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Climate Change, Migration, Law and Global Governance

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Climate Change, Migration, Law, and Global Governance

Elizabeth Ferris[†]

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I. Introduction

Our earliest records of human existence provide evidence that people have always moved for environmental reasons.¹ Moving away from areas at environmental risk, whether because of drought or sudden onset disasters, is a well-tested strategy people have used to survive and to protect themselves from harm.² In the past few decades, evidence has mounted that the effects of anthropogenic climate change will make certain parts of the planet uninhabitable and that consequently large numbers of people will likely have to

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¹ Amanda Mascarelli, *Climate Swings Drove Early Humans out of Africa (and Back Again)*, SAPIENS (Sept. 21, 2016), <https://www.sapiens.org/evolution/early-human-migration/> [<https://perma.cc/53B2-68J2>].

² Ed Chen, *Climate Induced Migration and Conflict: Historical Evidence, and Likely Future Outlook*, SCIENCE 2.0 (Sept. 21, 2009), https://www.science20.com/alchemist/blog/climate_induced_migration_and_conflict_historical_evidence_and_likely_future_outlook [<https://perma.cc/GQ8A-BCDU>].

move.³

The very first report of the Intergovernmental Panel on Climate Change in 1990 predicted that one of the major consequences of climate change will be the large-scale movement of people.⁴ In particular climate scientists warn that a warming planet will mean more frequent and longer droughts which damage livelihoods and force large numbers of people to move in order to survive.⁵ More frequent and more intense sudden-onset disasters will displace people.⁶ Sea level rise and changing weather patterns are already leading to coastal and riverine erosion, ocean acidification, higher king tides, and saltwater intrusion into freshwater supplies.⁷ Additionally, there is evidence that well-intentioned mitigation efforts to keep climate change in check by investing in renewable energies, protecting forests, and conserving habitats are causing further displacement—compelling people to leave their homes and livelihoods.⁸

However, while there has long been a consensus that the effects of climate change will increase mobility,⁹ there is little conclusive evidence on when, how, who, where, or how many people will move. Dire warnings of the potential for climate change to displace tens of millions or even hundreds of millions of people seem to have given way to the realization that the relationship between migration and climate change is a complex process influenced by factors that do not lend themselves well to estimates generated by statistical

³ OLI BROWN, CLIMATE CHANGE AND FORCED MIGRATION: OBSERVATIONS, PROJECTIONS AND IMPLICATIONS (2007).

⁴ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT (J.T. Houghton et al. eds., 1990).

⁵ Chen, *supra* note 2.

⁶ Lisa Lim Ah Ken, *Migration, Environment and Climate Change: What's New, and What's True*, LANDSCAPE NEWS (Nov. 1, 2018), <https://news.globallandscapesforum.org/viewpoint/migration-environment-and-climate-change-whats-new-and-whats-true/> [<https://perma.cc/8GRZ-HGBZ>].

⁷ See Mcleod et al., *A Blueprint for Blue Carbon: Toward an Improved Understanding of the role of Vegetated Coastal Habitats in Sequestering CO₂*, THE ECOLOGICAL SOC'Y OF AM. (Jan. 20, 2011), <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1890/110004> [<https://perma.cc/5PLF-NSUS>].

⁸ See Sara Vigil, *Displacement as a Consequence of Climate Change Mitigation Policies*, 49 FORCED MIGRATION REV. 43, 43–44 (2015).

⁹ BROWN, *supra* note 3.

projections and models.¹⁰

There are serious difficulties in conceptualizing or coming up with a term to characterize those who move because of the effects of climate change.¹¹ A particular challenge in assessing the likelihood that people will move because of climate change is the multi-causal nature of migration. People move for a variety of reasons; for example, they move in search of livelihoods and better opportunities, because of conflict and persecution, and because they can no longer survive where they are.¹² The 2011 Foresight Report looks at macro factors that lead people to move, including economic, environmental, demographic, political, and social factors, but also considers micro factors (such as gender, age, education, and wealth).¹³ In addition, there are intervening factors such as the existing legal framework, the cost of moving, and social networks at play; the intersection of all of these factors goes into an individual's decision to move or to stay.¹⁴ For example, the same environmental pressures may lead a young healthy man to decide to move to another country while an elderly woman with disabilities may decide to remain where she lives. After a storm destroys housing, one person with relatives in a nearby city may decide to move, whereas another person, facing similar destruction but not able to rely on social networks, may have no choice but to remain where she is. A well-to-do homeowner in New Jersey may decide to move before repeated flooding destroys all of his assets while a poorer person living nearby may have no option but to remain in place. Environmental factors always interact with other factors in decision-making about migration.

¹⁰ See, e.g., NICHOLAS STERN, STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE (2006); RACHEL BAIRD, HUMAN TIDE: THE REAL MIGRATION CRISIS, A CHRISTIAN AID REPORT (2007); ROGER ZETTER, PROTECTING ENVIRONMENTALLY DISPLACED PEOPLE: DEVELOPING THE CAPACITY OF LEGAL AND NORMATIVE FRAMEWORKS (2011); JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW (2012); BROWN, *supra* note 3; Koko Warner, *Global Environmental Change and Migration: Governance Challenges*, 20 GLOBAL ENVTL. CHANGE 402 (2010); UK GOV'T OFF. FOR SCI., FORESIGHT: MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE: FUTURE CHALLENGES AND OPPORTUNITIES (2011).

¹¹ See, e.g., Elizabeth Keyes, *Environment Refugees? Rethinking What's in a Name*, 44 N.C. J. INT'L L. 461, 463 (2019) (discussing how climate change has a varied impact on migration and spans a broad array of migration choices).

¹² See Ken, *supra* note 6.

¹³ UK GOV'T OFF. FOR SCI., *supra* note 10, at 12.

¹⁴ See *id.* at 11.

It is thus difficult to come up with accepted terminology for people who move in some measure because of environmental reasons, much less because of climate change.¹⁵ A second challenge is that the science is not yet sufficiently developed to determine the extent to which climate change is responsible for a particular sudden-onset event.¹⁶ While it is clear that climate change is changing patterns of sudden-onset disasters, leading to more intense and more frequent storms, we can still not yet say with any degree of certainty, for example, that Hurricane Harvey was caused by climate change.¹⁷ Thus, the terms “climate migrants,” “climate displaced,” or “climate refugees”¹⁸ are not straightforward. This may become clearer with recent advances in attribution science, where scientists are beginning to use sophisticated models to attribute the likelihood that any one weather event is the result of human-induced climate change.¹⁹

A third difficulty in terminology relates to our present international legal system for mobility which is based on sharp distinctions along two dimensions. Those who cross an international border are treated differently than those who remain within their borders.²⁰ Most of those moving because of the effects of climate change are expected to remain within the borders of their countries—and thus are either internal migrants or internally displaced persons.²¹ People who cross international borders are considered to be either international migrants or refugees,²² but neither category applies very well to those who move for

¹⁵ See Keyes, *supra* note 11, at 463–67.

¹⁶ See SARAH OPITZ STAPLETON, ET AL., CLIMATE CHANGE, MIGRATION AND DISPLACEMENT: THE NEED FOR A RISK-INFORMED AND COHERENT APPROACH (2017).

¹⁷ See Matt McGrath, *Hurricane Harvey: The Link to Climate Change*, BBC NEWS (Aug. 29, 2017), <https://www.bbc.com/news/science-environment-41082668> [<https://perma.cc/C54W-547E>].

¹⁸ See Tim McDonnell, *The Refugees the World Barely Pays Attention To*, NPR (June 20, 2018), <https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to> [<https://perma.cc/KQ4X-J5NQ>].

¹⁹ See Sarah Kaplan & Angela Fritz, *Climate Change Was Behind 15 Weather Disasters in 2017*, WASH. POST (Dec. 12, 2018), https://www.washingtonpost.com/science/2018/12/10/climate-change-was-behind-weather-disasters/?utm_term=.c04dfd4473ab [<https://perma.cc/9H9K-2LKN>].

²⁰ WORLD BANK GROUP, GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION (Kanta Kumari Rigaud et al. eds., 2018) [hereinafter GROUNDSWELL REPORT].

²¹ *Id.*

²² *Id.*

environmental reasons. Under international law, there is a clear legal distinction between those who are forced to move because of persecution and conflict (considered to be refugees) and those who choose to move voluntarily for a range of reasons (considered to be migrants).²³

The international refugee and migration regimes are very different animals. But neither offers much to those who leave primarily because of environmental change, including climate change. The definition of refugee as enshrined in the 1951 Convention includes five grounds for a refugee claim: persecution on the basis of race, religion, nationality, membership in a social group, and political opinion.²⁴ More generally, refugees are considered to be those who cannot avail themselves of the protection of their governments.²⁵ Courts have held persons seeking protection in another country because of the effects of climate change are not refugees under the U.N. Convention.²⁶ Moreover, legal experts specialized in refugee law warn against efforts to broaden the category of refugees, fearing that such a move could weaken an already over-stretched system.²⁷ International migration law is rooted in international human rights law,²⁸ and indeed people do not lose their rights when they migrate, including those who migrate for mainly environmental reasons. But beyond international human rights law, the existing normative frameworks in the migration regime focus mainly on migrant workers and do not specifically apply to those who leave their country because of the

²³ Adrian Edwards, *UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right?*, U.N. HIGH COMMISSIONER FOR REFUGEES (July 11, 2016), <https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> [https://perma.cc/59S4-MMF6].

²⁴ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T 6223, 189 U.N.T.S. 137.

²⁵ *Id.*

²⁶ See Gill Bonnett, *Climate Change Refugee Cases Rejected*, RADIO N.Z. (Oct. 24, 2017), <https://www.radionz.co.nz/news/national/342280/climate-change-refugee-cases-rejected> [https://perma.cc/BNF3-XJUM].

²⁷ See Jane McAdam, *Seven Reasons the UN Refugee Convention Should Not Include 'Climate Refugees'*, SYDNEY MORNING HERALD (June 6, 2017), <https://www.smh.com.au/opinion/seven-reasons-the-un-refugee-convention-should-not-include-climate-refugees-20170606-gw18b4.html> [https://perma.cc/CCE6-WKYQ].

²⁸ See MASSIMO FRIGO, *MIGRATION AND INTERNATIONAL HUMAN RIGHTS LAW* (Róisín Pillay eds., Priyamvada Yarnell trans., 2014).

effects of climate change.²⁹

For the first time, in 2010 the United Nations Framework Convention on Climate Change's meeting in Cancun referred to mobility as a form of adaptation to climate change and recommended that further work be done in the areas of migration (presumed to be voluntary), displacement (forced movement), and planned relocations (when a government resettles a community in order to protect them from the effects of climate change).³⁰ There has been considerable research on the first two of these, including major institutional efforts by the European Union, the U.K.'s Foresight Study, the International Organization for Migration ("IOM"), and the Platform on Disaster Displacement.³¹ Less work has been done on planned relocations, perhaps for the understandable reason that this is considered as a last resort, and indeed, existing research indicates that such planned relocations are fraught with difficulties.³²

For these reasons, it has been difficult to reach common understanding—and even basic definitions—among those working in the area of climate change mobility. There is no consensus on terminology or on how to deal with the multi-causal nature of movements.³³ Nor are there widely-accepted estimates of the number of people likely to move.³⁴ It has also been complicated by policy-makers and researchers who approach the issue from very

²⁹ See International Convention on the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention Concerning Migration for Employment, Jan. 22, 1952, 120 U.N.T.S. 71; Migrant Workers (Supplementary Provisions) Convention, June 24, 1975, I.L.O No. 143 (entered into force Dec. 9, 1978).

³⁰ U.N. Framework Convention on Climate Change, *Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*, U.N. Doc. FCCC/CP/2010/7 (Dec. 10, 2011) [hereinafter *Cancun Agreements*].

³¹ See EACH-FOR ENVIRONMENTAL CHANGE AND FORCED MIGRATION SCENARIOS FINAL REPORT SUMMARY (2012); EACH-FOR ENVIRONMENTAL CHANGE AND FORCED MIGRATION SCENARIOS D.3.4. SYNTHESIS REPORT (2009); UK GOV'T OFF. FOR SCI., *supra* note 10; ENV'T MIGRATION PORTAL, <https://environmentalmigration.iom.int/> [<https://perma.cc/B3BB-2CDW>]; PLATFORM ON DISASTER DISPLACEMENT, <https://disasterdisplacement.org/> [perma.cc/A8NT-FRGH].

³² For research and other materials on planned relocations, see *Planned Relocations*, INST. FOR THE STUDY OF INT'L MIGRATION, <https://isim.georgetown.edu/Planned-Relocations> (last visited on Apr. 15, 2019).

³³ See Ken, *supra* note 6.

³⁴ *Id.*

different backgrounds, using different assumptions and methodologies. For example, marine scientists, refugee lawyers, disaster management officials, security analysts, and environmental lawyers all approach the issue of climate change mobility differently.³⁵ It is thus understandable, as discussed further below, that there has been more progress and more consensus among those focusing on disaster displacement, particularly sudden-onset disasters,³⁶ than on climate-change mobility. The Internal Displacement Monitoring Centre has been collecting data on the number of people displaced by sudden-onset disasters and has found that on average 24.3 million people per year are displaced by sudden-onset disasters.³⁷

Two other political factors complicate efforts to develop new international standards or agreements to respond to those who move because of the effects of climate change. First, there is presently little international appetite for assuming new international obligations or developing new international law.³⁸ The big international successes of the last few years—the Paris Agreement, the Sendai Framework for Disaster Risk Reduction, Agenda 2030 for Sustainable Development and, most recently, the Global Compact for Migration—are all aspirational frameworks that depend on voluntary compliance rather than legal obligations.³⁹ Secondly, in spite of these U.N. “successes,” this is a difficult time for multilateralism and collective action on pressing global issues writ large. The liberal rules-based order that has largely provided stability and prosperity since World War II is being eroded due to changes in U.S. leadership.⁴⁰ U.S. policy appears to have moved

³⁵ See *id.* (discussing lack of consensus across the scientific and legal fields).

³⁶ See *id.* (stating that the International Organization for Migration only added a climate change migration division in 2015).

³⁷ INTERNAL DISPLACEMENT MONITORING CTR., GLOBAL REPORT ON INTERNAL DISPLACEMENT (2017), <http://www.internal-displacement.org/sites/default/files/publications/documents/20170522-GRID.pdf> [<https://perma.cc/9JCJ-M8PK>].

³⁸ See Kristen E. Boon, *Disaster Displacement: Gaps in International Norms*, OPINIOJURIS (Apr. 15, 2014), <http://opiniojuris.org/2014/04/15/disaster-displacement-gaps-international-norms/> [<https://perma.cc/ZLX9-HNPH>].

³⁹ See Dana Nuccitelli, *Climate Scientists Debate a Flaw in the Paris Agreement*, GUARDIAN (Mar. 29, 2018), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/mar/28/climate-scientists-debate-a-flaw-in-the-paris-climate-agreement> [<https://perma.cc/8FX4-QEH2>].

⁴⁰ ROBERT KAGAN, *THE JUNGLE GROWS BACK: AMERICA AND OUR IMPERILED WORLD*

away from seeing strong multilateral institutions as essential for U.S. national interests toward a worldview emphasizing “America First.”⁴¹ Moreover, the present xenophobic, anti-immigrant climate⁴² makes it difficult to come up with any new global framework which would make it easier, not harder, for people to gain entry into other countries. Indeed, it has even been difficult to mobilize support for accepting recognized refugees—witness the sharp decline in U.S. resettlement places, from 110,000 under President Obama to 40,000 under the Trump administration.⁴³

For these reasons, it is highly unlikely that the international community will develop and adopt a comprehensive legal framework in the near future for those who move because of the effects of climate change. A number of such draft treaties and agreements exist, but they are likely to remain an issue for discussion among academics and lawyers rather than serving as a basis for political action.⁴⁴

This Article now considers alternative ways of using existing legal instruments to respond to those who are presently moving and who will move in the future because of the effects of climate change, beginning with people who move within the borders of their own countries. This includes using the *Guiding Principles on Internal Displacement* and supporting national-level efforts to deal with those moving because of climate change.

II. Guiding Principles on Internal Displacement

The *Guiding Principles on Internal Displacement* (“the *Principles* or *Guiding Principles*”), developed in 1998 and affirmed by the World Summit of 2005, explicitly apply to those displaced by disasters as well as by conflict.⁴⁵ The *Principles* were developed

17 (2018).

⁴¹ *See id.*

⁴² *See* Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/> [<https://perma.cc/4LMY-2MBQ>].

⁴³ Dara Lind, *Trump Slashed Refugee Levels this Year. For 2019, He's Slashing Them Even Further*, VOX (Sep. 18, 2018), <https://www.vox.com/2018/9/17/17871874/refugee-news-record-history-asylum> [<https://perma.cc/D5K6-U66R>].

⁴⁴ *See* Katrina Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL L. REV. 167, 216 (2013).

⁴⁵ U.N. Secretary-General, *U.N. Guiding Principles on Internal Displacement*, U.N.

to respond to gaps in existing international law and to provide appropriate guidance to national authorities in responding to those who are compelled to move elsewhere in their own countries.⁴⁶ The *Principles* were developed by legal experts, convened by Francis Deng, then-Representative of the Secretary-General on Internally Displaced Persons (“IDPs”).⁴⁷ The 30 principles were synthesized and compiled from existing hard law particularly applicable to IDPs.⁴⁸ Thus, the Convention on the Rights of the Child affirms that all children have the right to education,⁴⁹ and the *Principles* state that all internally displaced children have the right to education.⁵⁰

While not in itself a legally binding document, because the *Guiding Principles* are based on and draw out the relevant norms of international human rights and humanitarian law (and by analogy, refugee law),⁵¹ they have enjoyed broad support.⁵² Central to the *Guiding Principles* is the affirmation that states bear the primary responsibility for protection of people, both citizens and habitual residents within their area of jurisdiction.⁵³ They recognize that individuals have a right to protection from arbitrary displacement as well as to assistance and protection when they are displaced.⁵⁴ Moreover, the *Principles* highlight the right to find durable solutions to displacement, return or settlement in the place of displacement, or in another part of the country.⁵⁵

The *Guiding Principles* are often considered to be one of the most effective soft law mechanisms.⁵⁶ Now available in more than

Doc. E/CN.4/1998/53/Ad.2 (1998) [hereinafter *Guiding Principles*].

⁴⁶ *See id.*

⁴⁷ *Id.* at 7.

⁴⁸ *Id.*

⁴⁹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁵⁰ *Guiding Principles*, *supra* note 45.

⁵¹ *See id.* at intro. (“Although they do not constitute a binding instrument, these Principles reflect and are consistent with international human rights and humanitarian law and analogous refugee law.”).

⁵² *See* Roberta Cohen, *The Guiding Principles: How Do They Support IDP Response Strategies*, BROOKINGS INSTITUTION (Nov. 9, 2001), <https://www.brookings.edu/on-the-record/the-guiding-principles-how-do-they-support-idp-response-strategies/> [<https://perma.cc/PB6Z-S2HF>].

⁵³ *Guiding Principles*, *supra* note 45.

⁵⁴ *Id.* at principles 3, 6.

⁵⁵ *Id.* at principle 28.

⁵⁶ Cohen, *supra* note 52.

60 languages, they have been used by many governments as the basis for the development of national laws and policies on IDPs and have been incorporated into policies and guidelines for humanitarian actors.⁵⁷ They have been useful to governments responding to large-scale internal displacement in providing concrete guidance as to their responsibilities.⁵⁸

The *Guiding Principles* have been successful in providing a normative framework that has undoubtedly protected the rights of some IDPs in many situations.⁵⁹ Presently some 40 governments have developed national laws and policies on IDPs—although not all of these are based on the Guiding Principles.⁶⁰ Even when governments have developed laws, however, implementation has usually been lacking. Phil Orchard has found that almost a third of these policies have not been implemented at all.⁶¹ With a few exceptions, even when governments have developed laws and policies on IDPs, the almost exclusive focus has been on those displaced by conflict, and there is as yet only one country that has incorporated them into a national policy on climate change displacement (Vanuatu, discussed further below).⁶² For example, Kenya has developed strong legislation to respond to conflict-induced displacement, but has not applied these policies to those displaced by drought.⁶³ Moreover, in recent years, there has been concern that the issue of internal displacement is falling off the international agenda.⁶⁴ For example, neither of the two Global Compacts adopted in 2018 (one on Refugees and the other on Safe, Orderly and Regular Migration) made more than a passing reference to internal displacement.⁶⁵

⁵⁷ PHIL ORCHARD, *PROTECTING THE INTERNALLY DISPLACED: RHETORIC AND REALITY* (2019).

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ ORCHARD, *supra* note 57.

⁶² *See id.*

⁶³ Dulo Nyaro, *Assessing the Evidence: Migration, Environment, and Climate Change in Kenya*, INT'L ORG. FOR MIGRATION 101–02 (2016), <https://gmdac.iom.int/MECLEP-Assessment-Kenya> [<https://perma.cc/9QHL-BY4C>].

⁶⁴ ELIZABETH FERRIS, BROOKINGS INSTITUTION, *TEN YEARS AFTER HUMANITARIAN REFORM: HOW HAVE INTERNALLY DISPLACED PERSONS FARED?* 3 (2015), <https://www.refworld.org/docid/54cb8e484.html> [<https://perma.cc/3RQB-XDGT>].

⁶⁵ *See id.*

One of the more concrete indicators of the success of the *Guiding Principles* has been the fact that they have directly led to the formulation of the world's first binding regional instrument on internal displacement.⁶⁶ The African Union Convention on Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) was adopted by the African Union in 2009 and entered into force in 2012.⁶⁷ This Convention built on the Great Lakes Protocols.⁶⁸ The Kampala Convention is the first binding international treaty to acknowledge climate change as a driver of displacement.⁶⁹ Unlike the *Guiding Principles*, the Convention is a formal, legally binding convention that establishes the obligations of states to prevent displacement, to protect and assist those who have been displaced, and to support solutions to displacement.⁷⁰ The Convention spells out the obligation of states to prevent displacement by, among other actions, instituting early warning systems and developing disaster risk reduction strategies.⁷¹ States parties are also required to protect and assist those displaced by disasters, including by climate change.⁷² Finally, states parties are liable to make reparations to IDPs for damages when "a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters."⁷³ The African Union and the states parties to the Convention are still working on implementation of the Convention and its domestication into appropriate legal frameworks at the national level.⁷⁴ In spite of the

⁶⁶ African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), *adopted on* Oct. 23, 2009 49 I.L.M. 86 [hereinafter Kampala Convention].

⁶⁷ *Id.*

⁶⁸ International Conference on the Great Lakes Region, *Protocol on the Protection and Assistance to Internally Displaced Persons*, U.N. Doc. E/CN.4/1998/53/Add.2 (Nov. 30, 2006).

⁶⁹ Allehone M. Abebe, *The Kampala Convention & Environmentally Induced Displacement in Africa*, IOM INTERSESSIONAL WORKSHOP ON CLIMATE CHANGE, ENVIRONMENTAL DEGRADATION & MIGRATION (Mar. 29–30, 2011), <https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/SessionIII-Paper-Allehone-Mulugeta-Abebe.pdf> [<https://perma.cc/3TXS-4QAP>].

⁷⁰ *Id.*

⁷¹ Kampala Convention, *supra* note 67, at art. 4(2).

⁷² *Id.* at art. 5(4).

⁷³ *Id.* at art. 12(3).

⁷⁴ Abebe, *supra* note 69.

lack of progress on implementation, the Kampala Convention stands as an important model for other regional organizations which are likely to be confronted with the challenge of responding to those who move because of the effects of climate change. This possibility is discussed more fully later in this Article.

In sum, the *Guiding Principles on Internal Displacement* have provided useful guidance for states and international organizations in the development of policies and programs to protect and assist people displaced within the borders of their countries. They stand as the best legal guidance presently available for the vast majority of those likely to be displaced by the effects of climate change.⁷⁵ They have served as the normative framework for efforts by international networks to establish operational guidelines for responding to people displaced and otherwise affected by natural disasters initiatives,⁷⁶ which are discussed later in this Article.

As governments throughout the world are faced with the reality of large-scale displacement within the borders of their countries, they would be well-advised to consider incorporating the *Guiding Principles* into their national laws and policies. Legal scholars could be encouraged to provide additional guidance as to how this framework could be interpreted into national law, particularly as it relates to climate change. At the end of the day, most of those displaced by the effects of climate change, who will remain within the borders of their countries, will have to depend on national laws and programs for protection and assistance. This applies to people displaced in wealthy countries, such as the United States, as well as those forced to leave their homes in small-island developing countries and in the world's great mega-cities located in vulnerable coastal areas. We turn now to the level of national laws and policies in consideration of normative guidance available to support those who move because of the effects of climate change.

III. National-Level Policies

Although there is a growing body of research on the ways in which climate change is leading both to greater migration and

⁷⁵ INT'L ORG. FOR MIGRATION, IOM FRAMEWORK FOR ADDRESSING INTERNAL DISPLACEMENT 2017 7 (2017), https://www.iom.int/sites/default/files/press_release/file/170829_IDP_Framework_Low_Res.pdf [<https://perma.cc/4FS7-4U2L>].

⁷⁶ *Id.*

displacement,⁷⁷ there is a paucity of research on national policies on environmental migration and displacement beyond disaster risk reduction (DRR) measures aimed at increasing resilience (where there is a substantial literature).⁷⁸ Those few studies that look at the policy dimension⁷⁹ suggest the need to incorporate migration and displacement into national development or climate change adaptation and DRR plans, a point reaffirmed in the World Bank's 2018 flagship report, *Groundswell*.⁸⁰

Presently there is little information on whether migration is even included in national and local climate change and disaster risk reduction policies, and there is virtually no information on how policies related to environmental migration were made.⁸¹ Nor is there research on the impact of such policies to prevent or manage migration.⁸² The reasons for this lack of research seems to be the reluctance to consider migration as a response to the effects of climate change,⁸³ and focuses instead on measures to mitigate the effects of climate change so that people are able to remain in place.

In looking at national level laws and policies, it seems that much of the relevant work currently underway is taking place at the state and local levels, which are the governments most likely to be confronted with responding to environmental displacement—

⁷⁷ BROOKINGS-LSE, PROJECT ON INTERNAL DISPLACEMENT: CLIMATE CHANGE AND INTERNAL DISPLACEMENT (2014), available at <https://www.brookings.edu/wp-content/uploads/2016/06/Climate-Change-and-Internal-Displacement-October-10-2014.pdf> [<https://perma.cc/2SV2-KK5R>].

⁷⁸ See INT'L ORG. FOR MIGRATION, DISASTER RISK REDUCTION, CLIMATE CHANGE ADAPTATION AND ENVIRONMENTAL MIGRATION (2009), http://publications.iom.int/system/files/pdf/ddr_cca_report.pdf [<https://perma.cc/BWD8-S5YT>].

⁷⁹ U.N. OFF. FOR DISASTER RISK REDUCTION, DISASTER DISPLACEMENT: HOW TO REDUCE RISK, ADDRESS IMPACTS AND STRENGTHEN RESILIENCE (2018), available at https://www.unisdr.org/files/58821_disasterdisplacement05a.pdf [<https://perma.cc/A6M7-W7QX>]; Adelle Thomas & Lisa Benjamin, *Policies and Mechanisms to Address Climate-Induced Migration and Displacement in Pacific and Caribbean Small Island Developing States*, 10 INT'L J. OF CLIMATE CHANGE STRATEGIES AND MGMT. 86 (2018).

⁸⁰ GROUNDSWELL REPORT, *supra* note 20.

⁸¹ *Id.* at xxv.

⁸² *Id.* at 185.

⁸³ See Katrina Wyman, *Responses to Climate Change*, 37 HARV. ENVTL. L. REV. 167, 172 (2013) ("It is also challenging to attribute a migration decision to climate change, as migration decisions are a response to a combination of factors.").

sometimes with the support of national political institutions.⁸⁴ Thus, in the United States, the state of Louisiana's efforts to relocate the small community of Isle Jean Charles (which has lost 98% of its physical territory in recent years to erosion, subsidence, and storm surges) is being carried out with the support of the Department of Housing and Urban Development.⁸⁵

In Florida, municipalities have developed different programs to respond to the threats posed by climate change. One significant positive development is the establishment of the Southeast Florida Regional Climate Change Compact, the first case of U.S. local governments voluntarily coming together to adapt to climate change on a regional scale.⁸⁶ In 2010, four southeast Florida counties created a compact to promote regional coordination of climate adaptation: Broward, Miami-Dade, Monroe, and Palm Beach.⁸⁷ Since then, they have expanded the compact to include non-governmental organizations and various governmental actors such as the U.S. Army Corps of Engineers.⁸⁸ Working through the compact, the four counties have developed a Regional Climate Action Plan which includes 110 projects for resilience and adaptation.⁸⁹

One of the best examples of a national policy on displacement caused by climate change is Vanuatu's recent *National Policy on Climate Change and Disaster-Induced Displacement*.⁹⁰ This policy

⁸⁴ See Coral Davenport & Campbell Robertson, *Resettling the First American 'Climate Refugees'*, N.Y. TIMES, May 2, 2016, at A1 (referencing the Department of Housing and Urban Development's \$1 billion in grants to help communities adapt to climate change).

⁸⁵ *Id.*

⁸⁶ See David L. Markell, *Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond*, 42 COLUM. J. ENVTL. L. 1 (2016); SYDNEY MENEES & JESSICA GRANNIS, GEORGETOWN CLIMATE CENTER, LESSONS IN REGIONAL RESILIENCE: THE SOUTHEAST FLORIDA REGIONAL CLIMATE CHANGE COMPACT (2017), available at https://www.georgetownclimate.org/files/report/GCC-Lessons-in-Regional-Resilience-SE_FL_Compact-Jan_2017-v2.pdf [<https://perma.cc/V5Q2-PWM7>].

⁸⁷ SOUTHEAST FLORIDA REGIONAL CLIMATE CHANGE COMPACT COUNTIES, A REGION RESPONDS TO A CHANGING CLIMATE: REGIONAL CLIMATE ACTION PLAN (2012), <http://www.southeastfloridaclimatecompact.org/wp-content/uploads/2014/09/regional-climate-action-plan-final-ada-compliant.pdf> [<https://perma.cc/WB23-93G7>].

⁸⁸ *Id.* at 48.

⁸⁹ See *id.* at 13.

⁹⁰ See GOV'T OF VANUATU, NATIONAL POLICY ON CLIMATE CHANGE & DISASTER-INDUCED DISPLACEMENT (2018),

is based on the country's own legal system (including respect for traditional law and customary land arrangements) and incorporates the *Guiding Principles on Internal Displacement*.⁹¹ It suggests concrete ways of preventing, responding to, and resolving displacement caused by climate change and disasters.⁹² It recognizes the multi-causal nature of displacement, and the importance of consulting with communities affected by displacement.⁹³ The policy proposes "twelve strategic priority areas for action to ensure displacement and human mobility considerations are mainstreamed into Vanuatu's planning at national, provincial and local levels."⁹⁴ The policy further identifies specific objectives, actions to be taken, and the relevant ministries and agencies charged with implementation and follow-up.⁹⁵ Vanuatu's policy stands as a model for other countries experiencing or likely to experience displacement caused by disasters and the effects of climate change. An interesting area for further research and for the expertise of international lawyers is to analyze the extent to which Vanuatu's new policy can serve as a model for other governments likely to experience large-scale displacement caused, at least in part, by the effects of climate change.

The experience of international disaster law, pioneered by the International Federation of Red Cross Red Crescent Societies ("IFRC"), suggests the importance of legal preparedness in preparing for disasters and indeed for the long-term effects of climate change.⁹⁶ IFRC suggests that governments are advised to review their national policies on disaster management and ensure that policies are in place before disasters strike.⁹⁷ While the focus

https://www.iom.int/sites/default/files/press_release/file/iom-vanuatu-policy-climate-change-disaster-induced-displacement-2018.pdf [<https://perma.cc/CF8-86YD>].

⁹¹ *See id.* at 17.

⁹² *See id.* at 7.

⁹³ *Id.*

⁹⁴ *See id.* at 8.

⁹⁵ *See id.* at 21 (listing various strategic areas and specifying the agencies to act).

⁹⁶ *See About the Disaster Law Programme*, INT'L FED'N OF RED CROSS AND RED CRESCENT SOC'YS (2019), <http://www.ifrc.org/what-we-do/idrl/about-idrl/> [<https://perma.cc/4RCH-9BQ5>].

⁹⁷ *See INT'L FED'N OF RED CROSS AND RED CRESCENT SOC'YS, INTRODUCTION TO THE GUIDELINES FOR THE DOMESTIC FACILITATION AND REGULATION OF INTERNATIONAL DISASTER RELIEF AND INITIAL RECOVERY ASSISTANCE* 16 (2011), [http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf)

of international disaster law is on immediate response (for example, taking measures to ensure that in the event of an emergency, customs offices will be expected to have longer opening hours and that relief goods can receive expedited clearance),⁹⁸ other factors should be taken into consideration. The development of national laws which could apply to those displaced by disasters and climate change could include measures such as ensuring that displaced children will have access to education even if they do not have their school records or that the government will take action to ensure the protection of property and other assets left behind after people are displaced because of the effects of climate change.

IV. Planned Relocations

As noted above, in 2010 the Conference of Parties of the U.N. Framework Convention on Climate Change (“UNFCCC”), recognized that mobility may be an adaptation strategy for climate change and called for further work on displacement, migration and planned relocations.⁹⁹ The Paris Agreement extended this recognition and called for concrete recommendations to be developed.¹⁰⁰ While there has been considerable work on displacement and migration,¹⁰¹ much less is known about planned relocations. Although the need for them is likely to increase in the coming years, there has been little guidance or statement of principles to address planned relocations as a protection strategy in response to the adverse effects of climate change. Development induced displacement and resettlement have been extensively used in the case of development projects,¹⁰² but their applicability in other cases of climate change has received relatively little attention.

Recognizing this gap, from 2011–2015, the Brookings Institution, Georgetown University, and United Nations High

[<https://perma.cc/JU2A-2SPZ>].

⁹⁸ *See id.* at 20.

⁹⁹ *See Cancun Agreements, supra* note 30.

¹⁰⁰ *See* U.N. Framework Convention on Climate Change, *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, ¶ 49 (Jan. 29, 2016).

¹⁰¹ *See id.* (requesting “expert bodies outside the Convention” and the Adaption Committee and the Least Developed Countries Expert Group to continue their work on displacement related to climate change).

¹⁰² *See generally* Chris de Wet, *Improving Outcomes in Development-Induced Displacement and Resettlement Projects*, 24 FORCED MIGRATION REV. (2002) (discussing Development-Induced Displacement and Resettlement Projects generally).

Commissioner for Refugees (“UNHCR”) worked on planned relocations, organizing meetings of both legal experts and practitioners in Bellagio, San Remo and again in Bellagio in May 2015.¹⁰³ The 2015 meeting drafted *Guidance on Protecting People through Planned Relocations from Disasters and Environmental Change, including Climate Change* as a guide for governments and others when planned relocations are necessary to protect people because of disasters and environmental change, including the effects of climate change.¹⁰⁴ This Guidance only applies to those who are relocated within the borders of their countries. This is likely to be the vast majority of people although there is considerable interest in those communities that might have to be relocated, at some point, to other countries.¹⁰⁵

The Guidance was widely disseminated and also served as the basis for the development of a Toolbox which lays out a number of concrete ways to translate the principles into practice.¹⁰⁶ The Toolbox organizes its checklists into five essential categories, including: (1) establishing and complying with an appropriate legal framework; (2) understanding and addressing the needs and impacts of Planned Relocations on affected populations; (3) providing information to, undertaking consultation with, and ensuring the participation of, affected populations; (4) understanding and addressing complexities related to land issues; and (5) undertaking

¹⁰³ See, e.g., THE BROOKINGS INSTITUTION ET AL., GUIDANCE ON PROTECTING PEOPLE FROM DISASTERS AND ENVIRONMENTAL CHANGE THROUGH PLANNED RELOCATION (2015), https://www.brookings.edu/wp-content/uploads/2016/06/GUIDANCE_PLANNED-RELOCATION_14-OCT-2015.pdf [<https://perma.cc/AY3Q-UJ5E>]; DANIEL PETZ, PLANNED RELOCATIONS IN THE CONTEXT OF NATURAL DISASTERS AND CLIMATE CHANGE: A REVIEW OF THE LITERATURE (2015), <https://www.brookings.edu/wp-content/uploads/2016/06/Brookings-Planned-Relocations-Annotated-Bibliography-June-2015.pdf> [<https://perma.cc/SX5F-JBRF>]; THE BROOKINGS INSTITUTION ET AL., PLANNED RELOCATIONS, DISASTERS AND CLIMATE CHANGE: CONSOLIDATING GOOD PRACTICES AND PREPARING FOR THE FUTURE (2014) [hereinafter PLANNED RELOCATIONS, DISASTER AND CLIMATE CHANGE], <https://www.brookings.edu/wp-content/uploads/2016/06/Planned-Relocations-Disasters-and-Climate-Change-Report-March-2014.pdf> [<https://perma.cc/3DUT-3ELD>]; DANIEL PETZ, OPERATIONAL GUIDANCE AND FRAMEWORKS RELEVANT TO PLANNED RELOCATIONS CAUSED BY NATURAL HAZARDS, ENVIRONMENTAL CHANGE, AND CLIMATE CHANGE (2015), <https://www.brookings.edu/wp-content/uploads/2016/06/Brookings-Planned-Relocations-Framework-DPetz-June-2015.pdf> [<https://perma.cc/RE65-PG5J>].

¹⁰⁴ *Id.*

¹⁰⁵ See *id.*

¹⁰⁶ PLANNED RELOCATIONS, DISASTER AND CLIMATE CHANGE, *supra* note 103.

monitoring and evaluation, and ensuring accountability.¹⁰⁷ The Toolbox further addresses the importance of making the decision that a community must be relocated, developing a comprehensive plan for the relocation and implementing the plan in a way that respects the rights of all of those affected by the relocation, including those who are relocated, the communities that receive them and those that are left behind.¹⁰⁸

This initiative thus provides a framework to support governments and affected communities considering relocation of entire communities. Such relocations are generally considered as a last resort after other measures to enable communities to remain in place.¹⁰⁹ While some communities are proactively asking the government for assistance in relocation,¹¹⁰ others, such as Del Mar, California are actively resisting calls to at least consider relocations as a form of adaptation to the effects of climate change in their communities.¹¹¹

Work in these three areas—the *Guiding Principles on Internal Displacement* as a normative framework at the international level, laws and policies developed at the national level, and preparing for planned relocations,—offer guidance for those displaced internally because of the effects of climate change.

We now turn to efforts to deal with *international* displacement and migration, beginning with international refugee law, which as noted above is not immediately relevant but where some related efforts offer interesting possibilities.

V. Refugee Law

As noted above, refugee law in its current form will only cover a very small group of people affected by climate change, those that

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 6–7 (“Box 1.2. Basic Principles of Planned Relocations”).

¹⁰⁹ *Id.* at 3.

¹¹⁰ See generally Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y.U. REV. OF L. & SOC. CHANGE 357 (2017) (discussing the steps taken by Federal, State, and Tribal governments have taken to relocate Newtok, one of at least twelve small indigenous communities in Alaska that need to relocate due to climate change).

¹¹¹ Nathan Rott, ‘Retreat’ Is Not an Option as a California Beach Town Plans for Rising Seas, NPR (Dec. 4, 2018), <https://www.npr.org/2018/12/04/672285546/retreat-is-not-an-option-as-a-california-beach-town-plans-for-rising-seas> [https://perma.cc/46NT-XTBY].

suffer from ensuing conflict, persecution, or a breakdown of public order.¹¹² It may be that climate change exacerbates conflict and that as a result people flee across national borders; if they are fleeing violence and persecution, they may be able to avail themselves of protection under refugee law.¹¹³ There also may be cases where people affected by disasters face discrimination on the basis of one of the five protected grounds in the 1951 Convention¹¹⁴ and as a consequence seek protection in other countries. In these cases, people so displaced may be able to find protection under the refugee convention.¹¹⁵

However, the Refugee Convention does not apply to those whose main reason for flight is a deteriorating environment or the effects of climate change.¹¹⁶ While some have suggested changing the 1951 Refugee Convention to apply to such individuals,¹¹⁷ States are suspicious of extending legal obligations to other categories of displaced persons.¹¹⁸ Negotiating a new protocol or amendment to the Refugee Convention is thus unlikely and were such negotiations to occur, could prove counterproductive.

However, there are other areas where it may be possible to use refugee law. Some regional instruments such as the 1969 Organization of African Unity (OAU) *Convention on the Specific Aspects of Refugee Problems in Africa*¹¹⁹ and the 1984 *Cartagena Declaration on Refugees*¹²⁰ have moved beyond the narrow definition of the Geneva Convention. They acknowledge that

¹¹² See Bonnett, *supra* note 26.

¹¹³ Caitlin Werrell & Francesco Femia, *Climate Change Raises Conflict Concerns*, UNESCO COURIER (Feb. 2018), <https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns> [<https://perma.cc/K2N5-6P78>].

¹¹⁴ See Bonnett, *supra* note 26.

¹¹⁵ *Id.*

¹¹⁶ See Werrell & Femia, *supra* note 113.

¹¹⁷ See, e.g., Somini Sengupta, *Climate Change is Driving People from Home. So Why Don't They Count as Refugees*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/climate/climate-refugees.html> [<https://perma.cc/6WUD-J8LZ>] (raising the question of whether the definition of refugee ought to be revised to encompass climate migrants).

¹¹⁸ See *id.*

¹¹⁹ Organization of the African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Sep. 10, 1969, 1001 U.N.T.S. 45.

¹²⁰ *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

international protection may be needed for events that “seriously disturb public order” and thus potentially provide protection for people displaced by circumstances accompanying disasters.¹²¹ More recently, the Brazil Plan of Action, adopted in December 2014 by 28 countries, explicitly mentions climate change as a challenge to the region and calls on UNHCR to support the development of national and regional policies to respond to those forced to move because of climate change and disasters.¹²² There may be potential in applying these regional instruments and encouraging the development of similar instruments in other regions.

The concept of complementary protection, i.e. regional and national norms for temporary or subsidiary protection, offers other possibilities. This concept was developed to fill some protection needs outside the 1951 Refugee Convention.¹²³ An EU directive, for instance, allows the establishment of temporary protection for people facing generalized violations of human rights in their home countries, although it has never been applied.¹²⁴ Subsidiary protection can be claimed in the EU when applicants face the risk of serious harm such as indiscriminate violence in their home countries.¹²⁵ While neither of these measures explicitly references

¹²¹ Regional instruments such as the *1969 OAU Convention* and the *1984 Cartagena Declaration* apply a wider definition of refugees that includes events which seriously disturb public order, thus potentially encompassing disasters. This was used by some states in the Horn of Africa during the 2011–12 droughts to admit people displaced from Somalia, and by others in Latin America to grant asylum to Haitians displaced by the 2010 earthquake. Other Latin American states even found that Haitian asylum seekers had a “well-founded fear of persecution by non-state actors that arose from the vacuum of governmental authority after the earthquake.” See THE NANSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE 54 n.47 (2015).

¹²² See Regional Refugee Instruments & Related, 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 at 3–4, Dec. 3, 2014, 989 U.N.T.S. 175.

¹²³ See Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, L. & POL’Y 502, 513–14 (2008).

¹²⁴ See Council Directive 2001/55, 2001 O.J. (EC) (directing “minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof”).

¹²⁵ See Directive 2001/95, 2001 O.J. (EU) (directing standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the

climate-related risks, it may be that more intense disasters or prolonged drought may increase the likelihood of generalized human rights violations and indiscriminate violence and thus make the regimes applicable.

However, as McAdam argues, the concept of complementary protection would “need to be substantially developed” before it could become more generally applicable to climate change-related displacement.¹²⁶ Even if such measures were applied to those leaving their countries for climate change-related reasons, they usually provide only temporary protection and as the norms often reflect the lowest common denominator, they tend to establish weak protection standards.¹²⁷ Although far from perfect, a further area for legal experts would be to examine the extent to which such measures could bridge some of the existing gaps in the context of climate change-related displacement.

VI. International Law Commission Draft Articles on the Protection of Persons in the Event of Disasters

Another international initiative which may provide the basis for a new normative framework is the work of the International Law Commission (“ILC”), a U.N. body called upon by states to further the development of international law which has sought to establish hard law to protect people displaced by disasters.¹²⁸ After the failure of several efforts in the 1980s to develop a binding legal framework regulating humanitarian assistance for disasters outside armed conflicts, the 1990s brought new attention to the topic,¹²⁹ leading to the elaboration of “Draft Articles on the Protection of Persons in the Event of Disasters.”¹³⁰ The ILC worked on the draft from 2007 until

content of the protection granted).

¹²⁶ Climate Change Displacement and International Law: Complementary Protection Standards, Paper Submitted for the U.N. High Comm’r for Refugees Expert Roundtable on Climate Change and Displacement in Bellagio, It., at 118 n.126, U.N. Doc. PPLA/2011/03 (May 2011).

¹²⁷ *See id.* at 18–36 (noting the jurisprudence still requires significant development before it will be fully applicable to climate-related displacements).

¹²⁸ *About the Commission*, INT’L L. COMM’N, <http://legal.un.org/ilc/work.shtml> [<https://perma.cc/A8NA-J9G3>].

¹²⁹ Dug Cubie, *An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters*, 4–5 IRISH Y.B. OF INT’L L. 119, 132–34 (2009–10).

¹³⁰ *Protection of Persons in the Event of Disasters*, INT’L L. COMM’N,

2016 when it presented its draft articles and asked for comments by states.¹³¹ In November 2018 the General Assembly “took note” of the work of the ILC and in particular the comments received from six states and agreed to schedule another discussion in 2020.¹³²

The present 21 Draft Articles aim to frame an effective response to disasters, detailing both the rights and obligations of affected states and other international actors and define “disaster” as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, displacement, or large-scale material, economic or *environmental damage*, thereby seriously disrupting the functioning of society.”¹³³ With this broad definition covering both human-made and environmental disasters, the Articles would not only be of relevance primarily for internal displacement but also for the actions of international actors to respond to such cases. That said, it is not entirely clear whether the Draft Articles would also apply to slow-onset disasters and comments, including by the IOM and the IFRC who argue that the Draft Articles need further work.¹³⁴

According to the Draft Articles, the affected state remains the ultimate gatekeeper, although it shall not “withhold or withdraw arbitrarily” consent to external assistance (Art. 14 II).¹³⁵ The considerable amount of time and resources devoted to these negotiations reflect the general caution of states concerning the assumption of new obligations for climate-change related displacement that may infringe on their sovereignty.¹³⁶ At this

http://legal.un.org/ilc/guide/6_3.shtml#srapprep [https://perma.cc/3WKW-G7XN]

¹³¹ International Law Commission, *Draft Articles on the Protection of Persons in the Event of Disasters*, Ch. IV, ¶E, U.N. Doc. A/71/10 (Aug. 12, 2016).

¹³² *Sixth Committee (Legal) – 73rd Session, Protection of Persons in the Event of Disasters*, GEN. ASSEMBLY OF THE U.N. (Nov. 13, 2018) [hereinafter *Sixth Committee*], <http://www.un.org/en/ga/sixth/73/disasters.shtml> [https://perma.cc/KW9W-M2BT].

¹³³ *Draft Articles on the Protection of Persons in the Event of Disasters*, *supra* note 131, at art. 3.

¹³⁴ INT’L FED. OF RED CROSS AND RED CRESCENT SOC’YS, WRITTEN SUBMISSION OF THE INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES TO THE INTERNATIONAL LAW COMMISSION OF THE “DRAFT ARTICLES ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS,” http://legal.un.org/ilc/sessions/68/pdfs/english/pop_ifrc.pdf [https://perma.cc/H3JG-EM7C].

¹³⁵ *Draft Articles on the Protection of Persons in the Event of Disasters*, *supra* note 131, at art. 13(2).

¹³⁶ *See id.* at pmb1.

point, it is difficult to tell if the Draft Articles will ever be included in a new binding legal treaty submitted to states for their signature and ratification.¹³⁷ Several major states have deemed the existing legal framework to be sufficient and see more practical value in non-binding guidelines or in a framework of principles and recommendations.¹³⁸ It thus remains to be seen in which format the Draft Articles will be finalized, and how they may shape international law for those displaced by the effects of climate change.

VII. Mini-Multilateral Initiatives: The Nansen Initiative and the Platform for Disaster Displacement

Following the call of the 2010 UNFCCC Cancún Agreement to increase cooperation and coordination regarding climate change-related mobility, a number of governments and organizations mounted efforts to increase the visibility of climate change-induced displacement.¹³⁹ One of these initiatives, the Nansen Conference in June 2011, led to the development of the Nansen Principles,¹⁴⁰ which among other things, called for a sounder knowledge base. It also described the responsibilities of a broad range of stakeholders, and highlighted the need for better preventive capacities and more resilience.¹⁴¹

In particular, one of the principles identified an important protection gap associated with cross-border mobility in the context of disasters.¹⁴² As a concrete follow-up, the governments of Norway and Switzerland launched a new effort at the UNHCR Ministerial Conference in late 2012, known as the Nansen Initiative.¹⁴³ This effort was intended to be a state-owned, yet bottom-up and

¹³⁷ See generally *Sixth Committee*, *supra* note 132 (voting to delay consideration on Draft Articles for two years until 2020, after revising Draft Articles for over ten years indicates potentially fatal delay).

¹³⁸ See Cubie, *supra* note 131, at 138.

¹³⁹ Jennifer Morgan et al., *Reflections on the Cancun Agreements*, WORLD RESOURCES INST. (Dec. 14, 2010), <https://www.wri.org/blog/2010/12/reflections-cancun-agreements> [<https://perma.cc/38VM-WSM3>].

¹⁴⁰ The Nansen Conference, *Climate Change and Displacement in the 21st Century* (June 7, 2011), <https://www.unhcr.org/4ea969729.pdf> [<https://perma.cc/TD6Y-6DXU>].

¹⁴¹ *Id.* at 5.

¹⁴² *Id.*

¹⁴³ *About Us*, THE NANSEN INITIATIVE, <https://www.nanseninitiative.org/secretariat/> [<https://perma.cc/A5Q8-C4UD>].

participatory consultation process rather than an initiative solely carried out by legal experts.¹⁴⁴ It sought to build a better understanding of cross-border displacement resulting from disasters in the context of climate change and to develop a consensus around applicable protection mechanisms.¹⁴⁵ The term “in the context of climate change” was used to get around to the difficulties of ascribing causality for displacement to climate change alone.¹⁴⁶

The Nansen initiative, under the leadership of its Special Envoy, Walter Kälin and the support of a small secretariat,¹⁴⁷ organized various regional and sub-regional discussions in disaster hotspot areas, bringing together representatives of countries of origin and destination, civil society, and international organizations over the course of 2013–2015.¹⁴⁸ The results from these regional consultations as well as from additional research commissioned by the Nansen Initiative were synthesized at a global intergovernmental consultation in 2015.¹⁴⁹

The research and consultative processes produced a rich collection of conceptual frameworks and good practices to be used by governments and others and served as the background for the development of the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*,¹⁵⁰ which both establishes standards for the treatment of affected people and for effective operational responses. Endorsed

¹⁴⁴ THE NANSEN INITIATIVE, GLOBAL CONSULTATION CONFERENCE REPORT 26 (2015) [hereinafter GLOBAL CONSULTATION REPORT], <https://www.nanseninitiative.org/global-consultations/> [<https://perma.cc/R2SH-KAXT>].

¹⁴⁵ *Id.*

¹⁴⁶ See GLOBAL CONSULTATION REPORT, *supra* note 144 (“A fundamental concern is that while refugees from war and persecution are protected by international conventions, it is unclear what laws and policies protect people displaced across international borders by extreme weather events.”).

¹⁴⁷ *About Us*, *supra* note 143.

¹⁴⁸ See GLOBAL CONSULTATION REPORT, *supra* note 144, at 26 (citing text accompanying note 13).

¹⁴⁹ *Id.*

¹⁵⁰ THE NANSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE (2015) [hereinafter *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*], <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> [<https://perma.cc/ZYH5-KLJ3>]

by 109 government delegations in October 2015,¹⁵¹ the Agenda addresses questions of admission and stay for cross-border disaster displacement.¹⁵²

Undoubtedly, the Nansen Initiative catalyzed government attention and action around cross-border mobility in the context of climate change. In May 2016, under the leadership of the governments of Germany and Bangladesh, the Platform on Disaster Displacement was established to follow up the work of the Nansen Initiative and to implement the recommendations in the Agenda for Protection.¹⁵³

VIII. The International Climate Change Regime

Another possible source for development of legal norms on climate change-induced mobility is the UNFCCC, which is the major legal framework for international climate action.¹⁵⁴ However, UNFCCC was relatively late in considering how to deal with migration and displacement stemming from the effects of climate change.¹⁵⁵ Only concerted advocacy before the sixteenth Conference of the Parties (“COP”) in Cancún brought human mobility more significantly into the UNFCCC negotiations.¹⁵⁶ Thanks to these efforts, states adopted the Cancún Adaptation Framework in late 2010, which recognized human mobility as a form of adaptation to climate change.¹⁵⁷ This decision led to an

¹⁵¹ *Our Response*, PLATFORM ON DISASTER DISPLACEMENT, <https://disasterdisplacement.org/the-platform/our-response> [https://perma.cc/8CBR-5L7P].

¹⁵² *Id.* For full text, see AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE, *supra* note 150.

¹⁵³ Press Release, Platform on Disaster Displacement, Germany and Bangladesh Commit to Address the Needs of People Displaced Across Borders in the Context of Disasters and Climate Change (May 24, 2016), <https://disasterdisplacement.org/germany-and-bangladesh-commit-to-address-the-needs-of-people-displaced-across-borders-in-the-context-of-disasters-and-climate-change> [https://perma.cc/7YVQ-NLQK].

¹⁵⁴ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

¹⁵⁵ See Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, at 21, U.N. Doc. PPLA/2012/01 (Feb. 2012).

¹⁵⁶ See Koko Warner, *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations*, at 7, U.N. Doc. PPLA/2011/02 (May 2011).

¹⁵⁷ *Cancun Agreements*, *supra* note 30, at ¶14(f) (calling on parties to improve

increase in research by the academic community, spurred the efforts of the Nansen Initiative and others, and elevated the issue of mobility within the international climate change regime.¹⁵⁸ In addition, an Advisory Group on Climate Change and Human Mobility was established to provide technical assistance to the Parties.¹⁵⁹ Cancún thereby created important momentum and legitimacy for the issue¹⁶⁰ and potentially opened access to international climate financing for mobility-related adaptation measures.

Since the COP meeting in Cancún, migration, displacement, and relocation figured more visibly in the climate change negotiations.¹⁶¹ The Warsaw International Mechanism for Loss and Damage (“WIM”) associated with climate change was established at the 19th meeting of the Conference of Parties and seeks, among other things, to improve the knowledge base on the relationship between climate change and migration, enhance cooperation among states, and to provide technical support on approaches to address loss and damage.¹⁶² The Advisory Group on Climate Change and Human Mobility established in Cancún continues its support to the associated WIM Executive Committee,¹⁶³ and there is growing

adaptation efforts by, amongst other things, “[m]easures 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[.]”).

¹⁵⁸ THE NANSEN INITIATIVE, *supra* note 144.

¹⁵⁹ Recommendations from the Advisory Group on Climate Change and Human Mobility, Human Mobility: In the Context of Climate Change UNFCCC – Paris COP-21 (Nov. 2015).

¹⁶⁰ See Kälin & Schrepfer, *supra* note 155, at 49.

¹⁶¹ See U.N. Framework Convention on Climate Change, *Rep. of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012, 3/CP.18*, U.N. Doc. FCCC/CP/2012/8 (Feb. 28, 2013) (adopting decision entitled “[a]pproaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change”).

¹⁶² THE WARSAW INTERNATIONAL MECHANISM FOR LOSS AND DAMAGE ASSOCIATED WITH CLIMATE CHANGE IMPACTS, MAPPING HUMAN MOBILITY AND CLIMATE CHANGE IN RELEVANT NATIONAL POLICIES AND INSTITUTIONAL FRAMEWORKS 1 (2018) [hereinafter MAPPING HUMAN MOBILITY AND CLIMATE CHANGE], <https://unfccc.int/sites/default/files/resource/20180917%20WIM%20TFD%20I.1%20Out%20final.pdf> [https://perma.cc/2Y7H-YTKU].

¹⁶³ Dina Ionesco, *COP21 Paris Agreement: A Stepping Stone for Climate Migrants*, IOM (Dec. 23, 2015), <https://weblog.iom.int/cop21-paris-agreement-stepping-stone->

recognition by states that human mobility constitutes an adaptation as well as a loss and damage issue.¹⁶⁴

In 2015 the Paris Agreement was adopted, in which virtually all states agreed for the first time on partially binding¹⁶⁵ Intended Nationally Determined Contributions (“INDCs”) to limit climate change and its adverse impacts.¹⁶⁶ A review of the INDCs submitted indicate that about one-fifth mention human mobility, mostly by those countries expected to be most affected by climate change.¹⁶⁷ These references mainly focus on migration as adaptation, security issues, and remittances as a contribution to climate action.¹⁶⁸ Importantly, a Task Force on Displacement was created under the Warsaw Mechanism to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”¹⁶⁹

This Task Force on Displacement brings together 13 representatives of international organizations working on the issue, such as IOM, International Labor Organization (“ILO”), U.N. Development Program (“UNDP”), and the UNHCR, as well as the Platform on Disaster Displacement, civil society organizations, and representatives of UNFCCC bodies.¹⁷⁰ The Task Force has developed a plan of action and produced a number of studies and in

climate-migrants [<https://perma.cc/AYY7-MUSS>].

¹⁶⁴ *Id.*

¹⁶⁵ Charlotte Streck et al., *The Paris Agreement: A New Beginning?*, 34 J. ENERGY & NAT. RESOURCES L. 16 (2016). Due to political constraints in the USA and other countries, not all of the agreement is considered legally binding, though the legal discussion continues.

¹⁶⁶ *Id.*

¹⁶⁷ MAPPING HUMAN MOBILITY AND CLIMATE CHANGE, *supra* note 162, at 3.

¹⁶⁸ Eva Mach & Mariam Traore Chazalnoel, *Ahead of COP21 Intended Nationally Determined Contributions Take Stock of Human Mobility Questions*, IOM (Nov. 30, 2015), <https://weblog.iom.int/ahead-cop21-intended-nationally-determined-contributions-take-stock-human-mobility-questions> [<https://perma.cc/9DGN-X2BB>].

¹⁶⁹ *Migration, Displacement and Human Mobility*, U.N. CLIMATE CHANGE, <https://unfccc.int/process/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/areas-of-work/migration--displacement-and-human-mobility> [<https://perma.cc/FKW9-2JYS>].

¹⁷⁰ *See Membership - Task Force on Displacement*, U.N. CLIMATE CHANGE, <https://unfccc.int/process/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/sub-groups/task-force-on-displacement/membership> [<https://perma.cc/MN69-TKQ3>].

2018 its mandate was extended.¹⁷¹

While it is important that the issue of climate change-related mobility is dealt with in the framework of the UNFCCC, particularly as this is likely to be one of the main consequences of climate change,¹⁷² situating the issue in the context of “loss and damage” raises politically contentious questions, particularly in considering liability and compensation.¹⁷³ There is a reluctance among some countries, particularly those who have been historically significant carbon emitters, to discuss liability for their actions in the context of displacement.¹⁷⁴ Thus, while some have called the inclusion of migration in the preamble of the Paris agreement an “unprecedented breakthrough,”¹⁷⁵ others have argued that the UNFCCC is not the adequate forum to deal with displacement, particularly as the Framework faces difficulties in moving forward on less sensitive core functions.¹⁷⁶

On the other hand, others argue in favor of the potential of the UNFCCC to “prevent and mitigate displacement in the context of climate change[.]”¹⁷⁷ In particular, the establishment of the WIM could lead to discussion on vital funding questions.¹⁷⁸ This is an issue of great importance to countries which could face the need to relocate communities away from areas damaged by the effects of climate change.¹⁷⁹ Whether or not the UNFCCC mechanisms, including the Task Force on Displacement, are able to come up with either new normative standards or concrete mechanisms to support

¹⁷¹ *Task Force on Displacement*, U.N. CLIMATE CHANGE, <https://unfccc.int/wim-excom/sub-groups/TFD#eq-1> [<https://perma.cc/H2XA-RBMN>].

¹⁷² *See id.* (describing U.N. climate policy designed to avert, minimize, and address displacement related to the adverse impacts of climate change).

¹⁷³ *See* Streck et al., *supra* note 165, at 35–36.

¹⁷⁴ *See* Maxine Burkett, *Reading Between the Red Lines: Loss and Damage and the Paris Outcome*, 6 CLIMATE L. 118, 118–29 (2016).

¹⁷⁵ *See* Ionesco, *supra* note 163.

¹⁷⁶ David Hodgkinson & Lucy Young, “*In the Face of Looming Catastrophe*”: *A Convention for Climate Change Displaced Persons*, 1, 2–3 (2009), [http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20\(January%202012\).pdf](http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20(January%202012).pdf) [<https://perma.cc/JE87-K7SD>].

¹⁷⁷ ADVISORY GROUP ON CLIMATE CHANGE AND HUMAN MOBILITY, HUMAN MOBILITY IN THE CONTEXT OF CLIMATE CHANGE 3 (2015).

¹⁷⁸ *See* Jonathan Gewirtzman et al., *Financing Loss and Damage: Reviewing Options Under the Warsaw International Mechanism*, 18 CLIMATE POL’Y 1076 (2018).

¹⁷⁹ *Id.*

governments dealing with increased migration, displacement, and relocations stemming from climate change, it is indeed a positive step that the climate change community is discussing issues related to mobility.

IX. Building on Operational Guidance

Yet another approach to developing normative frameworks for those displaced or otherwise affected by disasters is to build on the framework and guidelines developed by international organizations to guide operational response. In particular, the *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*¹⁸⁰ provide a rights-based approach to protecting those affected by disasters.¹⁸¹ This effort has its origins in the visit to Asia following the 2004 Indian Ocean tsunami by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (“RSG”) who was concerned by the many human rights violations he witnessed in the operational response to the disaster.¹⁸² In spite of the fact that unprecedented sums of money were raised for the victims of the tsunami and hundreds of actors mobilized to support the response, there was evidence of discrimination in assistance, inadequate attention to gender, and a lack of protection for many vulnerable groups.¹⁸³ He called for the development of general guidance on human rights in humanitarian settings, applicable to IDPs but also to others who were not displaced but who also faced protection concerns.¹⁸⁴ In 2006, he presented draft guidelines to the Inter-Agency Standing Committee (“IASC”) on the Protection of Persons in Natural Disasters, which after field-

¹⁸⁰ THE BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, IASC OPERATIONAL GUIDELINES ON THE PROTECTION OF PERSONS IN SITUATIONS OF NATURAL DISASTERS (2011) [hereinafter OPERATION GUIDELINES ON THE PROTECTION OF PERSONS IN SITUATIONS OF NATURAL DISASTERS], https://www.ohchr.org/Documents/Issues/IDPersons/OperationalGuidelines_IDP.pdf [<https://perma.cc/UCM8-7TMX>].

¹⁸¹ *See generally id.* (providing the details of a human-rights based framework for protecting those affected by natural disasters).

¹⁸² A WORKING VISIT TO ASIA BY THE REPRESENTATIVE OF THE UNITED NATIONS SECRETARY-GENERAL ON THE HUMAN RIGHTS OF INTERNALLY DISPLACED PERSONS 1, 7 (2005), <https://www.ohchr.org/Documents/Issues/IDPersons/Tsunami.pdf> [<https://perma.cc/VE8W-Q9SD>].

¹⁸³ *See id.* at 7–8.

¹⁸⁴ *Id.*

testing, were revised and adopted by the IASC in 2010.¹⁸⁵

The Operational Guidelines, the first guidance of its kind for disaster settings, called for the incorporation of a human rights approach to both disaster risk reduction and to recovery efforts.¹⁸⁶ They emphasize that persons affected by natural disasters should enjoy the same rights and freedoms under human rights law as others in their country and not be discriminated against.¹⁸⁷ The Guidelines also reconfirm the central principle of the *Guiding Principles on Internal Displacement* that national authorities have the primary duty and responsibility to provide assistance to those affected by natural disasters and to protect their human rights.¹⁸⁸ The Operational Guidelines recognize that in the heat of an emergency, it is important to prioritize the implementation of rights. This means that in the initial days and weeks of emergency response, some rights, such as the right to food, water, and medical care take priority over other rights, such as the right to vote and to freedom of movement.¹⁸⁹

Like the *Guiding Principles* and other normative frameworks surveyed in this Article, the Operational Guidelines have served to raise awareness of the importance of a human rights approach in disaster response.¹⁹⁰ They are directed primarily to operational agencies, including governmental disaster management agencies, international organizations, and non-governmental organizations involved in disaster response.¹⁹¹ They have also been used to provide human rights guidance for disaster risk reduction and thus can be a useful resources in the development of climate change adaptation policies.¹⁹² Similarly, individual operational agencies, such as the International Organization for Migration and the International Federation of Red Cross Red Crescent Societies, as well as the inter-agency cluster system have all developed policies

¹⁸⁵ See OPERATIONAL GUIDELINES ON THE PROTECTION OF PERSONS IN SITUATIONS OF NATURAL DISASTERS, *supra* note 180.

¹⁸⁶ See *id.* at 1–3.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at 3.

¹⁹⁰ *Id.*

¹⁹¹ OPERATIONAL GUIDELINES ON THE PROTECTION OF PERSONS IN SITUATIONS OF NATURAL DISASTERS, *supra* note 180, at 7–8.

¹⁹² *Id.* at 8–9.

or guidelines which incorporate rights-based approaches.¹⁹³ In particular, considerable work has been done to develop guidelines to prevent and respond to sexual and gender-based violence in disaster settings.¹⁹⁴ These kinds of operational guidelines do not constitute international law,¹⁹⁵ but they can serve as both catalysts and building blocks for the development of laws and policies on climate change mobility. They identify specific needs—such as the need to prevent sexual and gender-based violence and to reunite unaccompanied children with their families.¹⁹⁶ These are needs that should be upheld in any normative frameworks on climate change-induced mobility.¹⁹⁷ They underscore the relevance of international human rights law at different stages of displacement. Because they are based on concrete experiences by operational humanitarian actors,¹⁹⁸ they indicate relevant areas which should be addressed in over-arching normative frameworks.

X. Promising Areas for Further Work

This Article has identified a number of efforts to develop normative frameworks for the treatment of those who leave their communities because of the effects of climate change. While it is unlikely that the international community will adopt a legally-binding comprehensive international convention on such movements, at least in the foreseeable future, the evidence suggests that considerable work is underway. As it is likely that most population movements resulting from climate change will occur within state borders,¹⁹⁹ it is important that further work be done to

¹⁹³ See INT'L FED'N OF RED CROSS AND RED CRESCENT SOC'YS, OPERATIONAL FRAMEWORK FOR INVOLVEMENT IN MIGRANT HEALTH AND CARE SERVICES 1, 5 (2016), <https://media.ifrc.org/ifrc/wp-content/uploads/sites/5/2016/12/Operational-Health-Framework-on-Migration.pdf> [<https://perma.cc/FQM9-ZP98>].

¹⁹⁴ See IASC, *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action* (2015), https://gbvguidelines.org/wp/wp-content/uploads/2015/09/2015-IASC-Gender-based-Violence-Guidelines_lo-res.pdf [<https://perma.cc/2PKJ-JGHD>].

¹⁹⁵ 44B AM. JUR. 2D *International Law* § 5 (2019).

¹⁹⁶ INTER-AGENCY STANDING COMM., GUIDELINES FOR INTEGRATING GENDER-BASED VIOLENCE INTERVENTIONS IN HUMANITARIAN ACTION: REDUCING RISK, PROMOTING RESILIENCE, AND AIDING RECOVERY 5 (2015).

¹⁹⁷ *Id.*

¹⁹⁸ See generally IASC, *supra* note 194 (providing data and concrete experiences that underscore the guidelines' recommendations).

¹⁹⁹ See GROUNDSWELL REPORT, *supra* note 20.

incorporate the existing standards, primarily the *Guiding Principles on Internal Displacement*, into national laws and policies applicable to those who move because of climate change. More governments at the national, state, and local levels should be encouraged to review their existing laws and policies to either modify them or to adopt new laws and policies to meet the challenges of responding to larger movements of people resulting from climate change. In particular, migration should be incorporated into national development plans, climate change adaptation plans, and disaster risk reduction policies. While a few governments have made such efforts,²⁰⁰ the vast majority of governments of both developed and developing countries have not yet put into place plans to respond to increased migration resulting from climate change.²⁰¹ There is a tremendous amount of work to be done in this area and outside legal experts have a key role to play in identifying issues and suggesting new legal approaches. The Grantham Research Institute on Climate Change and the Environment and Sabin Center for Climate Change Law have a database of national laws and policies relating to climate change which provides a useful source for reviewing related national laws and policies and identifying countries where such policies are lacking.²⁰² Even without a comprehensive international agreement, governments at all levels and countries can begin to develop national laws which will make a difference in the lives of those who have to move because of climate change. And the development of a body of national legislation could be an important catalyst leading to the development of more international agreements.

Given an international agreement is unlikely, a second promising area for normative development is at the regional level. The Kampala Convention is presently the only binding regional agreement which obligates states to prevent, respond to, and resolve internal displacement stemming from climate change.²⁰³ Although implementation of the Convention has been lacking,²⁰⁴ this is a case

²⁰⁰ *See id.* at 1–2.

²⁰¹ *See id.*

²⁰² *See Climate Legislation— Countries, Regions, Territories*, LONDON SCHOOL OF ECON., <http://www.lse.ac.uk/GranthamInstitute/countries/> [<https://perma.cc/E6F6-V98N>].

²⁰³ *Translating the Kampala Convention into Practice: A Stocktaking Exercise*, 99 INT'L REV. OF THE RED CROSS 365, 365 (2017).

²⁰⁴ *Id.* at 366.

where advice of legal experts could be helpful. For example, analysis of how a particular African government could incorporate the provisions of the Kampala Convention into national law or suggestions of a monitoring mechanism to measure compliance with the Convention could contribute to strengthening normative frameworks generally. In the Pacific Islands, strong regional organizations could take the lead in developing policies on climate change-related migration in the region.²⁰⁵ There are many regional processes, including the regional consultative processes on migration, usually led by IOM which could provide the forum for discussion of possible regional normative frameworks for dealing with environmental migration and development.²⁰⁶ For example, under the auspices of the Platform for Disaster Displacement, work has begun on a new non-binding regional agreement on cross-border disaster displacement in South America.²⁰⁷ These offer promising opportunities for the development of both binding law at the regional level and for non-binding frameworks and agreements which could eventually lead to the development of new law.

At the global level, while it is unlikely that a comprehensive legal instrument on climate change induced mobility will be adopted, there are processes underway, such as the Platform on Disaster Development, the International Law Commission, and the UNFCCC processes on displacement, which are slowly but steadily building up a body of norms and principles which could serve as the basis for a new legal convention on treatment of climate change migrants when the time is more auspicious.²⁰⁸ Some of these

²⁰⁵ See COSMIN CORENDEA, *MIGRATION & HUMAN RIGHTS IN THE WAKE OF CLIMATE CHANGE: A POLICY PERSPECTIVE OVER THE PACIFIC*, UNU-EHS PUB. SERIES 2 (2017).

²⁰⁶ See *Regional Consultative Process on Migration*, INT'L ORG. FOR MIGRATION, <https://www.iom.int/regional-consultative-processes-migration> [<https://perma.cc/J53M-EK2K>].

²⁰⁷ Press Release, Platform on Disaster Displacement, South American Countries Now Have a Non-Binding Regional Instrument on the Protection of Persons Displaced Across Borders and on the Protection of Migrants in Disaster Situations (Nov. 30, 2018), <https://disasterdisplacement.org/south-american-countries-now-have-a-non-binding-regional-instrument-on-the-protection-of-persons-displaced-across-borders-and-on-the-protection-of-migrants-in-disaster-situations> [<https://perma.cc/VK5Z-43VA>].

²⁰⁸ See *generally Enhance the Use of Identified Effective Practices*, PLATFORM ON DISASTER DISPLACEMENT, <https://disasterdisplacement.org/enhance-the-use-of-identified-effective-practices> [<https://perma.cc/9L6V-CJFY>] (identifying effective practices that the organization is attempting to enhance and strengthen); U.N. Framework Convention on Climate Change, Rep. of the Executive Comm. of the Warsaw Int'l Mechanism for Loss

initiatives, such as the Platform for Disaster Displacement and the Migrants in Countries in Crisis (“MICIC”)²⁰⁹ provide guidance for specific groups of people, namely cross-border disaster displaced and migrants caught up in crises in other countries, including natural disasters.²¹⁰ MICIC, like the Platform on Disaster Displacement, is a state-led initiative which developed comprehensive guidelines and training materials for governments to prepare for such situations.²¹¹ Although these “mini-multilateral initiatives” (so-called because rather than bringing in all 193 U.N. member states²¹² they have been developed by those countries with a particular interest in an issue) are not comprehensive, they do offer useful guidance in particular situations.²¹³ These less-than-comprehensive approaches actually represent a creative and realistic response to the fact that many different types of people are likely to move because of the effects of climate change. As noted earlier, an individual displaced by a hurricane in the United States is likely to have very different needs than a Somali pastoralist whose seasonal migrations are affected by climate change, or a Nigerian migrant caught up in a monsoon in Bangladesh.

Finally, there is a golden opportunity in the December 2018 adoption of the *Global Compact on Safe, Orderly and Regular Migration*.²¹⁴ The Compact, also a non-binding agreement,²¹⁵ makes specific commitments to address the drivers of environmental mobility and to develop policies to uphold the rights of those affected by these movements.²¹⁶ It also offers an entry point for finding solutions for those who might not be able to move—the so-

and Damage Associated with Climate Change Impacts, U.N. Doc. FCCC/SB/2017/1/Add.1 (2017).

²⁰⁹ See MIGRANTS IN COUNTRIES IN CRISIS INITIATIVE, GUIDELINES: TO PROTECT MIGRANTS IN COUNTRIES EXPERIENCING CONFLICT OR NATURAL DISASTER (2016).

²¹⁰ See *id.* at 3.

²¹¹ See *id.*

²¹² See *Member States*, UNITED NATIONS, <http://www.un.org/en/member-states/index.html> [<https://perma.cc/2M4G-YLYH>].

²¹³ See Moises Naim, *Minilateralism*, FOREIGN POL’Y (Jun. 21, 2009), <https://foreignpolicy.com/2009/06/21/minilateralism/> [<https://perma.cc/WE38-EY27>].

²¹⁴ Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, *Global Compact for Safe, Orderly, and Regular Migration*, U.N. Doc. A/CONF.231/3 (Dec. 10–11, 2018).

²¹⁵ See *id.*

²¹⁶ See *id.*

called “trapped populations”—and for using other migration pathways for safe and orderly migration as a way to reduce the risk of disasters and adapt to the slow-onset disasters.²¹⁷ The Global Compact represents, for the first time, an international consensus on developing new ways of addressing the urgent needs of those displaced by environmental or climate change.²¹⁸ The fact that the Global Compact for Migration includes these provisions is due to the hard work of civil society organizations as well as to the interests of states at risk from the effects of climate change.²¹⁹ Among its provisions for follow-up and implementation, the Compact includes a new capacity development mechanism which could be used to provide technical support to governments, and to develop new laws and policies to deal with climate change-induced mobility. It is too early to tell if the Global Compact for Migration will live up to its ambitious affirmations and objectives, but it is clear that it offers yet another “hook” for legal experts and others concerned with climate change as a driver of migration to develop new approaches and standards.²²⁰

Given the reality of human-induced climate change and the certainty that even more people will leave their communities because of its effects,²²¹ further work is needed to create adequate normative frameworks to ensure that the rights of those who move are upheld.

²¹⁷ See SUSAN MARTIN ET AL., *THE GLOBAL COMPACTS AND ENVIRONMENTAL DRIVERS OF MIGRATION* (2018); ALICE THOMAS & MARK YARNELL, *REFUGEES INT’L, ENSURING THAT THE GLOBAL COMPACTS ON REFUGEES AND MIGRATION DELIVER* (2018).

²¹⁸ See THOMAS & YARNELL, *supra* note 217, at 5.

²¹⁹ See *id.* at 2.

²²⁰ See THOMAS & YARNELL, *supra* note 217.

²²¹ See GROUNDSWELL REPORT, *supra* note 20.

