Given the diversity in human mobility—with respect to the level of compulsion, geography, temporality, and underlying structural and other factors—and associated assistance and protection needs, the session posed several questions on the role international law plays, and should play, with respect to:

1. Admission, rights, and solutions for cross-border migration and displacement associated with climate change.
2. The prevention of arbitrary displacement and dignified and rights respective solutions when displacement associated with climate change occurs.
3. Opportunities for people to stay in their homes, and in their countries, with dignity.

## Locating International Law on Human Mobility in the Context of Climate Change

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*By Walter Kälin**

What has international law to say about forced displacement, predominantly voluntary migration, and other forms of human mobility occurring in the context of climate change and its adverse impacts? Let me make four points:

First, this issue has only recently made its way onto the international agenda. States parties to the UN Framework Convention on Climate Change (UNFCCC)[1] only recognized "climate change induced displacement, migration and planned relocation" as challenges to adapt to climate change when adopting the Cancun Adaptation Framework in 2010.[2] Not much happened after that at the global level. The breakthrough came in 2015. In March, states adopted the Sendai Framework for Disaster Risk Reduction 2015–2030,[3] which includes several provisions on disaster-related displacement.[4] In October, 109 states endorsed the Nansen Initiative Protection Agenda,[5] which presents a series of tools to manage and reduce displacement risks and to protect those who are displaced. COP21 held in Paris in December 2015 provided for the establishment of the Task Force on Displacement under the Warsaw International Mechanism for Loss and Damage (WIM)[6] to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change. 2018 was another important year. In December, the recommendations of the WIM Task Force on Displacement were unanimously endorsed by COP24.[7] During the same month, the UN adopted the Global Compact on

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[1] UN Framework Convention on Climate Change, *adopted* May 9, 1992, *entered into force* Mar. 21, 1993, 1771 UNTS 107 (UNFCCC).

[2] Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Longterm Cooperative Action Under the Convention, UN Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

[3] Sendai Framework for Disaster Risk Reduction 2015–2030; GA Res. 69/283, Annex II (June 3, 2015).

[4] Sendai Framework, *supra* note 3, para. 28(d).

[5] The Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, Vol. I (2015).

[6] Decision 1/CP.21, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

[7] COP24, Decision 10/CP.24, Report of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change, Annex, UN Doc. FCCC/CP/2018/10/Add.1 (Dec. 15, 2018).

Migration (GCM)[8] containing detailed commitments and recommendations relevant to preventing and addressing climate change-related displacement. Since then, climate change, disaster risk reduction, and migration have become the three workstreams where climate change-related forced displacement and voluntary migration are discussed.

Second, is this just another example of the fragmentation of international law? On the negative side, the parallel workstreams explain why it has not been possible—and will be very difficult—to reach consensus on terminology. As can be expected, they conceptualize the issue from the perspective of their mandates and subject matter. The decision adopting the Paris Agreement (para. 50) and the recommendations of the Task Force on Displacement (para. 1(g)(ii)) talk about displacement related to or occurring in the context of climate change. This conceptualization is problematic insofar as it excludes displacement related to disasters triggered by weather events not linked to global warming or by geophysical hazards and thus excludes categories of displaced persons who might also be in need of protection abroad. The Sendai Framework and the Nansen Initiative Protection Agenda are broader. They conceptualize disaster displacement as a form of human mobility that occurs when people are exposed to a natural or man-made hazard and are too vulnerable to withstand its impacts and cope with its effects. The Global Compact on Migration brings the two approaches together and covers migration resulting from disasters, climate change, as well as environmental degradation (para. 18(h)).

Despite these conceptual differences, there is a higher degree of coherence between these documents than one could expect. They all recognize the multicausality of human mobility in the context of climate change, moving away from the implicit assumption in the term "climate refugee" that there is a direct causal link between global warming and displacement. Attempts to cross-reference concepts also exist. The GCM imports the notion of climate change adaptation into migration policy by recommending that affected persons be granted admission temporarily while adaptation in the country of origin is not possible, and permanently when, as for instance in the case of low-lying atoll islands, adaptation is no longer possible (para. 21(g)–(h)). On the other hand, the Task Force on Displacement uses the GCM's concept of orderly, safe, and regular migration. Such cross-fertilization of concepts has an important potential to create coherence across policy-silos.

Third, all these documents are legally non-binding and their implementation remains limited despite some good examples. A baseline study prepared on the occasion of the first International Migration Review Forum (IMRF)[9] shows that the availability and use of regular pathways for people from countries and regions with high exposure to adverse effects of climate change and low adaptive capacity is not meeting current and future demands. A clear norm that persons displaced in the context of disasters and adverse effects of climate change have a right to admission and stay in other countries does neither exist in international soft law nor in any treaty applicable at the global level.

Finally, despite these weaknesses, relevant law protecting people forced to move across borders in the context of disasters and adverse effects of climate change exists at domestic and regional levels. Many countries provide for measures such as humanitarian visa or temporary protection to admit or not return people displaced across borders in disaster and climate change contexts. While migration authorities have discretion when deciding to use such tools for admission and stay, countries in Central and South America, where such legislation is frequently used, have

[8] GA Res. 73/195, Global Compact for Safe, Orderly and Regular Migration (Dec. 19, 2018); GA Res. 72/182, Annex (Jan. 19, 2018).

[9] Daria Mokhnacheva, *Implementing the Commitments Related to Addressing Human Mobility in the Context of Disasters, Climate Change and Environmental Degradation*, Platform on Disaster Displacement (2022).

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adopted guides and guidelines to harmonize their approaches.[10] Domestic immigration quotas for people from climate vulnerable Pacific island states, although limited and not specifically created for this purpose, provide migration pathways to Australia and New Zealand. There is growing recognition that bilateral or regional agreements on the free movement of persons have a huge potential to provide people anticipating or affected by adverse impacts of climate change and disasters with regular migration pathways. Such agreements serve economic purposes, but in some parts of the world, for instance in Africa's Economic Community of West African States (ECOWAS) region, they have allowed affected people to find refuge in other countries, access employment there, and thus to some degree help themselves. In 2017, Trinidad and Tobago applied the Caribbean Community (CARICOM) free movement agreements to assist Dominicans affected by Hurricane Maria. Similar efforts were made by Antigua, Grenada, St. Lucia, and St. Vincent within the Organization of Eastern Caribbean States' (OECS) free movement regime. In the Horn of Africa, IGAD went a step further and decided to formalize the availability of free movement arrangements for disaster and climate change scenarios when it recently finalized its Protocol on Free Movement of Persons. Its Article 16 explicitly provides that people who are moving in anticipation of, or during, or in the aftermath of disasters can enter the territory of another member state and stay there. However, while multiple tools to admit and protect people displaced across borders exist, the glass is not only half full, it is also half empty. Whether states use tools such as humanitarian visa, temporary protection, or immigration quota, or are ready to adapt free movement agreements to today's realities of climate change, is hardly predictable and still not widespread. And other states refrain from doing so

This short overview allows us to draw the following conclusions. As David Cantor in his study on domestic law and practices in the Americas remarked, "grand proposals for new global treaties on international protection or environmental law to address the legal implications of [climate change-related] mobility are less likely to gain traction with States . . . than efforts to develop the existing approach in international immigration law at the regional or subregional levels."[11] This requires us to look at international law not as something essentially distinct from domestic law but rather as the top floor of a multistory building, with domestic and subregional and regional law as the first, second, and third floor,[12] and to build new norms on existing state practice rather than opt for top-down approaches. Such bottom-up approaches to international law making exist in other areas, too, and are indeed the manner in which most customary international law develops. At the same time, hoping that it is sufficient to expect domestic laws and practices or (sub)regional agreements to grow into a coherent whole would be naïve. Ambitions of states differ widely from one region or another. And competing policy objectives may override the willingness to create a coherent and well-coordinated legal regime for the protection of persons forced to move across borders in anticipation of, during, or in the aftermath of disasters and climate-related events. In other words: Our task as experts of international law is to contribute to finding the proper balance between bottom-up and top-down approaches to enhance the protection of such persons.

[10] Regional Conference on Migration, Protection for Persons Moving Across Borders in the Context of Disasters. A Guide to Effective Practices for RCM Member Countries (Nansen Initiative, November 2016); Conferencia Suramericana sobre Migraciones, Lineamientos regionales en materia de protección y asistencia a personas desplazadas a través de fronteras y migrantes en países afectados por desastres de origen natural (CSM 2018).

[11] David J. Cantor, *Environment, Mobility, and International Law: A New Approach in the Americas*, 21 CHI. J. INT'L L. 263, 322 (2021).

[12] *See* Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. UN L. 261, 300 (2003).

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