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Research Framework

Climate change is an unprecedented and growing threat.
The arguments for action are clear.
So are the immense opportunities for peace and prosperity
if we act quickly and decisively.
United Nations Secretary-General António Guterres,
“Climate Action: Mobilizing the World”

I INTRODUCTION

1 *Background*

In December 2015, the world looked toward Paris. For more than twenty years, the international community had been trying to reach a universal, binding agreement on climate change. Paris was the international community’s litmus test: States would either reach consensus on a multilateral instrument or it would be the end of the United Nations’ efforts to forge global action on climate change. After two weeks of frantic negotiations, there was a historic breakthrough and the Paris Agreement was eventually adopted.

The Paris Agreement is hailed as a turning point. States, including developing nations, committed to reducing their greenhouse gas emissions. Developed countries also pledged to assist developing States, including through financial support, in their efforts to reduce emissions and to provide aid to those countries affected by climate-related disasters.

Beyond that, Paris can also be considered a turning point for human rights. It is the first climate change treaty that contains a reference to human rights and the need to respect human rights obligations when addressing climate change. By that, Paris paves the way for a rights-based approach to responses to climate change challenges. Similarly, the Paris Agreement contains a central reference to climate migrants in recognition of the fact that climate displacement may be one of the greatest challenges of the century.

And yet, Paris was a deplorable outcome for those affected by climate displacement. The provisions contained in the draft agreement on a climate change displacement coordination facility to help coordinate efforts to address the displacement of people as a result of the extreme impacts of climate change, notably through organized migration and planned relocation as well as compensation to those fleeing the adverse impact of climate change, did not meet the agreement of the negotiating parties and were deleted from the final Agreement.

This is even more disappointing since climate displacement is not a distant phenomenon, but is already happening in many countries around the globe. The envisaged climate change displacement coordination facility was expected to address the existing legal and institutional vacuum and provide guidance to States and assistance to affected communities.¹

Mindful of the normative, policy and operational gap as a result of firsthand experience working with affected communities, Displacement Solutions, an international NGO working in the area of climate displacement, spearheaded the efforts to consolidate existing norms regarding climate displacement and procedures for relocation. As a result, in 2013, a drafting committee of experts and practitioners gathered to elaborate and adopt a set of principles known as the Peninsula Principles on Climate Displacement within States. The present study will examine whether in the absence of an internationally agreed framework, these principles provide an adequate response to handling climate displacement.

2 *Rationale and Research Question*

It is projected that climate change will lead to unprecedented numbers of displaced persons around the world in the decades ahead, even though this linkage has only recently been recognized. Most of those who will eventually have to leave their places of habitual residence will be remaining within their countries, while some may also cross international borders. So far, the international community has failed to provide adequate responses for the handling of climate displacement and for addressing the protection challenges of the affected individuals.

The emerging policy, operational and protection gaps need urgently to be addressed at both the international and national levels. While cross-border displacement may be covered, to some extent, by existing international protection frameworks and institutional arrangements, such as the refugee protection regime, there is no comprehensive response for many other cross-border movements as a result of climate change. Closing this gap at the international level may require setting into

¹ FCCC/ADP/2015/L.6, December 5, 2015, Art. 5, para. 3: “A climate change displacement coordination facility shall be established under the [WIM] [Conference of the Parties serving as the meeting of the Parties to the Agreement (CMA)] to help coordinate efforts to address climate change induced displacement, migration and planned relocation.” For further details, see J. Wentz, M. Burger, Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21, 2015.

motion an intergovernmental process to provide protection solutions for persons displaced across international borders. A recent attempt, the Nansen Initiative, which has been made at the international level to devise a suitable response in this regard, will also briefly be discussed in the context of this research in terms of its relevance to domestic climate displacement, even though cross-border displacement will not constitute the main focus of this study. This study will rather look at majority populations affected by environmental degradation and disasters that will remain within the boundaries of their own countries and will thus represent the core of the issue.

In spite of the recognition that climate displacement will be internal for most of its part,² few States have by now developed policies or established institutions to provide support to climate displaced persons in a comprehensive, all-encompassing and sustainable manner. This lack of action, which has multiple roots, including capacity gaps, is paralleled and exacerbated by the absence of concrete guidance and action-oriented recommendations at the international level. To address the challenges arising at the domestic level, States require guidance regarding their protection obligations toward individuals affected by climate change in order to conceptualize policies and design programs to assist those displaced.

This diagnosis, which emerged further to a bottom-up and broad-based consultative process, led a group of experts in August 2013 to elaborate the Peninsula Principles. The Peninsula Principles claims to be the first policy document that provides responses to the challenges of internal climate displacement.

A set of interrogations arise from this claim, the overall question being: is this nonbinding framework of the Peninsula Principles adequate to effectively address the policy, protection and operational challenges resulting from climate change displacement?

Before turning to an analysis of the Peninsula Principles themselves, the Principles' underlying assumptions (i.e. that climate change entails displacement and impacts human rights) will need to be examined. The basic set of questions is: Does climate change lead to displacement, and if so, what are the displacement scenarios and patterns? Is there a nexus between climate change and human rights? Is there a policy, protection and operational gap that needs to be filled? Or, in other words, what other frameworks and policy options exist?

3 Methodology

This research is situated at the intersection of political science and related disciplines such as international relations and public international law as well as human rights law.

² Government Office for Science, *Foresight: Migration and Global Environmental Change*, Final Project Report, 2011, p. 11; S. C. McAnaney, *Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement*, 2012, p. 1178 *et seq.*

It examines information collected through various means, including through discussions with experts and other stakeholders as well as exchanges of views at international conferences and consultations, such as the 2015 LANDac Annual International Conference in Utrecht,³ the 2014 Sanremo consultation on Planned Relocation, Disasters and Climate Change,⁴ and the 2015 Displacement Solutions Roundtable on Land Access for Climate Displaced Persons and Communities held in Geneva,⁵ with a view to corroborate the findings and reduce potential bias of not only textual sources but also those that could result from the author's own involvement in the final drafting stage of the Peninsula Principles.

The analysis draws on a broad array of technical and legal primary and secondary documents, including an extensive body of literature from various disciplines. When it comes to the normative aspects of the handling of climate displacement, which cut across this study, the research uses established primary and secondary sources of international law in accordance with the authoritative enumeration contained in Article 38 of the Statute of the International Court of Justice.⁶

The initial part of the analysis, which frames the issue by looking at displacement scenarios, projections and patterns, draws on scientific climate change reports and related research from climate and social sciences, notably the writings of recognized academics and practitioners. The study then evaluates the various outcomes of the COP of the UNFCCC and other related mechanisms to analyze how displacement was progressively recognized within the climate change framework.⁷ The body of human rights law and reports of human rights mechanisms are reviewed when examining the link between human rights and climate change in order to bring to the fore the diverging views relating to the recognition of this nexus.

The study then assesses the protection challenges to establish benchmarks for the evaluation of the Peninsula Principles and appraises existing policy options, basing itself on existing soft law and policy documents in addition to academic literature, which is available to a limited extent on more recent initiatives, including the Peninsula Principles themselves.

³ LANDac Conference, July 9–10, 2015, Session: Climate Change-Induced Displacement and Migration, 2015.

⁴ UNHCR/Brookings/Georgetown University, Planned Relocation, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future, Background Document, 2014; UNHCR, Planned Relocation, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future, Report, 2014.

⁵ Displacement Solutions, Land Access for Climate Displaced Persons and Communities, Roundtable hosted by Displacement Solutions and The Global Migration Centre of the Geneva Graduate Institute of International and Development Studies, Meeting Report, 2016; see also Displacement Solutions, Climate Displacement and Human Rights: Where to Go from Here?, Displacement Solutions Expert Roundtable Discussion, 2016.

⁶ K. Oellers-Frahm, Art. 92, G. I., para. 101 *et subsequ.*, in: B. Simma *et al.*, The Charter of the United Nations, Vol. II, 2012.

⁷ See <http://unfccc.int/bodies/body/6383.php> (accessed May 22, 2019) for an updated overview.

Turning to the assessment of the Peninsula Principles, rather than analyzing them on a principle-by-principle basis, the study follows a thematic cluster approach and offers commentary on the significance of the Principles' value from a policy, operational and legal perspective, drawing on *travaux préparatoires* and a variety of other primary and secondary sources across several disciplines, thereby critically assessing whether the protection challenges are effectively addressed and how the Principles need to be operationalized to contribute to this effect.

4 Scope

This research focuses on how to respond adequately to internal displacement situations occurring because of the effects of climate change through the application of the Peninsula Principles and on how to ensure protection of the rights of those affected, including individual persons or communities facing climate displacement. It does not conduct an analysis into empirical evidence relating to the issue of climate change itself. Such scientific evidence can be found notably in the reports of the IPCC, which are issued on a regular basis.⁸

This study moreover addresses climate displacement within States (i.e. displaced persons who do not cross an internationally recognized border as a result of the adverse effects of climate change). Cross-border displacement will not be the focus of this research. Also not within the scope of this research is displacement resulting from industrial accidents as well as development-induced displacement and resettlement (i.e. displacement due to environmental degradation that occurs as a result of the implementation of development projects).

5 Terminology and Discourse

There is no consensus on how to designate people on the move as a result of climate change or the phenomenon itself. Terms employed try to link existing concepts either with progressive environmental degradation, with the occurrence of disasters or more specifically with the climate change phenomenon and its consequences and range from *migrants* to *displaced persons* and *refugees*. While some of the terms are well defined – or at least circumscribed – in international law, there are no universally agreed definitions of the compound terms.⁹

An additional layer of complexity is added by the fact that population movements are rarely monocausal. An individual may for a variety of reasons decide or be compelled to leave their habitual place of residence, one of which may be the degradation of the environment and the loss of livelihood as a result of climate change. There are intersections with other push factors for migration, such as the

⁸ Available at www.ipcc.ch/publications_and_data/publications_and_data_reports.htm (accessed March 4, 2019).

⁹ K. Warner, *Global Environmental Change and Migration: Government Challenges*, 2010, p. 403.

socioeconomic environment, particularly as climate change disproportionately affects the most vulnerable segments of society, and which of these is dominant in the decision may be difficult to determine.¹⁰

Migration theory places the decision to migrate on a volitional continuum, which ranges from entirely voluntary migration, where the individual has total control over their relocation, to involuntary or forced migration, characterized by the total absence of control.¹¹ In other words, proactive and reactive migration.¹² Distinctions are also made with regard to the timing of the migration decision, which seems to be particularly relevant for the case of climate displaced persons. Egon Kunz notably differentiates between *acute refugees*, fleeing a crisis, and those who leave before the actual crisis occurs (i.e. *anticipatory refugees*).¹³

For the reasons outlined, it is important to examine in more depth the terminology in use in the current climate change/human mobility discourse, with a view to identifying the exact meaning and legal connotations of the various terms, which are often employed interchangeably and indiscriminately, and to determine which of them best captures the complexities of population movements resulting from climate change.

a Climate Change, Environmental Degradation and Disasters

Climate change, according to Article 1 of the UNFCCC, is “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” Whereas the Convention distinguishes between anthropogenic climate change (i.e. the changes in the atmospheric composition that can be attributed directly or indirectly to human activities) and climate variability (i.e. the natural changes of the climate over time), the IPCC does not draw that distinction as it defines climate change as any change in climate,¹⁴

¹⁰ C. Gibb, J. Ford, Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?, 2012, p. 2; J. McAdam, Swimming against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer, 2011.

¹¹ E. Kunz, The Refugees in Flight: Kinetic Models and Forms of Displacement, 1973, pp. 125–146; A. H. Richmond, Sociological Theories of International Migration: The Case of Refugees, 1988, pp. 7–25; A. H. Richmond, Reactive Migration: Sociological Perspectives on Refugee Movements, 1993, pp. 7–24; E. Fussell, Space, Time and Volition: Dimensions of Migration Theory, 2012, p. 38 *et subseq.*; D. C. Bates, Environmental Refugees? Classifying Human Migrations Caused by Environmental Change, 2002, p. 467 *et subseq.*; Greenpeace, Klimaflüchtlinge, Die verleugnete Katastrophe, 2007, p. 11.

¹² A. H. Richmond, Sociological Theories of International Migration: The Case of Refugees, 1988, pp. 7–25; A. H. Richmond, Reactive Migration: Sociological Perspectives on Refugee Movements, 1993, pp. 7–24.

¹³ E. Kunz, The Refugees in Flight: Kinetic Models and Forms of Displacement, 1973, pp. 125–146.

¹⁴ It is important to note that there are inconsistencies in the IPCC’s use of the climate change definition. Whereas the working group on science developed the mentioned definition, the working group on mitigation bases its analyses on the UNFCCC definition and the working group on impacts,

irrespective of whether it is linked to the natural variability or human activity.¹⁵ The definition contained in the UNFCCC is therefore more limited in scope, which is congruent with the main purpose of the Convention, which is primarily concerned with States' action, seeking to commit them to reduce their greenhouse gas emissions. This aspect of climate change, which is the result of human interference and is within the realm of States, constitutes the UNFCCC's main focus that consequently determines its definition of the climate change phenomenon. The objective of the IPCC in turn "is to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation."¹⁶ The scope of its mandate accordingly spans beyond changes resulting from human activity.

The definitions' distinct scope is obviously important, as this distinction will determine the latitude of protection accorded to people on the move. The mismatch between these definitions also has the potential to seriously impact the response of the international community to the challenges of climate change, as the political process (i.e. the intergovernmental process) follows the UNFCCC parameters and is hence based on its more limited definition.

From a rights-based perspective, focusing on certain aspects of climate change only, namely the anthropogenic part, would not be practicable. Consequently, the Peninsula Principles follow the IPCC definition. Principle 2(a) defines climate change as "the alteration in the composition of the global atmosphere that is in addition to natural variability over comparable time periods."

There is a variety of operational definitions of disaster in use within the United Nations, which demonstrates again the difficulties to formulate universally acceptable definitions that would satisfy all actors, who, depending on their mandate, may have a different focus and different needs.¹⁷ The UNDP defines disasters as "occurrences when hazards, whether natural or human-made, interact with vulnerable populations,"¹⁸ while the OCHA includes within the scope of its definition, the impact of disasters on society. According to the OCHA a disaster is "a serious disruption of the functioning of a society, causing widespread human, material, or environmental losses which exceed the ability of affected society to cope using its own resources. Disasters are often classified according to their speed of onset

adaptation and vulnerability seems to use both. See R. A. Pielke Jr., *Misdefining "Climate Change": Consequences for Science and Action*, 2005, p. 555.

¹⁵ A. Verbruggen, W. Moomaw, J. Nyboer, Annex I: Glossary, Acronyms, Chemical Symbols and Prefixes. In IPCC Special Report on Renewable Energy Sources and Climate Change Mitigation, 2011.

¹⁶ See IPCC, *Principles Governing IPCC Work*, para. 2.

¹⁷ For an academic discussion of disaster definitions, see, e.g., R. W. Perry, *What Is a Disaster?*, 2007, pp. 1–15; E. Ferris, *The Politics of Protection, The Limits of Humanitarian Action*, 2011, p. 200 *et seq.*; see also CEDAW/C/GC/35 of July 14, 2017, for the gender dimension.

¹⁸ IASC, *Definition of Complex Emergencies*, 1994.

(sudden or slow), or according to their cause (natural or man-made).”¹⁹ The most authoritative of definitions is the one used by the UNISDR, which does not only consider the impact on society as a whole, but is also concerned with the community level. It also reduces the threshold of the losses that have to be suffered in order to qualify as a disaster by leaving out *widespread*. The UNISDR defines a disaster as follows: “A serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.”²⁰ It provides its own interpretation of the definition, noting: “The effect of the disaster can be immediate and localized, but is often widespread and could last for a long period of time. The effect may test or exceed the capacity of a community or society to cope using its own resources, and therefore may require assistance from external sources, which could include neighbouring jurisdictions, or those at the national or international levels.”²¹

Environmental degradation is another term used to qualify population displacement. Environmental phenomena are not necessarily linked to climate change and are much broader – and perhaps even too broad – as they could also include industrial accidents and alike. On the other hand, precisely because of the challenges in affirming the causal relation between sudden and particularly slow-onset disasters and displacement, this may be the preferred solution.

b Human Mobility

Human mobility is the terminology used by the IOM to describe migration in general terms. This concept is all-encompassing “ranging from totally voluntary migration [...] to totally forced migration,”²² reflecting the volitional continuum of migration theory.²³ The Nansen Initiative, by contrast, which is concerned with cross-border movement as a result of climate change, uses the Cancún Climate Change Adaptation Framework (CAF) as a point of departure and therefore also includes *relocation* within the scope of its definition of human mobility. Paragraph 14(f) of the CAF refers to displacement, migration and planned relocation, which

¹⁹ *Ibid.*

²⁰ UNISDR, Terminology on Disaster Risk Reduction, 2009.

²¹ *Ibid.*

²² IOM, Migration, Environment and Climate Change: Evidence for Policy (MECLEP), Glossary, July 2014.

²³ E. Kunz, The Refugees in Flight: Kinetic Models and Forms of Displacement, 1973, pp. 125–146; A. H. Richmond, Sociological Theories of International Migration: The Case of Refugees, 1988, p. 7 *et seq.*; A. H. Richmond, Reactive Migration: Sociological Perspectives on Refugee Movements, 1993, pp. 7–24; E. Fussell, Space, Time and Volition: Dimensions of Migration Theory, 2012, p. 38 *et subseq.*; D. C. Bates, Environmental Refugees? Classifying Human Migrations Caused by Environmental Change, 2002, p. 467 *et subseq.*; Greenpeace, Klimaflüchtlinge, Die verleugnete Katastrophe, 2007, p. 11.

designates – according to the Nansen Initiative – “a planned process of settling persons or groups of persons to a new location,”²⁴ and which may be either voluntary or involuntary in nature.

c Climate Refugees

Climate refugee is not a recognized term under international law. A refugee under Article 1 of the 1951 Refugee Convention, as amended by the 1967 Protocol, is:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁵

The terms *climate* or *environmental refugee* therefore are misleading, as they imply that the individual is fleeing war or persecution and can therefore claim a certain protection under the refugee regime.²⁶ They also only cover those individuals who have crossed international borders and not those who stay within their country.

Beyond the elements contained in the 1951 Refugee Convention, the 1969 Organization of African Unity Convention governing the specific aspects of refugee matters in Africa, in its Article 1, defines a refugee as any person compelled to leave their place of habitual residence in order to seek refuge in another place outside their country of origin or nationality, “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [their] country of origin or nationality.” While this definition is again limited to cross-border movement, it is broader than the *classical* refugee definition embracing the notion of *events seriously disturbing public order*, which could occur as a result of environmental degradation and loss of livelihood due to the adverse impact of climate change. The threshold for events seriously disturbing public order being lower than that of conflict, this definition could cover many more individuals who flee the impact of climate change, though it will still not extend to monocausal motivations.²⁷

²⁴ Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, 2015, p. 17; see also UNHCR, Planned Relocation, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future, Report, 2014.

²⁵ For the full text of the 1951 Refugee Convention, see www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf (accessed April 18, 2019).

²⁶ B. L. Burson: [2013] NZIPT 800413, para. 51.

²⁷ African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on September 10, 1969, by the Assembly of Heads of State and Government. CAB/LEG/24.3. It entered into force on June 20, 1974.

The Kampala Convention

The Kampala Convention, which came into force on December 6, 2012, is the first regional instrument that provides legally binding protection for the rights and well-being of those forced to flee inside their home countries due to conflict, violence, natural disasters and human rights abuses.

More specifically, the Convention:

- promotes and strengthens regional and national measures to prevent and eliminate the root causes of internal displacement and provide for solutions;
- establishes a legal framework for prevention, protection and assistance to IDPs;
- establishes a legal framework for solidarity, cooperation and promotion of durable solutions between State parties;
- outlines the obligations and responsibilities of Member States;
- outlines the obligations, roles and responsibilities of armed groups, non-State actors and other relevant actors including civil society organizations and humanitarian agencies.

The Convention makes specific reference to climate change in Article 5(4):

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.

See: Explanatory Note on the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), www.internal-displacement.org/sites/default/files/inline-files/200910-training-KC-Explanatory-Note-Eng.pdf

The UNHCR expressed serious reservations about the association of the term *refugee* with situations not currently covered by the 1951 Refugee Convention. There are concerns that this could undermine the international refugee protection regime. The UNHCR recognizes that climate change and environmental degradation may be among the root causes pushing persons to cross international borders. This is not enough, however, under applicable international law to qualify them as refugees. While some of the migrants may fall within the scope of the international protection regime, there is a protection gap with regard to those who cannot on this basis claim refugee status under international law, even though they are in actual need of assistance.²⁸

²⁸ UNHCR, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 2009; see also W. Kalin, *Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are the Gaps in the Normative Framework for Their Protection?*, 2008; O. Brown, *Migration and Climate Change*, 2008, p. 36 *et seq.*; D. Kniveton *et al.*, *Climate Change and Migration: Improving*