respectively, Immigration and Refugee Protection Act (Canada), S.C. 2001, c. 27, last amended 1 September 2014, sections 97(1)(a) and 97(1)(b).

¹⁴³ *Ibid.*, respectively, sections 97(1)(b)(ii) and 97(1)(b)(iv).

¹⁴⁴ This position was confirmed in a case heard by Immigration and Refugee Board of Canada in which it held that the risk to a Japanese applicant of exposure to radiation from the Fukushima disaster was ‘one faced generally by others in her country’. The fact that she may have been in a subgroup of persons who are at a heightened risk of harm due to such exposure as a result of a genetic disposition, poor diet or medical condition did not remove the generalised nature of the risk since the group was ‘sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in the country’ (Immigration and Refugee Board (Canada), File number VB1-01229).

¹⁴⁵ See, respectively: Ley No. 20430 (Chile), Diario Oficial, No. 39636, 15 April 2010, Article 4; Decreto No. 2840 (Colombia), 6 December 2013, Article 1(c); and Ley Sobre Refugiados y Protección Complementaria (Mexico), Article 2.IV.

¹⁴⁶ See below.

¹⁴⁷ Immigration and Refugee Protection Act (Canada), section 97(2).

¹⁴⁸ See section 7.2.1.

¹⁴⁹ See section 7.1.

standards according to which regular and irregular migrants should be treated.¹⁵⁰

Thirdly, the impulse towards generosity in accepting those who are genuinely refugees is balanced by the concern on the part of States that the wider class of persons fleeing from a disaster may ‘clog up’ their asylum system to the detriment of more deserving cases. As a result, we shall see later that, in practice, some States use legal and policy tools as a means of dissuading these sorts of wider ‘humanitarian’ cases from claiming asylum. The use of these other measures to provide some form of regular migratory status is not necessarily objectionable, so long as it does not deprive genuine refugees from having their status recognised.

Fourthly, it is important to point out that – in contrast to Europe, for example – States in the Americas have not opted to create a regional framework on ‘temporary protection’ that might risk undermining the primacy of the refugee law regime. Whilst the status of PTH in Panama appears a distinctive form of ‘temporary protection’ in the Americas, this study has equally identified a surprising number of other States in Latin America where a more progressive form of responding to mass influxes has been created in domestic refugee law. Although these legal mechanisms have yet to be applied to mass influxes from disasters, the potential is there.

Finally, it must be emphasised that the forms of protection reviewed in this section are unique in the Americas in that they represent a form of protection that is obligatory in character. In other words, in principle, State discretion does not enter into deciding whether to recognise refugee status etc. The matter is one of pure obligation under domestic and, sometimes, international law. This distinguishes the subject matter of this section from those described in the remainder of the study, which derive from migration law and have a predominantly discretionary character.

The next section sets the scene for this analysis of migration law by describing how States in the Americas have addressed the theme of international migration and disasters from within regional intra-governmental organisations.

¹⁵⁰ In this regard, see the Inter-American Court of Human Rights Advisory Opinion on *Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, Series A, No. 18, 17 September 2003.



4. REGIONAL ORGANISATIONS AND TEMPORARY SOLUTIONS FOR DISASTER-AFFECTED ALIENS

The implications of disasters for international migration are clearly a topic of legitimate concern at the international level. Indeed, the topic has been addressed in a range of inter-governmental forums across the world, including those promoted by the Nansen Initiative. The region of the Americas is no exception. Particularly in relation to the 2010 earthquake in Haiti, but also in other instances, a range of inter-governmental fora at the sub-regional and regional levels have discussed and adopted principled statements as to the mobility dimensions of these disasters.

4.1 REGIONAL CONFERENCE ON MIGRATION (RCM)

The RCM is a regional inter-governmental organisation formed in 1996 and composed of eleven member States, mostly from North and Central America: Belize, Canada, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the USA. The topic of cross-border migration was most recently addressed by the RCM in the Declaration adopted at the XIX Vice-Ministerial Meeting on 26 and 27 June 2014 in Managua, Nicaragua. This approved the undertaking of a regional workshop on ‘Temporary Protection and/or Humanitarian Visa in Disaster Situations’ to be celebrated in Costa Rica, financed by the Nansen Initiative.¹⁵¹ The present report sets out the background to the workshop approved by the RCM.

However, the topic of disasters has previously appeared prominently on the agenda of the RCM. For instance,

during the IV Vice-Ministerial-level meeting of the RCM in San Salvador, El Salvador, on 26 – 29 January 1999, the discussion revolved primarily around the devastation wrought upon Central America by Hurricane Mitch only a few months earlier in October-November 1998. Specific agenda items dedicated to new substantive themes on the first and second days included ‘Consequences of Hurricane Mitch in the migration field’ and ‘Discussion about these that will be considered in the exchange between Vice-Ministers, including “The IV Regional Conference on Migration in the face of the consequences of hurricane Mitch in the migration field”’.¹⁵²

An extensive report was presented to delegates at the IV Meeting by the International Organization for Migration (IOM) detailing its activities regarding the consequences of Hurricane Mitch in Central America.¹⁵³ This openly recognised the ‘influence this natural disaster will have on migration issues, both in the medium and long term’.¹⁵⁴ Consistent with its mandate, the IOM gave its commitment to support affected countries in devel-

¹⁵¹ Regional Conference on Migration, ‘Declaración: Por una Región Libre de Trata de Personas’, XIX Reunión Viceministerial de la Conferencia Regional sobre Migración, 26-27 June 2014 (2014), decisión 6.

¹⁵² Regional Conference on Migration, ‘Agenda de la IV Conferencia Regional sobre Migración, San Salvador, El Salvador, 26-29 January 1999’ (1999).

¹⁵³ Regional Conference on Migration, ‘Activities of the International Organization for Migration, IOM, related to the consequences of Hurricane Mitch in Central America’, Document prepared by the IOM for the IV Regional Conference on Migration, San Salvador, 26-29 January 1999 (1999).

¹⁵⁴ *Ibid.*, Introduction.

oping activities ‘for the prevention of irregular migration of the affected population’.¹⁵⁵ Its proposed response to the situation thus emphasised joint work towards the reconstruction and local development of affected communities to facilitate their sustainable reintegration, thereby also facilitating the ‘re-anchoring of the displaced population’.¹⁵⁶

It is important to emphasise that, in the Joint Communication issued by the IV Meeting, the topic of Hurricane Mitch is addressed as the priority item. In this part of the communication, the member States declared that they:

...[a]greed that the Conference [i.e. RCM] is an ideal forum for attending to the migratory aspects derived from this natural disaster, applying the holistic vision proposed by the Puebla Process, with an emphasis on the link between migration and development.¹⁵⁷

This represents an important statement of principle to the effect that the migration aspects of disasters fall within the ambit of the RCM. Based no doubt on the proposal of the IOM, the Communication also called on affected States in Central America to take action to generate local employment and work towards assuring the well-being of the communities of origin.¹⁵⁸ In view of the documented rise in international migration from these countries,¹⁵⁹ it is fair to suggest that any such measures taken in practice did not fully achieve their desired outcome.

However, the Communication also addresses the situation from the standpoint of States in the Americas not directly affected by Hurricane Mitch but rather by its consequences on international migrants. Specifically, it is recorded that the members:

Made special mention of the adoption of migratory measures for the benefit of nationals of the countries affected by hurricane Mitch on the part of Costa Rica and the United States of America.¹⁶⁰

This represents an important precedent within the RCM – the endorsement of the adoption of special migratory

measures by third States as one means of addressing the implications of disasters for international migration within the region. Simultaneously, the RCM has set an important regional precedent through its engagement with this theme. However, it is not the only forum in the Americas where States have endorsed this principle, as can be seen from the analysis that follows.

4.2 MEETING OF CENTRAL AMERICAN PRESIDENTS (ESQUIPULAS PROCESS)

The regular Meeting of Central American Presidents – deriving originally from the Esquipulas process that helped to secure peace in Central America – has constituted a useful forum for periodic engagement with pressing regional questions. Thus, an Extraordinary Meeting that took place in Comalapa, El Salvador, on 8 November 1998, considered the devastation wrought by Hurricane Mitch and discussed action on a regional scale to address its effects in various countries of the region. This meeting was attended by the governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. The ensuing declaration stated, *inter alia*, that:

We appeal to 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.¹⁶¹

A copy of the declaration was sent to the United States of America under cover of a letter drawing attention to this plea and appears to have influenced the granting of ‘temporary protected status’ to Hondurans and Nicaraguans.¹⁶² Moreover, a number of countries in Central America gave effect to what they saw as a commitment on their part and soon thereafter adopted national laws to grant amnesty to irregular Central Americans residing in their countries.¹⁶³

¹⁵⁵ *Ibid.*, Annex, Heading 1.

¹⁵⁶ *Ibid.*

¹⁵⁷ Regional Conference on Migration, ‘Comunicado Conjunto, IV Conferencia Regional sobre Migración, San Salvador, 26-29 January 1999’ (1999), third paragraph.

¹⁵⁸ *Ibid.*

¹⁵⁹ For references, see above in section 2.

¹⁶⁰ Comunicado Conjunto, IV Conferencia Regional sobre Migración, fourth paragraph.

¹⁶¹ Meeting of Central American Presidents, ‘Reunión Extraordinaria de Presidentes Centroamericanos: Declaración Conjunta’, Comalapa, El Salvador, 9 November 1998’ (1998) 3.

¹⁶² Letter from Central American Presidents to William Clinton, President of the United States of America, untitled, 9 November 1998 < <http://goo.gl/gG1rtP>. See below for analysis of temporary protected status in the USA.

¹⁶³ See below.

4.3 BOLIVARIAN ALLIANCE FOR THE PEOPLES OF OUR AMERICA (ALBA)

ALBA is a regional inter-governmental organisation that was formed in 2004 as an alternative to the Free Trade Area of the Americas and is composed of nine member States, mostly with left-leaning governments: Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, St Lucia, St Vincent and the Grenadines and Venezuela. ALBA has addressed the issue of migration due to disasters in two distinct fora and in rather distinct terms.

Firstly, ALBA and its member States profess a special relationship with Haiti. Shortly after the 2010 earthquake, the Political Council of ALBA thus called a special Emergency Meeting in which a 'Plan for ALBA Countries to Contribute in Solidarity to the Reconstruction Efforts in Haiti' was adopted.¹⁶⁴ One of the concrete proposals relates specifically to 'Migration' and called on ALBA members to:

Decree a migratory amnesty that regularises the migratory status of Haitian citizens resident in ALBA countries, facilitating that movements are developed in two senses:

a. Reception of family members in ALBA countries of groups of Haitian citizens that have family links with Haitians resident in ALBA countries that have the capacity to guarantee them better conditions of existence and development.

b. Solidarity brigades: Organisation of cooperation brigades in the fields of assistance and reconstruction, taking as a foundation the collectives of Haitian citizens resident in ALBA countries.¹⁶⁵

In consequence, a number of leading ALBA member States – namely Ecuador and Venezuela – did rapidly adopt and implement domestic measures towards this end.¹⁶⁶

Secondly, shortly thereafter, in the X Summit of ALBA States held on 25 June 2010 in Otavalo, Ecuador, delegates adopted a 'Special Declaration on Climate Change'. Among the many points proclaimed in this declaration that pointed to the responsibility of 'developed countries'

to address the substance and consequences of climate change, one related specifically to migration:

Developed countries must assume responsibility for climate migrants, welcoming them in their territories and recognising their fundamental rights.¹⁶⁷

Clearly, to the extent that the proclamation is aimed at States that are not part of ALBA, its content has a decidedly aspirational quality. Moreover, given the context, it would appear to be limited to climate change-related migration rather than that generated by natural hazards more generally. Nonetheless, to the extent that the latter relates to the former, it is noted here as an interesting regional example affirming the need to receive such migrants when they cross international borders.

4.4 UNION OF SOUTH-AMERICAN NATIONS (UNASUR)

UNASUR is a new intra-governmental union that brings together the member States of two existing sub-regional blocs in South America, the Andean Community of Nations (CAN) and the Common Market of the South (MERCOSUR). It currently comprises twelve members: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. As such, there is some overlap also with the membership of ALBA.

UNASUR has frequently expressed its 'solidarity' with countries affected by disasters in the region and beyond, e.g. to Chile for the 2010 earthquake¹⁶⁸ and to Japan for the 2011 earthquake and tsunami.¹⁶⁹ However, following the 2010 Haiti earthquake, a more extensive declaration – the 'Quito Decision: UNASUR Solidarity with Haiti' – was adopted by the 9 February meeting of Heads of State and Government of UNASUR in Quito, Ecuador.¹⁷⁰ They decided, *inter alia*, to:

Promote joint actions... through an action plan coordinated with the representatives of the Constitutional Government of Haiti [who were present in the meeting]. This action plan must provide for

¹⁶⁴ Bolivarian Alliance for the Peoples of Our America, 'Plan para la contribución solidaria de los países del ALBA al esfuerzo del reconstrucción de Haití', Reunión de emergencia del Consejo Político del ALBA-TCP, Caracas, Venezuela, 25 January 2010 (2010).

¹⁶⁵ *Ibid.*, Proposal 6.

¹⁶⁶ See below.

¹⁶⁷ Bolivarian Alliance for the Peoples of Our America, 'Declaración Especial sobre Cambio Climático', X Cumbre del ALBA, Otavalo, Ecuador, 25 June 2010 (2010).

¹⁶⁸ Union of South-American Nations, 'Comunicado de UNASUR ante el terremoto en Chile' (27 February 2010).

¹⁶⁹ Union of South-American Nations, 'Resolución del Consejo de Ministros de Relaciones Exteriores de la Unión de Naciones Suramericanas (UNASUR)', Mitad del Mundo, Quito, Ecuador, 11 March 2011 (2011).

¹⁷⁰ Union of South-American Nations, 'Solidaridad de UNASUR con Haití: Decisión de Quito', Otavalo, Ecuador, 9 February 2010 (2010).

the following measures, among others, which are voluntary in form and according to the capacities of each Member State:

...

Exhort those Member States that still have not applied special processes of migratory regularisation for the benefit of Haitian citizens to do so.¹⁷¹

The general humanitarian measures adopted by Ecuador for the benefit of Haitian migrants were announced at the conclusion of this meeting.¹⁷² Venezuela also later adopted similar measures, as did Brazil. Yet, in neither case does this action seem to have been prompted directly by the UNASUR declaration.¹⁷³ Other member States of UNASUR appear to have dealt with Haitians in their territories on a more individual basis.¹⁷⁴

4.5 ORGANIZATION OF AMERICAN STATES (OAS)

The OAS is the most well-established of all of the inter-governmental organisations in the Americas and also possesses the widest membership, comprised of all States in North, South and Central America and the Caribbean except Cuba. However, at least in the field of migration, its political organs have been somewhat sidelined by the more specialised sub-regional organisations canvassed above. Even so, its pronouncements and activities still carry quite some political weight because of the scope of its membership.

Curiously, despite the intense involvement of the OAS in certain disaster situations, such as Haiti, the political organs of the OAS do not appear to have dealt expressly with the topic of disasters and international migration. Resolutions adopted by the OAS General Assembly have dealt only with the issue of internal migration due to disasters. Thus, its recent annual resolutions on the theme of 'internally displaced persons' (IDPs) regularly touch on internal displacement due to disasters, for example by urging member States to adopt a comprehensive approach in their care for IDPs 'particularly in

disasters and for the reconstruction of the communities affected by natural disasters'.¹⁷⁵ Further, the OAS human rights organs have dealt extensively with international migration, but not in relation to disasters.¹⁷⁶

However, the Special Committee on Migration Issues – which forms part of the Permanent Council of the OAS – expressly considered the topic of 'Migrants in Disaster Situations' at a special meeting on 27 January 2009. Although this did not touch on aliens affected by a disaster in their home country, it did address the closely-related situation where aliens are affected by a disaster in the host country and emphasised their 'special vulnerabilities' in this regard.¹⁷⁷ Member States engaged in a discussion and exchange of comments and questions with invited experts, mainly on the conditions in which assistance may be provided to undocumented migrants. The importance of the topic 'which is not normally addressed in the context of the OAS', and the possibility for follow-up dialogue and action, were emphasised at the close of the meeting.¹⁷⁸

4.6 CONCLUSIONS

One principal conclusion can be drawn from this short survey of State practice in intra-governmental regional fora in the Americas. This is that the relationship between international migration and disasters, particular those that are rapid-onset, is one of confirmed special interest. Moreover, on that basis, States have endorsed the principle that aliens affected by disasters deserve special consideration by the State on whose territory they find themselves and, in particular, migratory amnesties have been sanctioned as an appropriate humanitarian response. In this regard, it is important to note that the membership of the different fora surveyed here represents all States from North, South and Central America, as well as all Latin American countries. At this level, generalised agreement among States in the region is thus evident.

The next section turns now to begin to explore the plethora of approaches relevant to these situations in the domestic migration law of States from across the Americas.

¹⁷¹ Ibid., paragraph 6.

¹⁷² See, for example, TeleSUR, 'Ecuador anuncia proceso para regularizar haitianos mediante amnistía migratoria', 11 February 2010.

¹⁷³ See below.

¹⁷⁴ See below.

¹⁷⁵ Organization of American States General Assembly, 'Resolution 2667 (XLI-0/11) on Internally Displaced Persons', adopted 7 June 2011 (2011), paragraph 7. Natural disasters in relation to IDPs are also mentioned in paragraphs 1, 8 and 11.

¹⁷⁶ See, for instance, the Inter-American Court of Human Rights Advisory Opinion on *Juridical Condition and Rights of the Undocumented Migrants*.

¹⁷⁷ See Organization of American States Permanent Council, Special Committee on Migration Issues, 'Migrants in Disaster Situations', OAS Doc. No. OEA/Ser.G CE/AM-X/09 (21 January 2009).

¹⁷⁸ Organization of American States Permanent Council, Special Committee on Migration Issues, 'Summary for the meeting of January 27, 2009', OAS Doc No OEA/Ser.G CE/AM-72/09 (3 February 2009).



5. USE OF ‘REGULAR’ MIGRATION LAW AND POLICY IN RESPONSE TO DISASTERS

In general, States in the Americas tend to use the provisions of their domestic migration law – rather than those of refugee law – to respond to the impact of disasters on migration and migrants. This may be due partly to the fact that refugee law is not seen to apply generally to these situations, whereas migration law appears to offer a greater range of tools with which to respond to these exceptional circumstances. However, this inherent flexibility equally reflects the fact that the pertinent tools are usually based on the State’s own discretion and thus lend themselves to be applied more freely than measures required as a matter of obligation. Discretion is thus the common thread that links the legal and policy provisions surveyed in this and subsequent sections.

The lack of any overarching international framework in the migration field – unlike refugee law – means that the measures adopted by States assume a wide variety of different forms based on the legal and institutional arrangements peculiar to each State, as well as their prevailing interests and politics. This represents challenging terrain for analysis, not least since some States have legislated not for one single means of addressing exceptional migratory circumstances, such as those created by disasters, but rather a panoply of different and overlapping mechanisms.

Aside from the shared feature of discretion, all of the measures analysed across the Americas share the important common acknowledgment that exceptional circumstances, such as those created through the impact of serious disasters, *should* be taken into account. There is also the equally widespread belief that it is necessary to distinguish these discretionary measures from those delimited as a matter of obligation by refugee law. Above and beyond these broad trends, for the purposes of analysis, it is possible to distinguish at least four distinct approaches from among this panoply of migration law and policy, each of which will be addressed by its own dedicated section.

In general, as will be described in this section, there is a tendency for States to try to ‘regularise’ the status of persons affected by disasters by trying to fit them into ‘regular’ migration categories. On the one hand, such persons may genuinely be eligible to enter or stay on this basis, which usually is preferred considerably over recourse to ‘exceptional’ migration categories. On the other hand, where the person may not be eligible, States sometimes apply a degree of flexibility to the relevant eligibility criteria to allow the person to benefit from that regular migratory category. This section analyses these trends by reference respectively to ‘trans-border’ displacement and to displacement ‘abroad’.

Otherwise, States may adopt exceptional measures to deal with the migratory aspects of a disaster. As analysed in **section 6**, some exceptional measures are based on an approach rooted in the general conditions in the country of origin. By contrast, as discussed in **section 7**, other measures are based on a more individualised approach to the situation of particular aliens who may be affected by exceptional circumstances. Finally, **section 8** considers legal responses to the situation of aliens affected by a disaster on the territory of a third State in which they are present.

5.1 'REGULAR' MIGRATION LAW AND 'TRANS-BORDER' DISPLACEMENT

Rapid-onset disasters sometimes provoke localised population movement across an international boundary between neighbouring countries in the Americas. This movement often lasts for short periods of time as the aliens seek temporary sanctuary on the other side of the border from the effects of the disaster.¹⁷⁹ At least for countries that have been identified through this study as recognising the arrival of this form of sudden population movement, the governmental response tends to avoid the use of special migratory measures such as those based on temporary protection or entry/stay on humanitarian grounds.

Instead, to the extent that the aliens enter via regular crossing points, this short-term border-crossing usually appears to take place under rules that allow for entry to the territory by nationals of the other country. These rules may be specific to the respective border zones and intended to facilitate the normal social interchange between populations divided by an international border. This is the case, for example, for those migrants from border zones of northern Guatemala who cross into **Mexico** to weather tropical storms and even flooding and whose everyday entry to the border regions of Mexico is permitted with the 'frontier worker visitor' [*visitante trabajador fronterizo*] card held by many Guatemalans along the northern frontier.¹⁸⁰

Elsewhere, the rules that facilitate the entry of these border populations are not based on their special situation, but derive from accords between the respective countries that are intended to allow all of their nationals to enter the other territory with a minimum of procedure. These accords may be regional in nature, as with the CA-4 free movement scheme instituted by **El Salvador, Honduras, Guatemala and Nicaragua** that allows for entry without a passport or visa. Alternatively, the accords may be bilateral in character, as with those negotiated by **Costa Rica** with all other Central American States (except Nicaragua) which allow entry without a visa. Both schemes have facilitated localised trans-border displacement at times of rapid-onset natural disaster.

5.2 'REGULAR' MIGRATION LAW AND DISPLACEMENT 'ABROAD'

The occurrence of a serious rapid-onset natural disaster overseas attracts a generous humanitarian response from many States in the Americas. This includes not only sending relief to the disaster zone but also often adopting a more lenient attitude towards migration and aliens from the affected country when implementing immigration law and policy. Indeed, States in the region are keen to use existing 'regular' migration options as a tool for addressing the impact of overseas disasters and the flexible application of these regular procedures is privileged. As such, more 'exceptional' grounds for entry or stay – such as temporary protection or humanitarian entry provisions – tend to play a parallel or even complementary role. Two main forms of this dynamic can be discerned.

Firstly, State officials in the region not infrequently find themselves confronting individual aliens whose stay in the country is affected by a serious natural disaster overseas. These tend to be persons who are liable to removal imminently from the territory, sometimes because they have no regular migratory status there. Yet, whereas the legislation of many of these same States makes provision for entry or stay on humanitarian grounds, there is a tendency in some of these States – and in others where there is no 'humanitarian' provision – to look first to see whether the individual alien's situation might instead be regularised through the application of more 'regular' migration options.

The tendency seems particularly pronounced in States with modern 'migrant-oriented' legislation. This is the case, for example, in **Costa Rica**, where a number of irregular aliens from Nicaragua were detected who had been personally affected by a disaster in their home country in 2010. However, rather than simply applying the 'humanitarian' stay provision, the immigration authorities first looked carefully at the migration profile of each person and succeeded in moving all of those who needed to stay to a 'regular' migration category based on family or similar links to Costa Rica. Access to these migration categories was facilitated in a number of cases by flexibly applying the substantive criteria, e.g. taking a more distant than usual family relation as sufficient. The procedural requirement that such persons should leave the country to make their applications was also waived.

The preference for adopting this kind of approach appears to be based on the perception that these 'regular' migration categories offer greater benefits and stability for aliens, especially those in a potentially vulnerable

¹⁷⁹ See above.

¹⁸⁰ This migration status is created by the Ley de Migración (Mexico), published in Diario Oficial on 25 May 2011, last reformed 7 June 2013, Article 52(IV) and regulated by Reglamento de la Ley de Migración (Mexico), published in Diario Oficial on 28 September 2012, see particularly Articles 134-136 and 155.

situation, than do the purely humanitarian provisions.¹⁸¹ This incentive is no doubt increased in States where the legislation does not provide explicitly for protection on humanitarian grounds outside of asylum. **Colombia** is a case in point, where a number of the Haitians who arrived in its territory following the earthquake in Haiti were apparently assisted by the authorities to regularise their status through work and student migratory routes. In these scenarios, the use of inherent discretion to flexibly apply the relevant requirements is an important option.

Secondly, particularly where the State hosts a large diaspora community from a country affected by a disaster, officials often find themselves under pressure to facilitate the entry of new migrants in addition to allowing the continued stay of aliens who are already there. Across the Americas, the countries with the most developed frameworks for simultaneously addressing both situations are **Canada** and the **USA**. Both illustrate the more general trend towards facilitating the entry and stay of ‘disaster migrants’ through the application of ‘regular’ migration categories, in tandem with the use of ‘humanitarian’ categories. At the same time, the specific measures that each State applies are specified to a much greater degree in law and/or policy than is seen elsewhere in the region.

In the case of **Canada**, the government has dictated ‘special measures’ in response to certain serious disasters that have occurred in the region of the Americas and beyond. These include the 1998 Turkey earthquake, the 2004 Asian tsunami, the 2010 Haiti earthquake, and the 2013 Typhoon Haiyan in the Philippines. These have been rapidly instituted on either a time-limited (6 months) or open-ended basis through the use of policy bulletins that are used to provide one-off or urgent instructions to Citizenship and Immigration Canada (CIC) staff.¹⁸² Ultimately, though, the policy measures

are rooted in a discretionary power conferred by law that allows for humanitarian considerations to be taken into account when making migration decisions and policy.¹⁸³

The special measures adopted by Canada are limited to applicants who self-identify as being negatively affected by the disaster. This individual link to the disaster is formulated in terms that differ slightly among the policy bulletins for different emergencies, i.e.: persons ‘directly and significantly affected’ by the Haiti earthquake;¹⁸⁴ ‘persons who have been and continue to be seriously and personally affected’ by the Asian tsunami;¹⁸⁵ persons ‘significantly and personally affected’ by Typhoon Haiyan.¹⁸⁶ In the last case, this was specified in the explanatory documents as meaning ‘you have lost family members, property and/or livelihood due to Typhoon Haiyan’.¹⁸⁷ The benefit of the special measures described below is thus limited to individuals able to demonstrate this link.

The ‘special measures’ adopted by Canada are based principally on the expedited processing of existing – and often new – applications for sponsorship or permanent residence under the Family Class by persons with immediate family members in Canada.¹⁸⁸ Such expedited processing is also extended occasionally to other categories. In the case of Haiti, this included applications for: citizenship certificates; extensions of temporary resident status from in-Canada and work permits for those individuals now unable to support themselves in Canada; as well as in-process applications to adopt children from the affected country. Expedited processing means that Canadian immigration officials ‘pull the applications of affected persons to the front of the queue for review’.¹⁸⁹

In general, the formal and procedural requirements pertaining to these immigration applications are maintained.¹⁹⁰ However, special measures have sometimes

¹⁸¹ On the scope of the humanitarian provisions, please see below.

¹⁸² E. Omeziri and C. Gore, ‘Temporary Measures: Canadian Refugee Policy and Environmental Migration’ (2014) 29 *Refuge* 43, 48.

¹⁸³ Such policy is usually created under section 25 of Immigration and Refugee Protection Act (Canada); in this case, specifically section 25.2. This section equally forms the basis on which entry or stay on such exceptional grounds may be granted in individual cases (see further below).

¹⁸⁴ Department of Citizenship and Immigration (Canada), ‘Special Measures in Response to the Earthquake in Haiti’, Operational Bulletin No. 179 (5 March 2010).

¹⁸⁵ Department of Citizenship and Immigration (Canada), ‘Fact Sheet: Citizenship and Immigration Response to Asian Tsunami’ (6 January 2005).

¹⁸⁶ Department of Foreign Affairs, Trade and Development (Canada), ‘Humanitarian Crisis in the Philippines: Canada’s Response to Typhoon Haiyan’, last modified 5 November 2014 <http://goo.gl/re0aZA>.

¹⁸⁷ See M. Scott, ‘Typhoon Haiyan and Immigration to Canada’, *Pilipino Express* (16 December 2013) <http://goo.gl/4cF5pl>

¹⁸⁸ See, for example, Department of Citizenship and Immigration (Canada), ‘Fact Sheet: Citizenship and Immigration Response to Asian Tsunami’; Department of Citizenship and Immigration (Canada), ‘Special Measures in Response to the Earthquake in Haiti’, Operational Bulletin No. 179; Department of Foreign Affairs, Trade and Development (Canada), ‘Humanitarian Crisis in the Philippines: Canada’s Response to Typhoon Haiyan’.

¹⁸⁹ Department of Citizenship and Immigration (Canada), ‘Guidelines for Priority Processing in the Event of Disaster Situations’, Operational Bulletin No. 83 (30 October 2008).

¹⁹⁰ In some cases, due to concerns regarding the possibility for fraudulent applicants, additional requirements are introduced. This was the case with the DNA tests required as a last resort to prove relationship for certain Family Class applications in the Haitian special measures (see, for example, Department of Citizenship and Immigration (Canada), ‘Special Measures for Haiti: Permanent Resident Non-Adoption Cases’, Operational Bulletin No. 179B (23 April 2010 – updated 29 June 2010).

been used to adjust one or more of the requirements for a particular category. Thus, for instance, application processing fees are sometimes waived for certain classes of applicant in recognition of the economic impact of the disaster.¹⁹¹ For similar reasons, Haitians applying in-Canada to extend or obtain a work permit were exempt from the requirement to obtain a Labour Market Opinion and entitled to health care coverage under the Interim Federal Health Program.¹⁹² Likewise, under devolved immigration powers, the province of Quebec adopted its own special measures to allow co-sponsorship of certain applications and to broaden the criteria for family membership in a number of cases.¹⁹³

In disaster scenarios, the Canadian immigration authorities generally make a commitment to examine applications – particularly those for extension of stay by students (and sometimes other categories such as visitors and temporary workers) – in a ‘compassionate and flexible manner’.¹⁹⁴ Under the relevant discretionary provision of Canadian immigration law, such officials may exempt applicants from any applicable criteria or requirement set down in the immigration law when justified by humanitarian and compassionate considerations.¹⁹⁵ Rather than moving such individuals to a different immigration status – i.e. one based purely on humanitarian considerations – it seems that Canadian officials are instead being encouraged to acknowledge the humanitarian concerns by waiving one or other formal criteria in order to extend their existing regular immigration status. Canada also expedited Haitian asylum claims already within the system.

The USA adopts a broadly similar approach to Canada, although there is some debate about whether ‘temporary relief measures’ in the USA reflect the exercise of an innate discretion on the part of immigration officials as opposed to a particular power conferred in federal

legislation. Even so, the published materials indicate that such measures are based on a set of underlying humanitarian considerations. These are, in particular, the fact that ‘natural catastrophes’ and other extreme events beyond the control of the applicant can impede her ability to return home as originally planned, may create temporary financial difficulties, or may affect her ability to maintain lawful immigration status whilst in the USA.¹⁹⁶ It is clear that the emphasis here on temporariness refers to the duration of the relief measures rather than the immigration outcomes that they may produce.¹⁹⁷

Unlike the Canadian example, the USA appears not to adopt special coordinated policy responses for particular disaster situations. Rather, it relies exclusively on US Citizenship and Immigration Services (USCIS) officials to exercise their discretion in dealing with these situations as they arise on a case-by-case basis and by recourse to the general range of such measures that exist.¹⁹⁸ As such, there is no formal requirement – as there is in Canada – that applicants must be seriously affected by the disaster in order to benefit from temporary relief measures, although this factor is no doubt taken into account by individual immigration officials in assessing a request for temporary relief on these terms. Even so, as in Canada, the onus is on the alien to approach the authorities and seek the benefit of such temporary relief measures as may be available to them.

Based on the periodic announcements made by USCIS reminding aliens of the existence of temporary relief measures, there is little doubt that they are used to respond predominantly to disasters.¹⁹⁹ Some such disasters were in the USA but the majority have been overseas.²⁰⁰ These have included as various a range of disasters as: tropical storms in the Caribbean in 2008; the 2010 Icelandic volcano eruption; the 2010 Chile earthquakes;

¹⁹¹ This was the case for new application processing fees and Permanent Resident application fees in the Asian tsunami special measures (CIC, ‘Fact Sheet: Asian Tsunami’) and also for Haitian nationals applying in Haiti and Haitians applying for a work permit in Canada and who were temporarily destitute as a result of their inability to return to Haiti (Department of Citizenship and Immigration (Canada), ‘Special Measures in Response to the Earthquake in Haiti’, Operational Bulletin No. 179A (29 June 2010)).

¹⁹² Department of Citizenship and Immigration (Canada), Operational Bulletin No. 179.

¹⁹³ Department of Citizenship and Immigration (Canada), Operational Bulletin No. 179B.

¹⁹⁴ See, for example, Department of Foreign Affairs, Trade and Development (Canada), ‘Humanitarian Crisis in the Philippines’.

¹⁹⁵ Department of Citizenship and Immigration (Canada), Operational Bulletin No. 179B, referring to the power given to CIC officers under section 25.1 IRPA (Canada).

¹⁹⁶ See, for example USCIS, ‘Special Situations’, last updated 27 November 2013 <http://www.uscis.gov/humanitarian/special-situations>; also USCIS, ‘Tips for Foreign Nationals Impacted by Civil Unrest or Natural Disasters’, last updated 13 April 2011 <http://goo.gl/3VyGFD>

¹⁹⁷ See the measures listed below.

¹⁹⁸ As such, in specific instances of natural disaster such as the extreme flooding in Central America in 2011, USCIS simply posts a notice to ‘remind everyone of immigration benefits available on request to eligible nationals from countries in that region’ (USCIS, ‘Relief for Nationals from Central America Stranded in the U.S. Due to Extreme Flooding’, last updated 16 November 2011 <http://goo.gl/dG8cPg>).

¹⁹⁹ Indeed, the majority of the USCIS announcements relate to natural disasters, albeit that some have a man-made element (see <http://goo.gl/kique80>).

²⁰⁰ For the implications of ‘temporary relief measures’ in the context of natural disasters in the USA, see below.

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; and Typhoon Haiyan in the Philippines in 2013.²⁰¹ The fact that these measures do not require a specific policy to exist in order for them to be applied makes them even more flexible (but also ad hoc) than the Canadian special measures policy tool.

US temporary relief measures revolve around the expedited processing of immigration applications, which extends beyond applications based on family grounds to include those relating to study and work. Fee waivers are also widely available so long as the grounds are justified. Other measures also envisaged as having the potential to benefit applicants disadvantaged by the circumstances of a disaster include: special consideration of applications for extension or change of migratory status, especially where a person has fallen out of status as a direct result of the disaster; granting of authorisation to students to work off-campus due to their economic support from overseas being curtailed by a disaster; and special consideration of any failure to appear at an immigration interview or respond to a request for documentary evidence.²⁰² Clearly, all the measures are based on 'regular' migration options to which such degree of flexibility has been applied on humanitarian grounds.

Further examples exist elsewhere in the region, even in small countries with a relatively circumscribed capacity to receive migrants. For instance, on the tiny island of **Dominica**, eligibility requirements were relaxed for Haitians applying for visa and in order to allow Haitians already in the territory to extend their stay for an additional six months. For the latter, application fees were also waived.²⁰³ Similarly, in **Antigua and Barbuda**, a visa waiver was granted to allow documented Haitian migrants living in the territory to bring close relatives from Haiti to stay with them so long as they could demonstrate the economic capacity to provide for their relatives.²⁰⁴

5.3 CONCLUSIONS

This section establishes a number of important points. Firstly, it shows that 'regular' migration categories and tools should not be underestimated as a method of responding to exceptional situations. Specifically, it demonstrates the considerable extent to which States in the Americas rely on the use of these categories and procedures to deal with the migratory implications of disasters overseas. In the case of the Haiti disaster, this approach allowed many thousands of Haitians to receive authorisations to enter or stay in countries such as Canada and the USA.

Secondly, in many countries, it is clear that there is some innate or statutory discretion on the part of the migration authorities to relax the eligibility criteria where this is dictated by the circumstances. In practice, it has been shown that this capacity is used by States to facilitate the speedy and effective resolution of these cases in response to disasters overseas. At the same time, this humanitarian aspect of the approach is based on the judgment of the authorities rather than fixed criteria, although Canada and the USA coincide substantially on how severely affected a person must be to qualify for this discretionary consideration.

Thirdly, we might reflect upon the categories of person who are most likely to benefit from the application of this approach. In general, they will be those who already have some link – whether family, work or other connection – with the host country. Accordingly, the general utility of these measures is limited in this regard since there will be aliens who are unable to satisfy even these minimal criteria. Moreover, these categories do not necessarily comprehend those migrants – or other persons – most severely affected by the disaster.


This last point indicates a potentially important role for exceptional migratory measures in these situations. It is to this specific issue that the next three sections address themselves.

²⁰¹ All announcements may be accessed at <http://www.uscis.gov/humanitarian/special-situations/previous-special-situations>.

²⁰² See, in general, USCIS, 'Special Situations'. For a detailed description of how such measures may be applied in the context of a particular disaster, see USCIS, 'USCIS Reminds Chilean Nationals of Immigration Benefits Available: Questions and Answers', last updated 20 November 2013 <http://goo.gl/3RWhE9>.

²⁰³ See the report in 'Caricom Welcome: Region Relaxes Visa Requirements for Haitians', *Dominica News Online* (16 January 2010) <http://goo.gl/ros9uo>.

²⁰⁴ See the report in 'Antigua Accepting Limited Haitians', *Caribbean 360* (5 February 2010) <http://www.caribbean360.com/news/antigua-accepting-limited-haitians>.



6. TEMPORARY ENTRY AND STAY IN MIGRATION LAW: GROUP-BASED APPROACHES TO EXCEPTIONAL EVENTS

Alongside the application of ‘regular’ migration measures, many States in the Americas respond to the situation of aliens from a country affected by a disaster by adopting exceptional measures that temporarily allow the aliens to enter or stay in the territory. Specifically in relation to disaster situations that have a strong ‘displacement abroad’ component, these measures have sometimes assumed a ‘group’ character, in the sense that they apply on a general basis to nationals of that country based on the relevant country conditions rather than looking for exceptional factors on an individual case-by-case approach.²⁰⁵

For the purposes of analysis, it is possible to understand these collective migratory measures as applying on the basis of one of two common rationales. The first assumes the form of what might be termed ‘regularisation programmes’. In principle, these apply on the basis of nationality and give access to a migratory status; however, they are limited to aliens who entered the country prior to the disaster (or a suitably close cut-off point). The second are measures based on the temporary suspension of removals to the affected country. These act only to prevent removal without granting a firm basis for stay. However, in principle, they apply to all aliens in the country regardless of the date on which they arrived. In practice, both sets of measures often exclude certain undesirable individuals from their scope. We examine each in turn now.

6.1 REGULARISATION PROGRAMMES

There are a number of important examples from the Americas of where regularisation programmes have been instituted specifically in response to a disaster

overseas. The general approach adopted in these instances bears many similarities to the programmes for the regularisation of irregular aliens that are implemented periodically by States in the Americas and elsewhere. In this sense, they are directed specifically towards authorising the stay of aliens – usually those already in the country and often implicitly those who do not have a regular migratory status – rather than facilitating the entry of new migrants to the territory.

Recent examples of such programmes in the Americas are those instituted by certain States for Haitians following the earthquake, in response to a call in January 2010 by the sub-regional organisation Bolivarian Alliance for the Americas (*Alianza Bolivariana para las Americas – ALBA*) to ‘decree an amnesty for migrants, which regularises the migratory status of Haitian citizens resident in ALBA countries’.²⁰⁶ Thus, in February 2010, **Ecuador** adopted a Presidential Decree that implemented a ‘regularisation process’ for Haitians in Ecuador.²⁰⁷ A raft of other measures was adopted by relevant branches of the government of Ecuador to facilitate this process.²⁰⁸ Shortly thereafter, in March

²⁰⁵ The latter approach will be addressed in the following section, focusing on the individualised application of special humanitarian or temporary protection categories.

²⁰⁶ Alianza Bolivariana para las Americas, Plan para la contribución de los países del ALBA al esfuerzo de reconstrucción de Haití, adopted by the emergency meeting of the Consejo Político del ALBA – TCP, Caracas, 25 January 2010, proposal 6. See further below.

²⁰⁷ Decreto No. 248 (Ecuador), 9 February 2010.

²⁰⁸ See, for example, Ministerio de Relaciones Laborales (Ecuador), Acuerdo Ministerial No. 00206, adopted 21 October 2010, disposiciones generales transitorias. See also Ley derogatoria del artículo 38 de la Ley de Migración; y, de exoneración económico-tributaria a favor de los ciudadanos haitianos que ingresaron al Ecuador hasta el 31 de enero de 2010 y se halan actualmente en situación irregular en el territorio ecuatoriano (Ecuador), adopted 6 April 2010, published in Suplemento – Registro Oficial No. 175, 20 April 2010.

2010, **Venezuela** also began to implement a 'regularisation operation' for Haitians living irregularly in Venezuela that benefitted many thousands of irregular aliens of this nationality.²⁰⁹

Similar sorts of programmes have also been undertaken by other countries in the Americas in response to the disasters of earlier years. A prime example is the far-reaching measures adopted by **Costa Rica** in 1999 following the devastation wrought by Hurricane Mitch on the countries of Central America. These sought to give the opportunity to aliens from other countries of Central America who were living in Costa Rica to 'normalise' their migratory situation in legal terms.²¹⁰ The measures allowed the regularisation of some 150 000 aliens, the great majority of whom were irregular migrants from Nicaragua.²¹¹ Indeed, like the Ecuadorian and Venezuelan examples, the programme was adopted following a commitment assumed in a regional forum, in this case during the Meeting of Central American Presidents at Comalapa, El Salvador, in 1998 that took action on the regional plane to deal with the effects of Hurricane Mitch.²¹² Other States in Central America adopted almost identical programmes on this basis, such as that created by **Nicaragua**.²¹³ **Panama** also created a similar programme shortly thereafter to regularise long-staying irregular Nicaraguan migrants on this same basis.²¹⁴

Another important example of this approach is the legal figure of 'temporary protected status' (TPS) in the **USA**. In essence, this also constitutes a mechanism through which the government of that country can 'regularise' the status of persons who are already present in the territory of the USA but come from a country affected by a disaster. It has been used to this effect for these disasters: the 1997 volcanic eruption on Montserrat;

the 1998 Hurricane Mitch in Honduras and Nicaragua; the earthquakes in El Salvador in 2000; and the 2010 earthquake in Haiti.²¹⁵ In contrast to the other examples canvassed in this section, though, it will be shown that TPS has certain distinctive features that make a more detailed analysis of its form and implementation necessary. One such difference is, of course, the fact that its creation was driven exclusively by domestic political processes and not by inter-governmental ones at the regional level.

All these programmes possess an inherently discretionary character, although the manner in which this is constituted and exercised varies between the countries. In **Costa Rica**, the measure is rooted in a legal discretion conferred on the Executive to adopt exceptional measures for regularising irregular aliens.²¹⁶ The **Ecuadorian** and **Venezuelan** programmes both appear to result from the exercise of an inherent constitutional discretion on the part of the Executive to designate particular classes of person as the beneficiaries of certain rather open-ended migratory categories. By contrast, the TPS scheme in the **USA** confers a fixed power on (since 2002) the Secretary of the Department of Homeland Security (DHS) to grant the defined TPS status.²¹⁷ Nonetheless, any decision by the DHS Secretary to designate a foreign State under the TPS rules is highly discretionary.²¹⁸ As a result, in all four countries, the decision to establish such programmes is not subject to review.²¹⁹

Nonetheless, in the particular case of TPS in the **USA**, the domestic legislation specifies the positive criteria under which the DHS Secretary may designate a foreign State (or a part of a foreign State). The set of criteria in section 244(b)(1)(B) that relate expressly to disas-

²⁰⁹ Reported by Radio Nacional de Venezuela, 'Saime inicia operativo de regularización para ciudadanos haitianos' (12 March 2010) <http://goo.gl/nmhdi6>.

²¹⁰ Decreto No. 27457-G-RE (Costa Rica), 1 February 1999, decreed 24 November 1998, published in La Gaceta No. 239, 9 December 1998.

²¹¹ A. Morales Gamboa (ed), 'Análisis de los alcances sociales y del impacto del régimen de excepción migratoria para los inmigrantes de origen centroamericano en Costa Rica' (Facultad Latinoamericana de Ciencias Sociales 1999) <http://www.flacsoandes.edu.ec/libros/digital/43559.pdf>.

²¹² See section 3 above.

²¹³ Decreto No. 94-98 (Nicaragua), approved 21 December 1998; published in La Gaceta, No. 4, 7 January 1999.

²¹⁴ Decreto No. 34 (Panama), approved 5 February 1999, published in Gaceta Oficial, No. 23731, 9 February 1999.

²¹⁵ It has also been used for contexts of war. For a full list of TPS countries and document, see: <http://www.justice.gov/eoir/vll/fedreg/tpsnet.html>.

²¹⁶ Decreto No. 27457-G-RE (Costa Rica), preamble, referring to the powers conferred by Article 42-43 of the now derogated Ley No. 7033 Ley de Migración y Extranjería, published in La Gaceta, No. 152, 13 August 1987.

²¹⁷ Immigration and Nationality Act (USA), section 244(a).

²¹⁸ *Ibid.*, section 244(b).

²¹⁹ For instance, in the case of the USA, this is expressly specified by INA (USA), section 244(b)(5)(A). However, the application of a TPS designation to an individual may be reviewed through an administrative procedure or when asserting protection on these grounds in removal proceedings (INA (USA), section 244(b)(5)(B)).

ters, and which form the basis on which TPS has been extended to the situations identified above, require that the DHS Secretary finds that.²²⁰

(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;...²²¹

It will suffice here to note two brief points. Firstly, the threshold for designation in limb (i) requires the existence of a very severe disaster.²²² However, it equally requires that the disruption of living conditions be ‘temporary’ in line with the wider rationale of TPS. If we accept that displacement ‘abroad’ is caused predominantly by very severe disasters in poorer countries with little capacity to respond,²²³ then we have a paradox here since the disruption is unlikely to be temporary.²²⁴ In effect, this is how it has played out in practice, with the USA extending the designations year-after-year for most of these countries due to the continuing disruption caused by a disaster many years ago.²²⁵

Secondly, the provision emphasises the position of the foreign State and US relations with it rather than the safety of its nationals.²²⁶ In short, the need for a request from the foreign State and the focus on its capacity to receive returnees suggests that the provision is – like the programmes in Costa Rica, Ecuador and Venezuela – as much concerned with the relations between States

as with the safety of returnees. Even so, it is important to point out that, in practice, humanitarian concerns figure prominently in the analysis conducted by DHS and the Department of State about whether a designation is appropriate. Yet the construction of TPS in section 244(b)(1)(B) suggests that safety issues arising from a disaster – especially where the foreign State does not request TPS – might be more appropriately dealt with under the TPS criteria in section 244(b)(1)(C) for ‘extraordinary and temporary conditions that prevent... [return] in safety’.²²⁷

A crucial shared feature of the different programmes examined here is the manner of their framing of the intended beneficiaries. This is defined principally on the blanket basis of an individual possessing the nationality of a country affected by a disaster, rather than by reference to more individualised humanitarian considerations in particular cases.²²⁸ This is not to suggest that any of the programmes automatically confers benefits on persons of that nationality who meet the other relevant secondary criteria, but simply that the protection offered is defined on an intrinsically collective rather than individual basis. Indeed, each programme expresses a procedural requirement that, in order to be considered for its benefits, potential beneficiaries must make an application to the authorities within a time-frame that may be specified by the measure or left open-ended.²²⁹

All of the programmes are also constructed to apply only to persons of the relevant nationality who had been living in the country before a set date, usually one shortly after the overseas disaster occurred. Thus, the **Costa Rican** programme was limited to Central American nationals who ‘currently reside in the country and entered before 9 November 1998’,²³⁰ the date of the Comalapa meeting and some four days after Hurricane Mitch

²²⁰ The criteria governing ‘armed conflict’ as a ground for TPS in INA (USA) section 244(b)(1)(A) do not concern us here. Nonetheless, it is important to note that while no country designated for TPS based on INA (USA) section 244(b)(1)(B) [environmental disaster] has been redesignated, several countries have been redesignated on other grounds. In this respect, Liberia, South Sudan, and Syria may all be thought of as countries experiencing armed conflicts but they were all redesignated under INA (USA) section 244(b)(1)(C), which concerns extraordinary and temporary conditions. For South Sudan, the Federal Register Notice cites environmental factors (drought [and flooding]) as one of the reasons for the redesignation.

²²¹ INA (USA) section 244(b)(1)(B).

²²² See further below.

²²³ See earlier section.

²²⁴ For a discussion of the issue of temporariness of the measures – and the challenges that this can generate – in relation to the case of Montserrat, see J. McAdam, *Climate Change, Forced Migration and International Law* (OUP 2012).

²²⁵ The ‘exception’ is Montserrat, where TPS lasted ‘only’ seven years, being terminated in 2004 (for the politics of this case, see McAdam, *Climate Change*). Every other instance of TPS designated on the basis of natural disasters remains in effect at the present day, with this ‘temporary’ status having lasted: Haiti – five years; El Salvador – thirteen years; Nicaragua and Honduras – fifteen years.

²²⁶ Compare with the other criteria in INA (USA) sections 244(b)(1)(A) and 244(b)(1)(C).

²²⁷ INA (USA) section 244(b)(1)(C). Note, though, that this provision also requires the DHS to make ascertain that ‘permitting the aliens to remain temporarily in the United States is [not] contrary to the national interest of the United States’.

²²⁸ Note that the Costa Rican regularisation programme was drafted as applying to more than one nationality, its scope in this sense being defined as ‘all Central American citizens’ (Decreto No. 27457-G-RE (Costa Rica), Article 1).

²²⁹ In the case of the USA, for example, it is specified that the registration period established by the DHS Secretary must be not less than 180 days (INA (USA), section 244(c)(A)(iv)). In the case of Costa Rica, a registration period of six months was specified (Decreto No. 27457-G-RE (Costa Rica), Article 2).

passed. The **Ecuadorian** and **Venezuelan** programmes were open only to Haitian nationals in those countries who entered – respectively – by 31 January 2010 and 12 January 2010,²³¹ the earthquake having occurred on the last of these two dates. Thus, these regularisation measures are not generally intended to apply to those who fled the country as a result of the disaster, but rather those aliens already in the host country whose return may now lead to complications. As such, the State in these cases already knows the approximate number of people that it is dealing with.

The same is equally true for TPS in the **USA**, which, for disasters, is generally limited to nationals of designated foreign States who have ‘continuously resided’ in the USA since the date of designation,²³² i.e. usually that of the disaster.²³³ An important instance in which this general approach was deviated from is that of Haiti, which was initially designated on the basis of ‘extraordinary and temporary conditions’ under section 244(b)(1)(C) only four days after the earthquake struck. Yet the relevant authorities re-designated Haiti on the same grounds in 2011 to offer Haitians access to TPS if they had been continuously residing in the USA from a date prior to *one year after* the earthquake.²³⁴ This act responded to a specific need to provide some form of migratory status to Haitian nationals whom the USA had admitted on an emergency basis in the aftermath of the earthquake due to worsening conditions caused in part by a cholera outbreak and who still remained there unable to return safely to Haiti.²³⁵

In addition to the time bar and nationality requirements, these programmes are subject to additional substantive limitations on eligibility, most of which are of a general character. Thus, the **Costa Rican** and **Venezuelan** programmes were limited to aliens living

irregularly in the country at the time.²³⁶ The **Ecuadorian** programme specified that not only those living irregularly in the country but also regular migrants who wished to change their migratory category could benefit.²³⁷ By contrast, legislation in the USA expressly renders applicants who have been convicted of certain forms of criminal activity or otherwise constitute a risk to national security ineligible for TPS.²³⁸ Similar limitations apply to the other programmes based either on specific provisions or on more general bars to entry into the relevant migratory categories.²³⁹

Each of the four programmes is envisaged as providing a ‘temporary’ form of stay in the country. However, what this means in each context differs. In the case of **Costa Rica**, beneficiaries of the regularisation programme were provided with a temporary residence document that was renewable initially every year (later changed to every two years) and enabled them to work in Costa Rica.²⁴⁰ In **Ecuador**, beneficiaries of the Haitian programme were given a non-immigrant ‘temporary’ visa for five years, allowing them to work in Ecuador and to enter and leave the country, as well as the possibility of legalising the status of any spouse and minor children who entered Ecuador after 31 January 2010 but before 30 June 2010.²⁴¹ In **Venezuela**, Haitians beneficiaries received a ‘social transitory visa’ [*visa de transeúnte social*], allowing them to gain an identity document, work in Venezuela and to enter and leave the country.²⁴² Sanctions for illegal entry were also waived as a matter of law or policy.²⁴³ These three countries provided beneficiaries with a temporary but ‘regular’ migration status that allowed an individual to switch to a new migratory status based on changed family or work circumstances.

By contrast, TPS is specially created as an exceptional status and represents something of an anomaly even in

²³⁰ Decreto No. 27457-G-RE (Costa Rica), Article 2.

²³¹ See Decreto No. 248 (Ecuador), Article 1; for Venezuela, see Radio Nacional de Venezuela, ‘Saime inicia operativo de regularización’.

²³² INA (USA), section 244(c)(1)(A)(i)-(ii).

²³³ See, for example, the USCIS (DHS), ‘Designation of Haiti for Temporary Protected Status’, Federal Register, Vol. 75, No. 13, 21 January 2010.

²³⁴ USCIS, ‘Extension and Redesignation of Haiti for Temporary Protected Status’, Federal Register, Vol. 76, No. 97, 13 May 2011.

²³⁵ *Ibid.*

²³⁶ Decreto No. 27457-G-RE (Costa Rica), Article 1; for Venezuela, see Radio Nacional de Venezuela, ‘Saime inicia operativo de regularización’.

²³⁷ Decreto No. 248 (Ecuador), Article 1.

²³⁸ See relevant sub-paragraphs of INA (USA), section 244(c)(2).

²³⁹ For instance, in the case of Costa Rica, applicants were specifically required to produce a ‘certificate of penal history’ (*certificado de antecedentes penales*) for the past ten years (Reforma al nuevo reglamento del Régimen de Excepción 1999 (Costa Rica), 24 September 2003, published in La Gaceta No. 218, 12 November 2003). By contrast, the Ecuadorian programme required merely that eligibility depended on fulfilling the general legal requirements for obtaining the relevant type of visa (Decreto No. 248 (Ecuador), Article 2).

²⁴⁰ See Decreto No. 32638 (Costa Rica), 6 September 2005.

²⁴¹ Decreto No. 248 (Ecuador), Articles 2 and 4; Ministerio de Relaciones Laborales (Ecuador), Acuerdo Ministerial No. 00206, disposición general transitoria segunda.

²⁴² See Radio Nacional de Venezuela, ‘Saime inicia operativo de regularización’, and also the report in Correo del Orinoco, ‘Saime inició regularización de documentos para ciudadanos haitianos’ (14 March 2010).

²⁴³ For instance, in the case of Ecuador, see Ley derogatoria del artículo 38 de la Ley de Migración; y, de exoneración económico-tributaria a favor de los ciudadanos haitianos que ingresaron al Ecuador hasta el 31 de enero de 2010 y se halan actualmente en situación irregular en el territorio ecuatoriano (Ecuador),

the broader framework of migration law in the USA. The benefits are that it provides protection against deportation and work authorisation.²⁴⁴ Moreover, recipients may apply for advance parole, which gives them the ability to travel outside USA and be readmitted.²⁴⁵ However, although time on TPS is not counted as ‘unlawful presence’ for subsequent immigration applications,²⁴⁶ the USA government takes the view that TPS does not constitute ‘admission’ or ‘parole’ for purposes of adjusting status to the ‘immigrant’ category of lawful permanent resident.²⁴⁷ TPS holders are thus confined to a short-term status for which they must regularly re-register, from which they cannot switch, and on which they cannot sponsor family members for immigration to the USA²⁴⁸ nor receive most federal benefits.²⁴⁹ Their legal situation is thus one characterised by a degree of uncertainty over the long term.

6.2 TEMPORARY SUSPENSION OF REMOVALS

The regularisation programmes examined above are directed principally towards regularising the stay of aliens who were in the respective country at the time of the disaster in their country of nationality. However, a separate set of measures applied by States in the Americas relate to the temporary suspension of removals to a country affected by a disaster. These measures are equally applied on a general basis on the criteria of nationality. However, they are distinct in two main ways. Firstly, they apply to nationals of the affected country regardless of whether they entered the host country before or after the disaster. Secondly, they do not generally include access to specific migratory categories but rather constitute a pragmatic act of desisting from removals. For obvious reasons, these measures are principally applied by countries that operate significant removal programmes for irregular aliens.

Canadian migration law provides the relevant Minister with the power to temporarily suspend (or reinstate) removals according to changes in conditions in a foreign State. The power is discretionary but the regulations provide criteria according to which the power may be exercised.²⁵⁰ These specify that a stay on removal orders with respect to a country or place may be imposed if circumstances there pose ‘a generalized risk to the entire civilian population’ as a result of certain situations.²⁵¹ These plainly contemplate disasters in the form of ‘environmental disaster resulting in a substantial temporary disruption of living conditions’,²⁵² as well as including ‘armed conflict’ and ‘any situation that is temporary and generalized’.²⁵³ The suspension of removals remains in place until cancelled by the Minister on the basis that the circumstances no longer pose a generalised risk.²⁵⁴

As a matter of policy, decisions about suspension and resumption of removals involve a process of consultation with other government departments, the UNHCR and even non-governmental organisations.²⁵⁵ The general focus of the measure means that it does not substitute for protection mechanisms that assess risk on an individual basis.²⁵⁶ However, certain categories of individuals are deemed ‘inadmissible’ to benefit from the suspension of removals, largely based on grounds of national security, violating human rights, and organised criminality.²⁵⁷ Otherwise, aliens from the country who benefit from the TSR are eligible to apply for a permit to work or study whilst the measure lasts, although no formal migratory status is provided.²⁵⁸

At the time of the 2010 Haitian earthquake, Canada had a temporary suspension of removals to Haiti that had been in place since 2004 and was based on the general security and humanitarian conditions in that country. On this basis, Haitians already in Canada who were affected by the earthquake were already not generally subject to removal. Indeed, the scale of the catastrophe led Canada to suspend even removals to Haiti of inadmissible persons (i.e. those whose cases involve a

²⁴⁴ INA (USA), section 244(a).

²⁴⁵ INA (USA), section 244(f).

²⁴⁶ INA (USA), section 244(f).

²⁴⁷ This is governed by INA (USA), section 245(a). Moreover, no legislation can be enacted to allow TPS holders to adjust their status to lawful permanent resident, unless approved by a three-fifths supermajority of the Senate (INA (USA), section 244(h)). For further comment, see Bergeron, 2014, p32.

²⁴⁸ INA (USA), section 203(a).

²⁴⁹ Bergeron, 2014, p32.

²⁵⁰ Immigration and Refugee Protection Regulations (Canada) (SOR/2002-227), 11 June 2002, Regulation 230.

²⁵¹ *Ibid*, Regulation 230(1).

²⁵² *Ibid*, Regulation 230(1)(b).

²⁵³ *Ibid.*, Regulation 230(1)(a) and (c).

²⁵⁴ *Ibid.*, Regulation 230(2).

²⁵⁵ Citizenship and Immigration Canada, Manual ENF 10: Removals, 31 March 2010, part 13.3.

²⁵⁶ *Ibid.*, part 13.4

²⁵⁷ Immigration and Refugee Protection Regulations (Canada), Regulation 230(3)

²⁵⁸ Citizenship and Immigration Canada, Manual ENF 10: Removals, part 13.3.

national security or serious criminal element) for a brief period. The general measure remains in place as at the present date. However, the open-ended nature of the measure, together with the lack of any clear migratory status, means that many beneficiaries of this measure remain for long periods of time in an undefined legal situation, despite having effectively established themselves in Canada.

Removals to Haiti were also suspended by a range of other States on a more discretionary basis. This was done by the USA, although apparently not under its normal procedures for Extended Voluntary Departure or Deferred Enforced Departure. The USA also extended the benefit of this measure to those not normally eligible, including those with serious criminal records. The suspension remains in force and removals have been reinstated only for Haitians arriving via one particularly perilous sea route, as a dissuasive measure. **Mexico** also pledged not to remove Haitians for a period following the disaster. The same approach was adopted by a number of islands in the Caribbean, such as the **Bahamas**, **Jamaica** and the **Turks and Caicos British Overseas Territory**. The **Dominican Republic** also temporarily suspended the removal of Haitians who had entered the country illegally.²⁵⁹

Finally, it is important to note that the use of this measure in the Americas has also been influenced by regional processes, such as the calls for a temporary suspension of removals made by international agencies in the aftermath of the Haiti earthquake. For instance, in February 2010, the United Nations High Commissioner for Human Rights and the High Commissioner for Refugees issued a joint emergency appeal to countries to suspend all forced removals to Haiti due to the ongoing humanitarian crisis and ‘until such time as people can return safely and sustainably’.²⁶⁰

6.3 CONCLUSIONS

A number of important points can be distilled from this section. Firstly, whereas the use of ‘regular’ migration tools may lead to both temporary and permanent residence,²⁶¹ the exceptional measures described here confer at most temporary residence. They are thus grounded in a hopeful perception of the need for stay on the specific basis of a natural disaster as temporary, at least in the first instance. Moreover, the exceptional measures described in this section apply on the general basis of nationality rather than predicating inclusion on exceptional factors in the individual case.

Secondly, there is clearly an important distinction between the scope *ratione personae* and *ratione materiae* of the two group-based exceptional measures. Regularisation measures seek to grant a regular migratory status to persons from the affected country that were already in the territory around the time that disaster struck. By contrast, the temporary suspension of removals is extended to all nationals of the affected country regardless of the date that they arrived in the territory of the host State. Even so, both measures exclude certain undesirable individuals from their scope.

Thirdly, at least in the Americas, this difference in scope may be related to the distinct rationale behind each measure. It is notable that regularisation programmes follow from the request of the affected State and seem directed principally towards relieving some its burden towards its nationals at a time of crisis. A generous response based on regularisation is thus appropriate based on comity in international relations. By contrast, the suspension of removals is based on a more unilateral set of humanitarian and pragmatic concerns about the safety and viability of removals. The wider scope of the measures *ratione personae* reflects these concerns. However, the lack of a bilateral element pushes the solution offered towards a decidedly more precarious form of ‘stay’.

Finally, it is important to emphasise the highly discretionary character of both sets of group-based measures in the Americas. There is no obligation to adopt either regularisation programmes or a temporary suspension of removals. At most, the relevant legislation provides very high-level decision-makers in the Executive with a broad set of parameters within which they may choose to exercise their positive discretion. These refer not only to the gravity of the disaster but also designate certain persons as not eligible to benefit from the measures due to their undesirable character.

It is clear that the two forms of group-based measure may be – and are – applied simultaneously, as well as alongside the flexible use of the regular migration framework. However, the advantage that they offer over the latter approach is that their positive application to a person is not dependent on that person having any particular link of family, employment etc. with the host State. They may also be applied alongside migration law measures that are based on the exercise of discretion in specific individual cases, although their use should mitigate the need for extensive deployment of the latter.

We turn now to consider exceptional measures that may be applied by States in the Americas to aliens on an individual basis.

²⁵⁹ United Nations Human Rights Council, ‘Report of the Independent Expert on the Situation of Human Rights in Haiti, Michel Forst, Addendum, Forced Returns of Haitians from Third States’, UN Doc A/HRC/20/35/Add.1 (4 June 2012) 6-7.

²⁶⁰ Quoted in *ibid.*, p.3.

²⁶¹ See previous section.



7. TEMPORARY ENTRY AND STAY THROUGH MIGRATION LAW: INDIVIDUALISED APPROACHES TO EXCEPTIONAL CIRCUMSTANCES

A surprising number of countries in the Americas have ‘exceptional’ provisions in their national law and policy that can be used in individual cases to permit the entry or stay (beyond non-removal) of aliens who do not qualify as refugees or as migrants under the ‘regular’ categories. These provisions are of great importance to the present study since they have often been used as the legal basis on which admission and, more commonly, temporary forms of stay have been granted by national authorities in the Americas to aliens from a country affected by a disaster.

The relevant provisions usually function by conferring a broad degree of discretion upon relevant national authorities to admit, or grant stay to, persons who fall outside the regular international protection and migration categories. It will be shown here that this discretion tends to take two distinct forms: those that expressly require the identification of ‘humanitarian reasons’, which may be more closely defined by law or policy; and those in which such reasons are left implicit in a broader set of discretionary powers. Both forms have been used by countries in the region in cases of displacement ‘abroad’ due to a rapid-onset disaster, and each is examined more carefully in turn in this section. The section ends by considering provisions adopted specifically to deal with individual cases in the context of ‘trans-border’ displacements due to disasters.

Finally, it should be noted that this study avoids use of the term ‘humanitarian visa’, except where it expressly appears in a country’s domestic law (only for **Mexico** and **Nicaragua**).²⁶² The main reason why a shift away from the language of ‘humanitarian visas’ is required is that many of the provisions lumped under this heading do not actually provide for visas, but rather for per-

mission to enter or stay in the country; in some cases, they even take the form of a visa waiver. Use of the term ‘humanitarian visa’ not only muddies the water but also shifts attention away from wider measures that are – or can be – used to provide temporary protection on a humanitarian basis, including those in previous sections. Finally, the term ‘humanitarian visa’ has a specific sense in European law that is narrower than its intended field of reference in the Americas,²⁶³ which may generate further confusion.

7.1 BROAD DISCRETION

One important way in which certain countries in the Americas address exceptional humanitarian circumstances in cases that fall outside the normal rules is through State officials in the immigration field exercising a broad and inherent discretion. Among RCM States, this can be demonstrated for **Canada**, the **Dominican Republic**, **El Salvador** and **Guatemala**. More broadly in the Americas, it is seen in **Chile** and **Colombia**. The degree of elaboration afforded to this concept

²⁶² See below, section 7.2.2.

²⁶³ See, for instance, U. Iben Jensen, *Humanitarian Visas: Option or Obligation?*, Study prepared for the European Parliament, Committee on Civil Liberties, Justice and Home Affairs (European Union 2014).

varies between the legislation of different countries, as does the guidance that such laws provide on the means open to decision-makers to resolve such cases. We thus proceed to examine the different laws, beginning with the most raw and fundamental and proceeding to the most closed and regimented.

In some countries, the framework of migration law offers no explicit guidance on the approach to be adopted by the immigration authorities in dealing with the particular cases of aliens whose migratory situation falls outside the normal rules but presents humanitarian considerations. The approaches adopted in these contexts may appear particularly *ad hoc*. Of course, this is simply the result of the lack of guidance in national legislation. Ultimately, though, they are based on the same well-spring of inherent State discretion in the immigration field as that which forms the basis for the textual provisions adopted by other countries to regulate migratory situations disclosing humanitarian considerations.

An important positive example of this approach in the context of disasters is that of the **Dominican Republic** in the aftermath of the Haiti earthquake. In addition to effectively adopting a *de facto* programme of entry to particular categories of Haitians immediately following the disaster,²⁶⁴ the authorities of the Dominican Republic also conceded a number of so-called ‘humanitarian visas’ to Haitian nationals in subsequent months.²⁶⁵ These were given to the relatives of persons who had been injured by the earthquake and were recovering and receiving medical attention in the Dominican Republic in order to allow them to cross back and forth in order to attend both to these relatives and to their commitments in Haiti. The visas took the form of one-year multiple entry visas given on humanitarian grounds, even though no such figure exists within national legislation. Thus, the general consensus is that the Dominican Republic was exercising an intrinsic authority in creating these visas to attend to special humanitarian circumstances faced by particular individuals.

Colombia is another country in which the national migration legislation provides no specific guidance to decision-makers on how to respond to special humanitarian circumstances. Following the Haitian earthquake, the Colombian authorities found themselves confronted with a small number of Haitian migrants. Some of them were accommodated within regular migration categories, such as stay as a student. Yet, other individual

cases in which asylum claims had been lodged presented more of a challenge, since Colombia did not consider the applicants to meet the legal criteria for refugee status established by law. Colombia therefore created the curious extra-legal figure of ‘refugee for humanitarian reasons’ as a means of regularising the situation of the person. Again, this represents an example of an *ad hoc* approach based on the exercise of inherent authority in the face of compelling humanitarian circumstances.

A firmer legal basis for such actions exists where the national legislation at least describes the authority of the decision-makers to adopt a special approach where this is demanded by the situation of the individual. Among RCM States, this is the case for **El Salvador** and, arguably, **Guatemala**. Whilst the legislation of these countries does not touch on how to resolve these sorts of applications, it does expressly provide a positive domestic legal basis on which an *ad hoc* response could be developed. In both cases, though, the legislative organs of these States are presently debating proposals to adopt a provision for cases involving humanitarian considerations based on the apparent recognition that the current framework provides insufficient guidance in these types of cases.

Thus, the migration law of **El Salvador** contains a ‘discretionary power’ provision that confers upon the Interior Ministry the faculty to ‘interpret and resolve by analogy, or founded in consideration of good sense and natural reasons, cases that are expressly contemplated in the present Law’.²⁶⁶ It has been used in the past to grant temporary residence status in cases where the alien evidences an appropriate degree of ‘vulnerability’. Although El Salvador has yet to receive requests for entry or stay from aliens affected by disasters, this would be the tool for which decision-makers would reach in that situation. A similar provision in the migration law of **Guatemala** allows the national migration authorities to resolve ‘unforeseen cases’ accordingly,²⁶⁷ although it also has yet to deal with an immigration application based on the effects of a disaster.

Outside the RCM, a pertinent example is that of **Chile**, which provided a form of temporary stay to a small number of Haitians in the aftermath of the earthquake. Although confirmation of the approach taken in law has not been possible, it appears to have been done on the basis of a provision that leaves it open to the authorities to qualify as ‘temporary residents’ certain aliens who do not fall under the regular rules.²⁶⁸ Specifically, the Min-

²⁶⁴ See above.

²⁶⁵ For details, see the report by UNHCR, ‘Dominican Republic Visa Programme Helps Haitian Quake Victims’ (27 May 2010) <http://www.unhcr.org/4bfe8c9d0.html>.

²⁶⁶ Decreto No. 2772: Ley de Migración (El Salvador), 19 December 1958, published 23 December 1958, reformed by Decreto No. 670, 29 September 1993, published 8 October 1993, Article 74.

²⁶⁷ Ministerio de Gobernación (Guatemala), Acuerdo Gubernativo No. 529-99: Reglamento de la Ley de Migración, 20 July 1999, Article 108.

²⁶⁸ Decreto No. 597: Aprueba Nuevo Reglamento de Extranjería (Chile), 14 June 1984, published 24 November 1984, Articles 49-50.

istry of the Interior or the Ministry of External Relations can do this where the residence of such persons is ‘useful or advantageous, or their activities are of interest for the country’.²⁶⁹ Effectively, these authorities can thus use their discretion to give aliens access to a ‘regular’ migration status on the basis of exceptional circumstances. As with the cases of El Salvador and Guatemala, the general approach taken here seems to be that of assimilating such persons to regular migration statuses rather than creating exceptional new figures.

This tendency reaches its most developed state in **Canada**. Here, the legislation confers a power upon immigration officials to grant temporary resident status to aliens who are ‘inadmissible or [do] not meet the requirements’ of the regular migration rules where they are ‘of the opinion that it is justified in the circumstances’.²⁷⁰ Although the grounds on which this power may be exercised are thus arguably broader than in some of the preceding examples, the procedure is regulated in much greater detail. For instance, it is specified that the powers may be exercised by immigration officers at the request of persons who are located inside Canada or outside the country;²⁷¹ but also that they may not consider requests from persons who have had claims for asylum rejected, withdrawn or abandoned until twelve months have passed from that date.²⁷²

This broad discretionary power in Canadian migration law exists alongside a separate discretionary power that refers specifically to humanitarian considerations.²⁷³ Even so, humanitarian concerns may equally fall within the broad ambit of the former and it is often used by officials in consulates when determining visa applications. For instance, it was used in the aftermath of the Haiti earthquake as a means of issuing visas to Haitian nationals who had relatives living in Canada but did not meet all of the family reunion criteria. In other words, the visa was not generally used to allow entry and stay on a purely humanitarian basis, but rather to waive certain unfulfilled criteria for visa applications but which were nonetheless based on a clear connection to Canada. Moreover, the objective was not to allow for permanent relocation by the person on the basis of family ties but rather to permit the individual to stay with family in Canada temporarily until the disaster situation had subsided.

Alongside these provisions of Canadian migration law, there is a separate ‘public policy class’ provision in Canadian law that allows the Minister to exercise wide discretion in deciding to take special migratory measures for persons on the basis of ‘public policy considerations’.²⁷⁴ Although the public policy class provision is located within the framework of powers to take measures for the benefit of individual aliens in view of humanitarian and compassionate considerations,²⁷⁵ it tends to be applied as a matter of practice to classes of persons who find themselves in a refugee-like situation (but might not qualify as refugees). Thus far, it has not been used to grant admission and stay purely on the basis of a rapid-onset disaster caused by a natural hazard. However, it was applied to the class of Haitian victims of sexual and gender-based violence in the aftermath of the 2010 earthquake. Thus, despite the framing of the legislation in terms of a broad power exercisable on an individual basis, in practice it tends to be used for humanitarian reasons, on a class basis, and for groups in a refugee-like situation. Arguably, it could equally be located in the refugee law section.²⁷⁶

Overall, we can see that many States in the Americas – and particularly RCM members – have used their inherent discretionary powers in the field of border and migration control to resolve exceptional individual migration scenarios that fall outside the regular migration rules but which demonstrate a compelling humanitarian aspect. Not all of these States have received immigration-related requests from individuals on the basis that they have been affected by a disaster overseas. However, among those that have faced this situation, these discretionary powers have often been utilised to resolve such individual cases to the benefit of the applicant. It is notable that they have been applied not only to the situation of persons requiring regularisation in-country, but also to facilitate travel and entry to the country on humanitarian grounds.

Of course, the fact that these powers are so rooted in the discretion of sovereign States means that they are legally expressed and exercised in a range of different ways. Particularly where they are not expressly provided for by migration legislation, the resulting actions may assume a rather ad hoc character. Nonetheless, most notably where the powers are mentioned in national migration law, a clear tendency exists towards resolving such

²⁶⁹ *Ibid.*, Article 50(f).

²⁷⁰ Immigration and Refugee Protection Act (Canada), section 24(1).

²⁷¹ *Ibid.*, section 24(2).

²⁷² *Ibid.*, section 24(4). In the case of ‘designated’ aliens, this period is five years (*ibid.*, section 24(5)).

²⁷³ See below.

²⁷⁴ Immigration and Refugee Protection Act (Canada), section 25.2(1)-(4).

²⁷⁵ This is provided for by Immigration and Refugee Protection Act (Canada), section 25(1)-(2) and section 25.1. The scope and application of this individualised provision is discussed earlier in this same section of the report (section 7.2.1).

²⁷⁶ In practice, it could be considered as an exceptional form of ‘complementary protection’ on a group basis (see section 3.6).

exceptional cases by granting a recognised and well-regulated immigration status, usually that of temporary resident. In other words, in these countries, the immigration authorities tend to confer a 'regular' status rather than creating a new and exceptional one when faced with compelling humanitarian circumstances outside the rules. Overall, though, the exercise of these powers is intrinsically discretionary rather than obligatory.

7.2 'HUMANITARIAN' PROVISIONS

In many countries of the Americas, national migration laws contain provisions that address explicitly the situation of individual cases in which the alien falls outside the normal rules but where humanitarian considerations apply. The tendency is particularly pronounced among RCM member States, six of the eleven of which have adopted such provisions: **Canada; Costa Rica; Honduras; Mexico; Nicaragua** and **Panama**.²⁷⁷ Moreover, a substantial amount of similar practice exists elsewhere in the Americas and includes: **Argentina; Brazil; Bolivia; Jamaica** and **Uruguay**.²⁷⁸ These 'humanitarian reasons' provisions have often been applied where the migration authorities of these States have received immigration requests by persons from countries affected by disasters.

As with the broader provisions analysed above, these narrower rules, based on 'humanitarian reasons', are equalled underpinned by the concept of State discretion. In other words, the rules specify that humanitarian considerations may – or in a few cases must – be taken into account, which in itself is an instance of the State exercise of discretion rather than the consequence, for example, of an international obligation. Yet the positive resolution of a request disclosing even the specified humanitarian grounds usually remains a matter of discretion on the part of the relevant migration authority rather than a duty. It is thus the exercise of this discretion in identifying what counts as humanitarian reasons that may be more or less circumscribed by the law. The analysis proceeds on this basis, going from broadest discretion to narrowest.

Another vital point to take into account is the fact that national laws may specify the particular situation in which humanitarian circumstances can be taken into account. Thus, whilst the concept of 'humanitarian reasons' in some national laws is applied to the situation of entry to the territory, in other national laws it is applied

to stay in the territory, and in still others to applications for visas to travel to the territory. Clearly, it is important to draw this distinction since, whilst some of the national laws regulate all three situations, others regulate only one or two of them. This raises questions about whether provisions of such limited scope are taken implicitly to apply to the other situations. Moreover, it is an open question whether those laws that do regulate more than one of these situations see the concept of humanitarian concerns as equal in meaning across all situations, as there are examples where this does not appear to be the case.²⁷⁹

7.2.1 'Humanitarian reasons' not further defined

The broadest approach is where national migration law refers to the concept of 'humanitarian reasons' but does not define its scope with greater precision. Here, the discretion of decision-makers to decide what constitutes 'humanitarian reasons' is thus preserved at its widest, although this can also cause confusion about when the provision's application is justified. This approach has been adopted in the law of a number of countries in the Americas, including some which are members of the RCM.

A good example from among RCM States is that of **Honduras**, where the migration authorities are attributed the power to authorise for 'humanitarian motives' the entry of foreigners without a visa.²⁸⁰ By reference to the same motives, the migration authorities are also allowed to waive any penalty to be applied to such persons for entering the country without a visa.²⁸¹ Separate powers are also conferred on the same authorities to grant 'special residence permits' on a number of grounds, including for 'humanitarian reasons'.²⁸² The slight difference in terminology raises the question of whether the term 'humanitarian' has the same meaning in each situation. As the humanitarian clause is not defined in greater detail for any of the situations, though, its application is ultimately open to the discretion of the authorities.

In practice, 'special residence permits' on humanitarian grounds have been used to regularise the status of aliens found in Honduras who do not fall under any of the regular provisions of migration law and are not refugees, but whose removal would nonetheless raise questions of a humanitarian nature. It has usually been applied to *extracontinentales* and Cubans identified in Honduras and for whom refugee status has not been appropriate. Implicitly, therefore, refugees are seen as falling outside

²⁷⁷ Of the remainder, three have opted to adopt broader discretionary provisions that achieve a similar end (see below).

²⁷⁸ Of the remainder, two have adopted broader discretionary provisions that achieve a similar end (see below).

²⁷⁹ See, for example, that of Mexico below.

²⁸⁰ Reglamento de la Ley de Migración y Extranjería (Honduras), published in La Gaceta 3 May 2004, Article 110(3).

²⁸¹ *Ibid.*, Article 110, additional paragraph.

²⁸² Decreto No. 208-2003: Ley de Migración y Extranjería (Honduras), published in La Gaceta 3 March 2004, Article 39(13).

the scope of this provision. Although the legislation allows humanitarian permits to be granted for up to five years, and then renewed, they are normally given for between one and five years. The humanitarian permit and wider 'humanitarian' provisions formed the legal basis on which Honduras was preparing to receive Haitians in the aftermath of the 2010 earthquake, and following a request from the international community, although none actually arrived.

By contrast, **Canada's** migration law provides the CIC Minister or her delegates with the power to grant permanent resident status or an exemption from any applicable criteria of migration law if she 'is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national'.²⁸³ The approach adopted is distinct from that in Honduras in that the beneficiary is not given a special migration category but rather assimilated to existing migration statuses. Relatedly, the power is very broad in allowing the CIC Minister to waive any aspect of migration law or even grant permanent residence.²⁸⁴ Although the Minister must consider any such a request made by an alien, the decision about whether and how to exercise the power is ultimately at her discretion.²⁸⁵ The power may also be exercised *proprio motu* by the Minister absent a request.²⁸⁶

Yet, as in Honduras, the scope of the substantive concept 'humanitarian' is left undefined by the Canadian provision and regulations, such that its meaning is left largely to the discretion of the authorities. Even so, administrative guidance provided to decision-makers clarifies that the Canadian courts have interpreted the provision as implying a test of 'unusual and undeserved or disproportionate hardship' if the request were to be denied.²⁸⁷ The same guidance lists some indicative factors that may be taken into account. These include not only such factors as 'ties to Canada' but also conditions in the applicant's 'country of origin, including adverse country conditions'. In this respect, the guidance notes that relevant factors could include those 'having a direct, negative impact on the applicant such as war [and] natural disasters...'.²⁸⁸ Ultimately, though, the weighing up

and taking a decision on the basis of all of the relevant factors raised by the applicant is a matter of discretion for the individual decision-maker.

Procedurally, it is clear also that the request for consideration on this basis may be made by persons who are located inside or outside Canada. However, unlike the Honduran provision, there are a number of vital procedural bars affecting the classes of person who can be considered under this provision. Most broadly, consideration is open only to aliens who are 'inadmissible or [do] not meet the requirements' of the regular migration rules. It is specified, however, that those persons who are inadmissible on grounds of national security, violating human or international rights, and organised criminality cannot apply.²⁸⁹

Finally, with some limited exceptions,²⁹⁰ the CIC Minister may not consider requests from persons who have outstanding asylum claims or have had claims for asylum rejected, withdrawn or abandoned until twelve months have passed from that date.²⁹¹ Similarly, under this provision of Canadian law, the Minister is also barred from considering the 'factors that are taken into account in the determination of whether a person is a Convention refugee'.²⁹² The elements to be considered must instead be related to 'hardships that affect the foreign national'.²⁹³ This power was exercised after the Haiti earthquake in a few cases, mainly to facilitate the stay of Haitians who had established themselves in the country over a long period in spite of their irregular migration status.

This approach of leaving the scope of the concept 'humanitarian' to the discretion of the decision-maker is also found in the legislation and policy of a number of States elsewhere in the Americas. For instance, the migration law of **Uruguay** confers a power on the national authorities to authorise

...conditional entry to the country of persons who do not meet the requirements established in the present law, and its regulations, when exceptional reasons exist of a humanitarian character...²⁹⁴

²⁸³ Immigration and Refugee Protection Act (Canada), section 25(1).

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, section 25.1(1).

²⁸⁷ This was confirmed in *Singh v Canada (Minister of Citizenship and Immigration)* (2009) Carswell Nat 452; 2009 CF 11, as per the guidance to officials on Citizenship and Immigration Canada, 'The Humanitarian and Compassionate Assessment: Hardship and the H&C Assessment', last modified 24 July 2014 <http://www.cic.gc.ca/english/resources/tools/perm/hc/processing/hardship.asp>.

²⁸⁸ Citizenship and Immigration Canada, 'The Humanitarian and Compassionate Assessment: Hardship and the H&C Assessment'.

²⁸⁹ As specified by Immigration and Refugee Protection Act (Canada), section 25(1).

²⁹⁰ See below.

²⁹¹ In the case of 'designated' aliens, this period is five years (Immigration and Refugee Protection Act (Canada), section 25(1.01)).

²⁹² Immigration and Refugee Protection Act (Canada), section 25(1.3).

²⁹³ *Ibid.*

²⁹⁴ Ley No. 18250: Migración (Uruguay), published in Diario Oficial No. 27407, 17 January 2008, Article 44.

Again, the provision is clearly intended to apply on an exceptional basis to those persons who do not fall within the ordinary migration rules and the concept of 'humanitarian' is left undefined. One point of importance to note, though, is that Uruguayan migration law is silent as to the basis on which any subsequent stay would be granted. In other words, the impact of special humanitarian concerns is limited to the situation of entry by aliens to the territory. However, the grounds for stay in the country do not expressly provide for special cases of humanitarian need, which is problematic if conditional entry is restricted to persons 'who do not meet the requirements' of migration law.

By contrast, in the case of **Jamaica**, stay on humanitarian grounds is framed expressly as a measure for dealing with unsuccessful asylum applicants whose situation discloses humanitarian concerns. In particular, the national refugee policy of Jamaica permits the Committee considering an asylum application to make a recommendation to the Permanent Secretary in the immigration ministry that the applicant be given 'exceptional leave to remain in Jamaica for a limited period'.²⁹⁵ This is possible only on 'humanitarian grounds' where the applicant is found not to be a refugee.²⁹⁶ Leave to remain is initially for three years and may be extended for another three years, or even indefinitely, upon review by the immigration authorities.²⁹⁷ In general, this provision is applied only in-country as a means of granting stay and, even then, only to those persons who have made a claim for protection as refugees. However, a broad discretion is given to the authorities to decide the kinds of 'humanitarian grounds' on which such stay is merited.

A similarly broad approach is adopted in **Brazilian** policy. Here, the absence of any formal mechanism within Brazilian migration law to deal with cases involving humanitarian considerations (and who are not refugees) has led to the adoption of a special administrative framework by the relevant governmental institutions. The framework is based on a 'normative resolution' adopted in 1998 by Brazil's National Council on Immigration (*Conselho Nacional de Imigração* – CNIg) in which, by reference to broader attributes conferred by law, it defines the approach to be taken for 'special situations' and 'unforeseen cases'.²⁹⁸ These are defined, respectively, as: those situations not defined expressly in CNIg resolutions but which 'possess elements that make

them suitable to be considered for a visa or for residence'; and those 'unforeseen cases not provided for by [CNIg] resolutions'.²⁹⁹ At base, this approach arguably represents the exercise of a broad conferred discretion on the part of governmental authorities and could thus be located also in the preceding section.³⁰⁰

However, this policy approach has equally resulted in the creation of well-established administrative norms that give direct guidance to the relevant authorities on how to deal with applications based on 'humanitarian reasons'. On the one hand, the CNIg has made a recommendation that the National Committee for Refugees (*Comité Nacional para os Refugiados* – CONARE) send it any asylum requests where, although refugee status is not appropriate, the individual's stay may be warranted for 'humanitarian reasons' so that CNIg can consider them under the 'special situations' and 'unforeseen cases' framework.³⁰¹ This recommendation was taken up by the CONARE, which has resolved to suspend its consideration of any asylum claim where such 'humanitarian questions' are in play, and instead remit the case for consideration under the relevant framework by CNIg.³⁰²

It appears that this framework is sometimes applied on an individual basis. However, its most frequent application is to categories of aliens. It is thus used in response to flows of migrants who do not fulfil the relevant criteria of the dated Brazilian migration law but still show some exceptional ground on which stay or a visa may be granted. The most innovative application of this provision has been to the flow of Haitians who began arriving in increasing numbers in Brazil in the aftermath of the 2010 earthquake. In this case, the CNIg took the view that this migration flow was not composed of refugees, but neither was it a typical form of economic migration, since:

...the majority of Haitian immigrants had specific losses as a result of the earthquake: whether their house, family, their means of survival, the school where they studied, etc. With the country paralysed, many decided to emigrate.³⁰³

On this basis, claims for asylum by Haitians were sent from CONARE to CNIg, which granted stay on the basis of 'humanitarian reasons' for up to five years. It represents an important example of where the general

²⁹⁵ Refugee Policy (Jamaica), 11 March 2009, Article 12(a)(iii).

²⁹⁶ *Ibid.*, Article 13(f).

²⁹⁷ *Ibid.*, Article 12(b).

²⁹⁸ Conselho Nacional de Imigração (Brazil), Resolução Normativa No. 27, 25 November 1998, published in Diário Oficial No. 243-E, 18 December 1998, Article 1.

²⁹⁹ *Ibid.*, Articles 2 and 3.

³⁰⁰ In other words, in section 7.1.

³⁰¹ Conselho Nacional de Imigração (Brazil), Resolução Recomendada No. 08, 19 December 2006, Article 1, and first paragraph.

³⁰² Comitê Nacional para os Refugiados (Brazil), Resolução Normativa No. 13, 23 March 2007, Articles 1 and 2.

³⁰³ See P. Sérgio de Almeida, 'La política de migraciones brasileña y la migración haitiana a Brasil' (2012) II.5, *Migration Policy Practice* 15, 15.

situation of persons from a country affected by a disaster has been expressly qualified to engage an undefined 'humanitarian reasons' provision.

The provision clearly allows for significant discretion to be exercised by the Brazilian governmental authorities. This is true in terms of the scope of the term 'humanitarian reasons', which is not further defined. However, the terms of the framework created by CNIg also allow the authorities to address such humanitarian concerns in a range of different situations. Thus, the provision was applied not only to allow Haitians already located irregularly in Brazil to benefit but to facilitate their entry at the border. Moreover, in view of the problems that began to accumulate on the borders and *en route*, the Brazilian authorities were able to use this figure to create a special five-year 'humanitarian visa' that Haitians could request at Brazilian consulates as a means of travelling to, entering and staying in Brazil on a regular status. Although Brazil has done away with its cap on the number of visas to be issued each year, Haitians with a criminal record remain ineligible to benefit from this programme.

In a similar fashion, **Canadian** national law has defined a concept of 'persons in need of protection' that may be applied either on an individualised basis as a human rights-based complementary protection mechanism or on a group basis through the exercise of ministerial discretion.³⁰⁴ What is interesting for our purposes is that such application is not constrained by the definitions used to define the concept's application on an individual basis.³⁰⁵ Rather, the legislation specifies that:

A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.³⁰⁶

The wording thus gives the Minister an almost unfettered discretion in delineating the relevant class of beneficiaries. In practice, it has formed the basis for protecting groups of persons who would not clearly qualify for international protection on an individual basis. There would be nothing to prevent the Minister from thus designating a group of persons affected by a disaster as 'persons in need of protection' in the terms of this provision.

At this end of the 'discretion' spectrum, therefore, we have seen that the migration provisions based exclusively on humanitarian considerations have assumed a range of forms. For instance, some apply only to certain migratory situations, while others have explicitly introduced procedural bars based on such characteristics as criminality. The migratory status provided is equally variable between countries. Nonetheless, there are some consistent features. Firstly, there is an understanding that any special permits for stay are available only to those who do not qualify for stay on other regular migration grounds, i.e. a privileging of the normal migratory categories. Secondly, there is a strong emphasis on separating this category of persons from that of refugees, which is often explicit.

On this latter point, it is important to conclude by highlighting the existence of a humanitarian provision within a humanitarian provision. In **Canada**, whereas the CIC Minister is barred from examining a request under the IPRA section 25.1 provision (mentioned at the start of section 7.2.1 of this study) if less than twelve months have passed since the alien has had a claim for asylum rejected etc.,³⁰⁷ two exceptions are made for removal cases. These are where the removal would 'have an adverse effect on the best interest of a child directly affected', or where the removable person:

...would be subjected to a risk to their life, caused by the inability of each of their countries of nationality... to provide adequate health or medical care [...]³⁰⁸

There is no suggestion that these considerations are to be read back to the broader 'humanitarian and compassionate considerations' referred to by the provision at large. Nonetheless, the provision quoted does indicate certain sorts of factors that these broader 'humanitarian and compassionate considerations' might include. Moreover, it gives a sense of when such considerations would be sufficiently pressing to override certain other national interests, such as those expressed through the 12-month asylum bar. Both exceptions have potential relevance to the cases of these specified sub-classes of persons from countries affected by a natural disaster.

³⁰⁴ Immigration and Refugee Protection Act (Canada), section 97(1) and section 97(2) respectively. For further comment on its application in the former sense, see section 3.6 above.

³⁰⁵ In other words, although both provisions refer to 'persons in need of protection', section 97(2) is entirely distinct in its scope of application from section 97(1) of the Immigration and Refugee Protection Act (Canada).

³⁰⁶ Immigration and Refugee Protection Act (Canada), section 97(2).

³⁰⁷ See above.

³⁰⁸ Immigration and Refugee Protection Act (Canada), section 25(1.21).

7.2.2 ‘Humanitarian reasons’ defined more closely

Among those countries where the concept of ‘humanitarian reasons’ in migration law is defined in greater detail, there are a number where this is done by reference to human rights instruments or an apparently mandatory concept of non-return.

A good example from the RCM is **Costa Rica**, where the legislation creates ‘special migratory categories’ that are intended to regulate situations that ‘require a distinct approach from [regular] migratory categories’.³⁰⁹ As such, they can be used by the migration authorities to permit entry to the country as well as stay in the territory.³¹⁰ In the latter case, though, irregular aliens already in the country can be permitted to stay on the basis of a special migratory category only for ‘reasons of humanity’;³¹¹ such applications are otherwise inadmissible. The exceptional nature of these special migratory categories means that they generate no rights of definitive stay,³¹² and beneficiaries require specific authorisation to work. They also entail only short durations of temporary stay, although beneficiaries may switch to another migration status if they later meet the requirements.³¹³

Among the special migratory categories created by Costa Rican legislation are those that the migration authorities ‘consider appropriate for humanitarian reasons, in conformity with international human rights instruments’.³¹⁴ This category generates a (renewable) period of stay of one year.³¹⁵ The term ‘humanitarian reason’ is more closely defined in the subsequent regulations as a:

Circumstance in which a foreign national with a high degree of vulnerability finds herself to the detriment of her condition as a human person.³¹⁶

This understanding can thus be applied to inform the ‘reasons of humanity’ that an irregular alien would need

to show in order to apply for stay on the basis of a special migratory category.³¹⁷

The same understanding of ‘humanitarian reasons’ is carried through to the criteria for granting stay on the basis of the ‘special category for reasons of humanity’, which are as follows:

Under extraordinary conditions, the [migration authorities] can examine and resolve on an individual basis, and for reasons of humanity, a case that due to its particular conditions, supposes the foreign national to be in a special situation of vulnerability derived from her age, gender, disability, among other conditions, that makes regularising her migratory situation necessary to attend to that situation.³¹⁸

Thus, despite the reference to human rights instruments in the primary law, the regulations shift the emphasis to conditions of ‘vulnerability’ more broadly. This approach has been carried through into practice, where the provision is not limited to ‘complementary protection’ cases. The Costa Rican authorities recognise that this provision can be applied to irregular aliens affected by a disaster in their home country, although to date Costa Rica has used regular migration categories to resolve such cases, given the less preferential benefits that holding a special migratory status implies.

A similar approach can be seen in **Nicaragua**. Its migration framework gives a broad power to the migration authorities to extend the stay of non-resident aliens in the territory on the expiry of their legal stay where justified by ‘humanitarian reasons’.³¹⁹ The concept is not further defined in this context. However, the national migration law also gives the national authorities a discretionary power to grant ‘humanitarian visas’ to aliens.³²⁰ This concept is described in the migration law under the heading of ‘complementary protection’ and as applying, ‘in conformity with international human rights instruments’, to those persons who ‘suffer violations of

³⁰⁹ Ley No. 8764: Ley General de Migración y Extranjería (Costa Rica), 19 August 2009, Article 93.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*, Article 93(12).

³¹² *Ibid.*, Article 95.

³¹³ *Ibid.*, Article 96.

³¹⁴ *Ibid.*, Article 93(12).

³¹⁵ Decreto No. 37112-G: Reglamento de Extranjería (Costa Rica), 21 March 2012, published in *La Gaceta Diario Oficial*, No. 95, 17 May 2012, Article 136.

³¹⁶ *Ibid.*, Article 2 (Razón Humanitaria).

³¹⁷ However, in practice, most other Central American nationals are able to enter Costa Rica on a regular basis for short durations due to benefits granted under bilateral accords. In case of persons seeking to access a special migratory category due to a natural disaster in their home country, this criterion would thus become relevant only where the person had overstayed in Costa Rica or in the case of Nicaraguans entering without a tourist visa.

³¹⁸ Decreto No. 37112-G (Costa Rica), Article 135.

³¹⁹ Decreto No. 31-2012: Reglamento a la Ley No. 761, Ley General de Migración y Extranjería (Nicaragua), 20 September 2012, published in *La Gaceta* No. 184-186, 27 September-1 October 2012, Article 50.

³²⁰ *Ibid.*, Article 61; Ley No. 761: Ley de Migración (Nicaragua), 28 June 2011, published in *La Gaceta*, 6 July 2011, Article 220.

their human rights and victims of people-trafficking, in particular women and children'.³²¹

However, the Nicaraguan migration regulations strongly suggest that such visas are to be issued as a means for allowing travel and entry to persons located outside the country. Indeed, they even specify that upon entry to Nicaragua, such persons are to be granted stay under the temporary resident category for one year (renewable if the protection need continues). This suggests that these 'humanitarian visas' are indeed visas in the conventional sense. If correct, then questions arise as to their *ratione personae* scope.³²²

On this point, the most coherent interpretation would be that the Nicaraguan provision allows for two things simultaneously. Firstly, it allows 'humanitarian visas' to be granted to persons on a broad humanitarian basis in order to facilitate their travel and entry to Nicaragua, after which they are granted temporary residence initially for one year. For logical reasons, this category cannot be limited to (potential) beneficiaries of complementary protection. However, its application is discretionary. Secondly, it also allows complementary protection in the form of temporary residence initially for one year to be given to persons already located within Nicaragua and whose removal would violate international human rights standards. Given the existence of these obligations, its activation is not a matter of discretion. Both applications of the provision would be relevant in cases where Nicaragua received immigration or protection requests from nationals of a country affected by a disaster.

Examples of legislation where the concept of 'humanitarian reasons' is linked to the principle of non-return can also be identified elsewhere in the Americas. A similar scenario appears in the case of **Bolivia**. Its migration law includes a special provision that allows 'temporary humanitarian stay' to be granted to aliens who:

...for reasons of force majeure, beyond their control and duly justified cannot comply with the requirements for temporary residence established [in migration law].³²³

The migration law also provides for a 'humanitarian' class of visas.³²⁴ However, the regulations define 'humanitarian reasons' for the broad purposes of both provisions as:

- 1 Need for international protection sanctified by the principle of non-return;
- 2 Victim of trafficking and smuggling of persons or other modes of exploitation;
- 3 Accompanying a sick person that requires medical treatment.³²⁵

Of the three non-cumulative criteria, that relating to a need for international protection is most relevant to the situation of persons affected by a disaster. Here again, though, in order to have any substantive meaning, the concept of non-return will have to be given a speculative reading based on a broad humanitarian conception of international protection. Presumably, those persons issued visas to enter Bolivia on this basis will have their cases examined under the humanitarian provision for temporary stay or even under refugee law.

Argentina offers an interesting point of comparison in the wider Americas context. Firstly, the law allows the national migration authorities to authorise physical entry to the country by aliens who do not meet the requirements of migration law on the basis of 'exceptional reasons of a humanitarian character'.³²⁶ Moreover, Argentina's migration law provides that 'humanitarian reasons' may be considered by the migration authorities (with input from the Interior Ministry) to allow access to the migratory categories of temporary or permanent residence by persons who would otherwise be impeded from doing so on stipulated grounds.³²⁷ Many of the stipulated grounds concern issues of national security or acts of serious criminality. However, they also include attempts – successful or otherwise – to enter the country irregularly,³²⁸ and other non-compliance with migration law.³²⁹ Even if the concept of 'humanitarian reasons' is not further defined in law, this provision has real significance in allowing access to the residence categories analysed below.

³²¹ Ley No. 761, Article 220. This is taken up by the regulations as concerning aliens that 'require protection against return, in those cases in which it could lead to the violation of general obligations of non-return contained in international treaties to which Nicaragua is party' (Decreto No. 31-2012, Article 6(I)).

³²² Are these visas restricted to persons outside their country of nationality and outside Nicaragua who are not refugees but threatened with *refoulement* from a third country? Alternatively, are they for persons still located in their country of nationality but who would need complementary protection (but not refugee status) in the hypothetical situation that they were allowed to travel to Nicaragua? Yet, in neither case would the return of such persons lead to a breach of Nicaragua's treaty obligations referred to in the national law provision.

³²³ Ley No. 370: Ley de Migración (Bolivia), 8 May 2013, Article 30(4).

³²⁴ Ley No. 370: Ley de Migración (Bolivia), Article 21(I)(6).

³²⁵ *Ibid.*, see respectively Article 13(II)(e) and Article 9(I)(d). The former class, i.e. stay, also includes reference to persons who have obtained their liberty on Bolivian territory in the context of criminal proceedings (Article 13(II)(e)(4)).

³²⁶ Ley No. 25871: Política Migratoria Argentina (Argentina), 17 December 2003, published in Boletín Oficial, 21 January 2004, Article 34.

³²⁷ *Ibid.*, Article 29.

³²⁸ *Ibid.*, Article 29(i).

³²⁹ *Ibid.*, Article 29(j).

Argentinian migration law also provides for the granting of special 'transitory residence' based on a temporary inability to return owing to 'prevailing humanitarian conditions' or the consequences of disasters.³³⁰ Yet it also establishes a longer-term and more stable category of 'temporary residence' based on the adducing of 'humanitarian reasons' that 'in the opinion of the [migration authorities]' require special treatment.³³¹ The regulations state that the following situations are to be 'taken especially into account', implying equally that the list is not exhaustive:

- 1 Persons needing international protection that, although not refugees or asylees in the terms of the applicable legislation, are protected by the Principle of Non-Return [*sic.*] and cannot regularize their migratory situation through the other criteria established in [migration law].
- 2 Persons whom it is presumed likely that, if they were obliged to return to their country of origin, would be subjected to violations of human rights recognized in international instruments of constitutional status.
- 3 Persons that have been victims of trafficking or other modes of slave exploitation and/or victims of the illicit smuggling of migrants.
- 4 Persons that invoke health reasons that imply a risk of death if they were obliged to return to their country of origin for lack of medical treatment.
- 5 Stateless persons and refugees that have lived in the country for a period greater than three years and had their condition ceased.³³²

These provisions are directed principally to persons who are already in the country and require a form of temporary stay. Despite the criteria enumerated on the list, and the apparently obligatory nature of some, the decision to grant temporary residence in response to an application is not obligatory and may also be taken on the basis of wider 'humanitarian reasons'.

Towards this end, this provision is viewed in practice by the migration authorities as applying to the situation of aliens fleeing disasters, such as from Haiti, where the

duration of stay is likely to be longer than that envisaged by the alternative 'transitory residence' provision.³³³ This is because temporary residence status is conceded for two years, is renewable, and also allows a beneficiary to later switch to another migratory category if the relevant criteria are fulfilled. Although the benefit of this provision is usually solicited from inside Argentina, it can also be requested from outside the country, again suggesting that the concept of 'humanitarian reasons' is to be applied more broadly than simply the factors listed in the regulations. For the benefit of Haitian migrants in the aftermath of the earthquake, the Argentinian education ministry also included them in a special educational programme directed towards refugees.³³⁴

A similar situation prevails in **Panama**. Alongside the humanitarian temporary protection status created by its domestic refugee law for mass influx situations, Panamanian migration law allows temporary residence of up to six years to be granted for 'humanitarian reasons'.³³⁵ These grounds are expressly distinguished from those on which protection on refugee law grounds is granted.³³⁶ The regulations specify that this status may be granted for 'exceptional humanitarian reasons' by the migration authorities following a request from the alien and assessment by an interdisciplinary team.³³⁷ The category is envisaged specifically as a means of regularising the stay of persons already in Panama, until their voluntary return is practicable,³³⁸ rather than allowing travel or entry to Panama by persons outside the country. The period of temporary residence granted on this basis may be extended for another six years on the basis of a request by the alien and again following evaluation by an interdisciplinary government team.³³⁹

The regulations indicate a number of general factors that are to be weighed either positively or negatively in the balance when assessing such requests, including: links with Panama, criminal record and economic, physical and mental condition.³⁴⁰ Certain 'humanitarian reasons' are also listed as necessary of evaluation, all of which are based essentially on the physical state of the alien, i.e.:

- 1 Proved to be suffering a disease or disability that requires medical attention and makes her return to her country of origin or residence impossible;

³³⁰ See below.

³³¹ *Ibid.*, Article 23(m).

³³² Reglamentación de la Ley de Migraciones (Argentina), 3 May 2010, published in Boletín Oficial No. 31898, 6 May 2010, Article 23(m).

³³³ See below.

³³⁴ Ministerio de Educación (Argentina), Resolución 1007/2012, 29 June 2012.

³³⁵ Decreto Ley No. 3 (Panama), 22 February 2008, published in Gaceta Diario Oficial No. 25986, 26 February 2008, Article 18.

³³⁶ Decreto No. 320 (Panama), 8 August 2008, published in Gaceta Diario Oficial No. 26104, 13 August 2008, Article 171, additional paragraph.

³³⁷ *Ibid.*, Articles 171 and 173.

³³⁸ *Ibid.*, Article 171.

³³⁹ *Ibid.*, Article 174.

³⁴⁰ *Ibid.*, Article 171.

- 2 Proved to suffer from a permanent serious disability;
- 3 Being more than 85 years old, demonstrates that cannot care for herself or is in a state of abandonment;
- 4 Finds herself in conditions of obvious indigence (extreme poverty) and has spent more than five (5) years in the national territory at the moment when [regulations] enter into force;
- 5 Being a minor who suffers some degree of disability, in finds [sic] undocumented or in a vulnerable situation.

However, the relatively narrow criteria espoused here are plainly indicative only, such that a wider class of ‘humanitarian reasons’ may be admitted within the category. Indeed, Panama is reported to have granted temporary residence on the basis of this category to a number of Haitians who appeared in its territory after the 2010 earthquake. These Haitians appear not to have demonstrated any of the physical features listed above, nor were their cases ones that decisively engaged the more general criteria identified above of links with Panama. Similar to Argentina, Panama thus appears to give the term ‘humanitarian reasons’ a broad meaning in practice, despite the enunciation of certain limited criteria in law, at least for aliens affected by a natural disaster.

The law and policy on ‘humanitarian visas’ finds perhaps its fullest development in **Mexico**. In developing an analysis of the practice of this country, the emphasis here will be upon describing the current state of the law on this area under Mexico’s new migration law framework. Even so, it is important to appreciate that the current law is greatly influenced by, and in fact based upon, older and more informal law and policy in this area that was applied by Mexico in the aftermath of the 2010 Haitian earthquake. Indeed, that law was applied in many individual cases to allow Haitians, usually with family links to Mexico, to travel to, enter and stay in Mexico following the earthquake.

Mexico is an example of a country whose national migration law gives the term ‘humanitarian’ a slightly

different meaning in different migratory or procedural contexts. Thus, the new migration law creates a category of ‘stay as a visitor for humanitarian reasons’.³⁴¹ This stay may be granted to specified classes of person, including: victims or witnesses of crimes committed in Mexico; unaccompanied alien children; and asylum-seekers. However, the migration authorities are also given a broader power to grant stay under this category to other persons on the basis of a ‘humanitarian cause’.³⁴² This is defined more closely in the regulations in terms of: needing to assist a seriously-ill family member in Mexico; recovering the body of a family member or authorising medical attention to a family member who is in the custody of the Mexican State; or when ‘a risk to the person’s own health or life exists and requires them to remain in the national territory’.³⁴³ Arguably, there is some scope for the last element to include aliens who cannot be returned to their country of origin due to a risk to health or life posed by a disaster or its after-effects.

Separately, the national migration authorities are also given a power to admit foreigners who do not meet the normal requirements for entry if there is ‘humanitarian cause’.³⁴⁴ Here, though, the term ‘humanitarian cause’ is limited to mean an alien

... who due to a risk to her own health or life, or due to her situation of vulnerability cannot be returned to her country of origin, or cannot continue with her journey...³⁴⁵

The concept of ‘humanitarian cause’ at the point of entry thus encompasses a broader range of vulnerabilities than it does in the context of granting stay, but not the family-related grounds. Here also, the wider ‘humanitarian reasons’ category is differently constituted to include asylum seekers, but not witnesses or unaccompanied alien children.³⁴⁶ Ultimately, though, permission to enter on these grounds equally leads to the granting at the point of entry of ‘stay as a visitor for humanitarian reasons’.³⁴⁷

Finally, Mexico’s migration law explicitly gives the national migration authorities powers to grant foreigners outside Mexico a visa for ‘humanitarian reasons’.³⁴⁸ Here again, the criteria are similar to, but distinct from,

³⁴¹ Ley de Migración (Mexico), published in Diaro Oficial de la Federación, 25 May 2011, last reform published in Diario Oficial de la Federación, 6 July 2013, Article 52.

³⁴² Decreto: Reglamento de la Ley de Migración (Mexico), published in Diario Oficial de la Federación, 28 September 2012, Articles 137 and 141.

³⁴³ Ibid.

³⁴⁴ Ley de Migración (Mexico), Article 37(III)(e) and Article 42.

³⁴⁵ Reglamento de la Ley de Migración (Mexico), Article 63(III).

³⁴⁶ Ibid, Article 63(I)-(II). It also adds the classes of relief workers coming to Mexico’s aid in emergency situations and the crew and passengers of flights forced to land in Mexico due to technical or climatological issues (ibid, Article 63(IV)).

³⁴⁷ Ibid., Article 62.

³⁴⁸ Ley de Migración (Mexico), Article 41.

both classes of ‘humanitarian cause’, not least because they give express recognition to the situation of disasters.³⁴⁹ Thus, this visa must be applied for by a Mexican or a temporary or permanent resident in Mexico on behalf of a relative overseas for whom the family link is not sufficiently close to allow them to be admitted on the basis of family reunion.³⁵⁰ Moreover, the humanitarian considerations aspect requires either that the sponsor needs the assistance of the family member due to her own serious state of ill-health,³⁵¹ or:

That the foreign national... finds herself in a situation of danger to her life or integrity owing to violence or a duly accredited natural disaster.³⁵²

Alongside this clause, freshly-issued procedural guidance on these visas adds a new clause to include the situation that the alien ‘is victim of a natural catastrophe’.³⁵³ The new guidance also authorises the migration authorities in such cases to make contact with UNHCR about any guidance on international protection considerations that it may have issued with respect to the relevant country.³⁵⁴ If the relevant criteria are met, then the alien may be issued by the relevant Mexican consulate with a ‘visa as a visitor without permission to work’ that allows travel and entry to Mexico.³⁵⁵ Both the sponsor and recipient are to be informed of the right of the latter to seek asylum on entering Mexico. Although it is unclear what category of stay would be granted were refugee status not sought by the alien, that of ‘stay as a visitor for humanitarian reasons’ seems a likely option.³⁵⁶

7.3 INDIVIDUALISED APPROACH SPECIFIC TO ‘TRANS-BORDER’ DISPLACEMENTS

In general, we saw that migrants forming part of a ‘trans-border’ displacement are admitted under regular migration laws. However, where these rules do not exist, or are perceived as insufficient for the protection

of persons fleeing a disaster, States may adopt special legislation. The only documented case in the Americas is that of **Argentina**, where national legislation gives to the National Migration Department [*Dirección Nacional de Migraciones*] the power to adopt rules of a general character in cases that demand ‘special treatment’ in order to admit aliens to Argentinian territory as ‘transitory residents’ [*residentes transitorios*].³⁵⁷ The migratory status of ‘transitory residents’ is distinct from that of ‘temporary residents’. As a ‘transit’ status held, for example, by such migratory categories as tourists and passengers in transit,³⁵⁸ it is shorter in duration and does not automatically imply the right to work in Argentina, although this may be expressly authorised in appropriate cases.³⁵⁹

Crucially, the ‘special cases’ category of the ‘transitory residents’ class has been given a distinctive natural disaster orientation by the implementing regulations. Thus, in dealing with this category, the Argentinian national migration authorities are instructed directly to take into account:

[T]he situation of those *persons who, despite not requiring international protection, temporarily cannot return to their countries of origin* by reason of the prevailing humanitarian conditions or *due to the consequences generated by natural or man-made environmental disasters*. Towards this end, recommendations formulated by [UNHCR] about non-return can be taken into account.³⁶⁰

The reference to UNHCR recommendations is intended to be directed towards the ‘prevailing humanitarian conditions’ limb. By contrast, the inclusion of a reference to disasters is specifically directed towards ensuring that Chileans from the remote border regions who cross temporarily into Argentina due to earthquakes and floods in that part of their country benefit from a regular status.³⁶¹ Application of this provision would allow such persons to enter Argentina for 90 days, a period which could be renewed if circumstances required. Even so, it has yet to be used in practice.

³⁴⁹ *Ibid.*, Article 116(I)(b).

³⁵⁰ *Ibid.*, Article 116(I)(a). A ‘humanitarian visa’ may also be solicited by certain branches of the Mexican authorities to allow the entry of a foreign relief worker coming to Mexico’s aid in emergency situations (*ibid.*, Article 116(II)).

³⁵¹ *Ibid.*, Article 116(I)(c).

³⁵² *Ibid.*, Article 116(I)(b).

³⁵³ *Lineamientos Generales para la expedición de visas que emiten las secretarías de Gobernación y de Relaciones Exteriores*, published in *Diario Oficial de la Federación*, 11 October 2014, eighteenth general provision, procedure 9, second resolution criteria, insert (a)(ii).

³⁵⁴ *Ibid.*, third resolution criteria.

³⁵⁵ *Ibid.*; see also *Reglamento de la Ley de Migración (Mexico)*, Article 116.

³⁵⁶ See above.

³⁵⁷ See Ley No. 25871 (Argentina), Article 24(h) in conjunction with Decreto No. 616/2010 (Argentina), Article 24(h).

³⁵⁸ See Ley No. 25871 (Argentina), Article 24((a)-(b)).

³⁵⁹ Ley No. 25871 (Argentina), Article 52.

³⁶⁰ Decreto No. 616/2010 (Argentina), Article 24(h), emphasis added.

³⁶¹ Chileans did not benefit from Mercosur-derived free movement rights in Argentina at that time.

One issue of law and public policy on aliens that has particular relevance in these trans-border displacements (although not exclusively so) is that of access to shelter and humanitarian assistance.³⁶² Often, members of border populations have family and friends on the other side of the border who may be prepared to accommodate them for a short period of time. However, particularly where a disaster such as a tropical storm affects both sides of the border, then access to public shelters becomes a live issue not only for residents but also for trans-border migrants.

The approach adopted in a number of countries – of which **Mexico** is but a prominent example – is to apply the principle of non-discrimination. Access to the government-run hostels that it uses as shelters during rapid-onset disasters is provided without distinguishing between nationals and aliens or between regular and irregular migrants. Those entering the shelters at this time are thus not denied access or humanitarian assistance on the basis of such characteristics, and often include many thousands of Guatemalans from the border regions come to weather the storm. The experience of Mexico is that these persons usually cross back across the border after the emergency.

7.4 CONCLUSIONS

This section of the study establishes a number of important points. Firstly, the Americas provide a surprisingly wide of range of examples of countries that demonstrate in law, policy or practice a basis for resolving the migratory situations of individuals when these are based on exceptional circumstances such as the effects of a disaster in their country of origin. Where such provisions do not exist, or are seen to be inappropriately vague in light of current circumstances, there are efforts to legislate for new provision in this area, as in Brazil, Ecuador, El Salvador, Guatemala and Peru. In short, there is broad consensus as to the utility of such provisions.

Secondly, despite the variety of forms assumed by these provisions, discretion lies at the heart of each. In other words, States generally do not see the application of these provisions as a matter of obligation, but rather one of right. There is some variation among different laws as to whether ‘humanitarian’ circumstances are expressly envisaged, and the degree to which this concept is regulated. However, even where law circumscribes the meaning of the phrase to certain kinds of emergency, practice has shown that decision-makers across the Americas are willing to go beyond these terms to include disasters where these are not expressly provided for.

Thirdly, it is important to identify clearly the point at which this discretion operates, i.e. in relation to travel to the country, entry into it, or stay. In some laws, it is clearly specified, but this is not always the case. Moreover, certain States allow for the operation of this humanitarian discretion at certain points but apparently not others, leaving open the question whether a similar discretion can be assumed to exist in the latter cases on an implied basis. Additionally, it would seem that some States that do prescribe the meaning of ‘humanitarian reasons’ may define the scope of the concept differently in different situations, depending whether it is travel, entry or stay that is at stake. Finally, a number of laws make explicit provision for disasters as a humanitarian concern.

Fourthly, there is a good degree of variation in the duration and conditions of stay provided for. At times, these reflect the presumed characteristics of the migration flow, as with the very different provision for ‘trans-border’ displacement and displacement ‘abroad’ made by Argentinian law. All, though, are based on the understanding that the entry or stay will be but temporary – at least in the first instance – and do not require any form of more enduring links with the country (i.e. family, employment etc.) or prior stay (as with regularisation provisions) in order to be granted. In all cases, it is the responsibility of the alien to apply to the authorities for the benefit of these provisions. None require the authorities to undertake a consideration *proprio motu*, although in some cases they have the right to do so if they wish.

Finally, it is clear that all existing practice in the Americas based on the application of these provisions in contexts of disasters concerns rapid-onset rather than slow-onset disasters. In light of the scope of the concept of ‘humanitarian reasons’, State officials from different countries expressed during interview a desire for further guidance on when this concept might be applied in the contexts of migration and aliens affected by rapid-onset disasters. A pertinent question would be the extent to which the standards in existing national law across the Americas – whether relating to generalised or individualised approaches – would represent suitable models.

The next section shifts to consider the separate but closely-related topic of the law relating to aliens in the Americas who are affected by a disaster in the country in which they find themselves.

³⁶² The same issue arises in parallel for migrants who are residing – whether regularly or irregularly – in another country at the time that it is affected by a serious rapid-onset natural disaster (see further below).



8. ALIENS IN DISASTERS

Aliens present on the territory of a State who are affected by a rapid-onset disaster face particular challenges as a consequence.³⁶³ In theory, their situation might be addressed by the UN Guiding Principles on Internal Displacement which, after all, apply to all persons on the territory without distinction.³⁶⁴ In the Americas, however, this framework is rarely used in the disaster context and, by dealing with the needs of internally displaced persons in general (i.e. without drawing a distinction between nationals and aliens), does not address the particular needs of aliens in the disaster context. Indeed, it is clear that the occurrence of such a disaster may not necessarily result in the displacement of aliens from their homes but instead may impact upon them negatively in other ways that merit closer consideration here from the point of view of current State practice.

Even so, in the Americas, it appears that the provision of emergency assistance by a government during a disaster on its territory generally does not discriminate between nationals and non-nationals. In principle, therefore, aliens are eligible to access shelters, receive food and material assistance, and apply for any available compensation for damage caused etc. on the same terms as nationals of the country. Moreover, there is no general practice of curtailing the stay of foreigners or instituting removals of non-nationals simply due to the fact that a disaster has occurred. However, there remains a need to ensure that the particular needs of aliens are included in disaster preparedness planning at the national –and, in federal systems, local – level.³⁶⁵

A particular legal challenge arises in the case of irregular and undocumented migrants. In some States of the Americas, access to government assistance – even in emergency situations – appears to be reserved for individuals with appropriate documentation.³⁶⁶ Indeed, in regional debates on the situation of aliens in disasters, the discussion has tended to turn on the extent to which undocumented migrants can be provided with assistance.³⁶⁷ This theme encompasses also assistance which may be provided by civil society organisations. Some legislation makes it unlawful for any individual or organization to give humanitarian assistance to an irregular migrant.³⁶⁸ On this broad challenge, **Mexico** represents a positive example in that its provision of shelter and assistance during disasters is without distinction and based purely on need.

³⁶³ See section 2.6 of this report.

³⁶⁴ United Nations Commission on Human Rights, 'Guiding Principles on Internal Displacement', UN Doc E/CN.4/1998/53/Add.2 (11 February 1998). See, specifically, Principles 1-4.

³⁶⁵ Organization of American States Permanent Council, Special Committee on Migration Issues, 'Summary for the meeting of January 27, 2009'.

³⁶⁶ Organization of American States Permanent Council, Special Committee on Migration Issues, 'Migrants in Disaster Situations'.

³⁶⁷ OAS Permanent Council, Special Committee on Migration Issues, 'Summary for the meeting of January 27, 2009'.

³⁶⁸ OAS Permanent Council, Special Committee on Migration Issues, 'Migrants in Disaster Situations'.

A related challenge that arises specifically in the case of irregular migrants caught up in a context of disaster overseas is the risk that presenting themselves to the authorities may result simply in their swift prosecution and/or removal on the basis of their irregular migratory status. However, in the Americas, it is possible to find governmental arrangements where the function of maintaining law and order during disaster situations is separated from that of the enforcement of migration law, which might not be opportune in such contexts.³⁶⁹ The challenge is particularly heightened where the national institution tasked with providing emergency assistance is the same – or falls under the same authority – as that tasked with migration control. In the USA, where this is the case, such tensions arose for Department of Homeland Security officials working in emergency assistance provision in the aftermath of Hurricanes Katrina and Rita in 2005.³⁷⁰

A broader challenge that exists for regular migrants, as well as irregular migrants applying to regularise their status, is that of compliance with the requirements of immigration law. This may take the form of submitting an application or evidence on time to the migration authorities, or attending a scheduled interview. Certain States expressly recognise that a disaster on their territories can interfere with such processes and give the migration authorities discretion to take such factors into account.³⁷¹ For instance, in the USA, the immigration authorities have this capacity; moreover, the authorities have sometimes specifically issued generalised ‘special situation’ notices in these circumstances. This was the case for: Hurricane Katrina (2005); California Wildfires (2007); and Hurricane Sandy (2012).³⁷²

A related challenge exists where the alien’s basis for legal stay in the foreign country is removed as a result of the disaster. In most countries of the Americas, the possibilities for immigration based on self-petitioning are few but rather require that the alien has a family member or employer etc. who is willing to support or sponsor the application. For example, in the context of Hurricane Katrina in the USA, ‘the loss of life, devastation of businesses, or depletion of personal assets’ directly affected the ability of certain migrants who were victims of the hurricane or the family of victims to meet the eligibility criteria for stay or a visa.³⁷³ Even some of those on temporary visas had the purposes behind the visa grant disrupted.³⁷⁴ It was necessary for the USA authorities

to issue specific guidance in this context, although the broader legal issues remained unresolved.³⁷⁵

The challenges facing aliens due to the occurrence of a disaster also appear to be heightened for those who are in-transit rather than living in the territory of a foreign State. This manifests itself in a potentially heightened lack of knowledge about what to do and where to go in the event of a disaster. For those in-transit migrants who do not originate in a Spanish-speaking country, such as the *extracontinentales* of various Asian and African nationalities, the difficulties may be exacerbated by a reduced comprehension of the local language. These situations are, of course, particularly acute for those migrants who are travelling irregularly by land, for whom specific provision in national and local disaster relief plans may be appropriate.

Plainly, we can conclude that the situation of aliens affected by a disaster in a country that is not their own is a topic on which useful guidance to States in the Americas could be provided.

³⁶⁹ OAS Permanent Council, Special Committee on Migration Issues, ‘Summary for the meeting of January 27, 2009’.

³⁷⁰ See, for example, R.E. Wasem, ‘Unauthorized Aliens’ Access to Federal Benefits: Policy and Issues’ (Congressional Research Service 2012) 19-20.

³⁷¹ See above.

³⁷² All announcements may be accessed at <http://www.uscis.gov/humanitarian/special-situations/previous-special-situations>.

³⁷³ R.E. Wasem, ‘Hurricane Katrina-Related Immigration Issues and Legislation’ (Congressional Research Service 2005) 7-10.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*



9. SUMMARY OF FINDINGS AND CONCLUSION

This study has reviewed the law, policy and practice of member States of the RCM, as well as other selected States from the Americas, to ascertain whether and how they respond to the challenge of providing humanitarian protection to aliens affected by disasters caused by natural hazards. The findings of the study provide an important framework within which to begin conceptualising the nature and dynamics of this form of displacement in the region as well as the common threads that run through panoply of State responses.

The principal findings of the study are thus as follows:

International legal background

- As yet, there is no international or regional legal regime that explicitly addresses cross-border displacement in disaster contexts
- As yet, there are no universally-applied criteria to determine, in the context of disasters, when aliens affected by the disaster should benefit from temporary humanitarian protection

Empirical dynamics of displacement in the Americas

- International movement caused by disasters tends to follow traditional migration routes
- The environmental factor tends to be more easily identifiable as the trigger for displacement where the disaster is rapid-onset than when it is slow-onset
- Different patterns of displacement are evident in the region, including ‘trans-border’ displacements, displacements ‘abroad’ and evacuations
- Aliens already outside their country may equally be affected negatively by a disaster in the country of origin or by a disaster in the foreign country in which they find themselves
- Aliens in the Americas who are affected by disasters originate not only from the countries of the Americas but also from other regions of the world

Approach based on national law, policy and practice in the Americas

- A wide range of State law, policy and practice on the provision of humanitarian protection on a temporary basis to aliens in the context of disasters already exists in the Americas
- This law, policy and practice exists predominantly at the national level, although some relevant practice can also be discerned in connection with regional and sub-regional organisations
- This law, policy and practice encompasses a range of diverse provisions drawn both from national refugee law and from national migration law, but with the latter predominating
- There are a number of important commonalities that run through the range of provisions surveyed in the different national contexts (see below)
- State responses address aliens affected by rapid-onset disasters and not slow-onset disasters

Continuing relevance of refugee law in the context of disasters

- For States, the occurrence even of a rapid-onset disaster does not usually create refugees; yet, its *effects* in terms of insecurity etc. may still mean international protection is required by some
- States use refugee status rather than statuses based on complementary protection as the principal tool for providing international protection in appropriate individual cases
- States do not generally apply the restrictive European concept of ‘temporary protection’ in mass influxes; rather the region has developed a distinct form of protection on a temporary basis
- Measures taken under this body of law are seen as having an obligatory character in contrast to the more discretion-based measures provided for under migration law (see below)

Migration law and aliens affected by natural disasters overseas

- States in the Americas make considerable use of ‘regular’ migration categories and tools to respond in a flexible, spontaneous and *ad hoc* fashion to the impact on aliens of disaster situations overseas
- A number of States in the Americas also use group-based ‘exceptional’ tools in migration law and policy to respond to displacement flows caused by disasters; these include regularisation programmes and temporary suspension of removals to the affected country
- Many States in the region also use individualised ‘exceptional’ migration categories to provide humanitarian protection to affected aliens on a temporary basis; the categories are constituted in different ways in national laws but are all susceptible to considering humanitarian grounds
- Measures taken under migration law are largely based on a positive exercise of the inherent discretion of these States to accommodate humanitarian concerns in regulating the travel, entry, stay and removal of aliens, whether newly displaced or already present in the territory
- State officials in the region espouse an urgent need for further guidance on the parameters within which this discretion should be exercised in respect of aliens affected by natural disasters; also, in these contexts, there are protection gaps in some States’ migration law

Migration law and aliens affected by natural disasters in the territory in which they find themselves

- During disasters affecting a country in the Americas, aliens are generally entitled to access emergency assistance; however, a protection gap exists in some States for aliens with an irregular migration status and who face a range of legal and practical challenges on this basis
- Some States recognise a disaster as grounds for exercising positive discretion in dealing with the inability by affected aliens to comply with relevant requirements of migration law
- Aliens affected by a disaster also face challenges in relation to contact with their own authorities and family that are specific to their situation and for which a protection gap may exist
- These challenges are heightened for aliens who are irregular and particular so for those who are only transiting the territory of the State

Regional approach

- The need for a concerted regional response is strongly indicated by the forms of displacement generated by disasters in the Americas (especially in the case of displacement ‘abroad’)
- A firm precedent exists within the RCM and other sub-regional organisations for promoting temporary solutions by States to the regional migratory impact of rapid-onset disasters
- Overall, it can be seen that the study demonstrates a strong basis on which to proceed to elaborate a draft guide on effective practices on ‘humanitarian protection for aliens on a temporary basis in the context of disasters’ to be considered by the RCM in the planned workshop in February 2015.



APPENDIX A:

List of Interviewees

Governmental interviewees

1. Adriana C. Alfonso, Coordinadora de Temas Internacionales, Ministerio de Justicia y Derechos Humanos, Argentina
2. João Guilherme Lima Granja Xavier da Silva, Diretor, Departamento de Estrangeiros, Secretaria Nacional de Justiça, Ministro da Justiça, Brazil
3. Fraser Fowler, Assistant Director, Social Policy and Programs, NHQ – Citizenship and Immigration Canada, Canada
4. Luis Monzon, NHQ – International and Intergovernmental Relations, Citizenship and Immigration Canada, Canada
5. Cynthia Ralickas, Senior Analyst, NHQ – Immigration, Citizenship and Immigration Canada, Canada
6. Bruce Scoffield, Minister-Counsellor (Humanitarian Affairs) Mission of Canada in Geneva, Canada
7. Kathleen Sigurdson, Director, Refugee Operations Division, NHQ – Operational Management and Coordination Branch, Citizenship and Immigration Canada, Canada
8. Louise Wanczycki, Senior Analyst, NHQ – Immigration, Citizenship and Immigration Canada, Canada
9. Kathya Rodríguez, Directora General de Migración y Extranjería, Ministerio de Gobernación, Costa Rica
10. Lewis Cortez, ex-Director de Refugio, Ministerio de Relaciones Exteriores y Movilidad Humana, Ecuador
11. Helen Flamenco, Secretaria General, Dirección General de Migración, El Salvador
12. Doris Rivas, Secretaria Ejecutiva, CONMIGRANTES, El Salvador
13. José Rodríguez, Director de Asuntos Migratorios, Cancillería, Guatemala
14. Consuelo María Maas, Directora de Protección al Migrante, Dirección General de Asuntos Consulares y Política Migratoria, Cancillería, Honduras
15. Carlos Amilcar Sánchez, Jefe de Migraciones Internacionales, Dirección General de Migración y Extranjería, Honduras
16. Norma Araceli Díaz Godínez, Directora de Migración y Refugio, Secretaría de Relaciones Exteriores, Mexico
17. Maria Fernanda García Villalobos Haddad, Director general de Regulación y Archivo Migratorio, Instituto Nacional de Migración, Mexico
18. Isabel Pabon, Protección al Migrante y Vinculación, Instituto Nacional de Migración, Mexico
19. Barbara Pérez Martínez, ex-Directora de Protección, Comisión Mexicana de Ayuda a Refugiados (COMAR), Mexico
20. Anel Sánchez, Protección al Migrante y Vinculación, Instituto Nacional de Migración, Mexico
21. Martha Olivia Guitérrez Vega, Directora de Asuntos Consulares, Cancillería, Nicaragua
22. Ana Cecilia Solís Díaz, Directora de Protección a Nacionales, Cancillería, Nicaragua
23. Yaribeth de Calvo, Directora, Oficina Nacional para la Atención de los Refugiados (ONPAR), Panama
24. Iris Lidieth de León, Oficina Nacional para la Atención de Refugiados (ONPAR), Panama

25. Patricio Rubio, Secretario Ejecutivo de la Comisión Especial para los Refugiados, Ministerio de Relaciones Exteriores, Perú
26. Alfred M. Boll, Deputy Director, Office of International Migration, Bureau for Population, Refugees and Migration, U.S. Department of State, United States of America
27. Molly Groom, Chief, Refugee and Asylum Law Division, Office of Chief Counsel, US Citizenship and Immigration Services (USCIS), United States of America
28. Oliver Bush, Secretaría Técnica Conferencia Regional sobre Migración

Non-Governmental interviewees

1. Flavio Lauria, Secretario General. Fundación Comisión Católica Argentina de Migraciones (FCCAM), Conferencia Episcopal, Argentina (Non-Government)
2. Janet Dench, Canadian Council for Refugees, Canada (Non-Government)
3. Jessie Thomson, Director, Humanitarian Assistance and Emergency Team, CARE Canada, Canada (Non-Government)
4. Wooldy Edson Luidor, Pontificia Universidad Javeriana, Colombia (Non-Government)
5. Enrique Torrella Raymond, Coordinador de País-Panamá, Norwegian Refugee Council (NRC), Panama (Non-Government)
6. Gabriela Cortina, Coordinadora General, Servicio Ecueménico para la Dignidad Humana (SEDHU), Uruguay (Non-Government)
7. Ruth Ellen Wasem, Kluge Staff Fellow, Library of Congress Office of Scholarly Programs, United States of America (Non-Government)

Anonymous interviewees

- AA (Non-Government)
 BB (Non-Government)
 CC (Non-Government)
 DD (Non-Government)
 EE (Non-Government) – by exchange of emails
 FF (Non-Government) – by exchange of emails

All interviews conducted by telephone or remote means unless otherwise specified



APPENDIX B:

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APPENDIX C:

Tables of selected national and international provisions referred to in study (non-exhaustive)

1. Refugee law (not including human rights-based complementary protection provisions)

Scenario	Concept	Definition	Status	Source
International				
Qualification	Refugee	'[a 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...'	Variable, depending on domestic law of country, usually temporary	Convention relating to the Status of Refugees (1951 and 1967 Protocol), Article 1A(2)
		'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'.	Variable, depending on domestic law of country, usually temporary	Cartagena Declaration on Refugees (1984), Conclusion III
Cuba				
Entry and stay	Refugee	'...those aliens and persons lacking citizenship whose entry to the national territory is authorised due to leaving their country owing to social or warlike calamity, due to cataclysm or other phenomena of nature and who will remain temporarily in Cuba, until normal conditions are re-established in their country of origin'	Temporary residence	Decree No. 26 (1978), Article 80
Panama				
Entry, stay and non-return (mass influx)	Temporary Humanitarian Protection	'a mass influx of persons illegally or irregularly entering the country in search of protection'	Temporary humanitarian protection status (temporary admission and non-refoulement), 2 months (renewable)	Decreto Ejecutivo No. 23 (1998), Title II, Chapter I
Venezuela				
Entry, stay and non-return (mass influx)	Temporary Protection	'groups of persons in need of protection that are fleeing from the same country, making it difficult to immediately determine the reasons that caused their movement', particularly: 'persons who wish to claim asylum as refugees in Venezuela', or 'persons that use the national territory as a transit point to enter again the territory from which they came' or 'persons that wish to remain temporarily in Venezuelan territory and who do not wish to claim asylum as refugees'.	Temporary protection status (admission and non-return), 90 days (renewable)	Ley Orgánica sobre Refugiados o Refugiadas y Asilados o Asiladas (2001), Article 32; Decreto No. 2491 (2003), Articles 21-23

Scenario	Concept	Definition	Status	Source
Peru				
Entry, stay and non-return (mass influx)	Temporary Protection	'mass influx in an illegal or irregular manner by persons seeking protection'	Temporary protection status (admission and non-return)	Ley No. 27891 (2002), Article 35-36; Reglamento (2002), Articles 35-39
Costa Rica				
Unspecified (mass influx)	Temporary Protection	'mass influx, or imminent risk of mass influx, to the country by persons needing international protection'	Unspecified	Decreto No. 36831-G (2011), Article 145
Bolivia				
Unspecified (mass influx)	Temporary Protection	'mass influx, or imminent risk of mass influx, to the country by persons needing international protection'	Unspecified	Ley No. 251 (2012), Article 31
USA (1965 – 1980 only)				
Refugee resettlement	Refugee	'persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode'	–	1952 Immigration and Nationality Act (1964 ed., Supp. V), section 203(a)(7)(B)
Canada				
Refugee resettlement	Country of Asylum Class	'seriously and personally affected by civil war, armed conflict or massive violation of human rights'	–	Immigration and Refugee Protection Regulations (2002), Regulation 147

2. Migration law

Scenario	Concept	Definition	Status	Source
Canada				
Any	Special Measures	Unspecified	-	Ministerial discretion, expressed in CIC Operational Bulletins
USA				
Any	Temporary Relief Measures	Unspecified	-	Official discretion, expressed in USCIS announcements
Ecuador				
One-off regularisation (Haiti earthquake)	Regularisation	Haitian nationals who entered Ecuador by 31 January 2010	Lawful visitor (non-immigrant), 5 years	Decreto No. 248 (2010)
Venezuela				
One-off regularisation (Haiti earthquake)	Regularisation	Haitian nationals in who entered Venezuela by 12 January 2010 and living irregularly in country	Social temporary resident	Official discretion, internal directives
Costa Rica				
One-off regularisation (Hurricane Mitch)	Regularisation	Central American nationals who 'currently reside [irregularly] in the country and entered before 9 November 1998'	Temporary residence, 1 and then 2 years (renewable)	Decreto No. 27457-G-RE (1999)
Nicaragua				
One-off regularisation (Hurricane Mitch)	Regularisation	Central American nationals who entered the country before 15 November 1998	Temporary residence	Decreto No. 94-98 (1998)
Panama				
One-off Regularisation (Hurricane Mitch)	Regularisation	Nicaraguan nationals living irregularly in the country and who entered before 31 December 1994	Temporary residence, one year (after which apply for permanent residence)	Decreto No. 34 (1999)
USA				
One-off regularisation (various natural disasters)	Temporary Protected Status	'(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, [and] (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;...' person in USA before specified cut-off date	Temporary protected status (non-return), variable durations usually 6-12 months (renewable)	Immigration and Nationality Act (2002), section 244
Canada				
Removals	Temporary Stay of Removals	'if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of ... (b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or (c) any situation that is temporary and generalized.'	-	Immigration and Refugee Protection Regulations (2002), Regulation 230
El Salvador				
Any	Discretionary Power	'interpret and resolve by analogy, or founded in consideration of good sense and natural reasons, cases that are expressly contemplated in the present Law'	-	Decreto No. 2772 (1958, reformed 1993), Article 74

Scenario	Concept	Definition	Status	Source
Guatemala				
Any	Discretionary Power	resolve 'unforeseen cases'	–	Ministerio de Gobernación, Acuerdo Gubernativo No. 529-99 (1999), Article 108.
Chile				
Travel, entry or stay	Discretionary Power	residence of persons is 'useful or advantageous, or their activities are of interest for the country'	Temporary residence	Decreto No. 597 (1984), Articles 49-50
Canada				
Travel, entry or stay	Discretionary Power	aliens who are 'inadmissible or [do] not meet the requirements' of the regular migration rules where they are 'of the opinion that it is justified in the circumstances'	Temporary residence	Immigration and Refugee Protection Act (2002), section 24
Travel, entry or stay	Public Policy Class	on the basis of 'public policy considerations'	Temporary residence	Immigration and Refugee Protection Act (2002), section 25.2
Honduras				
Entry	Entry Without a Visa	'humanitarian motives'	–	Reglamento de la Ley de Migración y Extranjería (2004), Article 110(3)
Stay	Special Residence Permit	'humanitarian reasons'	Temporary residence, up to 5 years (renewable)	Decreto No. 208-2003 (2004), Article 39(13).
Canada				
Any	–	'justified by humanitarian and compassionate considerations relating to the foreign national', understood as implying a test of 'unusual and undeserved or disproportionate hardship' if denied	Temporary or permanent residence, or exemption from any applicable criteria of migration law	Immigration and Refugee Protection Act (2002), section 25(1) and section 25.1.
Uruguay				
Entry	Entry Without a Visa	'persons who do not meet the requirements established in the present law, and its regulations, when exceptional reasons exist of a humanitarian character'	–	Ley No. 18250 (2008), Article 44
Jamaica				
Stay	-	'humanitarian grounds'	Exceptional Leave to Remain, 3 years (renewable for same or indefinitely)	Refugee Policy (2009), Article 12(a)(iii) and Article 13(f)
Brazil				
Travel, entry or stay	Special Situations and Unforeseen Cases	'humanitarian reasons'	Temporary residence, 5 years	Conselho Nacional de Imigração (2006), Resolução Recomendad No. 08, Article 1, and first paragraph
Canada				
Travel, entry or stay	Persons in Need of Protection	'persons in need of protection'	Temporary residence	Immigration and Refugee Protection Act (2002), section 97(2)
Costa Rica				
Entry or stay (latter only for 'reasons of humanity')	Special Migratory Category	'humanitarian reason', understood as a '[c] ircumstance in which a foreign national with a high degree of vulnerability finds herself to the detriment of her condition as a human person' (for stay, more closely defined as 'a special situation of vulnerability derived from her age, gender, disability, among other conditions, that makes regularising her migratory situation necessary to attend to that situation')	Temporary stay, 1 year (renewable)	Ley No. 8764 (2009), Articles 93-96; Decreto No. 37112-G (2012), Articles 2, 135-136

Scenario	Concept	Definition	Status	Source
Nicaragua				
Stay	Extension	'humanitarian reasons'	-	Decreto No. 31-2012 (2012), Article 50
Travel, entry or stay?	Humanitarian Visa	applies 'in conformity with international human rights instruments' to those persons who 'suffer violations of their human rights and victims of people-trafficking, in particular women and children'	Temporary residence, 1 year (renewable)	Ley No. 761 (2011), Article 220; Decreto No. 31-2012 (2012), Articles 6(l), 61
Bolivia				
Stay	Temporary Humanitarian Stay	applies to persons who 'for reasons of force majeure, beyond their control and duly justified cannot comply with the requirements for temporary residence established [in migration law]', understood as '1. Need for international protection sanctified by the principle of non-return; [or] 2. Victim of trafficking and smuggling of persons or other modes of exploitation; [or] 3. Accompanying a sick person that requires medical treatment	Temporary humanitarian residence, 1 year	Ley No. 370 (2013), Articles 13(II)(e), 30(4)
Travel or entry?	Humanitarian Visa	'humanitarian reasons', understood as '1. Need for international protection sanctified by the principle of non-return; [or] 2. Victim of trafficking and smuggling of persons or other modes of exploitation; [or] 3. Accompanying a sick person that requires medical treatment'	-	Ley No. 370 (2013), Articles 9(I)(d), 21(I)(6)
Argentina				
Entry	Entry Without A Visa	'exceptional reasons of a humanitarian character'	-	Ley No. 25871 (2003), Article 34
Entry or stay	Stay for Humanitarian Reasons (Trans-Border Displacement)	'persons who, despite not requiring international protection, temporarily cannot return to their countries of origin by reason of the prevailing humanitarian conditions or due to the consequences generated by natural or man-made environmental disasters'	Transitory residence, 6 months (renewable)	See Ley No. 25871 (2003), Article 24(h); Reglamentación de la Ley de Migraciones (2010), Article 24(h)
Entry or stay	Stay for Humanitarian Reasons (Displacement Abroad)	'humanitarian reasons', for which the following situations are to be 'taken especially into account', implying equally that the list is not exhaustive: '1. Persons needing international protection that, although not refugees or asylees in the terms of the applicable legislation, are protected by the Principle of Non-Return [sic.] and cannot regularize their migratory situation through the other criteria established in [migration law]. 2. Persons whom it is presumed likely that, if they were obliged to return to their country of origin, would be subjected to violations of human rights recognized in international instruments of constitutional status. 3. Persons that have been victims of trafficking or other modes of slave exploitation and/or victims of the illicit smuggling of migrants. 4. Persons that invoke health reasons that imply a risk of death if they were obliged to return to their country of origin for lack of medical treatment. 5. Stateless persons and refugees that have lived in the country for a period greater than three years and had their condition ceased.'	Temporary residence, 2 years (renewable)	Ley No. 25871 (2003), Article 23(m); Reglamentación de la Ley de Migraciones (2010), Article 23(m)
Panama				
Stay	Stay for Humanitarian Reasons	'exceptional humanitarian reasons', among which the following need evaluation: '1. Proved to be suffering a disease or disability that requires medical attention and makes her return to her country of origin or residence impossible;	Temporary residence, up to 6 years	Decreto Ley No. 3 (2008), Article 18; Decreto No. 320 (2008), Articles 171-174

Scenario	Concept	Definition	Status	Source
		2. Proved to suffer from a permanent serious disability; 3. Being more than 85 years old, demonstrates that cannot care for herself or is in a state of abandonment; 4. Finds herself in conditions of obvious indigence (extreme poverty) and has spent more than five (5) years in the national territory at the moment when [regulations] enter into force; 5. Being a minor who suffers some degree of disability, in finds [sic] undocumented or in a vulnerable situation.'		
Mexico				
Entry and stay	Entry for Humanitarian cause	a person '... who due to a risk to her own health or life, or due to her situation of vulnerability cannot be returned to her country of origin, or cannot continue with her journey...'	Stay as a visitor for humanitarian reasons	Ley de Migración (2011, reformed 2013), Article 37(III)(e) and Article 42; Reglamento de la Ley de Migración (2012), Article 63(III)
Stay	Stay for Humanitarian Reasons	'humanitarian reasons' defined as certain specified classes of person, including: victims or witnesses of crimes committed in Mexico; unaccompanied alien children; and asylum-seekers	Stay as a visitor for humanitarian reasons	Ley de Migración (2011, reformed 2013), Article 52
Stay	Stay for Humanitarian Cause	'humanitarian cause' defined in terms of: needing to assist a seriously-ill family member in Mexico; recovering the body of a family member or authorising medical attention to a family member who is in the custody of the Mexican State; or when 'a risk to the person's own health or life exists and requires them to remain in the national territory'	Stay as a visitor for humanitarian reasons	Reglamento de la Ley de Migración (2012), Articles 137 and 141
Travel	Humanitarian Visa	'humanitarian reasons', understood as meaning that the person 'finds herself in a situation of danger to her life or integrity owing to violence or a duly accredited natural disaster' or 'is victim of a natural catastrophe'	–	Ley de Migración (2011, reformed 2013), Articles 41, 116; Lineamientos Generales (2014), eighteenth general provision, procedure 9

DISASTERS
CLIMATE CHANGE AND
DISPLACEMENT



EVIDENCE FOR ACTION

This is a multi-partner project funded by the European Commission (EC) whose overall aim is to address a legal gap regarding cross-border displacement in the context of disasters. The project brings together the expertise of three distinct partners (UNHCR, NRC/IDMC and the Nansen Initiative) seeking to:

- 1 › **increase the understanding** of States and relevant actors in the international community about displacement related to disasters and climate change;
- 2 › **equip them to plan for and manage** internal relocations of populations in a protection sensitive manner; and
- 3 › **provide States and other relevant actors tools and guidance** to protect persons who cross international borders owing to disasters, including those linked to climate change.

THE
NANSEN
INITIATIVE

DISASTER-INDUCED CROSS-BORDER DISPLACEMENT

Nansen Initiative Secretariat

International Environment House 2
7-9, Chemin de Balexert, 1219 Chatelaine, Geneva, Switzerland
Phone: +41 22 917 8205
info@nanseninitiative.org
www.nanseninitiative.org