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**FROM THE NANSEN INITIATIVE TO THE
PLATFORM ON DISASTER DISPLACEMENT:
SHAPING INTERNATIONAL APPROACHES TO
CLIMATE CHANGE, DISASTERS AND
DISPLACEMENT**

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JANE McADAM*

‘Would you tell me, please, which way I ought to walk from here?’
‘That depends a good deal on where you want to get to,’ said the Cat.
‘I don’t much care where –’ said Alice.
‘Then it doesn’t matter which way you walk,’ said the Cat.
‘– so long as I get *somewhere*,’ Alice added as an explanation.
‘Oh, you’re sure to do that,’ said the Cat, ‘if you only walk long enough.’

Lewis Carroll, *Alice in Wonderland*¹

I INTRODUCTION

In the past three years, there has been significant progress on both the conceptual and practical dimensions of displacement related to climate change and disasters. In October 2015, 109 states endorsed the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, providing a toolbox of concrete policy options and proposing a series of recommendations for future work.² Important language on human mobility was incorporated in the *Sendai Framework for Disaster Risk Reduction 2015–2030*³

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1 Lewis Carroll, *Alice’s Adventures in Wonderland* (D Appleton and Co, 1866) 89–90.

2 The Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (Vol 1, December 2015) (*‘Protection Agenda Vol 1’*) <<https://www.nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>>; The Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (Vol 2, December 2015) <<https://www.nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf>>.

3 *Sendai Framework for Disaster Risk Reduction 2015–2030*, GA Res 69/283, UN GAOR, 69th sess, 92nd plen mtg, Agenda Item 19(c), UN Doc A/RES/69/283 (23 June 2015) (*‘Sendai Framework’*).

and the 2015 Paris Outcome on climate change,⁴ and the Nansen Initiative on Disaster-Induced Cross-Border Displacement (‘Nansen Initiative’) drafted a guide for member countries of the Regional Conference on Migration (‘RCM’) to create more harmonised responses to disaster-related movement.⁵ The UN Secretary-General’s report for the 19 September 2016 high-level meeting on large movements of refugees and migrants underscored the displacement risks posed by the impacts of disasters and climate change, noting the need for strengthened international cooperation and protection, and more attention to root causes.⁶ Meanwhile, a series of court cases in New Zealand has begun to develop the jurisprudence on the scope of refugee law and human rights law to assist people who do not want to return home because of the long-term impacts of climate change, such as sea-level rise.⁷

This article is the first to provide an account and analysis of those developments. In doing so, it serves as a sequel to an article I published in 2014, entitled ‘Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013’, which reviewed the various global attempts to develop a normative framework relating to climate change and migration from late 2010 to mid-2013.⁸ That piece traced the ‘catalytic effect’ of paragraph 14(f) of the 2010 *Cancun Adaptation Framework* (adopted in December 2010), through to the concerted, but ultimately unsuccessful, attempt in 2011 by the United Nations High Commissioner for Refugees (‘UNHCR’) to get states to agree to the formulation of a ‘global guiding framework’ on displacement relating to climate change and natural

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- 4 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015*, UNFCCC Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) (‘Adoption of the Paris Agreement’).
- 5 *Protection for Persons Moving across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries* (2016) (‘Guide to Effective Practices’). The RCM Member Countries are Belize, Canada, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States. It was tabled by Costa Rica at the June 2016 meeting of the Regional Consultation Group on Migration in Honduras.
- 6 UN Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, 70th sess, Agenda Items 55 and 116, UN Doc A/70/59 (9 May 2016) [3], [18], [27], [47], [93], [119].
- 7 *AF (Tuvalu)* [2015] NZIPT 800859; *AD (Tuvalu)* [2014] NZIPT 501370-371; *AC (Tuvalu)* [2014] NZIPT 800517-520; *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125; *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173; *AF (Kiribati)* [2013] NZIPT 800413; *Refugee Appeal No 72719/2001* (Unreported, Refugee Status Appeals Authority, Member Plunkett, 17 September 2001); *Refugee Appeal No 72313/2000* (Unreported, Refugee Status Appeals Authority, Member Parker, 19 October 2000); *Refugee Appeal No 72314/2000* (Unreported, Refugee Status Appeals Authority, Member Parker, 19 October 2000); *Refugee Appeal No 72315/2000* (Unreported, Refugee Status Appeals Authority, Member Parker, 19 October 2000); *Refugee Appeal No 72316/2000* (Unreported, Refugee Status Appeals Authority, Member Parker, 19 October 2000); *Refugee Appeal No 72179/2000* (Unreported, Refugee Status Appeals Authority, Member Millar, 31 August 2000); *Refugee Appeal No 72189/2000* (Unreported, Refugee Status Appeals Authority, Member Joe, 17 August 2000); *Refugee Appeal No 72185/2000* (Unreported, Refugee Status Appeals Authority, Member Joe, 10 August 2000); *Refugee Appeal No 72186/2000* (Unreported, Refugee Status Appeals Authority, Member Joe, 10 August 2000).
- 8 Jane McAdam, ‘Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013’ (2014) 29(2) *Refugee* 11.

disasters.⁹ It also set forth some tentative thoughts on the then nascent Nansen Initiative, which was created in late 2012.

The present article examines the accomplishments of the Nansen Initiative, which formally concluded at the end of 2015, and the strategic priorities of its successor, the Platform on Disaster Displacement, which commenced work on 1 July 2016. It also considers the potential of related global processes to reflect and develop norms and effective practices to mitigate displacement, as well as some important parallel jurisprudential developments over the past three years.

Whereas the first half of the article focuses on emergent global developments, the second half reflects on the role of international law in these processes – both now and into the future. International law recognises only a small category of forced migrants as people whom other countries have an obligation to protect: ‘refugees’, ‘stateless persons’, and those eligible for complementary protection (under international human rights law). The article reviews the capacity of existing legal frameworks to address the needs of people displaced in the context of disasters and climate change, and suggests ways in which international law might be progressively developed in this area.

Methodologically, the article draws heavily on direct quotes from states and other key actors to capture the nuance of discussions and illuminate perspectives that have rarely been articulated publicly. Similarly, it replicates language from relevant international texts and judicial decisions to show how approaches to climate change and disaster-related mobility are evolving in more formal contexts. In this way, the article helps to document how the phenomenon is being conceptualised and internalised by relevant stakeholders. The article also draws on the author’s direct experiences as a member of the Consultative Committee of the Nansen Initiative and her involvement in related international processes.

II WHERE WE CAME FROM

The creation of the Nansen Initiative in October 2012 marked the most significant institutional development on climate change, disasters and human mobility to that point. As a state-led, bottom-up consultative process, it sought ‘to build consensus on a protection agenda addressing the needs of people displaced across borders by natural disasters in the context of disasters and the effects of climate change’.¹⁰ Through a series of seven sub-regional consultations and civil society meetings conducted between 2013 and 2015,¹¹ it developed a nuanced understanding about the challenges of disasters and climate change in

9 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010: Addendum: Part Two: Action taken by the Conference of the Parties at Its Sixteenth Session*, FCCC Dec 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 14(f) (‘Cancun Adaptation Framework’).

10 The Nansen Initiative, ‘Towards a Protection Agenda for People Displaced across Borders in the Context of Disasters and the Effects of Climate Change’ (Information Note, January 2015) 1 <https://www2.nanseninitiative.org/wp-content/uploads/2015/03/NANSEN_Leaflet_english_Jan2015.pdf>.

11 For details, see The Nansen Initiative, *The Approach* <<https://nanseninitiative.org/secretariat/the-approach-2/>>.

different parts of the world, identifying community needs and effective practices. It focused on the various phases of displacement – preparedness prior to displacement, protection and assistance during displacement, and solutions following displacement – and drew together a variety of otherwise disparate policy areas to generate better understanding of the issues and a toolbox of measures to address them.

The Nansen Initiative was a direct response to a concerted effort by UNHCR during 2011 to encourage states to work towards the formulation of a ‘global guiding framework’ on displacement relating to climate change and natural disasters.¹² This was given impetus by a number of developments in 2010–11,¹³ including the adoption of paragraph 14(f) of the *Cancun Adaptation Framework*, pursuant to which states were invited to ‘enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels’.¹⁴

At a landmark ministerial meeting to commemorate the 60th anniversary of the 1951 Refugee Convention and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness,¹⁵ UNHCR sought to mobilise states by asking:

Would it be useful for States, UNHCR and other relevant actors to develop a global guiding framework or instrument to apply to situations of displacement across borders other than those covered by the 1951 Convention? If so, should this be limited to displacement relating to climate change and natural disasters, or could it be broader? Could temporary or interim protection arrangements be useful? If so, in which situations?¹⁶

This was rebuffed in no uncertain terms, just as a proposal in June 2011 for UNHCR to become the lead agency for coordinating protection responses in situations of natural disaster had been resoundingly rejected, sparking some of the most intense reactions by states ever witnessed in that forum.¹⁷ There was a strong sense that if any work was to be done on the topic, it should be led by states rather than an international organisation. According to Professor Walter Kälin, who was to become the Envoy of the Chairmanship of the Nansen Initiative, this stemmed from states’ deliberate unwillingness to engage with the issue ‘whether from reasons of sovereignty, competing priorities or the lead role of UNHCR in the process’.¹⁸ States did not want to be ‘pushed’ into action either

12 *Intergovernmental Event at the Ministerial Level of Member States of the United Nations on the Occasion of the 60th Anniversary of the 1951 Convention Relating to the Status of Refugees and the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness (7–8 December 2011): Background Note for the Roundtables*, UN Doc HCR/MINCOMMS/2011/08 (18 November 2011) (*‘Background Note’*).

13 For a detailed analysis, see McAdam, ‘Creating New Norms’, above n 8, and the literature cited there.

14 *Cancun Adaptation Framework*, UN Doc FCCC/CP/2010/7/Add.1, para 14(f).

15 See Adrian Edwards, ‘Landmark UNHCR Conference Opens with Appeal for the World’s Forcibly Displaced, Stateless’ (7 December 2011) UNHCR <<http://www.unhcr.org/news/latest/2011/12/4edf2c946/landmark-unhcr-conference-opens-appeal-worlds-forcibly-displaced-stateless.html>>.

16 *Background Note*, UN Doc HCR/MINCOMMS/2011/08, 4 [7].

17 For details, see McAdam, ‘Creating New Norms’, above n 7, 13–14.

18 Walter Kälin, ‘From the Nansen Principles to the Nansen Initiative’ (2012) 41 *Forced Migration Review* 48, 49.

by institutional actors or through an experts-based approach ‘introduced through the back door’.¹⁹

Only five states indicated their willingness to support UNHCR’s work on the topic. Norway and Switzerland made a joint pledge, endorsed by Costa Rica,²⁰ Germany and Mexico, which read:

A more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters, including where climate change plays a role. We therefore pledge to cooperate with interested states, UNHCR and other relevant actors with the aim of obtaining a better understanding of such cross border movements at relevant regional and sub-regional levels, identifying best practices and developing consensus on how best to assist and protect the affected people.²¹

Detecting a ‘very general ... readiness to engage in a soft dialogue and to collect and share experience and practices in handling [climate change-related] displacement’,²² Norway and Switzerland decided to launch an intergovernmental process that could take into account ‘the strong sensitivities of states towards the topic’.²³ The Nansen Initiative was thus conceived.

III WHERE WE GOT TO

The Nansen Initiative developed an ambitious but strategically focused work plan, with a clear sense of direction about its outputs and the processes it could seek to influence along the way. It was quickly recognised that a scattergun approach would dilute resources and ultimately be less effective than a focused approach that sought to shape key global initiatives.

Though a state-led process in which ‘governments were consulted ... and their views were incorporated each step of the way’,²⁴ its effectiveness hinged in large part on the intellectual and diplomatic capabilities of the Envoy of the Chairmanship, Professor Walter Kälin. His personal leadership style of consultation and consensus-building helped to foster understanding and trust,

19 The Nansen Initiative, ‘A Protection Agenda for Disaster-Induced Cross-Border Displacement’ (Concept Note, 2 October 2012) 7.

20 Costa Rica pledged its support after the meeting, as in his closing remarks, the High Commissioner referred to only four states: António Guterres, *UNHCR Intergovernmental Meeting at Ministerial Level; Closing Remarks by the United Nations High Commissioner for Refugees* (8 December 2011) UNHCR <<http://www.unhcr.org/4ef094a89.html>>.

21 United Nations High Commissioner for Refugees, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons* (May 2012) 117; see also at 77 (Germany), 95 (Mexico), 100–01 (Norway).

22 The Nansen Initiative, ‘A Protection Agenda for Disaster-Induced Cross-Border Displacement’, above n 19, 2–3.

23 Ibid 8. For further background, see McAdam, ‘Creating New Norms’, above n 8; Walter Kälin, ‘The Nansen Initiative’s Protection Agenda for People Displaced by Disasters across Borders’ in Flavia Zorzi Gustiniani et al (eds), *Human Rights in Times of Disaster: International Law Put to the Test* (forthcoming).

24 Elizabeth Ferris, ‘Climate Change, Migration and the Incredibly Complicated Task of Influencing Policy’ (Speech delivered at the Conference on Human Migration and the Environment: Futures, Politics, Invention, Durham University, 1 July 2015) 8.

while his clear sense of direction and purpose kept the discussions and outcomes on track.²⁵ As a highly skilled international lawyer, he was mindful of the importance of linguistic precision and the boundaries of normative protection, and as an experienced former senior UN office holder, he understood the proclivities and sensitivities of state actors as well. Supported by a small but dedicated and highly able secretariat, the team marshalled a vast body of existing literature, commissioned original research to fill knowledge gaps, and cultivated a shared sense of goodwill among academics, policymakers and other experts who readily peer reviewed and evaluated draft papers and reports.

The structure of the Initiative enabled input from a diversity of actors, and created a sense of investment in the process. The three-year timeframe created a sense of momentum and urgency, but also interest. There was a constructive focus on identifying effective practices and learning from each other's experiences, not just on pinpointing gaps and deficiencies. There was also emphasis placed on actions that could be taken by governments now, within their own domain, without the need for new international or institutional arrangements.

In terms of substantive achievements, the Nansen Initiative took a level-headed approach to the issue by avoiding alarmist or sensationalist accounts, though nonetheless making plain the real present and future risks that climate change and disasters pose to human settlements and mobility. While being mindful of language and framing (eg, rejecting the notion of climate change refugees and sinking island nations), the Nansen Initiative still drew attention to the large numbers of people already displaced each year by the impacts of disasters (set to worsen over time with climate change).²⁶ It highlighted the multi-causal nature of movement. It also noted that while most movement will take place within countries, there remains a significant protection gap (both legal and operational) for those who cross an international border. In recent decades, at least 50 states have 'received or refrained from returning people in the aftermath of disasters, in particular those caused by tropical storms, flooding, drought, tsunamis, and earthquakes',²⁷ yet practices and standards remain diffuse.

Significantly, the Nansen Initiative moved beyond just identifying the problems to suggesting concrete positive recommendations for action that can be taken now.²⁸ For instance, as a Bangladeshi official observed:

25 Elizabeth Ferris also says that 'both his strategic vision for the work and the high international esteem in which he is held' contributed to the Nansen Initiative's success: *Ibid.*

26 'Between 2008 and 2014 a total of 184.4 million people were displaced by sudden-onset disasters, an average of 26.4 million people newly displaced each year. Of these, an annual average of 22.5 million people was [sic] displaced by weather- and climate-related hazards. Others have to move because of the effects of sea level rise, desertification or environmental degradation': *Protection Agenda Vol 1*, above n 2, 6.

27 *Ibid.*

28 'The Nansen Initiative has precisely addressed some of these root causes in very practical and well-conceived ways': Comments by EU delegation in The Nansen Initiative, 'Global Consultation Conference Report: Geneva, 12–13 October 2015' (Report, December 2015) 110 ('*Global Consultation Conference Report*').

developing our institutional capacity and technology appear to be most crucial in addressing the primary causes of displacement. Of the many sectors, much visible and meaningful change can be brought in agriculture, water and sanitation just through making technology available.²⁹

The Greek delegate stated that:

we greatly appreciate elements and notions such as increased preparedness and solidarity, reducing vulnerability, building resilience, ensuring migration with dignity, planned relocation, reviewing development policies and generally finding lasting solutions.³⁰

In this way, the Nansen Initiative helped to shape and frame the debate in three separate but interrelated ways. First, it brought the issue back to the present, rather than leaving it as an issue to be dealt with in the future. Secondly, it emphasised that there are practical solutions, grounded in existing state practice, that can be implemented now, rather than looming intractable problems. Thirdly, it brought the issue back to the local, national and regional levels, rather than stuck in the quagmire of international policymaking (or not, as the case may be). According to Elizabeth Ferris, a member of the Consultative Committee, one of the Nansen Initiative's strengths was its focus on 'very concrete tools which can be used to help governments and others which are faced with the reality of cross-border movements occurring because of disasters, such as humanitarian visas, stays of deportation, bilateral or regional arrangements on free movement of persons, etc'.³¹ Specific, actionable items are more likely to have influence than '[g]eneral exhortations to "pay more attention to the issue"'.³²

This approach was a feature lauded by states at the presentation of the Nansen Initiative's *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* ('*Protection Agenda*') in October 2015.³³ This non-binding document, endorsed by 109 states, consolidated the outcomes from the regional consultations and put forward a number of priority areas and recommendations for future work. The UN Secretary-General has encouraged states to give 'favourable consideration' to incorporating its insights 'into national policies and practices'.³⁴

The Nansen Initiative was always envisaged as a short-term intervention to kick-start focused global discussions that were not tied to any one particular policy priority (eg, climate change, development, etc). As the multi-causal nature of mobility in the context of disasters and climate change was consistently reinforced by evidence gathered through the sub-regional consultations and related research, it became increasingly clear that it was essential that

29 Bangladesh in *ibid* 81.

30 Greece in *ibid* 119. The Austrian delegate highlighted that shifting 'from an exclusive humanitarian response to forced displacement to a development approach' was an important outcome: Austria in *ibid* 78.

31 Ferris, above n 24, 8.

32 *Ibid* 10.

33 According to the representative from Brazil, the *Protection Agenda*'s 'comprehensive, diverse and flexible approach ... is one of its remarkable strengths', with its policy toolkit and list of effective practices 'certainly as important as the *Agenda* itself': Brazil in *Global Consultation Conference Report*, above n 28, 82.

34 *In Safety and Dignity*, UN Doc A/70/59 [119].

engagement not become siloed, but instead range across the full spectrum of relevant areas. In turn, the Nansen Initiative could leverage existing processes by ‘framing and feeding’³⁵ its findings into related policy initiatives, thus building up a common language on and coordinated approach to disaster- and climate change-related mobility.³⁶ It also became a focal point for researchers and organisations working in the area – a hub that connected scholars, policymakers, practitioners and officials – and organically became a depository and ‘go to’ point for up-to-date information. It was highly successful both in mobilising the relevant actors and creating multi-sectoral networks, and in collating resources and knowledge.

A The Protection Agenda

The Protection Agenda outlines the normative gaps in addressing displacement, migration and planned relocation in the context of disasters and climate change, and suggests concrete steps that states can take at the national, regional and international levels to address them. It was the result of three years of detailed, rigorous and respectful consultations, evidence-gathering and discussions with a wide variety of stakeholders from government, community leaders, academia, international organisations, civil society groups and experts in five sub-regions of the world. It is a non-binding, non-standard-setting document which draws together effective practices from around the world, and sets out a series of recommendations and priority actions for further work. It has been described as a ‘pre-soft law initiative, which seeks to build political consensus and open the way to greater legal achievements’.³⁷

The Protection Agenda: (a) conceptualises a comprehensive approach to disaster displacement, focused primarily on protecting those displaced across international borders; (b) compiles effective practices that states and other actors can use to ensure more effective future responses to such displacement; and (c) highlights the need to link multiple policy and action areas, and to ensure better

35 Kälén, ‘The Nansen Initiative’s Protection Agenda for People Displaced by Disasters across Borders’, above n 23, pt 3.3.

36 Rather than duplicating other efforts, the Nansen Initiative saw its role as providing ‘further complement and support’ and ‘relevant evidence and examples of effective practices’ to processes such as the United Nations Framework Convention on Climate Change (‘UNFCCC’), the Sendai Framework, the UN’s 2030 Agenda for Sustainable Development, and the World Humanitarian Summit, rather than duplicating them: *Protection Agenda Vol 1*, above n 2, 7.

37 François Gemenne and Pauline Brücker, ‘From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration Can Learn from the Governance of Internal Displacement’ (2015) 27 *International Journal of Refugee Law* 245, 259. While there were some similarities with the procedure that resulted in the adoption of the Guiding Principles on Internal Displacement, the Nansen Initiative process was overall quite different. It was state-led, rather than expert-driven, and set out to identify legal and policy gaps, rather than compiling and particularising existing norms. Still, Gemenne and Brücker suggest that the Guiding Principles helped to legitimise a normative process involving ‘expert drafting, circulating, finalizing and mobilizing support’: at 260, quoting Roberta Cohen, ‘Lessons Learned from the Development of the Guiding Principles on Internal Displacement’ (Worker Paper, Crisis Migration Project, Institute for the Study of International Migration, October 2013) 13.

collaboration between them.³⁸ It also sets out three priority areas for further action to address existing gaps:

1. Collecting data and enhancing knowledge on cross-border disaster-displacement;
2. Enhancing the use of humanitarian protection measures for cross-border disaster-displaced persons, including mechanisms for lasting solutions, for instance by harmonizing approaches at (sub-)regional levels;
3. Strengthening the management of disaster displacement risk in the country of origin by:
 - A. Integrating human mobility within disaster risk reduction and climate change adaptation strategies, and other relevant development processes;
 - B. Facilitating migration with dignity as a potentially positive way to cope with the effects of natural hazards and climate change;
 - C. Improving the use of planned relocation as preventative or responsive measure to disaster risk and displacement;
 - D. Ensuring that the needs of IDPs [Internally Displaced Persons] displaced in disaster situations are specifically addressed by relevant laws and policies on disaster risk management or internal displacement.³⁹

Executing this program of action requires ‘*increased preparedness, solidarity and cooperation* by states, (sub-)regional organizations and the international community to prevent, avoid, and respond to disaster displacement and its causes’.⁴⁰ Streamlined leadership at the national level is needed to better coordinate a whole-of-government approach to planning and responses, which, in turn, must involve local authorities and affected communities. Regional coordination and planning is also key, and could include ‘Regional Consultative Processes (on migration), human rights mechanisms, disaster risk management centres, climate change adaptation strategies, as well as common markets and free movement of persons arrangements, among others’.⁴¹

At the international level, a wide range of actors from the humanitarian, development, human rights, migration, refugee, disaster risk reduction, climate change adaptation, and development sectors (among others) can provide operational, technical and capacity-building support, but better coordination and collaboration is needed.⁴²

At the global intergovernmental consultation that endorsed the Protection Agenda, states underscored the importance of collaboration and coordination across different policy areas and with other stakeholders (eg, government departments, international agencies, academic disciplines).⁴³ Brazil, for instance, noted that: ‘A strong sense of solidarity must drive our efforts to ensure that

38 *Protection Agenda Vol 1*, above n 2, 7.

39 *Ibid* 10.

40 *Ibid* 6 (emphasis in original).

41 *Ibid* 10.

42 *Ibid*.

43 See, eg, *Global Consultation Conference Report*, above n 28, 76:

Developing appropriate responses to multi-causal movements will require even closer collaboration, to ensure that policy, responses and action evolve in parallel. ... We must continue to work together toward coordinated, collaborative responses to the challenges involved.

persons displaced by increasingly more frequent natural hazards receive the protection they need'.⁴⁴ This requires adequate financing, technical cooperation and capacity building, and while national governments bear the primary responsibility to manage risk, 'developing countries should be able to rely on international cooperation to tackle this challenge'.⁴⁵ Lesotho similarly observed that '[n]ational authorities cannot always find solutions on their own'.⁴⁶ Germany emphasised the importance of '[r]egional and international mechanisms and solidarity' to assist those in need,⁴⁷ and Nigeria stated that 'regional or sub-regional cooperation is crucial in making the engagement of protecting displaced population across international borders more enduring'.⁴⁸

B Engaging with Other Processes

When Walter Kälin, the Envoy of the Chairmanship of the Nansen Initiative, presented the Protection Agenda in Geneva in October 2015, he issued a call to action:

Let's not leave books on bookshelves. It is time to act and turn theory into action to address cross-border disaster-displacement. We have a historic opportunity to use the endorsed Protection Agenda as a guide and ensure that the issue is included in the Paris agreement. We cannot miss it.⁴⁹

The past three years have seen a considerable development in knowledge about the impacts of climate change and disasters on human mobility, and a reflection of these findings in the framing, discussions and outcome documents of key international processes (such as the Sendai disaster risk reduction framework in 2015, the Paris climate change negotiations in 2015, and the World Humanitarian Summit in 2016). This was not accidental, but the result of a strategic effort on the part of the Nansen Initiative, international organisations and inter-agency groups, such as the Advisory Group on Climate Change and Human Mobility (comprised of a small number of academic, policy and operational actors, including UNHCR and the International Organization for Migration ('IOM')). The government of Nepal described the Nansen Initiative as 'one of the most effective forums to accelerate collaborative efforts among all the related stakeholders to tackle these issues'.⁵⁰

1 Sendai Framework for Disaster Risk Reduction

As a result of concerted efforts by Nansen Initiative Steering Group member states (particularly Bangladesh, Norway, the Philippines and Switzerland), the

44 Brazil in *ibid* 82.

45 *Ibid.* The Philippines also 'call[ed] on the international community to provide capacity-building support to vulnerable and receiving States as well as regional organizations such as ASEAN': at 167–8.

46 Lesotho in *ibid* 140.

47 Germany in *ibid* 117.

48 Nigeria in *ibid* 161.

49 The Nansen Initiative, 'More than 100 Governments Affirm Broad Support to Better Protect People Displaced across Borders by Disasters and the Effects of Climate Change' (Press Release, 14 October 2015).

50 Nepal in *Global Consultation Conference Report*, above n 28, 155. It also specifically notes the Nansen Initiative's work for the Paris climate change negotiations: at 154.

Sendai Framework contains important language on human mobility in the context of disasters.⁵¹ This is a 15-year, non-binding but highly authoritative agreement which succeeds the Hyogo Framework and aims to substantially reduce disaster risk and loss of lives, livelihoods, health and assets.

The issue of displacement was highly contentious and delayed the adoption of the final text.⁵² The *Sendai Framework* ultimately recognises that displacement is one of the most devastating consequences of disasters, and that disaster risk reduction requires ‘protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights’.⁵³ It also acknowledges that national and local authorities must ‘promote regular disaster preparedness, response and recovery exercises, including evacuation drills, training and the establishment of area-based support systems, with a view to ensuring rapid and effective response to disasters and related displacement, including access to safe shelter, essential food and non-food relief supplies, as appropriate to local needs’.⁵⁴ It highlights the need to develop ‘public policies, where applicable, aimed at addressing the issues of prevention ... of human settlements in disaster risk-prone zones’,⁵⁵ and calls for the promotion of ‘transboundary cooperation ... to build resilience and reduce disaster risk, including ... displacement risk’.⁵⁶

2 Paris Outcome

The outcome document of the Paris climate change negotiations, adopted in 2015, provides another interesting example. While some lamented the relative obscurity of the issue,⁵⁷ there was a general consensus that the result was a significant step forward, marking ‘a milestone in terms of global commitment to move from enhancing knowledge on climate-related displacement to taking action to avert, mitigate and address such displacement’.⁵⁸

The decision adopting the Paris Agreement (giving effect to the treaty) calls for the establishment of a task force, under the auspices of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change

51 Walter Kälin, ‘Sendai Framework: An Important Step Forward for People Displaced by Disasters’ on Brookings, *Up Front* (20 March 2015) <<http://www.brookings.edu/blogs/up-front/posts/2015/03/20-sendai-disasters-displaced-kalin>>.

52 Ibid.

53 *Sendai Framework*, UN Doc A/RES/69/283, para 19(c).

54 Ibid para 33(h).

55 Ibid para 27(k).

56 Ibid para 28(d).

57 See, eg, Alexander Betts, ‘Global Issues Don’t Live in Separate Boxes. Why No Mention in Paris of Refugees?’, *The Guardian* (online), 13 December 2015 <<http://www.theguardian.com/commentisfree/2015/dec/13/refugee-status-extended-people-displaced-climate-change>>.

58 Walter Kälin and Kelly Clements, ‘Thematic Session 2: Addressing “New” Root Causes: Urbanization, Food Insecurity, Water Scarcity, Natural Hazards and Climate Change’ (Co-Chairs’ Summary, High Commissioner’s Dialogue on Protection Challenges: Understanding and Addressing Root Causes of Displacement, 16–17 December 2015) 3 (emphasis altered). See also Sewell Chan, ‘Paris Accord Considers Climate Change as a Factor in Mass Migration’, *New York Times* (online), 12 December 2015 <http://www.nytimes.com/2015/12/13/world/europe/paris-accord-considers-climate-change-as-a-factor-in-mass-migration.html?_r=0>.

Impacts,⁵⁹ ‘to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change’.⁶⁰ It does not contain any detail about how the task force will operate, how its recommendations will be implemented, what weight they will carry, or how they will be financed.

Originally, there had been far greater ambitions for the treatment of the issue. From late 2014, developing states had pushed for the creation of a climate change displacement coordination facility to provide support for emergency relief, assist in providing organised migration and planned relocation, and undertake compensation measures.⁶¹ That this proposal was housed within the ‘loss and damage’ section was especially controversial since many states regarded the issue as relevant to ‘adaptation’ only.

Ultimately, the draft provisions on such a facility were omitted. Nevertheless, the establishment of the task force will help to transform the information-oriented agenda of Cancun into an action-oriented agenda, providing a mechanism within the UNFCCC process for coordinating actions on mobility with other relevant actors and creating ‘an opportunity to bring migration into the discussion and to feed into national plans’.⁶²

Part of the task force’s mandate is to ‘draw upon the work of and involve, as appropriate, existing bodies and expert groups under the Convention including the Adaptation Committee and the Least Developed Countries Expert Group, as

59 The 2012 Doha Decision 3/CP.18 acknowledged the need for ‘further work to advance the understanding of and expertise on loss and damage’, including ‘[h]ow impacts of climate change are affecting patterns of migration, displacement and human mobility’: United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Eighteenth Session, Held in Doha from 26 November to 8 December 2012*, Dec 3/CP.18, UN Doc FCCC/CP/2012/8/Add.1 (28 February 2013) para 7(a)(vi). Following on from that decision, in 2013 the Warsaw Mechanism for Loss and Damage was created ‘to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change’: United Nations Framework Convention on Climate Change, *Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, Dec 2/CP.19, UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014) para 1.

60 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, para 49; see also para 50. The Preamble also notes that when taking action to address climate change, state parties should ‘respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity’: at 2.

61 For a detailed overview of the history of the proposal and its various iterations, see Carlos Arenas, ‘A Climate Change Displacement Coordination Facility in the Paris Draft Agreement: Summary of Facts’ (Summary, Displacement Solutions, 6 November 2015) <<http://displacementsolutions.org/wp-content/uploads/2015/11/Climate-change-displacement-coordination-facility.pdf>>. For discussion of the potential role of such a facility, see Jessica Wentz and Michael Burger, ‘Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21’ (Report, Sabin Center for Climate Change Law, Columbia Law School, September 2015) <https://web.law.columbia.edu/sites/default/files/microsites/climate-change/unfccc_climate_change_displacement_coordination_facility.pdf>. For amendments suggested by the Advisory Group on Climate Change and Human Mobility, see United Nations High Commissioner for Refugees, ‘Human Mobility in the Context of Climate Change: Elements for the UNFCCC Paris Agreement’ (Report, March 2015).

62 Kälén and Clements, above n 58, 3 (emphasis altered).

well as relevant organizations and expert bodies outside the Convention'.⁶³ This should include relevant academic, policy and operational actors and international organisations with expertise in displacement and migration, as well as experts from other relevant sectors, such as climate science, disaster risk reduction, development, land use planning/human settlements, human rights and gender.⁶⁴

The Advisory Group on Climate Change and Human Mobility, noted above, has suggested that the task force structure its 'recommendations for integrated approaches to avert, minimize and address displacement' around enhancing: (a) knowledge; (b) policy coordination; (c) action; and (d) technical expertise and capacity-building.⁶⁵ This should include: sharing examples of best practice; disseminating research; fostering dialogue and collaboration; mapping existing activities and initiatives (including in relation to relevant international processes) to avoid duplication and develop coordinated approaches; developing guidance and training on adaptation measures that may avoid and/or reduce displacement; and integrating human mobility considerations into policies addressing climate change adaptation and disaster risk reduction.

The Executive Committee of the Warsaw International Mechanism for Loss and Damage has already invited relevant organisations and experts to provide 'knowledge, data and scientific information on both internal and cross-border migration, displacement and other forms of human mobility owing to factors related to climate change impacts, including in combination with other factors', which will, in turn, help to inform the work of the task force.⁶⁶

3 *World Humanitarian Summit*

The World Humanitarian Summit ('WHS') held in Istanbul on 23–24 May 2016 was a global call to action by the UN Secretary-General, designed to reinvigorate a commitment to the universality of humanitarian principles, stimulate new pledges and concrete actions to better prepare and respond to conflict and disasters, and share best practices.

With the objective to 'leave no one behind',⁶⁷ the Secretary-General argued that this 'place[d] a new obligation on us all to reach those in situations of conflict, disaster, vulnerability and risk first so that they benefit from and

63 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, para 49.

64 Advisory Group on Climate Change and Human Mobility, 'Inputs from the Advisory Group on Climate Change and Human Mobility' (Report, Executive Committee of the Warsaw International Mechanism for Loss and Damage, 2–5 February 2016) 5.

65 *Ibid* 2, 5–6.

66 United Nations Framework Convention on Climate Change, *Submissions on Internal and Cross-Border Migration, Displacement and Other Forms of Human Mobility* <http://unfccc.int/adaptation/groups_committees/loss_and_damage_executive_committee/items/9508.php>. See also Conference of the Parties, United Nations Framework Convention on Climate Change, *Third Meeting of the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impact*, Agenda Item 4(f), Action Area 6: Migration, Displacement and Human Mobility (26–30 April 2016) <http://unfccc.int/adaptation/workstreams/loss_and_damage/items/9073.php>.

67 This is the central theme of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals, which forms part of the UN's larger humanitarian agenda: *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1 UNGAOR, 70th sess, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015) Preamble paras 4, 26, 48, 72.

contribute to sustainable long-term development'.⁶⁸ He noted that an average of 26 million people have been displaced by disaster-related hazards each year since 2008, and that '[m]ore frequent and intense extreme weather events associated with climate change, including rising sea levels, are expected to increase that trend further'.⁶⁹ As such, he highlighted the need to '[p]repare for cross-border displacement owing to disasters and climate change',⁷⁰ and tacitly reflected the recommendations of the Nansen Initiative in stating that:

National legislation and institutional and operational measures should be put in place alongside regional cooperation frameworks to prepare countries to receive and protect people displaced across borders owing to disasters and climate change who do not have the protection of refugee status. People in small island developing States who face the permanent loss of their homelands will need particular attention to ensure their continued safety, cultural identity and legal citizenship. Like those fleeing conflict, people displaced by disasters triggered by natural hazards and climate change, as well as their host countries and communities, will need both short- and long-term support.⁷¹

The Agenda for Humanity, annexed to the Secretary-General's report 'as a framework for action, change and mutual accountability',⁷² called on states to:

Adopt an appropriate international framework, national legislation and regional cooperation frameworks by 2025 to ensure that countries in disaster-prone regions are prepared to receive and protect those displaced across borders without refugee status.⁷³

The multi-stakeholder nature of the WHS process, and the fact that its outcome documents are not negotiated texts, makes it difficult to predict whether and how its recommendations will be translated into action.⁷⁴ Nevertheless, it provided another opportunity to contribute to the development of protective frameworks in the context of climate change and disasters.

All these processes show that, as yet, states are prepared only to take incremental steps in this area. This is sobering, especially in light of the calls by some for more radical, global standard-setting instruments.⁷⁵ On the flipside, however, the cumulative effect of such 'baby steps' can be powerful, each mutually reinforcing the other and, in time, strengthening the normative regime.

68 *One Humanity: Shared Responsibility: Report of the Secretary-General for the World Humanitarian Summit*, 70th sess, Agenda Item 73(a), UN Doc A/70/709 (2 February 2016) para 72 ('*One Humanity*').

69 *Ibid* para 73, citing Michelle Yonetani, 'Global Estimates 2015: People Displaced by Disasters' (Report, Internal Displacement Monitoring Centre, July 2015); Justin Ginnetti, 'Disaster-related Displacement Risk: Measuring the Risk and Addressing Its Drivers' (Report, Internal Displacement Monitoring Centre, March 2015).

70 *One Humanity*, UN Doc A/70/709, para 88.

71 *Ibid*.

72 *Ibid* annex ('*Agenda for Humanity*') 48.

73 *Ibid* annex 55.

74 There will be three outcome documents: a Chair's Summary, reflecting the main discussions and commitments of the WHS; a Commitments to Action document, reflecting concrete actions and pledges; and a report of the Secretary-General on the outcomes of and follow up to the WHS.

75 See references and discussion in Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23 *International Journal of Refugee Law* 2.

IV WHERE WE ARE GOING

In May 2016, a successor to the Nansen Initiative was launched – the Platform on Disaster Displacement.⁷⁶ With effect from 1 July 2016, its role is to follow up on the work started by the Nansen Initiative and to implement the Protection Agenda’s recommendations.⁷⁷ Like the Nansen Initiative, it involves a range of stakeholders and seeks to forge strong partnerships between policymakers, practitioners and ‘a multi-stakeholder forum for dialogue, information sharing as well as policy and normative development’.⁷⁸

The process remains state-led, with Germany as the Chair and Bangladesh the Vice-Chair of a Steering Group providing ‘overall strategic leadership and guidance on coordination, policy and advocacy’.⁷⁹ In addition to those two states, the Platform’s founding members are Australia, Brazil, Canada, Costa Rica, the European Union, Fiji, France, Kenya, Madagascar, Maldives, Mexico, Morocco, the Philippines, Senegal and Switzerland. As Brazil had noted previously, any institutional arrangement must ‘draw its legitimacy from a clear intergovernmental mandate ... [to] enjoy the same kind of political backing’ as the Nansen Initiative had had, and ‘to allow the [Protection] Agenda to be widely incorporated by Member States around the world’.⁸⁰ Indeed, the ability of the Nansen Initiative to influence a variety of other global processes was because concerned state members of the Steering Group proactively voiced their concerns in relevant international meetings. This would have been impossible if the institutional mandate were carried by a Special Rapporteur or international organisation.

A secretariat, known as the Coordination Unit, provides administrative, coordination, communication and other technical assistance. An Advisory Committee drawn from civil society, academia and other experts has replaced the Nansen Initiative’s Consultative Committee to provide ‘expert input and strategic advice to the Steering Group’ and support the implementation of the Platform’s activities.⁸¹ A new feature is a Geneva-based Working Group of the agencies responsible for implementing activities set out in the work plan (including, but not limited to, UNHCR and IOM), whose role is to coordinate the implementation of activities, strengthen operational collaboration and support mainstreaming within relevant agencies.⁸²

76 Platform on Disaster Displacement, ‘Addressing the Protection Needs of People Displaced across Borders in the Context of Disasters and Climate Change’ (Leaflet, May 2016).

77 As the representative of Brazil stated at the Nansen Initiative Global Consultation: ‘This meeting represents the end of a fruitful journey and the beginning of a promising new one’: Brazil in *Global Consultation Conference Report*, above n 28, 83.

78 Platform on Disaster Displacement, ‘Addressing the Protection Needs of People Displaced across Borders’, above n 76, 2.

79 Ibid.

80 Brazil in *Global Consultation Conference Report*, above n 28, 83.

81 Platform on Disaster Displacement, ‘Addressing the Protection Needs of People Displaced across Borders’, above n 76, 2.

82 Platform on Disaster Displacement, ‘Strategic Framework 2016–2019’ (2016) 3 <<http://disasterdisplacement.org/about-us/our-architecture/>>.

Based on the priority areas for action identified by the Nansen Initiative,⁸³ the Platform has four strategic priorities, summarised as follows:

1. Address knowledge and data gaps (which are conceptual, institutional and operational);
2. Enhance the use of identified effective practices and strengthen cooperation among relevant actors to prevent, when possible, reduce and address cross-border disaster-displacement at the national, regional and international levels;
3. Promote policy coherence and mainstreaming of human mobility challenges in, and across, relevant policy and action areas; and
4. Promote policy and normative development in gap areas.⁸⁴

The Platform does not intend to create new global legal norms or standards, but rather will continue the work of the Nansen Initiative in consolidating and enhancing the use of effective practices and promoting policy coherence by linking into existing initiatives. For instance, it will cooperate with UNHCR to support the development and use of its Guidelines on Temporary Protection or Stay Arrangements as one type of humanitarian protection measure that might be used in a disaster context. It will coordinate with IOM's work on humanitarian visas, the Migration Crisis Operational Framework and the Migrants in Countries in Crisis Initiative. Adopting the Nansen Initiative's recommendation that standard-setting activities are more appropriately undertaken at the domestic and regional levels, it will seek to develop initiatives similar to the Guide to Effective Practices for RCM Member Countries in other regions.⁸⁵ In following up on the outcomes of the WHS, it will:

take note of UN SG's Agenda for Humanity and the proposed commitment to work with States in relevant regions to: '*Adopt an appropriate international framework, national legislation and regional cooperation frameworks by 2025 to ensure countries in disaster-prone regions are prepared to receive and protect those displaced across borders without refugee status*'.⁸⁶

Specifically, it will encourage the development of law and policy at the domestic and regional levels; the creation of bilateral/regional frameworks on admission, stay and non-return of cross-border disaster-displaced persons; and ensure that relevant research and analysis is conveyed to policy and decision makers.

Like the Nansen Initiative, the Platform will also play a lead role in coordinating, complementing and/or feeding into existing activities and processes, rather than reinventing the wheel. In my view, this is the most effective approach, since no single institution or body can harness the resources

83 These are: (a) collecting data and enhancing knowledge; (b) enhancing the use of humanitarian protection measures; and (c) strengthening the management of disaster displacement risk in the country of origin. See *Protection Agenda Vol 1*, above n 2, 44 [107].

84 See Platform on Disaster Displacement, 'Addressing the Protection Needs of People Displaced across Borders', above n 76.

85 *Guide to Effective Practices*, above n 5.

86 Platform on Disaster Displacement, 'Strategic Framework', above n 82, 10.

or expertise to provide authoritative guidance across the vast array of policy areas involved. The Platform may, for example, provide technical support to states as they start to implement their commitments under the Sendai Framework, or help to 'promote policy coherence' through the new Task Force created under the Warsaw International Mechanism for Loss and Damage. This is important because:

As these frameworks and decisions enter their implementation phases, the inclusion and reference to displacement and other human mobility challenges represent important opportunities for enhanced policy coherence, synergies and for enhanced capacity to prevent and address disaster displacement.⁸⁷

There are also a number of continuing processes with which the Platform will engage, such as the Inter-Agency Standing Committee, the Global Forum on Migration and Development, the UNFCCC, the Human Rights Council and its Special Procedures, the High Level Dialogue on Migration and the International Dialogue on Migration.

V THE ROLE OF THE LAW

A chief motivation behind the creation of the Nansen Initiative and its successor was the concern that there were gaps in existing international law to address the needs of those displaced across borders in the context of disasters and climate change. Notwithstanding this, neither process has sought to advance new international norms. The second part of this article provides a more focused analysis of the capacity of current legal protection instruments to respond to displacement in this context. It includes an examination of recent jurisprudential developments that both informed, and were informed by, the Nansen Initiative's findings, and considers whether new legal frameworks are necessary and desirable. This is relevant to how the Platform on Disaster Displacement might best advance its strategic priorities.

In the area of climate change, it is clear that a straightforward application of existing international normative frameworks will lead to difficulties. In a forthcoming article, Elizabeth Fisher, Eloise Scotford and Emily Barritt examine the burgeoning field of legal cases in this field, and note how normatively conflicted it is.⁸⁸ In effect, their study shows that the challenge of applying principles of international protection in the climate change context is replicated in virtually all other areas of law as well. The application of existing doctrine remains awkward and difficult; whether the doctrine can evolve to accommodate the elements that do not easily fit is unsettled; and some courts are more disposed

⁸⁷ Ibid 4.

⁸⁸ Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 (forthcoming) *Modern Law Review*. Thank you to the authors for sharing a pre-publication version with me. For an overview of their arguments, see Liz Fisher, Eloise Scotford and Emily Barritt, 'Why Understanding the Legally Disruptive Nature of Climate Change Matters' on *Oxford University Press Blog* (22 April 2015) <<http://blog.oup.com/2015/04/legally-disruptive-nature-of-climate-change/#sthash.mRtXuuGq.dpuf>>.

to doing so than others.⁸⁹ The basic questions being grappled with across legal theory and practice seem to be: how much are we talking about trying to squeeze a round peg through a square hole, how much do we just need to reshape the hole, and what are the ramifications of doing so? As discussed below, while refugee and human rights law might provide limited scope to assist individuals seeking protection,⁹⁰ a more sustainable approach lies in the creation of wider-ranging systemic policies.

A Refugee Law

Legally, there are cogent reasons why international refugee law will generally not assist people moving in the climate change/disaster context. Refugee law requires individuals to establish that they have a well-founded fear of being persecuted for reasons of their race, religion, nationality, political opinion or membership of a particular social group; the obstacles to establishing each of these elements have been examined in detail elsewhere.⁹¹ If people are adversely affected by policies adopted in the aftermath of disasters – for instance, discriminatory government policies restricting access to humanitarian assistance – then a refugee claim may succeed. As the Protection Agenda explains, ‘the effects of a disaster may create international protection concerns by generating violence and persecution, such as when a collapse of governmental authority triggered by the disaster leads to violence and unrest or when a government uses a disaster as pretext to persecute its opponents’,⁹² or, as Ferris notes, where there are ‘increases in gender-based violence in temporary shelters, discrimination in assistance and solutions, shortcomings in evacuation procedures, etc’.⁹³ However, these are, in effect, secondary impacts of a disaster; the disaster itself merely provides the context for the conventional refugee claim.

89 For example, on creative approaches to standing: see, eg, *Urgenda Foundation v The State of the Netherlands*, Hague District Court, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396, 24 June 2015.

90 ‘The traditional western approach of individualized decision-making about protection on technical legal grounds seems highly inappropriate to the situation of climate change-related displacement, in which the responsibility for displacement is highly diffuse (attributable to a large number of polluting States over many years, rather than to direct ill-treatment of a particular person by a certain government) and the numbers of those displaced may require group-based rather than individualized solutions’: Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 87.

91 *Ibid* 39–51.

92 *Protection Agenda Vol 1*, above n 2, 27 [55] (citations omitted). The Protection Agenda further noted that ‘a few States (Panama, Peru) found that asylum seekers from Haiti had a “well-founded fear of persecution by non-State actors that arose from the vacuum of governmental authority after the earthquake in Haiti,” thus applying the 1951 Refugee Convention’: at 27 n 47. It also noted that the Refugee Status Appeals Authority in New Zealand found that an activist from Myanmar had a well-founded fear of arrest and sentencing because post-Cyclone Nargis she had distributed humanitarian aid acquired by foreigners who supported an opposition party: at 54 n 48. See *Refugee Appeal No 76374* (Unreported, Refugee Status Appeals Authority of New Zealand, Member Burson, 28 October 2009). See also *AC (Tuvalu)* [2014] NZIPT 800517-520, [84]–[86], [97].

93 Elizabeth Ferris, ‘Disasters and Displacement: What We Know, What We Don’t Know’ on Brookings, *PlanetPolicy* (9 June 2014) <<http://www.brookings.edu/blogs/planetpolicy/posts/2014/06/09-climate-change-natural-disasters-ferris>>.

New Zealand case law is the most developed in this field.⁹⁴ It recognises that natural disasters and environmental degradation may involve significant human rights issues, especially where the state abdicates its duty to protect people against known risks.⁹⁵ But while the adverse impacts of climate change and disasters are harmful, they generally do not satisfy the concept of ‘persecution’ as it is currently understood in international and domestic law. Even if it were possible to overcome this hurdle, the further requirement that persecution be *for reasons of* an individual’s race, religion, nationality, political opinion, or membership of a particular social group poses an additional difficulty, given that the impacts of climate change and natural disasters are largely indiscriminate.⁹⁶ However, the application of the Refugee Convention has not been ruled out entirely, and ‘[c]are must be taken to examine the particular features of the case’.⁹⁷ Thus, if a government were to restrict access to fresh water supplies or agricultural land for a Convention reason, then the refugee definition might be satisfied.⁹⁸ It would be the act or omission by government that constituted the harm, rather than the disaster or resource scarcity itself. This line of authority represents an important jurisprudential milestone.⁹⁹

In 2011–12, some African states applied the 1969 *OAU Convention’s* expanded refugee definition on a *prima facie* basis to people fleeing Somalia’s severe droughts. Arguably, this was a combination of the fact that

the famine threatened their lives, domestic authorities able to help them did not exist, and the ongoing conflict and violence greatly hindered international organizations’ capacity to protect and assist Somalis during the famine, justified considering them as victims of an event ‘seriously disturbing public order in either part or the whole’ of the country that ‘compelled’ them to seek refuge abroad.¹⁰⁰

In endorsing the Protection Agenda, the Ethiopian representative stated that:

94 See above n 7 for a list of cases. For detailed analysis, see Jane McAdam, ‘The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement’ (2015) 3 *Migration Studies* 131.

95 *AF (Kiribati)* [2013] NZIPT 800413, [63], citing *Oneryildiz v Turkey* (2005) 41 EHRR 20; *Budayeva v Russia* (European Court of Human Rights, Chamber, Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008); UN Committee on Economic, Social and Cultural Rights, ‘General Comment No 12: The Right to Adequate Food (Art. 11)’, 20th sess, UN Doc E/C12/1999/5 (12 May 1999); UN Committee on Economic, Social and Cultural Rights, ‘General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)’, 22nd sess, UN Doc E/C12/2000/4 (11 August 2000).

96 *AF (Kiribati)* [2013] NZIPT 800413, [56]; *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125, [54]; *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [19].

97 *AF (Kiribati)* [2013] NZIPT 800413, [64].

98 *Ibid* [58]–[59].

99 This approach was upheld by the New Zealand High Court, Court of Appeal and Supreme Court. On 28 January 2016, the applicant in those cases lodged a complaint with the UN Human Rights Committee in Geneva: Kidd Legal, ‘Climate Refugee’ *Fighting to Stay in New Zealand* (28 January 2016) <http://www.kiddlegal.com/index_files/page0002.htm>.

100 *Protection Agenda Vol 1*, above n 2, 27 [56], citing Tamara Wood, ‘Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts’ (Technical Paper, The Nansen Initiative, January 2013) 32–3. See also *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) (‘*OAU Convention*’).

We are of view that, as outlined in the Agenda for Protection, the broader definition of refugees adopted by the OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa to include persons who are compelled, due to natural disasters, to leave their place of habitual residence in order to seek refuge in another place outside their country of origin or nationality, has enabled African countries, including Ethiopia to open their borders.¹⁰¹

Yet other states, such as Kenya, explained that they had welcomed people fleeing such calamities (such as some 200 000 Somalis fleeing severe drought/famine in the Horn of Africa) ‘as refugees on humanitarian grounds’,¹⁰² not invoking the *OAU Convention* at all.¹⁰³

B Human Rights Law

In my view, human rights law has the greatest capacity to protect people against forcible return to life-threatening circumstances or cruel, inhuman or degrading treatment.¹⁰⁴ States have an obligation to take positive steps to realise the rights to life, health, adequate food and so on, and may violate this duty if they fail to provide adequate safeguards against known risks. Turning again to New Zealand jurisprudence, it has been accepted that disasters, including those linked to climate change, could in principle ‘provide a context in which a claim for recognition as a protected person’ might be grounded.¹⁰⁵ However, if a government is taking steps within its power to protect people in its territory or jurisdiction from the negative effects of climate change, then it will not abrogate its obligations under human rights law. Since a government would be faced with ‘an impossible burden’ were it required as a matter of law to mitigate all environmental hazards, an assessment of its positive obligations to protect life must be ‘shaped by this reality’.¹⁰⁶

In a different context, the European Court of Human Rights and the UK House of Lords have accepted that dire humanitarian conditions or destitution can amount to ill-treatment in certain cases, especially if conditions cumulatively reach a sufficient level of severity.¹⁰⁷ However, the meaning of ‘inhuman or degrading treatment’ has been limited so that it cannot encompass general poverty, except in the most extreme cases. In New Zealand law, for instance,

101 Ethiopia in *Global Consultation Conference Report*, above n 28, 107.

102 Kenya in *ibid* 135.

103 *Ibid*.

104 In endorsing the Protection Agenda, the representative from Lesotho noted the importance of international human rights law in this context, because it sets out minimum standards of treatment for the displaced, and complementary protection mechanisms might provide additional bases on which protection could be granted (tacitly drawing on McAdam, *Climate Change, Forced Migration, and International Law*, above n 90, 52). He called for the harmonisation of ‘all the existing legal instruments or laws ... to specifically provide for cross border climate change displacement’: Lesotho in *Global Consultation Conference Report*, above n 28, 139.

105 *AC (Tuvalu)* [2014] NZIPT 800517-520 [70].

106 *Ibid* [75].

107 See, eg, *Sufi and Elmi v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 8319/07 and 11449/07, 28 June 2011); *D v United Kingdom* (1997) 24 EHRR 423; *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477. On the cumulative grounds in refugee law, see Rebecca Dowd, ‘Dissecting Discrimination in Refugee Law: An Analysis of its Meaning and its Cumulative Effect’ (2011) 23 *International Journal of Refugee Law* 28.

‘treatment’ requires an act or omission (committed or tolerated) by the home state.¹⁰⁸ An economic policy targeted at a specific section of the population could constitute such ‘treatment’, whereas generally difficult socio-economic conditions would not. Applying this logic to the disaster context, the Immigration and Protection Tribunal has found that a state’s incapacity to respond to a disaster will generally be insufficient to constitute ‘treatment’. However, if a state were to withhold post-disaster assistance on a discriminatory basis, or arbitrarily withhold access to available foreign assistance when domestic capacity were lacking, this could potentially constitute a ‘treatment’ of the disaster-affected population.¹⁰⁹

Finally, it would seem that harm must be relatively imminent before international protection would be forthcoming,¹¹⁰ which may be especially problematic for creeping slow-onset processes. Although New Zealand jurisprudence requires only that there is ‘sufficient evidence to establish substantial grounds for believing the appellant would be in danger’,¹¹¹ similar to the ‘well-founded fear’ test in refugee law, a risk to life from sea-level rise and natural disasters has thus far been found to fall ‘well short of the threshold required to establish substantial grounds for believing that they would be in danger of arbitrary deprivation of life’, and ‘remains firmly in the realm of conjecture or surmise’.¹¹²

This jurisprudence illustrates the potential, but also the limitations, of existing international protection frameworks, and the Protection Agenda highlights the need for additional humanitarian and migration pathways.

C Statelessness

This section would be incomplete without noting that the statelessness regime is also ill-fitting. There remains a misconception that if a small island state loses its territory, for example through sea-level rise, then its population will be

108 It does not encompass the act of removal, in deliberate contrast to the approach taken by the European Court of Human Rights in cases such as *D v United Kingdom* (1997) 24 EHRR 423 and *Sufi and Elmi v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 8319/07 and 11449/07, 28 June 2011). Likewise, it has construed the potential scope of arts 6 and 7 of the *International Covenant on Civil and Political Rights* – including in relation to the meaning of ‘treatment’ – more narrowly than it might have done, because the Act itself contains a residual humanitarian discretion to enable a person to remain if compelling or compassionate circumstances exist. In another jurisdiction, the absence of such a provision might influence a decision-maker to interpret the scope of arts 6 and 7 more liberally: see *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6–7.

109 *BG (Fiji)* [2012] NZIPT 800091, [84] (Member Burson). See discussion of the International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters in *AC (Tuvalu)* [2014] NZIPT 800517-520, [91]–[98].

110 See McAdam, *Climate Change, Forced Migration, and International Law*, above n 90, 84–7.

111 *AF (Kiribati)* [2013] NZIPT 800413, [90].

112 *Ibid* [91]. There was insufficient evidence to show that the conditions on return would be ‘so parlous that [the applicant’s] life [would] be placed in jeopardy, or that [the applicant] and [the applicant’s] family [would] not be able to resume their prior subsistence life with dignity’: at [74].

rendered stateless.¹¹³ From a practical point of view, it is far more likely that the population will need to move long before the territory itself disappears, as related impacts such as salt water inundation corrupting the fresh water supply mean that land can no longer sustain human communities. From a legal point of view, a stateless person is someone whom no state recognises as a national, and it is far from obvious that this test would be met given the way movement is likely to occur and the uncertainty of what kind of governance might continue even if a community resides elsewhere.

VI INCREMENTAL CHANGE, OR CHANGE BY DESIGN?

It is unsurprising that international lawyers use the above matrix when evaluating protection for those displaced in the context of climate change or disasters. We use the legal tools at our disposal, derived from international law and translated into various regional and national iterations. At the same time, it is important to recognise that this approach necessarily constrains our thinking, both conceptually and pragmatically. On the one hand, it might be argued that there is little choice (especially for a practitioner faced with a client) to push the boundaries of existing law and test how progressively a court or tribunal is prepared to develop it to accommodate new circumstances. On the other hand, the test case needs to be ‘right’, especially because in uncharted territory it is unclear what a decision-maker might do, and the scope of the law could be as readily closed down as opened up. It is essential that interventions are not counter-productive.

Strategic litigation can help to highlight legal gaps or uncertainties, and can begin to develop the jurisprudence on particular issues. Even if the courts never find that the Refugee Convention is applicable, for instance, this in itself may help to create the impetus and political will for other policy responses (precisely *because of* the limitations of existing law). It may foster the urgency required for policy change, delegitimising inaction simply on the basis that it is a legal grey area.¹¹⁴

Those engaged with the broader legal and policy questions, however, unencumbered by the particularities of the individual case and client, need to go back to first principles *and* to the empirical reality of movement in this context. Scholars and other experts involved in the Nansen Initiative and Platform on Disaster Displacement have sought to step out of disciplinary confines to view the phenomenon of mobility more holistically. Any legal definition is necessarily constrained and artificial, in that it describes less a social phenomenon than a bureaucratic category from which certain rights and obligations flow. If we can release ourselves from our known legal categories and instead look at drivers of

113 This article does not examine the statelessness regime, but it is also ill-fitting and based on misconceptions: for analysis, see McAdam, *Climate Change, Forced Migration, and International Law*, above n 90, 138–43.

114 ‘Political will in relation to climate change has not been strong and much litigation concerning climate change has been about catalyzing action’: Fisher, Scotford and Barritt, above n 88.

movement, human needs, and how movement is already playing out in different contexts, we readily see that the classic refugee paradigm is ill-fitting for a variety of reasons, not just interpretational ones.

A A New Legal Instrument?

There is broad consensus among legal scholars and practitioners engaged in the various international processes described above that it is premature to push for a new standard-setting agreement at the global level.¹¹⁵ Apart from the clear unwillingness of states to develop such an instrument, this kind of focus may distract from the distinct need for – and more feasible prospect of – new domestic and regional laws to facilitate migration, and/or to provide more predictable responses in situations of displacement. Over time, the development of such state practice may inform the subsequent articulation of the relevant legal principles at the international level.

The absence of a multilateral treaty on disaster- or climate change-related displacement does not mean that there is a complete legal void.¹¹⁶ As noted above, state action in this field is already circumscribed by the principle of *non-refoulement* and human rights law (which themselves have been developed progressively over time).¹¹⁷

However, while international law requires that certain minimum standards are respected, including in relation to non-removal, it does not contain clear rules about ‘admission, access to basic services during temporary or permanent stay, and conditions for return’.¹¹⁸ Where states have addressed these matters, it has typically been in an ad hoc fashion that discloses a general lack of preparedness and coordination.¹¹⁹ Many measures are discretionary and thus unpredictable, and

115 See, eg. McAdam, ‘Swimming against the Tide’, above n 75; Walter Kälin and Nina Schrepfer, ‘Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches’ (Report No PPLA/2012/01, United Nations High Commissioner for Refugees, February 2012); Jane McAdam, et al, ‘International Law and Sea-Level Rise: Forced Migration and Human Rights’ (FNI Report No 1/2016, Fridtjof Nansen Institute and Andrew & Renata Kaldor Centre for International Refugee Law, January 2016) 38–9 [98]. New Zealand supported the Protection Agenda’s ‘approach of building on and supporting existing institutions and frameworks, rather than seeking to establish a new binding international convention’: New Zealand in *Global Consultation Conference Report*, above n 28, 156.

116 For the applicability of existing law, see McAdam, *Climate Change, Forced Migration, and International Law*, above n 90; McAdam, ‘Swimming against the Tide’, above n 75; McAdam et al, above n 115, 31–9 [82]–[98].

117 Indeed, it is arguably encompassed by a broader principle of temporary refuge: see Guy Goodwin-Gill, ‘*Non-refoulement*, Temporary Refuge, and the “New” Asylum Seekers’ in David Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill, 2014). In customary international law, the norm of temporary refuge requires states to admit those in need of international protection and not to return them to a situation of danger, although what follows next in terms of rights and entitlements is far from uniform.

118 *Protection Agenda Vol 1*, above n 2, 18 [28].

119 *Ibid* 6. See also McAdam, *Climate Change, Forced Migration, and International Law*, above n 90, ch 4. For instance, the Protection Agenda notes that ‘[e]ven in regions where relevant legal provisions are more common, such as in the Americas, such approaches could benefit from a certain degree of harmonization to better facilitate regional cooperation in addressing disaster displacement’: *Protection Agenda Vol 1*, above n 2, 25 [41].

there is little harmonisation across particular regions.¹²⁰ While the flexibility of discretionary measures can facilitate nimble responses, more commonly the outcome is uncertainty.¹²¹

There are already some good practices in existence. For instance, a number of states offer temporary stay arrangements for foreigners caught abroad when a disaster occurs back in their home country. In 2015, the Nansen Initiative drafted a guide for RCM countries in the Americas on effective practices to protect people forced across borders in the context of disasters, in recognition of the mutual and shared benefits that a more predictable response would bring.¹²² This reflected the 2014 Brazil Declaration's recognition of 'the challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause in the region',¹²³ and states' request to UNHCR

to prepare a study on the subject with the aim of supporting the adoption of appropriate national and regional measures, tools and guidelines, including response strategies for countries in the region, contingency plans, integrated responses for disaster risk management and humanitarian visa programmes, within the framework of its mandate.¹²⁴

These, in turn, had been influenced by the Nansen Initiative Regional Consultation in Central America in December 2013¹²⁵ and the Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disaster in June 2014.

In the African context, the *Kampala Convention* 'sets an international precedent as the first legally binding regional instrument providing legal protection

120 The degree to which regional instruments such as the 1969 *OAU Convention* or the 2001 EU Temporary Protection Directive might facilitate admission and protection remains uncertain in practice: the latter has never been triggered, and African states have generally extended protection to people fleeing drought and other environmental impacts on the basis of 'humanitarian' principles rather than treaty law: *Protection Agenda Vol 1*, above n 2, 28 [58]. See also Wood, above n 100.

121 'It may be used negatively to block the entry of foreigners, or to deny or terminate their permission to stay. It may also be used positively to allow foreigners to enter or stay in the country': *Protection Agenda Vol 1*, above n 2, 24 [38]. See also the New Zealand case of *AD (Tuvalu)* [2014] NZIPT 501370–371 where the Tribunal used its discretionary powers to permit a family from Tuvalu to remain in New Zealand. Even though the impacts of climate change in Tuvalu were not in any way determinative, they formed part of the overall factual matrix factored into the Tribunal's assessment. The Tribunal accepted in principle that 'exposure to the impacts of natural disasters [could], in general terms, be a humanitarian circumstance' for the exercise of the discretion. However, an applicant would have to show that there were exceptional circumstances of a humanitarian nature that would make removal unjust or duly harsh in the individual case: at [32].

122 *Guide to Effective Practices*, above n 5.

123 'Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (Intergovernmental Agreement, Cartagena +30, 3 December 2014) 3. This declaration was adopted by 28 States and three Territories on the occasion of the 30th anniversary of the 1984 Cartagena Declaration on Refugees.

124 'Brazil Plan of Action: A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity' (Intergovernmental Agreement, Cartagena +30, 3 December 2014).

125 See The Nansen Initiative, *Central America Regional Consultation – Intergovernmental*, <<https://nanseninitiative.org/central-america-consultations-intergovernmental/>>.

for climate change displaced persons'.¹²⁶ Although it relates only to IDPs, 'there are many provisions of the Convention, which could guide the formulation of a possible future legal mechanism providing for cross-border climate change displacement'.¹²⁷

In endorsing the Protection Agenda, a number of states stressed the value of seeing 'how existing law can be applied more effectively to environment-induced migration, filling gaps not with more rules, but with practical guiding principles, based on sound research and comparisons of experience'.¹²⁸ In that sense, the Protection Agenda provides both a roadmap for action and a toolbox of responses that can be adapted to particular situations.

B A Protection Toolbox

There are legal gaps, for sure, but we must be careful not to mistake the absence of a dedicated international legal regime as an impediment to action. As the Nansen Initiative and related processes have shown, many effective steps can – and must – be taken now, at the national and regional levels.¹²⁹ By leveraging existing mechanisms more strategically, states can create targeted, localised responses that together form part of a global effort.¹³⁰ This is not mutually exclusive with the progressive development of the law at the international level, but nor is it contingent on it. As Jon Barnett has observed of climate change more generally, an international treaty-making process can, paradoxically, result in greater inaction: it requires consensus; it can get bogged down in linguistic detail; and it can result in the sense that action is only possible once an international agreement is reached, which then excuses states from doing anything until an

126 Lesotho in *Global Consultation Conference Report*, above n 28, 139. The Ugandan representative stated that it 'is already a great achievement in filling the legal gap in the international convention on refugees': at 189. That treaty provides that 'States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change': *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, opened for signature 23 October 2009, 52 ILM 400 (entered into force 6 December 2012) art 5(4).

127 Lesotho in *Global Consultation Conference Report*, above n 28, 139.

128 EU in *ibid* 110–11.

129 *Protection Agenda Vol 1*, above n 2, 46 [114]–[115]. This includes: (a) reviewing domestic laws and policies to ascertain the extent to which they already enable the temporary admission, stay or non-return, as well as lasting solutions, for cross-border disaster-displaced persons, and revise them where appropriate, especially taking into account the specific needs of vulnerable persons; (b) exploring the need to harmonise approaches to admission, stay and non-return of cross-border disaster-displaced persons at the (sub-)regional level; (c) revising, harmonising and/or exploring the need to develop new national, bilateral or (sub-)regional cross-border disaster risk management and humanitarian response mechanisms, ensuring that they integrate cross-border disaster-displacement risk; (d) exploring the need to develop bilateral or (sub-)regional cooperation mechanisms to facilitate the return and sustainable reintegration of cross-border disaster-displaced persons; and (e) establishing mechanisms at the country-level to support governments to determine the respective roles and responsibilities of international organisations and agencies to address the protection and assistance needs of cross-border disaster-displaced persons in receiving countries.

130 Regional or bilateral agreements are likely to provide more tailored responses than a global instrument, and as Alex Randall has noted, '[s]ix countries around a table is much easier than 192': Alex Randall, 'Should Immigration Laws Cater for Climate Refugees?', *Climate Change News* (online), 6 March 2014 <<http://www.climatechangenews.com/2014/06/03/immigration-laws-must-cater-for-climate-refugees/>>.

outcome is delivered that never can be delivered.¹³¹ Similarly, Fisher, Scotford and Barritt have argued that '[t]he "super wicked" characterization of climate change as a scientific problem has resulted in a determined focus on finding solutions', and 'the international treaty process is seen as the ultimate panacea'.¹³² While treaties are important, 'equally important is to understand exactly what type of problem climate change is. Only with that understanding can long-lasting legal responses to climate change be developed'.¹³³

Recognising that a 'one size fits all' response is inappropriate, the Protection Agenda sets out a toolbox of strategies to strengthen resilience and manage the risk of future displacement.

First, states need to enhance disaster risk reduction and climate change adaptation to build resilience in communities.¹³⁴ By systematically integrating disaster risk reduction measures, there is a better chance that if disaster strikes, some people may avoid displacement altogether – or at least be displaced for a much shorter period of time. Of course, human rights and dignity must remain front and centre of all adaptation policies. For instance, it may be possible to grow flood-resistant crops, but as one Bangladeshi woman told me, if this means a woman has to wade through floodwaters each day to harvest vegetables to feed her family, then this is not really a sustainable adaptation option.¹³⁵ Indeed, as the representative of Bangladesh stressed in endorsing the Protection Agenda, 'we may need to find out what is within our capacity of adaptation, and also what is not', since people cannot adapt ad infinitum.¹³⁶

Secondly, states need to prepare for some displacement, taking into account regional variations based on risk, geography, and existing patterns of movement. They should review their domestic laws to enable the temporary admission and stay for people displaced in the context of climate change or disasters, and explore opportunities to harmonise approaches at the (sub-)regional level.¹³⁷ States must also ensure that there are appropriate laws and policies in place to address the needs of IDPs, who will be the largest number of displaced people.¹³⁸

Thirdly, states should enhance voluntary migration opportunities so that people can move before disaster strikes or slow-onset climate processes render land uninhabitable.¹³⁹ These could include bilateral or regional free movement agreements,¹⁴⁰ training programs that prepare individuals to find work abroad, or

131 Jon Barnett, 'Innovation, Energy and Climate Change in the Developing World Panel Discussion' (Speech delivered at the Deakin Lectures, Melbourne, 10 June 2010) <<http://www.wheelercentre.com/broadcasts/innovation-energy-and-climate-change-in-the-developing-world-panel-discussion>>.

132 Fisher, Scotford and Barritt, above n 88.

133 Ibid.

134 See *Protection Agenda Vol 1*, above n 2, 34–6 [76]–[86], 47 [117]–[118].

135 Interview with Rizwana Hasan, Chief Executive of the Bangladesh Environmental Lawyers Association (Dhaka, Bangladesh, 16 June 2010).

136 Bangladesh in *Global Consultation Conference Report*, above n 28, 81.

137 *Protection Agenda Vol 1*, above n 2, 46 [114]–[115].

138 Ibid 39–41 [99]–[105], 48 [123]–[124].

139 Ibid 36–7 [87]–[93], 47–8 [119]–[120].

140 See, eg, Bruce Burson and Richard Bedford, 'Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific' (Discussion Paper, The Nansen Initiative, 9 December 2013) 7–10.

the creation of special visa categories for people living in specifically identified regions. States could also utilise existing migration categories more extensively and/or more cleverly, such as by waiving some of the usual requirements for employment, family or student visas in order to admit displaced people and prioritise their applications for stay. Or, they could provide educational training in areas of need, thus providing opportunities for people to migrate for labour reasons.

Targeted work and education schemes (for temporary and permanent movement) enable small numbers of Pacific islanders to move to Australia and New Zealand each year. In endorsing the Protection Agenda, Australia stressed the importance of ‘safe and well managed migration schemes’, such as temporary seasonal worker programmes, as ‘a key part of building resilience’.¹⁴¹ In terms of permanent migration, New Zealand’s Pacific Access Category permits up to 250 citizens from Fiji, 250 from Tonga, 75 from Tuvalu, and 75 from Kiribati to move permanently to New Zealand each year. To be eligible, a person must have an offer of ongoing and sustainable employment in New Zealand, and meet a minimum level of English, a minimum level of income, and health and character requirements. Given population pressures on some of the islands, more migration might enable a smaller population to remain at home for longer.¹⁴²

Endorsing the Protection Agenda, Kiribati explained how its Migration with Dignity policy was ‘providing relevant education and training that would ensure that when I-Kiribati people relocate, they would do so with dignity – as citizens who are skilled and would find jobs’.¹⁴³ The Swedish delegate emphasised that ‘migration can bring benefits to the countries of origin, countries of destination and the migrants and their families, if it’s responsibly facilitated. Legal and so-called circular migration is important in this respect, and a priority for Sweden’.¹⁴⁴

The importance of ‘self-help’ mechanisms cannot be overstated. For instance, the bilateral Trans-Tasman Travel Arrangement between Australia and New Zealand enabled 3600 New Zealanders to move to Australia after the Christchurch earthquakes in 2010–11.¹⁴⁵ Although the arrangement was never envisaged as a disaster response tool, it provided a ready-made mechanism that allowed people to take charge of their own lives, rather than requiring targeted government intervention. Not everybody moved – again reflecting the fact that people have different tolerance thresholds and support networks – and anecdotal evidence suggests many families returned once the situation stabilised.

141 Australia in *Global Consultation Conference Report*, above n 28, 77. See also the statement by Kiribati: at 137.

142 See McAdam, *Climate Change, Forced Migration, and International Law*, above n 90, 36; Richard Bedford and Charlotte Bedford, ‘International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu’ in Bruce Burson (ed), *Climate Change and Migration: South Pacific Perspectives* (Institute of Policy Studies, 2010) 89.

143 Kiribati in *Global Consultation Conference Report*, above n 28, 137.

144 Sweden in *ibid* 182.

145 Peter Lafferty, ‘International Migration to/from Christchurch after the Earthquakes’ (Presentation, Statistics New Zealand, 29 November 2011) <http://www.population.org.nz/wp-content/uploads/2012/02/3b3_peter-lafferty.pdf>.

Finally, planned relocation is another proactive response that may move people out of harm's way before disaster strikes, or move them to safer areas in the aftermath of a disaster if returning home is not possible.¹⁴⁶ This requires very careful consultation and planning to avoid greater vulnerability and impoverishment.¹⁴⁷ The longstanding consequences of past cross-border relocations in the Pacific explain why it is generally considered the 'option of last resort'.¹⁴⁸ It is essential that any planned relocations are undertaken with the full participation of affected communities, with their rights and interests safeguarded.

VII CONCLUSIONS

The achievements of the Nansen Initiative over its three-year tenure cannot be understated, especially given the political context in which it was born. The Nansen Initiative took care to listen to a wide range of views, and not impose a preconceived framework,¹⁴⁹ and it thus helped to conceptualise a comprehensive approach to displacement in the context of climate change and disasters, identifying key areas for future action based on concrete examples of effective practices.¹⁵⁰ It is hoped that a similar methodology might be adopted by states themselves.¹⁵¹ Statements by governments endorsing the Protection Agenda reflected a far more mature understanding of the issues than previously, which is itself a sign of significant progress. While the Nansen Initiative's lasting success will be measured by the extent to which its recommendations are implemented in practice, as a process it was highly inclusive and consultative, and engaged actors from all sectors and communities.

As UNHCR's Assistant High Commissioner for Protection, Volker Türk, noted at the presentation of the Protection Agenda, if there is one thing we should

146 *Protection Agenda Vol 1*, above n 2, 38–9 [94]–[98], 48 [121]–[122].

147 Elizabeth Ferris, 'Protection and Planned Relocations in the Context of Climate Change,' (UNHCR Legal and Protection Policy Research Series, PPLA/2012/04, August 2012); Alice R Thomas, 'Post-disaster Resettlement in the Philippines: A Risky Strategy' (2015) 49 *Forced Migration Review* 52; Jane McAdam and Elizabeth Ferris, 'Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues' (2015) 4 *Cambridge Journal of International and Comparative Law* 137; Jane McAdam, 'Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change' (2014) 49 *Journal of Pacific History* 301; see also Brookings, Georgetown University and United Nations High Commissioner for Refugees, 'Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation' (Report, 7 October 2015).

148 Cook Islands in *Global Consultation Conference Report*, above n 28, 97; McAdam, 'Historical Cross-Border Relocations', above n 147.

149 The Protection Agenda did not start with a refugee law 'blueprint' (or other preconceived ideas) and then seek to determine what was similar or different. Rather, it approached the issue from a variety of different perspectives, allowing a much more comprehensive and dynamic approach to the issue.

150 Kälin, 'The Nansen Initiative's Protection Agenda for People Displaced by Disasters across Borders', above n 23, pt 7.

151 As the government of Bangladesh observed: 'Perhaps the best way to prepare ourselves against climate change and disasters is to mobilize local capabilities and resources. In the process we have engaged communities at the grassroots': Bangladesh in *Global Consultation Conference Report*, above n 28, 80–1.

learn from the Syrian humanitarian crisis, it is to take the forecasting seriously.¹⁵² The German representative sounded a similar word of caution:

With a change in climate in the coming years and decades this form of displacement is very likely to become one of the mega trends of the twenty-first century. The recent steep rise in numbers of conflict induced displacement shows us that countries and continents need to be prepared for such developments. ... This farsightedness will pay off.¹⁵³

As this article has demonstrated, there are many known interventions that could reduce those numbers considerably if undertaken now, even if some movement will be inevitable. Through the actions taken today, states have the ability to shape what kind of movement much of this will be – whether a humanitarian catastrophe, evacuation and return, voluntary migration, or planned relocation. While the ideal outcome may be avoiding movement altogether, a pre-planned mobility strategy will still be far preferable to displacement in the face of pending disaster. It must also be recalled that such strategies are not only about finding safe passage and shelter, but also about building resilience over the longer term by creating access to education, employment, and a secure legal status. It is essential, therefore, that the Platform on Disaster Displacement continues this forward-looking agenda, keeping the needs, rights and entitlements of individuals and communities at the forefront of its interventions.

152 Volker Türk, Assistant High Commissioner for Protection, UNHCR, ‘Nansen Initiative Global Consultation: Keynote Address’ (Speech delivered at the Nansen Initiative Global Consultation, Geneva, 12 October 2015).

153 Germany in *Global Consultation Conference Report*, above n 28, 117–18.