

**THE NANSEN INITIATIVE AND THE DEVELOPMENT OF AN INTERNATIONAL  
PROTECTION NORM FOR CROSS-BORDER DISASTER-DISPLACED PERSONS**

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

in

THE FACULTY OF GRADUATE AND POSTDOCTORAL STUDIES

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

April 2018

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## **Abstract**

Using the Nansen Initiative on Disaster-Induced Cross-Border Displacement (the “Nansen Initiative”) as a case study, this dissertation applies a synthesis of the theories of international norm development to the decades of international efforts for the recognition and protection of cross-border disaster-displaced persons leading to the establishment of the Nansen Initiative in 2012. The dissertation examines the range of guideposts in the international norms literature for identifying a successful new norm. Relying on judicial precedents and some notable literature on international norms, this dissertation argues that there are diverse forms of contemporary international law. Thus, the dissertation concludes that the Protection Agenda, which is the final product of the work of the Nansen Initiative, is a normative soft law instrument. The dissertation further examines international norm compliance theories as they might relate to states’ disposition towards the Protection Agenda. Based on the endorsement of the Protection Agenda by 109 states in Geneva in 2015, the calibre of states that made the endorsement, and the enthusiasm with which they did so, the dissertation argues that states are likely to implement it. This is so, given that the establishment of the Platform on Disaster Displacement as a post-Nansen Initiative process for the Agenda’s dissemination, interpretation and implementation purposes is a core requirement in the literature for achieving international norm compliance.

## **Lay Summary**

This dissertation examines the legal value of an international document called the “Protection Agenda”. The Protection Agenda is the outcome of the work of the Nansen Initiative on Disaster-Induced Cross-Border Displacement (the “Nansen Initiative”) which was established in 2012 by states. The Nansen Initiative ended its work in 2015 leading to the establishment of the Platform on Disaster Displacement in 2016. The purpose of the Nansen Initiative was to ensure that states agree on how to protect people displaced across international borders by disasters and climate change. The Platform on Disaster Displacement now has the responsibility to ensure that the Protection Agenda is implemented. This dissertation discusses the usefulness of the Protection Agenda in protecting cross-border disaster-displaced persons and the role of the Platform on Disaster Displacement in fostering its implementation.

## **Preface**

This dissertation is an original intellectual product of the author, Ademola Oladimeji Okeowo. The fieldwork reported in this dissertation was covered by UBC Ethics Certificate number H15-00940.

Parts of Chapter 1 and Chapter 3 have been published in Demola Okeowo, “Examining the Link: Climate Change, Environmental Degradation, and Migration” (2013) 15 *Environmental Law Review* 273 – 289.

Parts of Chapter 5 were published in Demola Okeowo, “Why International Law Should Respond to Cross-Border Environmental Migration” (2014) 3 *NIALS Journal of Environmental Law* 172 – 204.

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## List of Abbreviations

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CVF	Climate Vulnerable Forum
GFMD	Global Forum on Migration and Development
IASC	Inter-Agency Standing Committee
ICJ	International Court of Justice
IDPs	Internally Displaced Persons
IGOs	Intergovernmental Organizations
ILC	International Law Commission
ILO	International Labour Organization
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
IR	International Relations
NGOs	Nongovernmental Organizations
PDD	Platform on Disaster Displacement
R2P	Responsibility to Protect
RCM	Regional Conference on Migration
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council

## **Acknowledgements**

This work has an unusual history of supervision in that at different stages during the Ph.D. program, I had the opportunity of being supervised by different professors. Thus, I am thankful to Benjamin Richardson (“Ben”) for being my supervisor from the start of the program to the point of my candidacy examination. I am particularly grateful to Karin Mickelson who as a member of my supervisory committee agreed to act as my interim supervisor when Ben left UBC. Karin, in your positions as a member of my supervisory committee and briefly as my acting supervisor, you impacted me academically and morally in ways that I will never forget. Thank you so much. My profound thanks and appreciation go to Catherine Dauvergne who not only agreed to supervise my work from the candidacy stage but also offered great insights into the substance and methodology of the work. All of these paid off. Catherine, notwithstanding your busy schedule, you made out time to read each of the chapters of the dissertation, met with me at regular intervals with feedback, and taught me to be attentive to opposing views. On many occasions, you demonstrated your support for my career and professional development goals. My appreciation also goes to Richard Price who as a member of my supervisory committee introduced me to the field of international relations in general, and to the study of norms in particular. Richard, your encouragement, and criticisms have been invaluable.

I would like to thank the Envoy of the Chairmanship of the defunct Nansen Initiative, Professor Walter Kalin, and some members of the Steering Committee such as the representatives of Switzerland, Norway, Germany, Australia, Kenya, Bangladesh, and the Philippines for participating in the interviews for this dissertation. I am equally grateful to Professor Jane McAdam for sharing her thoughts with me on the subject matter of this research. The Head of

the Coordination Unit of the Platform on Disaster Displacement, and Head of the defunct Nansen Initiative Secretariat, Mr. Atle Solberg also deserves special mention for providing necessary information and assistance, even at short notice.

This study was supported by funding from the Law Graduate Program, the Law Foundation of British Columbia, McCarthy Tétrault LLP, and the Charles Bourne International Law Scholarship. Catherine funded a substantial part of my Geneva fieldwork expenses. Many thanks to Ljiljana Biukovic, Doug Harris, and Joanne Chung of the UBC Graduate Law Program.

I worked with Joe Weiler and Nikos Harris as a teaching assistant. Both of you ensured that my tasks as a teaching assistant did not interfere with the progress of this work. To this and many other acts of kindness, I say thank you. To Andrew Pilliar and Alison Yule, thank you for the sustained companionship when the doctoral journey became rough and solitary. To the Berea Baptist Church family, especially Ward and Jane, Gerry and Janet, Darrell and Jayne, Alan and Dianne, Holger and Linda, Harry and Nancy, Clive and Janette, Simeon and Angela, and Doug and Joy, for the numerous instances of love, kindness, understanding, and prayers. Many thanks also to friends and well-wishers at the Vancouver office of McCarthy Tétrault LLP.

To my wife, Abiola: You deserve a special award not only for taking good care of our kids while I was locked down daily in some library away from home writing this dissertation, but also for taking excellent care of me too. The quality of this work would not have been possible without your love and understanding. Our adorable kids, Kiki and Sam will also share in this special

award for putting up with my dawn to dusk library schedule. And to my family and in-laws, I owe a debt of gratitude to all of you for your prayers and support.

I dedicate this work to my parents who though not educated understood the essence and value of education. And without whom I would not have been able to achieve this academic feat.

## Chapter 1: The Conceptual Framework and Methodology of the Dissertation

*“In situations where a multitude of national and international actors face similar problems, they need to coordinate their behaviour and efforts. In such circumstances, we often see what political scientists call ‘international regimes’ or ‘global governance’, i.e. a set of ‘implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.”<sup>1</sup>*

### 1.1 Introduction

From 2010 to the present, a number of efforts have been made at the international level to recognise and protect cross-border disaster-displaced persons. In 2012, the governments of Norway and Switzerland established the Nansen Initiative on Disaster-Induced Cross-Border Displacement (“The Nansen Initiative”). Using theories of international norms, this dissertation seeks to achieve three main goals. The first is to conduct an empirical inquiry into the applicability of the theory of international norm change to cross-border disaster displacement. The second goal is to investigate whether the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* (“Protection Agenda”) – a document detailing the outcomes of the three-year consultative work of the Nansen Initiative as well as recommendations on the recognition and protection of cross-border disaster displaced persons – constitutes a normative framework on cross-border disaster displacement. The third goal is to examine whether or not states that have adopted the Protection Agenda of the Nansen Initiative are likely to implement it.

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<sup>1</sup> Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (Geneva: United Nations High Commissioner for Refugees, 2012) at 67.

From state recognition to extinction, virtually all aspects of international relations are regulated by norms. A norm is widely accepted as "collective expectations for the proper behaviour of actors with a given identity."<sup>2</sup> There are international norms on statehood and sovereignty, decolonization, the prohibition of the use of force, chemical weapons and mercenarism, war and arms control, racial equality, refugeehood and security. As between states relating with one another as well as the relationship of states with other subjects of international law, norms define and indeed prescribe the acceptable standard of behaviour on any given subject of international concern. Norms take the form of judicial precedent, custom, treaty, or soft law instruments.

Norms do not emerge overnight. As social phenomena, norms emerge through complex but collective processes of argumentation and persuasion typically influenced strongly by power and interests.<sup>3</sup> This presupposes that new norms emerge by way of challenge to the status quo – the need to expand the meaning or the application of the extant norm and in some circumstances the need to outrightly reject the application of an existing norm to accommodate a new development. Norms and law are distinguishable but interrelated. While norms are generally informal, law is the codified formal subset of norms. Norms breed law and vice versa. There is constantly a direct interplay between the two. In the words of Amartya Sen:

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<sup>2</sup> See Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) at 5; Martha Finnemore, *National Interests in International Society* (New York: Cornell University Press, 1996) at 22; Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 *International Organization* 887 - 917 at 891 [Finnemore & Sikkink, International Norm Dynamics and Political Change]. See also Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca: Cornell University Press, 1995) at 14 where she defines norms broadly "as shared (thus social) understandings of standards for behaviour."

<sup>3</sup> Neta Crawford, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (New York: Cambridge University Press, 2002) [Crawford, *Argument and Change in World Politics*].

...norms can motivate law and have a substantial influence on what gets codified as law. This can work either directly through legislation, which may be influenced by demands linked to norms and established values and priorities, or through judicial interpretation of what the legal codes actually say or mean, which too can respond to prevailing values and general "moral sentiments"...Even if we do not want to go as far as Cicero in claiming that "the good of the people is the chief law," it is hard to deny the role of established norms in influencing legislation and judicial interpretations.<sup>4</sup>

Empirical research shows that many states implement and obey international norms for different reasons.<sup>5</sup> Whatever form a norm takes, its primary purpose is to regulate the behaviour of states and other actors. The general expectation is that norms must not only be implemented but must be obeyed lest such norms become a toothless bulldog. However, non-implementation of an international norm does not necessarily mean the norm in question is not in existence – it may only indicate that the norm is weak or has failed. Several factors bolster international norm compliance. From self-interest to the pressure within the international society, scholars have attempted to identify not only why states obey international law but also how such obedience could be encouraged.<sup>6</sup>

## **1.2 The Conceptual Framework of the Study**

In this section, I highlight the background to the study. To avoid confusion, I will clarify the meaning of some terms that I have used in this work since some of these terms may be capable

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<sup>4</sup> Amartya Sen, "Normative Evaluation and Legal Analogues" in John N. Drobak, ed., *Norms and the Law* (Cambridge: Cambridge University Press, 2006) 247 - 266 at 248.

<sup>5</sup> Harold H. Koh, "Why Do Nations Obey International Law?" (1997) 106:8 *Yale Law Journal* 2599 – 2659 [Koh, *Why Do Nations Obey International Law?*]; Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979) [Henkin, *How Nations Behave*]; Jeffrey T. Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55:3 *International Organisation* 553 – 588.

of different interpretations. I will also map the scope and boundary of the research so as to keep the discussions and analysis of issues in focus and context. Additionally, this section will set out the research problem as well as the research questions.

### **1.2.1 Background**

Human activities have continued to have deleterious effects on the environment.<sup>7</sup> The increasing concentration of anthropogenic greenhouse gas emissions into the atmosphere is gradually changing our climate with resultant dangers. Our planet is getting warmer at an alarming rate due to human activities. The Earth's surface temperature, which had not changed much in 10,000 years, has become significantly warmer during the past 150 years.<sup>8</sup> It has been observed that "if the current trend continues, many species, including humans, will not be able to adapt quickly enough to avoid severe hardship."<sup>9</sup> The consequences of global climate change are now obvious due to the increased prevalence of drought, rising sea level, extreme weather conditions and desertification. These consequences also have serious implications for food security, health, general ecosystem and migration.

Although the question whether climate change is responsible for any weather condition has been described as a "nonsensical question",<sup>10</sup> the totality of literature on this issue, including the Intergovernmental Panel on Climate Change (IPCC) reports suggests that climate change is

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<sup>6</sup> *Ibid.*

<sup>7</sup> Benjamin Richardson & Stepan Wood, "Environmental Law for Sustainability" in Benjamin J. Richardson & Stepan Wood, eds., *Environmental Law for Sustainability* (Oxford: Hart Publishing, 2006) 1.

<sup>8</sup> Shelley Tanaka, *Climate Change* (Toronto: House of Anansi Press, 2006) at 11.

<sup>9</sup> *Ibid.*

*probably* responsible for some environmental events.<sup>11</sup> Strange weather events and natural disasters have been put forward by scientists as the likely impacts of climate change. Others include sea level rise, crisis in freshwater resources, uncertain cereal output, increasing vector-borne diseases, changing migration patterns and flowering times.<sup>12</sup> Climate change is predicted to create hotter, drier climates, more variable rainfall and shorter growing seasons in the twenty-first century and the expected increase in duration and frequency of droughts is likely to lead to more widespread desertification, a loss in soil nutrients and fertility that diminishes agricultural production.<sup>13</sup> Several extreme events causing serious damage to human society have occurred in the twenty-first century such as the heatwave in Europe in 2003, Hurricanes Katrina and Sandy in 2005 and 2012 respectively, droughts in Australia and floods and droughts in Asia and Africa.<sup>14</sup> Scientists also agree that there are good sides to the changing climate such as the fertilizing effect of higher CO<sub>2</sub> concentration on plants. The danger however is that the negative impacts of climate change far outweigh the positive effects.

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<sup>10</sup> Daniel G Huber & Jay Gullede, “Extreme Weather and Climate Change: Understanding the Link and Managing the Risk” (2011) Centre for Climate and Energy Solutions, at 2 – 6.

<sup>11</sup> In the Fourth and the Fifth Assessment Reports of the Intergovernmental Panel on Climate Change, the terms “likely”, “very likely”, “extremely likely”, were used to answer the question whether human activities contributed to the changing climate while not being 100% certain whether climate change is responsible for some weather and environmental events. On this issue, the reports use phrases such as “low confidence”, “medium confidence”, “high confidence” to describe the degree of certainty on the link between climate change and a given environmental event. For example, the Fifth Assessment Report of the IPCC says with “medium confidence” that “increases in the frequency or intensity of ecosystem disturbances such as droughts, windstorms, fires, and pest outbreaks have been detected in many parts of the world and in some cases are attributed to climate change”. Indeed, the underlined clause further confirms the causal probability based approach of this report. See Intergovernmental Panel on Climate Change, Climate Change 2014, Synthesis Report at para 1.3.2, online <[http://ar5-syr.ipcc.ch/topic\\_observedchanges.php](http://ar5-syr.ipcc.ch/topic_observedchanges.php)>; Demola Okeowo, “Examining the Link: Climate Change, Environmental Degradation, and Migration” (2013) 15 Environmental Law Review 273 - 289.

<sup>12</sup> Asish Ghosh, “Climate Change: Cause and Concern” in Goutam Kumar Saha, ed., *Climate Change: Man and Environment* (New Delhi: Daya Publishing House, 2012) at 3.

<sup>13</sup> Michelle Leighton, “Drought, Desertification and Migration: Past Experiences, Predicted Impacts and Human Rights Issues” in Étienne Piguet, Antoine Pécoud & Paul De Guchteneire, eds., *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) 331.

Due to the complex nature of climate science, the outcome of any scientific investigation on whether changing climate caused a particular weather event can never be certain. Writing in 2005, Roda Verheyen was of the view that uncertainty is a feature of climate science on several levels and that uncertainties will never be eliminated completely.<sup>15</sup> She was also of the view, however, that "uncertainty about the global climate system is continually being reduced and with improved knowledge of the climate system, scientists are able to produce more accurate climate models and predictions – to the point where uncertainties could be deemed negligible in the legal sense."<sup>16</sup> Thus, she referred to the work of the International Ad-Hoc Detection and Attribution Group<sup>17</sup> wherein experts in detection and attribution of the human signal in climate change have stated that enhanced models, improved proxy data and statistical analyses today allow for rigorous attribution statements.<sup>18</sup> Consequently, Verheyen concluded that "the fact that such statistical evidence for a human contribution to 20th century warming exists and that regional attribution studies increasingly link human activities leading to climate change to regional changes strengthens the possibilities of applying (in international law) legal theories of causation and liability of responsibility to climate change damage."<sup>19</sup>

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<sup>14</sup> Nobuo Mimura, "Overview of Climate Change Impacts" in Akimasa Sumi, Nobuo Mimura & Toshihiko Masui, eds., *Climate Change and Global Sustainability: A Holistic Approach* (Tokyo: United Nations University Press, 2011) 46.

<sup>15</sup> Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Leiden: Martinus Nijhoff, 2005) at 21 [Verheyen, *Climate Change Damage and International Law*]. It should be noted that the level of certainty has increased since that time.

<sup>16</sup> *Ibid.*

<sup>17</sup> International Ad-Hoc Detection and Attribution Group, Status Report: Detection and Attribution of Anthropogenic Climate Signal, 25 September 2002.

<sup>18</sup> Verheyen, *Climate Change Damage and International Law*, *supra* note 15 at 23.

<sup>19</sup> *Ibid* at 24.

If the link between climate change and a particular weather or environmental event is generally believed to be probable, are there any links between climate change or environmental event and human internal or international mobility? In other words, is climate change or disaster alone responsible for peoples' decision to move or would it be arbitrary, as it has been claimed, to identify climate change or disaster alone as a driver of forced migration without considering other drivers like economic, social, political and cultural factors?<sup>20</sup> There are conflicting studies on this issue.<sup>21</sup> Mass movement of people has been listed as one of the likely effects of our changing climate. The proponents of this view argue that the sudden impacts of climate change in the form of earthquake or flood as well as gradual impacts such as deforestation, desertification, salinization, drought and soil erosion degrade and in most cases destroy land and food production. These inescapably force people to move out of their locality in search of greener pastures. Thus, Essam El-Hinnawi in 1985 introduced the term 'environmental refugees' to describe people who are forced to leave their places of habitual residence because of human or naturally-induced environmental issues.<sup>22</sup> The term has been bantered around since then in any discussion involving the impacts of climate change and forced migration.

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<sup>20</sup> Alexander Betts & Esra Kaytaz, "National and International Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime" (2009) UNHCR New Issues in Refugee Research, Research Paper No 175; Alexander Betts, "Towards a "Soft Law" Framework for the Protection of Vulnerable Irregular Migrants" (2010) 22 International Journal of Refugee Law 209.

<sup>21</sup> For the different issues raised by climate change and its implication on migration, see Norman Myers & Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995); Richard Black, "Environmental Refugees: Myth or Reality?" in *New Issues in Refugee Research – Working Paper No. 34* (Geneva: UNHCR, 2001); Stephen Castles, "Environmental Change and Forced Migration: Making Sense of the Debate" in *New Issues in Refugee Research – Working Paper No. 70* (Geneva: UNHCR, 2002). These studies have engaged in intellectual debate on some of the issues that climate change and migration raise and the sharp disagreement on these issues among the authors underscores the complexity of not only the issues but also the subject of climate change, disasters and migration.

<sup>22</sup> Essam El-Hinnawi, *Environmental Refugee* (Nairobi: United Nations Environmental Programme, 1985).

Thus, it has been asserted that desertification has caused migration in Mexico, Haiti and the Sahel.<sup>23</sup> Schwartz and Notini after doing a review of the environmental problems in Mexico conclude that desertification is a major reason why people move while in Haiti, people move largely because of deforestation and soil erosion.<sup>24</sup> For the Sahelian states, drought has been identified as a major reason for the migration that occurred in the mid-1980s.<sup>25</sup> Furthermore, studies have shown that droughts have led to the movement of people in Burkina Faso,<sup>26</sup> Ethiopia,<sup>27</sup> Mali,<sup>28</sup> and Senegal.<sup>29</sup> Commenting on the effects of sea level rise, Oliver-Smith is of the view that if the land occupied by a community is completely and permanently submerged, migration will be necessary although there are many aspects of sea level rise that will affect the sustainability of coastal peoples and communities but may not pressure people to move.<sup>30</sup>

On the other hand, it has been argued that the decisions to move or to stay are not attributable to environmental degradation or climate change alone – people’s decisions to migrate or not to migrate are based on a wide range of economic, social, political and cultural factors. This is the

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<sup>23</sup> Michelle L. Schwartz & Jessica Notini, “Preliminary Report on Desertification and Migration: Case Studies and Evaluation” in Puigdefabrigas J. Mendizabal, ed., *Desertification and Migrations* (Logrono: Geoforma Ediciones, 1995) 69 – 113.

<sup>24</sup> *Ibid* at 82 & 88.

<sup>25</sup> Jodi Jacobson, *Environmental Refugees: A Yardstick of Habitability* (Washington DC: World Watch Institute, 1988).

<sup>26</sup> Sabine Henry, Bruno Schoumaker, & Cris Beauchemin, “The Impact of Rainfall on the First Out-Migration: A Multi-Level Event-History Analysis in Burkina Faso” (2004) 25:5 *Population and Environment* 423 – 460 [Henry, Schoumaker & Beauchemin, *The Impact of Rainfall on the First Out-Migration*].

<sup>27</sup> Markos Ezra, *Ecological Degradation, Rural Poverty, and Migration in Ethiopia: A Contextual Analysis* (New York: Policy Research Division Population Council, 2001).

<sup>28</sup> Sally E. Findley, “Does Drought Increase Migration? A Study of Migration from Rural Mali during the 1983-1985 Drought (1994) 28:3 *International Migration Review* 539.

<sup>29</sup> Emmanuel S. Seck, *Désertification: Effets, Lutte et Convention* (Dakar: Environnement et Développement du Tiers Monde, 1996).

<sup>30</sup> Anthony Oliver-Smith, “Sea Level Rise, Local Vulnerability and Involuntary Migration” in Étienne Piguet, Antoine Pécoud & Paul De Guchteneire, eds., *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) 160 at 171.

view of most researchers in this field.<sup>31</sup> For example, studies have shown that droughts in parts of Africa resulted in decreases in international and long-distance migration, with food scarcity and increased food prices forcing people to spend money on basic needs rather than moving.<sup>32</sup> By contrast, short-distance migration increased as women and children sought to work to supplement household incomes through remittances.<sup>33</sup> Furthermore, in the contexts such as the so-called ‘sinking islands’ of Kiribati and Tuvalu in the South Pacific, it has been argued that movement is less likely to be in the nature of sudden flight, and more likely to be pre-emptive and planned.<sup>34</sup>

In a more recent study, scholars have shown how climate change or environmental events have led to migration in different parts of the world though the study also notes that climate change or disaster was not the sole cause of migration but exacerbates the existing stressors leaving people

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<sup>31</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (New York: Oxford University Press, 2012) [McAdam, *Climate Change, Forced Migration, and International Law*]; Stephen Castles, “Afterword: What Now? Climate-Induced Displacement after Copenhagen” in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 241; Colette Mortreux & Jon Barnett, “Climate Change, Migration and Adaptation in Funafuti, Tuvalu” (2009) 19 *Global Environmental Change* 105; Dominic Kniveton *et al.*, “Climate Change and Migration: Improving Methodologies to Estimate Flows” (2008) IOM Migration Research Series No. 33, 35; Ruth Haug, “Forced Migration, Processes of Return and Livelihood Construction among Pastoralists in Northern Sudan” (2002) 26 *Disasters* 70; Frank Laczko & Christine Aghazarm, eds., *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva: International Organization for Migration, 2009) [Laczko & Aghazarm, *Migration, Environment and Climate Change*]; Elisabeth Meze-Hausken, “Migration Caused by Climate Change: How Vulnerable Are People in Dryland Areas?” (2000) 5 *Mitigation and Adaptation Strategies for Global Change* 379.

<sup>32</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *ibid.*

<sup>33</sup> Henry, Schoumaker & Beauchemin, The Impact of Rainfall on the First Out-Migration, *supra* note 26; Michelle Leighton, “Desertification and Migration” in Pierre Marc Johnson, Karel Mayrand & Marc Pacquin, eds., *Governing Global Desertification: Linking Environmental Degradation, Poverty and Participation* (Hampshire: Ashgate, 2006); Fabrice Renaud *et al.*, “Control, Adapt or Flee: How to Face Environmental Migration?” (2007) *InterSecTions* No 5/2007, 19; Rita Afsar, “Internal Migration and the Development Nexus: The Case of Bangladesh” (2003) Refugee and Migratory Movements Research Unit, 2. All these references were cited by McAdam, *Climate Change, Forced Migration, and International Law* at 21.

<sup>34</sup> Jane McAdam, “Refusing ‘Refuge’ in the Pacific: (De)Constructing Climate-Induced Displacement in International Law” in Étienne Piguet, Antoine Pécoud & Paul De Guchteneire, eds., *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) 103.

with no other option than to move.<sup>35</sup> Droughts, reduction in soil quality, flooding and deforestation have accounted for human mobility in sub-Saharan Africa<sup>36</sup> while climate change and weather shocks are largely responsible for the migration decisions of many rural households in five Arab countries namely Algeria, Egypt, Morocco, Syria, and Yemen.<sup>37</sup> Apart from having serious consequences on future migration flows, environmental pressures resulting from climate change have been identified as a major push factor for internal and international movements in Asia,<sup>38</sup> including the mountainous Hindu Kush-Himalayan region.<sup>39</sup> Evidence abounds in Latin America and the Caribbean, based on historical experiences and projections that natural hazards such as tropical cyclones, heavy rains and floods as well as droughts and sea level rise have a significant impact on migration within these regions.<sup>40</sup> Environmental change has also propelled migration in Europe,<sup>41</sup> Oceania,<sup>42</sup> and in North America particularly in the United States and Canada.<sup>43</sup>

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<sup>35</sup> Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) [Piguet & Laczko, *People on the Move in a Changing Climate*].

<sup>36</sup> James Morrissey, “Environmental Change and Human Migration in Sub-Saharan Africa” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 81 – 109.

<sup>37</sup> Quentin Wodon, *et al.*, eds., *Climate Change and Migration: Evidence from the Middle East and North Africa Region* (Washington, DC: The World Bank, 2013); Quentin Wodon, *et al.*, “Climate Change, Extreme Weather Events, and Migration: Review of the Literature for Five Arab Countries” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 111 – 134.

<sup>38</sup> Graeme Hugo & Douglas K. Bardsley, “Migration and Environmental Change in Asia” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 21 – 48.

<sup>39</sup> Soumyadeep Banerjee, *et al.*, “The Changing Hindu Kush Himalayas: Environmental Change and Migration” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 205 – 227.

<sup>40</sup> Raoul Kaenzig & Etienne Piguet, “Migration and Climate Change in Latin America and the Caribbean” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 155 – 176.

<sup>41</sup> Mark Mulligan, Sophia Burke, & Caitlin Douglas, “Environmental Change and Migration Between Europe and Its Neighbours” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 49 – 79.

Notwithstanding the agreement in the literature that most climate change or disaster-driven movements will be internal, the concept of the “sinking island states” has raised the prospect of a large-scale international population displacement on account of climate change and environmental events. By “sinking island states”, it is generally understood that some small island states such as Tuvalu, Kiribati, Nauru, Maldives, to mention just a few risk losing their entire territories to the deleterious effects of climate change. These effects include but are not limited to catastrophic inundation by water to the point where they may become completely uninhabitable.<sup>44</sup> Thus, there exists the possibility of a mass exodus of persons across international borders because of climate change and disasters. In preparation for this eventuality, Kiribati has already bought land on the main island of Fiji with the hope of relocating its citizens in due time.<sup>45</sup> The Marshal Islands is expected to follow the Kiribati example.<sup>46</sup> Similarly, the former President of the Maldives, Mohamed Nasheed announced in 2008 the creation of a sovereign wealth fund which could be used to purchase a new island for the people of his country in the likely event that his country becomes completely submerged by water.<sup>47</sup> Other

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<sup>42</sup> John Campbell & Richard Bedford, “Migration and Climate Change in Oceania” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 177 – 204.

<sup>43</sup> Susana B. Adamo & Alexander M. de Sherbinin, “Migration and Environmental Change in North America (USA and Canada)” in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 135 – 153.

<sup>44</sup> Michael B. Gerrard & Gregory E. Wannier, eds., *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2015); McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 31.

<sup>45</sup> Laurence Caramel, “Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji” *The Guardian* (1 July 2014), online: <http://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>.

<sup>46</sup> *Ibid.*

<sup>47</sup> Susan F. Martin, “Climate Change and International Migration” (2010) *The German Marshall Fund of the United States Study Team on Climate-Induced Migration* at 4, online: [Prevention Web <http://www.preventionweb.net/files/14679\\_MartinV3.pdf>](http://www.preventionweb.net/files/14679_MartinV3.pdf).

than outright purchase, some like the Maldives and Tuvalu might consider renting islands from another state where their people could be moved to in the face of disaster.<sup>48</sup> Apart from the expected planned relocation of citizens of some Pacific island states, there is mounting evidence particularly in the Australian and New Zealand immigration and refugee jurisprudence showing that people are moving internationally due to climate change and environmental degradation.<sup>49</sup>

## 1.2.2 Conceptual Clarification

As we shall see in Chapter 2, the term “norm” is a generic name for four different phenomena. These are folkways, mores, taboos, and laws. Contemporary scholarship on norms appears to focus more on law as a norm and the same is true about the subject matter of this dissertation. Thus, it is common practice to use the terms law and norm interchangeably. Treaty is a form of law. In this dissertation, therefore, I have taken the liberty, as it is the practice in the norms literature, to refer to the *1951 Convention Relating to the Status of Refugees*<sup>50</sup> as a “norm” or simply as a “treaty”. Both descriptions are correct. As a matter of choice and convenience, therefore, other treaties may be referred to as norms in this dissertation.

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<sup>48</sup> Lilian Yamamoto & Miguel Esteban, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (New York: Springer, 2014) at 191.

<sup>49</sup> V94/02840 [1995] RRTA 2382 (23 October 1995); N95/09386 [1996] RRTA 3191 (7 November 1996); N96/10806 [1996] RRTA 3195 (7 November 1996); N99/30231 [2000] RRTA 17 (10 January 2000); N00/34089 [2000] RRTA 1052 (17 November 2000); *Refugee Appeal Nos. 72179 – 72181/2000*, RSAA (31 August 2000); *Refugee Appeal No. 72185/2000*, RSAA (10 August 2000); *Refugee Appeal No. 72186/2000*, RSAA (10 August 2000); *Refugee Appeal Nos. 72189 - 72195/2000*, RSAA (17 August 2000); *Refugee Appeal No. 72313/2000*, RSAA (19 October 2000); *Refugee Appeal No. 72314/2000*, RSAA (19 October 2000); *Refugee Appeal No. 72315/2000*, RSAA (19 October 2000); *Refugee Appeal No. 72316/2000*, RSAA (19 October 2000); *Refugee Appeal No. 72719/2001*, RSAA (17 September 2001); 0907346 [2009] RRTA 1168 (10 December 2009); 1004726 [2010] RRTA 845 (30 September 2010); AF [2013] NZIPT 800413; *Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125; *Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173; AD [2014] NZIPT 501370; AC [2014] NZIPT 800517 – 520.

Furthermore, in all of the examined literature on norms, none suggests that a rule must be binding to be normative. Fundamentally, this justifies the inclusion of soft laws as normative instruments in international law. Thus, the term “norm” as used in this dissertation is not only limited to treaty law but includes soft laws of various types as well as other sources of international law as provided for under article 38(1) of the *Statute of the International Court of Justice*.<sup>51</sup> For the avoidance of doubt, I understand and use the term “norm” in this dissertation to describe any instrument or document, whether hard or soft, that embodies the collective expectation and agreement of states and other actors on a given issue with a view to shaping or regulating their behaviour on and about that issue. Relatedly, I use the concept of “soft law” and “policy document” interchangeably only in relation to the Protection Agenda. As discussed in Chapter 5, there is a reasonable argument that the Nansen Initiative itself described the Protection Agenda as a policy document rather than a variety of soft international law for political and other reasons. In any case, both soft law and policy are generally non-binding but prescriptive and or proscriptive in nature and thus regulate the behaviours of states and other actors in an issue area.

Prior to the adoption of the Protection Agenda which now in its paragraph 33 describes the population displaced across international borders by climate change and environmental events as “cross-border disaster-displaced persons”, a number of sensational and controversial descriptions had been used by scholars and commentators. Some of these descriptions are “climate refugees”,

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<sup>50</sup> *1951 Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [*1951 Refugee Convention*] read in conjunction with the *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967) [*1967 Protocol*].

<sup>51</sup> *Statute of the International Court of Justice*, 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215, 18 April 1946, art. 38.

“environmental refugees”, “climate change refugees”, and so on. Since these terms are legally incorrect, I have adopted the new description of “cross-border disaster-displaced persons” in this dissertation. Occasionally, and particularly when discussing works that have made use of these old terms, the chances are that this dissertation may use them accordingly.

Disaster displacement could be sudden such as the one caused by a tropical cyclone or gradual such as the one caused by drought or sea-level rise.<sup>52</sup> Except where otherwise indicated, any reference to disaster displacement in this dissertation involves both sudden and slow onsets since the Nansen Initiative as the case study for this research treated both as “disasters”.

### **1.2.3 The Scope and Limitation of the Study**

It is important to delineate the scope and limitations of the study. The research questions which I have formulated below map the scope of the enquiries and the analyses. The study primarily focuses on the Nansen Initiative and its Protection Agenda as a norm entrepreneur and an international norm respectively. The dissertation raises questions and makes empirical analyses regarding the work of the Nansen Initiative, including its successor organisation – the Platform on Disaster Displacement. It examines the strategies adopted by the Nansen Initiative to positively change the course of events for cross-border disaster-displaced persons, states, and other international actors on cross-border disaster displacement. The focus is on whether the Protection Agenda is normative, including the proselytization efforts in this regard by the Nansen Initiative as well as implementation and compliance efforts.

The study does not, however, deal with the legal implications of the submergence of states by rising sea level or other effects of climate change and environmental events. Neither does it focus on disaster management as a defined discipline but makes references to it as of necessity. The study takes it as axiomatic that global warming is real. The work relies on the IPCC Reports and other authoritative works of scholars in asserting that human activities are responsible for our changing climate and that these in turn are responsible for some environmental events. Causality will as such be deemed established.

The dissertation does not engage with the classical theories of law such as natural law, positivism, and the like. As the subject matter of this dissertation relates to contemporary international law-making such as soft law, these classical theories offer little help. Legal positivism for instance emphasises, among other factors, the requirement for sanctions as a factor in determining what law is.<sup>53</sup> This is not always the case in modern international law.<sup>54</sup> While the modern version of legal positivism contemplates both soft and hard laws which are made by states or their surrogates through the United Nations systems,<sup>55</sup> it is not necessarily comprehensive or robust to justify all international legal phenomena. Nor would it provide

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<sup>52</sup> Matthew Scott, “Natural Disasters, Climate Change and *Non-Refoulement*: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?” (2014) 26:3 *International Journal of Refugee Law*, 404 – 432.

<sup>53</sup> John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995); Hans Kelsen, *Pure Theory of Law*, translation from the 2nd edition (Berkeley: University of California Press, 1967) at 201.

<sup>54</sup> H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1994) at 80.

<sup>55</sup> *Ibid*; Steven R. Ratner & Anne-Marie Slaughter, “Appraising the Methods of International Law: A Prospectus for Readers” (1999) 93:2 *American Journal of International Law* 291 – 302; Bruno Simma & Andreas L. Paulus, “The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View” (1999) 93:2

adequate theoretical basis for the emergence and nature of the Protection Agenda. Indeed, it will be difficult if not impossible to situate the place of informal international lawmaking in any of the classical theories of law.

While this dissertation uses international norm theories as its theoretical framework, its discussion of norm contestation is limited to how norm contestation or disputation changes or modifies an existing norm in line with the dispute-driven theory of international norm change. This is the version of norm contestation that aids our understanding of how the Protection Agenda emerged as a result of the inapplicability of the *1951 Refugee Convention* and its *1967 Protocol* to cross-border disaster displacement. Moreover, the Protection Agenda is a nascent norm on cross-border disaster displacement. Current international efforts on this issue are being channelled towards the implementation of the norm. Other than Russia, there is no record which suggests that states are contesting the Protection Agenda. Thus, it may be too early to focus on the contestation of the Protection Agenda though contestation may arise in the future. There are different accounts of the implication of contestation on norms. International norm scholars argue that contestation could either weaken or strengthen an international norm.<sup>56</sup> Where appropriate, the dissertation will be tapping into some of these works. However, this dissertation is not principally focusing on states' contestation of the *1951 Refugee Convention* as it relates to the

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American Journal of International Law 302 – 316; Steven R. Ratner & Anne-Marie Slaughter, eds., *The Methods of International Law* (Buffalo: Williams S. Hein & Co., 2005).

<sup>56</sup> Jutta Brunnee & Stephen J. Toope, "Norm Robustness and Contestation in International Law: Self-Defence against Non-State Actors" draft prepared for a workshop on "Norms Under Challenge: Unpacking the Dynamics of Norm Robustness," held 8-10 December 2016 (on file with author); Lisbeth Zimmermann & Nicole Deitelhoff, "Norms Under Challenge: Unpacking the Dynamics of Norm Robustness" draft prepared for a workshop on "Norms Under Challenge: Unpacking the Dynamics of Norm Robustness," held 8-10 December 2016 (on file with author); Richard Price, "Detecting Ideas and Their Effects" in Robert E. Goodin & Charles Tilly, eds., *The Oxford Handbook of Contextual Political Analysis* (Oxford: Oxford University Press, 2006).

principal purpose of this Convention as already researched and argued by Phil Orchard and other authors.<sup>57</sup> Rather, the dissertation focuses on the contestation about the non-inclusion of cross-border disaster-displaced persons for protection purposes in this Convention and how this paved the way for the establishment of the Nansen Initiative and the drafting and endorsement of the Protection Agenda.

#### **1.2.4 The Research Problem**

Research has predicted that most environmental or climate change movements will be internal while some will also cross international borders.<sup>58</sup> Due to the non-recognition of “climate refugees” under both national and international law, it may be difficult to determine the accurate numbers and the identity of those who have crossed international borders on account of environmental or climate change. Thus, there is the tendency for people who have been displaced by disasters and environmental events to seek to migrate under the existing recognised migration or refugee pathways. Arguably, there may be several cross-border disaster-displaced persons who have migrated to other countries ostensibly under the regular labour, education, tourism, and family migration categories. This is why McAdam argues, and rightly in my view, that “climate

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<sup>57</sup> Phil Orchard, *Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge: Cambridge University Press, 2014); Andrew Wolman, “Japan and International Refugee Protection Norms: Explaining Non-Compliance” (2015) 24:4 Asian and Pacific Migration Journal 409 – 431; James C. Simeon, ed., *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013); Erika Feller, Volker Turk, & Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).

<sup>58</sup> Jon Barnett & Michael Webber, “Migration as Adaptation: Opportunities and Limits” in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 37; McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 31.

change-related movement may remain a largely invisible phenomenon in bureaucratic and legal terms."<sup>59</sup>

Before the adoption of the Protection Agenda in 2015, there was a protection gap in international law for cross-border disaster-displaced persons and several unsuccessful efforts were made by the office of the United Nations High Commissioner for Refugees (UNHCR) and other actors to mobilize states to bridge this gap. In particular, the UNHCR had attempted to orient states on, among others, the need for additional instrument(s) for the protection of cross-border disaster-displaced persons. Thus, a group of scholars commissioned by the Bellagio Expert Meeting on Climate Change and Displacement in February 2011 to look into this and other ancillary issues agreed that "there is a need to develop a global guiding framework or instrument to apply to situations of external displacement other than those covered by the *1951 Convention*, especially displacement resulting from sudden-onset disasters".<sup>60</sup> Determined to facilitate the development of a new global guiding framework, the UNHCR took steps not only to secure the approval of states to be recognised as the lead organisation for coordinating protection responses in situations of natural disasters<sup>61</sup> but also to secure the pledge of states at the December 2011 UNHCR Ministerial Meeting to support its initiative for the development of global guiding principles on cross-border disaster displacement.<sup>62</sup>

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<sup>59</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 31 at 25.

<sup>60</sup> UNHCR, "Summary of Deliberations on Climate Change and Displacement" (22-25 February 2011), online: <<http://www.unhcr.org/4da2b5e19.pdf>> at 1.

<sup>61</sup> UNHCR Executive Committee, "Report of the 51st Meeting of the Standing Committee (21-23 June 2011)" (20 September 2011), UN Doc A/AC.96/1104 at 7-8, paras 30-36.

<sup>62</sup> Antonio Guterres, "Address" (6 June 2011), online: UNHCR <<http://www.unhcr.org/4def7ffb9.html>> at 5.

However, these steps were unsuccessful. On UNHCR's desire to be recognised as the coordinating agency for a protection response in situations of natural disasters, states were, among other concerns, of the view that the UNHCR lacks the legal mandate to assume this role<sup>63</sup> while its hope of securing the pledge of states on the need to formulate a set of guiding principles on cross-border environmental displacement did not materialize. Out of the 155 representatives of states that attended the December 2011 UNHCR Ministerial Meeting which was held in commemoration of the 60th anniversary of the *1951 Refugee Convention* and 50th anniversary of the *Convention on the Reduction of Statelessness*,<sup>64</sup> only five states supported this idea (Norway, Switzerland, Costa Rica, Germany, and Mexico).<sup>65</sup> Realizing that the consensus of states was required in charting a new protection paradigm coupled with the hard truth that no consensus can be attained without the clear understanding of the nitty-gritty of environmental displacement issue particularly within the most vulnerable regions, the governments of Norway and Switzerland launched the Nansen Initiative in October 2012.

Basically, the Nansen Initiative was a "state-led bottom-up" approach aimed at achieving international consensus on a "protection agenda" for addressing the needs of the population displaced across international borders by disasters and climate change. The Initiative completed

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<sup>63</sup> See UNHCR Executive Committee, "Report of the 51st Meeting of the Standing Committee (21-23 June 2011)", *supra* note 34. See also UNHCR Executive Committee, "Report of the 50th Meeting of the Standing Committee (1-3 March 2011)" (24 June 2011), UN Doc A/AC/96/1097.

<sup>64</sup> *1961 Convention on the Reduction of Statelessness*, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975).

<sup>65</sup> Antonio Guterres, "Closing Remarks by the UN High Commissioner for Refugees (8 December 2011)," online: UNHCR <<http://www.unhcr.org/4ef094a89.html>> at 1. It should be noted that the UNHCR mentioned "four" states in his closing remarks and this was because Costa Rica's pledge was made after the close of the meeting. See Jane McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010 - 2013" (2014) 29:2 *Refugee* 11 - 26 at 24 endnote 95 [McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement"].

its work in December 2015 and presented the Protection Agenda to the international community. Among other provisions, this document seeks to set standards for states and other actors about the recognition and protection of cross-border disaster-displaced persons before, during, and after a disaster displacement. There is also an ongoing international call and efforts through the Platform on Disaster Displacement for the implementation of the Protection Agenda. Thus, the research examines the nature and character of documents or instruments which “set standards” and “require implementation” such as the Protection Agenda.

### **1.2.5 Research Questions**

The overarching research questions which this dissertation seeks to unravel are:

1. Considering states’ lack of interest and reluctance to articulate a protection framework for cross-border disaster-displaced persons before the establishment of the Nansen Initiative, how did the Initiative secure the consensus of states on the Protection Agenda?
2. Is the Protection Agenda normative?
3. Why and how will states implement the Protection Agenda?

### **1.3 The Law Before the Protection Agenda**

International law governing human mobility before the adoption of the Protection Agenda consisted of the *1951 Refugee Convention* and its *1967 Protocol*, the *United Nations Guiding Principles on Internal Displacement*,<sup>66</sup> international migration law, and international human rights law. However, none of these laws adequately recognised and protected cross-border

disaster-displaced persons. Chapter 3 of the dissertation contains a more extensive exploration of these laws and their inadequacy and inapplicability to cross-border disaster-displacement.

#### **1.4 Brief Description of Basic Contents**

There are six chapters in this dissertation. The dissertation also has appendices containing the Nansen Initiative's Protection Agenda, and interview questionnaires. This Chapter (i.e. Chapter 1) has been introductory in focus providing a general overview and clarification of the main issues in discourse.

Chapter 2 serves as the foundational theoretical framework upon which the inquiry will be based. It is a framing chapter for the rest of the chapters in the dissertation. Examined within the contexts of international norm emergence, international norm identification, and international norm compliance, the theories of international norms provide useful insights for understanding the events and processes that led to the creation of the Nansen Initiative and the formulation of the Protection Agenda. Here, I elaborate on the dispute-driven cycles of international norm change as formulated by Wayne Sandholtz but supplementing it with the works of other norm scholars such as Martha Finnemore and Kathryn Sikkink. The Chapter also examines some authoritative definitions of norms with a view to recognising one when we see it. As it is crucial to discuss why and how states will implement the Protection Agenda, this Chapter further examines some theories of international norm compliance to guide this aspect of the dissertation.

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<sup>66</sup> *United Nations Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (11 February

Chapter 3 focuses on the reasons why the Nansen Initiative was created as well as why the Protection Agenda was necessary. The Chapter traces the history of international and regional efforts and activities for the recognition and protection of cross-border disaster-displaced persons. It also emphasises the failure of international law in this regard with reference to international refugee law, the UN Guiding Principles, international migration law, as well as international human rights law. The Chapter further examines the number of persons that have been displaced by environmental disasters as a projection for the future flow of cross-border disaster-displaced persons.

In Chapter 4, the dissertation discusses the role and achievement of the Nansen Initiative on cross-border disaster displacement. It discusses the role and purpose of the Nansen Initiative in the emergence of a new international protection norm for cross-border disaster-displaced persons. To this extent, the Chapter focuses extensively on the mandate, structure and method of operation of the Initiative including its legal, operational and institutional challenges. The Chapter also discusses the tools and mechanisms through which the Nansen Initiative was able to obtain the attention and consensus of states on cross-border disaster displacement.

Chapter 5 engages the Protection Agenda as the outcome of the three-year research and knowledge expedition of the Nansen Initiative in the Pacific, Central America, East Africa, Southeast Asia, and South Asia from 2013 – 2015. The quest in this Chapter is to determine the normativity or otherwise of the Protection Agenda. This will be done by analysing the core

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1998) [*UN Guiding Principles on Internal Displacement*].

provisions of the Agenda against the literature on the constitutive and definitional elements of norms. Based on this analysis, the Chapter argues that the Protection Agenda is normative. Given that the Protection Agenda is an embodiment of some existing international human rights, refugee, and humanitarian law principles, the Chapter further argues that this development lends credence to its normative status. The Chapter also assesses possible arguments against the normative status of the Protection Agenda so as to have a balanced perspective on this issue but offers counter-arguments where necessary. Chapter 5 further discusses the Nansen Initiative and the Protection Agenda post 2015. As part of the dissemination, implementation and compliance framework for the Protection Agenda, the Chapter examines the role of the Platform on Disaster Displacement as a successor to the Nansen Initiative.

Chapter 6 concludes based on anecdotal evidence that states, particularly those states that endorsed the Protection Agenda, are likely to implement it. The Chapter also identifies areas of further research on cross-border disaster displacement including the Agenda's implementation and compliance rate.

## **1.5 Methodology of the Study**

The work assesses the activities of the Nansen Initiative on the emergence of the protection norm for cross-border disaster-displaced persons. Citing evidence of past successes of states and other actors in the formulation of international norms as mirrored in the evolution of norms against slavery and colonialism, prohibition of plunder, the chemical weapons taboo, and the refugee

protection norm, the study creates a superstructure upon which to assess not only the work of the Nansen Initiative but also that of the Platform on Disaster Displacement. This work is based on three sources of data: texts and articles by legal and IR commentators, interviews with key officers and members of the Nansen Initiative and other relevant stakeholders, and primary or original documents generated by the Nansen Initiative, the Platform on Disaster Displacement, and other relevant organizations.

### **1.5.1 Setting up an Analytic Frame (IR Literature)**

A significant portion of the work will be analytical. As indicated, Chapter 2 is the theoretical framework for the dissertation and it operates as the reference point for the analysis. In analyzing the texts on international norm change, for example, I will highlight the key factors responsible for international norm change as documented in these texts and discuss how the chain of events on cross-border disaster displacement replicates some if not all of these factors. The main task will be to analyse the socially constructed facts or realities about international norms and the cycles of change. I will also analyze the consensus-building strategy of the Nansen Initiative and how the Initiative successfully endeared itself to many states leading to the legitimacy of the Protection Agenda. When it comes to determining whether the Protection Agenda is normative, the methodology will be both analytical and critical. The materials for this segment of the dissertation are not limited to the literature on the definitional components of international norms but also includes analysis of some legal texts as well as critical analysis of opinions of scholars. I will also be analytical when extrapolating the likely behaviour of states toward the Protection Agenda from the theories of international norm compliance. This methodology will further assist in situating the position of the Platform on Disaster Displacement in the compliance literature.

### **1.5.2 Qualitative Analysis of Interview Data**

In order to supplement the existing factual data on the Nansen Initiative in the areas of its mandate, *modus operandi* and the Protection Agenda, it was useful to conduct interviews with those involved in the process. These include members of the Steering Group, and Consultative Committee, particularly those involved in fieldwork and consultations in the five sub-regions of Pacific, Central America, East Africa, South Asia, and Southeast Asia where the Nansen Initiative met with representatives from states, international organizations, NGOs, civil society, think tanks and other key actors working on issues related to displacement and natural disasters, including climate change. Through my attendance at the public presentation of the protection agenda in October 2015, I conducted interviews and distributed questionnaires to government officials of some other states who attended the public presentation event in Geneva. Data gathered from these interviews have been qualitatively analysed and employed to determine, among others, how far and how well the Nansen Initiative achieved its set objectives. Moreover, the data were crucial in assessing the quality of the information at the disposal of the Nansen Initiative upon which the Protection Agenda was based. These data revealed the politics and diplomatic concessions surrounding the emergence of the Protection Agenda. More importantly, the interview data offered empirical evidence on states' implementation disposition to the Protection Agenda as well as for the role of transnational processes to international norm compliance.

Specifically, I interviewed representatives of seven states who were members of the steering committee of the Nansen Initiative. These are representatives of Australia, Bangladesh,

Germany, Kenya, Norway, Philippines, and Switzerland. In addition to interviewing the representatives of the above listed states, I also had the opportunity of interviewing the Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kalin, as well as a subject-matter expert, Professor Jane McAdam. There were a few other representatives of states that I had the opportunity of speaking with on a casual level about the subject matter of the dissertation. For example, apart from having access to a copy of the statement delivered by the representative of Russia during the public presentation of the Protection Agenda in Geneva, I had the privilege of having a further discussion with this representative to clarify some issues and to answer some questions that I had regarding the position of Russia on the Protection Agenda.

Before embarking on the research fieldwork in Geneva, I had the plan of interviewing as many representatives of states as possible. I was determined to interview all the states members of the steering committee of the Nansen Initiative, and the representatives of some notable developed countries which refugees and migrants have traditionally found attractive. However, this ambition was frustrated by events beyond my control. For example, out of the nine states that were members of the steering committee of the Nansen Initiative, I was only able to interview seven. The representatives of Costa Rica, and Mexico could not grant the needed interview due to timing and logistic issues. The United States, the United Kingdom, France, and Canada are countries not part of the steering committee of the Nansen Initiative but which are reputed to be among the developed countries that most refugees and migrants travel to. For that reason, I sent out Interview Invitation Letters and Questionnaires to the Missions of these countries in Geneva. I also made several phone calls but none of these efforts was successful. For instance, the Canadian Mission in Geneva initially accepted my interview invitation and scheduled an

interview appointment to be held in October 2015. However, a few weeks to the appointment date, I received an email from the Canadian Mission in Geneva that the appointment had been canceled because the officers to which I had been scheduled to meet were unavailable. All efforts to convince the Canadian Mission to reschedule the appointment or assign me to meet some other officers were unsuccessful.

Perhaps, the most interesting aspect of planning for my interviews relates to my attempts to schedule interviews in Geneva with the Missions of some Pacific Island countries. It was my impression that since the focus of this research was on climate change and environmental events and their implication on human mobility, low-lying states in the Pacific Island being some of the most vulnerable states to disaster-displacement would be interested in sharing their perspectives. I was wrong. Surprisingly, none of these countries responded to my email. I also placed several phone calls to their Missions in Geneva none of which was answered or returned.

### **1.5.3 Analysis of Primary and Original Documents**

This dissertation achieved its aim partly by analysing some primary documents of the Nansen Initiative, and the Platform on Disaster Displacement. These include Information and Conceptual Notes, Leaflets, Conference and Consultation Reports, Speeches, and Commissioned Research Papers. The climax of the activities of the Nansen Initiative was the formulation of the Protection Agenda which is a constellation of normative, institutional and operational frameworks for recognising and protecting cross-border disaster-displaced persons in three protection phases to wit *before*, *during* and *after* an environmental event. The dissertation analysed these primary documents in the context of their normative contents.

In addition to the primary documents generated by the Nansen Initiative and the Platform on Disaster Displacement which served as reliable sources of data for this dissertation, primary sources of law were also analysed. For example, the work analysed primary sources of law such as treaties, customs, principles, and judicial precedents of international, regional, and national courts and tribunals. The legal analysis was done with a view to resolving some of the questions raised by the dissertation and it provided an authoritative basis for the findings of the dissertation.

### **1.6 The Scholarly Contributions of the Study**

The study makes an empirical attempt at providing foresight into the future of the current international efforts particularly those of the Platform on Disaster Displacement to implement the Protection Agenda. No literature known to me has focused on this issue including examining the normative contents of the Protection Agenda. Moreover, the dissertation makes an original contribution to cross-border disaster displacement scholarship by unpacking the spectrum of activities and initiatives not just at the international level but also at the national and regional levels as well as those of the Nansen Initiative to determine the circumstances that led to the consensus of states on cross-border disaster displacement. Neither in legal nor international relations literature do we have an attempt at stepping back from the furor of recommendations by scholars on how best cross-border disaster-displaced persons can be recognized and protected as this work has done. Thus, the dissertation seeks to fill this gap in knowledge. I am aware of articles by Jane McAdam wherein she traces some notable international developments from 2010

to 2016 on climate change, natural disasters and displacement.<sup>67</sup> However, this dissertation is different because it deals with international relations tested theories of international norms as they apply to cross-border disaster displacement. There is thus a cross-fertilization of ideas between legal and international relations discipline on international norms.

Within the core international relations literature on norms, I am not aware of any that has dealt with the specific questions (on cross-border disaster displacement) which this dissertation addresses. In other words, this work is original because none of the literature known to me has dealt with the issues raised in it in the same way. This is not to say that the work has not benefitted immensely from the existing literature. Neither is it new in both international relations and legal literature to investigate the identity and emergence of international norms, including issues of compliance nor is it novel in scholarship to argue that the varieties of international law (particularly soft international law) are infinite.<sup>68</sup> However, what is significant about this work is its attempt to interrogate the normative contents of the Protection Agenda thereby considering the document a part and parcel of norms on cross-border disaster displacement.

By studying how international norms develop, including how to recognise a norm, and why and how states obey international norms, this dissertation assesses international developments on cross-border disaster displacement. The study offers useful insights into why and how international law is made and is thus an efficacious addition to both legal and international

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<sup>67</sup> McAdam, *Creating New Norms on Climate Change, Natural Disasters and Displacement*, *supra* note 65; Jane McAdam, "From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement" (2016) 39:4 UNSW Law Journal 1518 – 1546.

relations scholarship on international norm identification, formation, and compliance. The work is a useful tool for resolving the age-long controversies among international lawyers not only on what law is but also on the normative status of soft law and the forms of international law in general. The work is also a useful addition to the existing body of research on why states accept and comply with non-binding norms.

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<sup>68</sup> Richard R. Baxter, "International Law in her 'Infinite Variety'" (1980) 29:4 *International and Comparative Law Quarterly* 549 – 566.

## Chapter 2: Cross-Border Disaster Displacement and International Norms:

### The Theoretical Foundation

*“I argue that rules in international society often evolve in response to practical problems that incessantly arise out of the gap between general rules and specific actions”<sup>1</sup>*

#### 2.1 Introduction

As this work principally investigates whether the adopted *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* (“the Protection Agenda”)<sup>2</sup> of the Nansen Initiative on Disaster-Induced Cross-Border Displacement (“Nansen Initiative”) is normative, I have undertaken a succinct review of some literature dealing with the whole subject of international norms. This dissertation focuses on three main aspects of the international norms literature. The first is concerned with the process(es) by which international norms evolve. In other words, this work shall be exploring what triggers the development or formulation of an international norm and what stages this development or formulation takes. The second interest of this dissertation in norm scholarship relates to the definition of a norm or how to recognise a norm when we see it. Thirdly, this work harnesses the literature on international norm compliance. Thus, international norm theories are useful as the overarching theoretical framework for resolving the dissertation’s research questions.

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<sup>1</sup> Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (New York: Oxford University Press, 2007) at 3 [Sandholtz, *Prohibiting Plunder*].

<sup>2</sup> UNHCR, “UNHCR Commits to Follow Up on the Nansen Initiative on Climate and Disaster Displacement and Launches New Overview of Its Work in This Area” (14 October 2015), online: The UN Refugee Agency <<http://www.unhcr.org/561e5ea06.html>>.

The processes and conditions for international norm change have been extensively dealt with by international relations scholars. From the seminal work of Richard Price<sup>3</sup> to that of Martha Finnemore and Kathryn Sikkink,<sup>4</sup> and more recently to that of Justin Gest *et al.*,<sup>5</sup> the scope, including the form and substance of international norm emergence has been articulated. The works indicated later in this chapter by Peter Katzenstein, Ann Florini, Jutta Brunnee and Stephen Toope, Louis Henkin, Harold Koh, Abram Chayes and Antonia Chayes, Thomas Franck, and Jeffrey Checkel, among others on both the definition of norms and compliance with international norms are also instructive.

This chapter attempts to conduct a survey of the theories of international norms to assess their relevance to the fledgling category of forced movement – the cross-border disaster displacement. By analyzing the range of theories of international norms, I intend to set the stage for a heuristic research approach to the question, among others, of whether the international effort led by the Nansen Initiative to protect cross-border disaster-displaced persons has created an international protection norm for this emerging category of displaced persons.

I begin my analysis in this chapter by examining the meaning which has been attributed to norms in the literature. Norm seems to have a generally accepted definition in international relations scholarship. A clear understanding of what constitutes a norm is necessary to recognize one. As

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<sup>3</sup> Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" (1998) 52:3 *International Organization*, 613 – 644 [Price, Reversing the Gun Sights].

<sup>4</sup> Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 *International Organization* 887 – 917 [Finnemore & Sikkink, *International Norm Dynamics*].

the ultimate goal of this dissertation is to argue that the protection agenda for cross-border disaster-displaced persons which was handed down by the Nansen Initiative and which was endorsed by 109 states is a new international norm, engaging in an analysis of what constitutes a norm is crucial to achieving this goal. While this dissertation attempts to achieve this main goal by recourse to the works of notable international relations scholars on norms, it will adopt, in a significant proportion, the influential prescription by Peter Katzenstein on what constitutes a norm. Katzenstein's definition of a norm will be the theoretical underpinning for this part of the research.

Next, I move on to a consideration of the structure of norms, including their classification and the inherent tensions within this structure. International norms can generally be categorized as sovereignty norms and liberal norms in terms of their primary referant. That is, as we would see below, while sovereignty norms operate to the advantage of a state as a person of international law, liberal norms often protect the people within states. The tension that may ensue, for example, when an emerging liberal norm undermines or potentially undermines state's sovereignty can be clearly imagined.<sup>6</sup> Yet, it is this tension or conflict that can ultimately culminate into the emergence of a new norm. Examination of the tension between the different categories and structure of norms would then lead to a discussion of the evolution of international norms. The literature is replete with why and how norms change. The same is true

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<sup>5</sup> Justin Gest *et al*, "Tracking the Process of International Norm Emergence: A Comparative Analysis of Six Agendas and Emerging Migrants' Rights" (2013) 19 *Global Governance* 153 – 185 [Gest *et al*, Tracking the Process of International Norm Emergence].

<sup>6</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

of the influence of norms and their capability to regulate the (in)actions of states and other actors.

I then beam my research light on the stages of international norm development focusing principally on the dispute-driven model of international norm change by analyzing its four major components namely: the existing rule(s); the triggering event or dispute; arguments, precedents and ethical consideration; and rule change. In this analysis, I will be drawing upon the basic principles and propositions of international norm development as articulated by international relations scholars. This would be followed by a vindication of the choice of the theoretical framework which I have adopted in this research. A discussion of the theories of norm compliance will be made as a foundation for the analysis contained in Chapter 6 of why states accepted the Protection Agenda and why they may comply with it. I then conclude that international norms develop in stages, usually over a period of time with sustained activism from norm entrepreneurs and that the stages for the development of the international norm for the recognition and protection of cross-border disaster-displaced persons are not different.

## **2.2 The Meaning of Norms**

There are different definitions of norms. This is due largely to the complexity of the term which made scholars offer definitions that were susceptible to debate because the meaning which scholars ascribed to the term was either inadequate or too broad.<sup>7</sup> Indeed, the term “norm” was

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<sup>7</sup> For a critique of the definition of norms offered by some leading scholars, see Janice E. Thomson, “Norms in International Relations: A Conceptual Analysis” (1993) 23 *International Journal of Group Tensions* 67 – 83 [Thomson, Norms in International Relations].

considered to have “gained the reputation of being vague and fuzzy.”<sup>8</sup> In the early 80s norms were considered as part of the legal regimes comprising principles, *norms*, rules, and decision-making procedures for regulating the behaviour of actors in a given issue area.<sup>9</sup> In the mid-80s, Robert Axelrod summarized the various existing definitions of norms as relating to expectations, values, and behaviour and then chose to define a norm in the behavioural sense.<sup>10</sup> He wrote that “a norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.”<sup>11</sup> A major component of this definition of norm is the availability of sanctions for erring actors. The validity of this aspect of the definition in the face of contemporary developments at the international scenes remains debatable. In criticizing this definition as lacking analytical focus, Ann Florini argues that norms are not just about behavioural irregularities but “standards of behaviour”.<sup>12</sup> She emphasizes that norms are a product of an assessment and critique of the existing state of affairs within a given society and that it is this sense of “oughtness” that is analytically distinct.

Norms have also been considered to be normal, usual or customary practices of states with the consequential effect of shaping states’ behaviour.<sup>13</sup> Norms interpreted in this sense should denote the “normal”. The author of this idea posits that normative belief is a result of the customary or usual practice of states or other actors when confronted with a given situation. It would seem that

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<sup>8</sup> *Ibid.*

<sup>9</sup> Stephen D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983).

<sup>10</sup> Robert Axelrod, “An Evolutionary Approach to Norms” (1986) 80 *American Political Science Review* 1095 – 1111.

<sup>11</sup> *Ibid* at 1097.

<sup>12</sup> Ann Florini, “The Evolution of International Norms” (1996) 40 *International Studies Quarterly* 363 – 389 [Florini, *The Evolution of International Norms*].

<sup>13</sup> Thomson, *Norms in International Relations*, *supra* note 7.

this definition rules out the prescriptive content of norms or “the sense of oughtness” which some other scholars have identified as lying at the core of normative change.<sup>14</sup> Martha Finnemore in a paper presented at the third Social Science Research Council/MacArthur Workshop at Stanford University in October 1994 defines norms as “intersubjective variables that shape the interests of international actors in both systematic and systemic ways.”<sup>15</sup> Moreover, two decades ago Audie Klotz defines it “as shared understanding of standards for behaviour.”<sup>16</sup>

However, from 1996 onward, the definition of a norm is no longer a subject of debate in international relations literature.<sup>17</sup> Peter Katzenstein defines a norm as “collective expectations for the proper behaviour of actors with a given identity.”<sup>18</sup> To him, “norms either define (or constitute) identities or prescribe (or regulate) behaviour, or they do both.”<sup>19</sup> This definition has been widely accepted in the literature as a reference point for the meaning of a norm.<sup>20</sup> Three

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<sup>14</sup> Florini, *The Evolution of International Norms*, *supra* note 12 at 364; Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 891.

<sup>15</sup> Martha Finnemore, “Constructing Norms of Humanitarian Intervention” (1994) A paper presented at the Third Social Science Research Council/MacArthur Workshop at Stanford University, Stanford, California, USA and published later in Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 153 – 185.

<sup>16</sup> Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca: Cornell University Press, 1995) at 14.

<sup>17</sup> The definition handed down by Professor Peter J. Katzenstein in his 1996 work entitled *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) has been widely accepted in international relations literature. See for example, Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4; Denise Garcia, *Small Arms and Security: New Emerging and International Norms* (London: Routledge, 2006); Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (New York: Oxford University Press, 2007); Noha Shawki, “Responsibility to Protect: The Evolution of an International Norm” (2011) 3:2 *Global Responsibility to Protect*, 172 – 196; Gest *et al*, *Tracking the Process of International Norm Emergence*, *supra* note 5.

<sup>18</sup> Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) at 5 [Katzenstein, *The Culture of National Security*].

<sup>19</sup> *Ibid.*

<sup>20</sup> Martha Finnemore, *National Interests in International Society* (New York: Cornell University Press, 1996) at 22; Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 891.

issues stand out from this definition. These are “collective expectations”, “proper behaviour of actors”, and “constitution of identity”. Thus, to designate anything as a norm, a principal requirement is that it must be collectively shared. Additionally, a norm could guarantee the proper behaviour of actors and create or recognise an identity.

By “collective expectations” it means that whatever must be considered a norm must be shared broadly by actors to whom it is addressed. In other words, a norm must not be esoteric. It is this element of collective expectation that accounts for the legitimacy of a norm. And it has been argued that “no matter how a norm arises, it must take on an aura of legitimacy before it can be considered a norm since legitimacy is the most important characteristic that a norm must possess.”<sup>21</sup> This raises the question of how many actors must share this phenomenon before we call it a norm. While there is the need for a “critical mass of actors” to have a shared understanding of what would be a norm that would regulate their actions and inactions, the phrase “critical mass of actors” does not mean that all the actors to whom the norm would be addressed must agree with or support the norm.<sup>22</sup>

The phrase “proper behaviour of actors” as a constitutive element of a norm relates to the prescriptive or evaluative quality of a norm. By default, norms prescribe rules and set standards of behaviour. Norms are regulatory in nature. What should be noted however is that norms evolve by way of reactions to or evaluation of the status quo – a desire for “what ought to be” flowing from “what it is.” In legal parlance, the former is akin to the natural law theory which

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<sup>21</sup> Florini, *The Evolution of International Norms*, *supra* note 12 at 364 – 365.

pervaded the early twelfth century while the latter could be likened to legal positivism. Answering the question of what is appropriate or proper behaviour, Martha Finnemore, and Kathryn Sikkink are of the view that “we only know what is appropriate by reference to the judgments of a community or society. We recognize norm-breaking behaviour because it generates disapproval or stigma and norm-conforming behaviour either because it produces praise, or, in the case of a highly internalized norm because it is so taken for granted that it provokes no reaction whatsoever.”<sup>23</sup>

“Constitution of identity” presupposes that a norm may define not only the obligation holders but also the person or people that the norm protects. Obligation holders have traditionally been understood to be states, but events on the global scene have revealed more actors beyond states. These include non-state actors such as individuals, terrorists, rebels, non-governmental organizations, international and regional organizations as well as multi-national corporations. In terms of the beneficiary of a norm, a norm may create legal or terms of art identities such as “refugees”, “internally displaced persons”, “migrant workers”, “child”, “cross-border disaster-displaced persons”, and so on as the ultimate beneficiary of the range of rights and privileges which the norm has established. To be qualified for these rights and privileges, therefore, a claimant needs to show that he or she fits the status being contemplated by the norm. In a nutshell, the following characteristics are gleanable from the various definition of norms examined above:

- a. Collectively shared by the society to whom it is addressed (legitimacy);

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<sup>22</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4.

- b. Prescribing and regulating standard of behaviour of actors on a given subject;
- c. Creation of status or identity;
- d. Establishment of an overall sense of “oughtness”.

A scrutiny of the various definitions of norms will reveal a striking similarity between norms and law. This similarity underscores the mutual relationship that exists between these phenomena. Notwithstanding this similarity, the relationship between norms and law can be confusing, particularly to legal scholars. For example, while legal scholars see the *1951 Refugee Convention* as law, international relations scholars see it as both a law and norm. Thus, the term “law” and “norm” could be used interchangeably to refer to this treaty. This is because law in international relations scholarship is the codified formal subset of norms. In other words, law is a type or category of norms. Thus, “norm” is a generic term in international relations parlance which subsumes conventions or treaties, customs, principles, policies and other soft law documents and judicial pronouncements the same way the term “law” in international law parlance subsumes conventions or treaties, customs, principles, policies and other soft law documents and judicial precedents.<sup>24</sup> The best way of overcoming the inherent confusion between norms and law is to bear in mind that all laws, be they hard or soft, are norms, but not all norms are laws. This is because other than law, sociologists have identified three other types of norms which are

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<sup>23</sup> *Ibid* at 891 – 892.

<sup>24</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4; Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) [Sandholtz & Stiles, *International Norms and Cycles of Change*]; Ian Brownlie, *Principles of Public International Law*, 7th Ed., (Oxford: Oxford University Press, 2008); *Statute of the International Court of Justice*, 18 April 1946, art. 38.

folkways, mores, and taboos.<sup>25</sup> There is a dearth of recent academic materials on these other types of norms as most recent literature focuses on “law” (including all that this term represents in international law) as a type of norm.

Folkways are unwritten societal norms that regulate casual interactions. For instance, it is considered indecent to belch loudly after a meal in a public place or at someone else’s home. A folkway also requires that everyone joins a queue and not jump it to receive goods and services. Violation of folkways usually leads to resentment or other negative reactions to condemn the violator’s action. Mores on the other hand define what is moral and ethical. It is usually rooted in but not limited to religious doctrines and behaviours. For example, many religions forbid a cohabitation between an unmarried couple. Rules against racism, bigotry, bullying and harassment are well entrenched in many societies as examples of mores. Mores are stricter and often stronger than folkways in terms of consequences because they are considered not only as immoral but unacceptable. In the same vein, a taboo “is a strict prohibition of behaviour that society holds so strongly that violating it results in extreme disgust or expulsion from the group or society.”<sup>26</sup> Many societies consider incest as a taboo.

While folkways, mores, and taboos are largely unwritten norms, contemporary developments as well as civilisation and modernization have led to their legalisation. In other words, some rules

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<sup>25</sup> William Graham Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (New York: Dover Publications Inc., 1906).

<sup>26</sup> Ashley Crossman & Nicki Lisa Cole, “Understanding Folkways, Mores, Taboos, and Laws: An Overview of Some Core Sociological Concepts” (10 December 2016), online: About Education, <<http://sociology.about.com/od/Deviance/a/Folkways-Mores-Taboos-And-Laws.htm>>.

of folkways, mores, and taboos are now contained in written form in domestic, regional and international law documents leading norm scholars to increasingly focus more on law as a norm.

### 2.3 The Structure of Norms

Generally, norms could be domestic or international, or could be both. However, it should be noted that many international norms began as domestic norms.<sup>27</sup> In practical terms, there is an interconnectedness between domestic and international norms.<sup>28</sup> Ellen Carol Dubois in her work recounts how women's suffrage was a national issue before becoming an international agenda.<sup>29</sup> The norm against slavery also started as a domestic issue, but it is now an established international norm.<sup>30</sup> Indeed, slavery generates such a magnitude of international resentment that it has now been regarded as a crime against humanity.<sup>31</sup> Domestic norms require international structures for wider coverage, acceptance, and implementation.<sup>32</sup> Conversely, international norms have also translated into domestic norms usually as a result of the socialization or internalization of international norms by states.<sup>33</sup> Finnemore and Sikkink argue that “international norms must always work their influence through the filter of domestic structures

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<sup>27</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 893.

<sup>28</sup> Peter B. Evans, Harold K. Jacobson, & Robert D. Putnam, eds., *Double-Edge Diplomacy: International Bargaining and Domestic Politics* (Berkeley: University of California Press, 1993).

<sup>29</sup> Ellen Carol Dubois, “Woman Suffrage Around the World: Three Phases of Suffragist Internationalism” in Caroline Dalley & Melanie Nolan, eds., *Suffrage and Beyond: International Feminist Perspectives* (New York: New York University Press, 1994) at 252 – 274.

<sup>30</sup> Kendall Stiles, “Slavery: Liberal Norms and Human Rights” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 169 – 203 [Stiles, Slavery: Liberal Norms and Human Rights].

<sup>31</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3, art 7(1)(c), (entered into force 1 July 2002); Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Leiden: Martinus Nijhoff Publishers, 2013).

<sup>32</sup> Antje Wiener & Uwe Puetter, “The Quality of Norms is What Actors Make of It: Critical Constructivist Research on Norms” (2009) 5:1 *Journal of International Law and International Relations* 1 – 16.

<sup>33</sup> Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

and domestic norms which can produce important variations in compliance and interpretation of these norms.”<sup>34</sup> The *Universal Declaration of Human Rights*<sup>35</sup> and the *United Nations Guiding Principles on Internal Displacement*<sup>36</sup> remain classic examples of this.

Domestic or international norms can also be either sovereignty norms or liberal norms. Sandholtz and Stiles made this categorization. They argued that “international society has been shaped largely by two normative currents, one that emphasized the rights and freedoms of states and another that emphasized the rights and freedoms of individuals”.<sup>37</sup> Sovereignty norms, they argue, are rules establishing for states “exclusive internal jurisdiction and independence in external affairs.”<sup>38</sup> Traditionally every state has a distinct legal personality and is not subject to the authority and control of other states. This traditional understanding of the sovereignty of a state has been codified in the *United Nations Charter*.<sup>39</sup> Article 2(1) of the *UN Charter* declares that the United Nations is based on the principle of the sovereign equality of all its members while article 2(4) & (7) forbids the threat or use of force against the territorial integrity and political independence of any state, including intervention of any kind except in accordance with the purposes of the United Nations as well as its Charter. The ascription of the sovereign status to a state comes with some protective rules which other states and actors must respect. Examples of

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<sup>34</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 893.

<sup>35</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948) 71 [UDHR].

<sup>36</sup> The *United Nations Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) [UN Guiding Principles on Internal Displacement].

<sup>37</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, [UN Charter].

such rules or norms are the international norms banning piracy,<sup>40</sup> ending conquest,<sup>41</sup> protecting cultural treasures in wartime,<sup>42</sup> proscribing terrorism,<sup>43</sup> and limiting extraterritoriality.<sup>44</sup>

Liberal norms evolved in the eighteenth century out of the understanding that every human being has inherent value, dignity, and self-respect.<sup>45</sup> An attempt was made by the United Nations in 1948 to codify what were referred to as “universal human rights” believed to be common to all persons regardless of race, colour, and other legally protected grounds – the *Universal Declaration of Human Rights*. Opponents of the idea of the universality of human rights have challenged this international instrument on many grounds, particularly on cultural relativism.<sup>46</sup> However, it is indisputable that the constellation of rights enshrined in this document have been accepted as binding by the vast majority of states and most of these rights if not all are now regarded as customary international law.<sup>47</sup> Since liberal norms guarantee and protect the

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<sup>40</sup> Kendall Stiles, “Banning Piracy: The State Monopoly on Military Force” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 29 – 54.

<sup>41</sup> Brook Gotberg, “The End of Conquest: Consolidating Sovereign Equality” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 55 – 83.

<sup>42</sup> Wayne Sandholtz, “Protecting Cultural Treasures in Wartime” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 85 – 107; Sandholtz, *Prohibiting Plunder*.

<sup>43</sup> Kendall Stiles, “Terrorism: Reinforcing States’ Monopoly on Force” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 109 – 139.

<sup>44</sup> Titus Chih-Chieh Chen, “Extraterritoriality: Expanding Exclusive Internal Jurisdiction” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 141 – 166.

<sup>45</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24.

<sup>46</sup> Karin Mickelson, “How Universal is the Universal Declaration?” (1998) 47 U.N.B.L.J 19 – 48. Some Islamic states, for example, during the drafting period of the Universal Declaration of Human Rights between January 1947 and December 1948 opposed the idea of the right to change religious belief under article 18 as well as equal marriage rights under article 16. For more on some of these objections and their critiques, see Faraz Anjum, “Human Rights, Cultural Relativism and Islam” (2013) 50:2 Journal of the Research Society of Pakistan; Reza Afshari, *Human Rights in Iran: The Abuse of Cultural Relativism* (Philadelphia: University of Pennsylvania Press, 2011); Elsa Stamatopoulou-Robbins, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Leiden: Martinus Nijhoff Publishers, 2007).

<sup>47</sup> Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995/96) 25 Georgia Journal of International and Comparative Law, 289 – 392 particularly at 323; Stephen James, *Universal Human Rights: Origins and Development* (New York: LFB Scholarly Publishing LLC, 2007); Roland

inalienable rights of every person, they have developed as international norms abolishing slavery,<sup>48</sup> outlawing genocide,<sup>49</sup> protecting refugees and asylum seekers,<sup>50</sup> and as emerging norms on humanitarian intervention,<sup>51</sup> and the right to democracy.<sup>52</sup>

Sovereignty and liberal norms often collide – there is an inherent tension between the two. Usually, the tension between sovereignty and liberal norms generates new norms.<sup>53</sup> The right of people to freely choose their own government and to exist as a country colloquially known as the right to self-determination is a liberal norm. Its emergence was at variance with the then established right of a state to acquire the territory of another state through war and known as conquest. In the case of the evolving norm of humanitarian intervention, the tension between sovereignty and liberal norms could be seen in the light of the international law principle of sovereignty which embodies the idea of supreme decision-making and enforcement authority over a given territory and population (a sovereignty norm)<sup>54</sup> and the idea of the dignity of the human person which has been described as the basis for the whole theory of human rights (a liberal norm).<sup>55</sup> On the one hand lies the impression by some states that they could commit mass

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Burke, “Human Rights Day After the ‘Breakthrough’: Celebrating the Universal Declaration of Human Rights at the United Nations in 1978 and 1988” (2015) 10:1 *Journal of Global History* 147 – 170.

<sup>48</sup> Stiles, *Slavery: Liberal Norms and Human Rights*, *supra* note 30.

<sup>49</sup> Kendall Stiles, “Genocide” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 205 – 235.

<sup>50</sup> William Chiu, “Refugees and Asylum” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 237 – 262.

<sup>51</sup> Heather J. Wood, Taylor Nuttall, & Kendall Stiles, “Humanitarian Intervention” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 263 – 288.

<sup>52</sup> Alix van Sickle & Wayne Sandholtz, “The Emerging Right to Democracy” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 289 – 321.

<sup>53</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24.

<sup>54</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007) at 196 – 244.

<sup>55</sup> Izabela Bratiloveanu, “Human Dignity in International Law: Issues and Challenges” (2012) 7:1 *EIRP Proceedings* 154; George Kateb, *Human Dignity* (Cambridge, MA: Harvard University Press, 2011).

atrocities and wanton violations of the human rights of their citizens without any external interference or control by other states under the principle of sovereignty. On the other hand lies the emerging international duty of other states through multilateral actions to protect not just their citizens but also the citizens of other countries where their government engages in a gross violation of the principle of human dignity.<sup>56</sup>

Similarly, the emergence of the international refugee norm was as a result of the tension between states' exclusive right to include or exclude aliens in and from their territories and the then emerging international human rights standards particularly following outrageous atrocities and crimes against humanity committed during World War II which led to mass displacement and refugee crisis. The former right is a derivative of the principle of sovereignty, and thus, a sovereignty norm while the latter is a liberal norm. The same is now true of the cross-border disaster-displacement. There was and remains a tension between states' sovereignty to control their borders and human rights violations or the risk thereof where states unabashedly shut their borders to cross-border disaster-displaced persons. On cross-border displacement in the context of disasters and climate change, states are certainly reluctant to take on new legal obligations in this regard. Hence, the Nansen Initiative during its consensus building process was unambiguous in stating that it does not intend to create new legal standards, perhaps as a negotiation strategy to get states to be interested in its work.<sup>57</sup> As I will argue later in the dissertation, the Protection Agenda though not creating new legal standards but a restatement of the existing legal

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<sup>56</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003).

<sup>57</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement Websites at <https://www.nanseninitiative.org/>.

obligations and standards is indeed a new addition to international law on the recognition and treatment of persons displaced across international borders by disasters and climate change.<sup>58</sup>

Any of the foregoing classification of norms could be evaluative or prescriptive focusing on what is morally right or wrong.<sup>59</sup> They could also be constitutive norms creating and defining actors' identities or regulative norms which direct and control conduct.<sup>60</sup> Furthermore, Katzenstein tersely refers to what he calls "practical norms" "focusing on commonly accepted notions of best solutions"<sup>61</sup> while Antje Wiener proposes three types of norms which are fundamental norms, organizing principles and standardized procedures.<sup>62</sup> Fundamental norms, according to Wiener are constitutional and procedural norms like human rights, democracy, non-intervention and others in this category which apply to modern constitutionalism and international relations theory. Organizing principles, she says, are principles such as transparency, accountability, responsibility and proportionality which "inform political procedures and guide policy practices".<sup>63</sup> Standardized procedures are rules or regulations "which are clearly defined and expected to facilitate immediate and uncontested understanding".<sup>64</sup> As it will be seen in chapter

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<sup>58</sup> See Chapter 5.

<sup>59</sup> Gest *et al*, Tracking the Process of International Norm Emergence, *supra* note 5; Finnemore & Sikkink, International Norm Dynamics, *supra* note 4.

<sup>60</sup> Peter J. Katzenstein, "Introduction: Alternative Perspectives on National Security" in Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 1 – 32 [Katzenstein, Alternative Perspectives on National Security]; John G. Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge (1998) 52:4 *International Organization*, 855 – 885 at 871 – 874.

<sup>61</sup> Katzenstein, Alternative Perspectives on National Security, *ibid* at footnote 12.

<sup>62</sup> Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008) at 65 – 67.

<sup>63</sup> *Ibid* at 67.

<sup>64</sup> *Ibid*.

5, these distinctions are necessary because they will assist in properly understanding the class to which the Protection Agenda belongs.

## **2.4 The Evolution of Norms**

So how does a norm emerge? The literature has treated this question as a combination of not just the stages of norm development but what and who is responsible for the emergence. International relations specialists have written tomes on themes such as who changes norms (agents), what forms these changes take (results) and why (reasons) and how (stages and strategies) these changes are made. The literature has treated these themes together and rarely do we have texts on international norm change addressing one of these themes in isolation of the others. Even in *Legalization and World Politics*, which was a special research project specifically interrogating the "move to law" in many issue areas and thus primarily addressing the theme on the forms in which normative changes are made, the treatise also inevitably addresses some if not all of the other themes as highlighted above.<sup>65</sup>

A new norm may emerge where it resonates or "grafts" with an existing norm that has generally been accepted.<sup>66</sup> An international norm may emerge where a domestic norm is elevated to an international level or where the new international norm bears semblance with an established

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<sup>65</sup> Judith Goldstein, *et al*, eds., "Legalization and World Politics" (2000) 54:3 *International Organization* 385 – 399 [Judith Goldstein, et al, eds., "Legalization and World Politics"]. For a critique of this work, see Martha Finnemore & Stephen J. Toope, "Alternative to "Legalization": Richer Views of Law and Politics" (2001) 55:3 *International Organization* 743, where the authors argued that "legalization" is not only about treaty-based regimes of international law as canvassed by the authors of *Legalization and World Politics* but a consideration of the rules of customary international law and norms represents a richer understanding of law's operation.

<sup>66</sup> Price, *Reversing the Gun Sights*, *supra* note 3.

domestic norm.<sup>67</sup> Robert Keohane has argued that international cooperation norms in the world political economy may develop when no hegemonic power is available.<sup>68</sup> Offering a useful insight on the emergence of the international norm of transparency in international security, Ann Florini argues that the identity of the norm entrepreneur, coherence with other relatively recent norms, and the availability of a hospitable environment led to the successful development of this international norm.<sup>69</sup> Scholars have argued that the interpretation of chemical weapons as a unique threat to civilians, and the availability of a favourable legal antecedent prohibiting their use were major factors responsible for the chemical weapons taboo.<sup>70</sup> Furthermore, disputes about the scope and application of an existing norm following the occurrence of an event or situation not contemplated by the existing norm may lead to the initiation of a new norm.<sup>71</sup>

International norms scholars agree that every new international norm has promoters or “norm entrepreneurs.”<sup>72</sup> These are persons or entities who champion the cause of a campaign or movement for the recognition of a new norm by states and other actors.<sup>73</sup> Hegemonic states may

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<sup>67</sup> Richard Price & Nina Tannenwald, “Norms and Deterrence: The Nuclear and Chemical Weapons Taboo” in Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 114 – 152.; Andrew P. Cortell & James W. Davis Jr., “How Do International Institutions Matter? The Domestic Impact of International Rules and Norms” (1996) 40 *International Studies Quarterly* 451.

<sup>68</sup> Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984) [Keohane, *After Hegemony*].

<sup>69</sup> Florini, *The Evolution of International Norms*, *supra* note 12.

<sup>70</sup> Richard Price, “A Genealogy of the Chemical Weapons Taboo” (1995) 49:1 *International Organization* 73 – 103 [Price, *A Genealogy of the Chemical Weapons Taboo*]; Michelle Bentley, “Strategic Taboos: Chemical Weapons and US Foreign Policy (2014) 90:5 *International Affairs* 1033 – 1048 [Bentley, *Strategic Taboos*].

<sup>71</sup> Florini, *The Evolution of International Norms*, *supra* note 12 at 378; Price, *Reversing the Gun Sights*, *supra* note 3 at 631; Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24.

<sup>72</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4; Price, *Reversing the Gun Sights*, *supra* note 3; Gest *et al*, *Tracking the Process of International Norm Emergence*, *supra* note 5.

<sup>73</sup> Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society” (1990) 44:4 *International Organization* 479 – 526.

champion the cause of a new norm.<sup>74</sup> Though not always the case, the chances are that a new norm may quickly gain traction and be widely accepted if it is promoted or supported by one of the world's super powers. Using the power of material incentives such as threats and promises of financial aid, and possibly the subtle power of socialization, hegemons can and have successfully established a new international norm.<sup>75</sup>

While hegemons occupy a lofty vantage position giving them the privilege to exert their influence in the promotion of a new global norm, non-hegemonic states or non-state actors may also succeed in bringing a new international norm to life without the support of the hegemons.<sup>76</sup> The norm banning land mines was generated crucially by non-state actors and supported by some 120 states at the treaty signing conference in December 1997 even though it excluded key powers including the United States, Russia, and China.<sup>77</sup> Having said that, it should be noted that for some norms to succeed, it is critical that such norms enjoy the support of some of the world's powers. In the case of the Land Mines Ban Treaty, for instance, the norm cascaded after securing the support of France and Britain,<sup>78</sup> whereas the norm on the protection of migrant workers and the members of their family remains weak and ineffective largely because the hegemonic states neither supported nor ratified it.<sup>79</sup>

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<sup>74</sup> G. John Ikenberry & Charles A. Kupchan, "Socialization and Hegemonic Power" (1990) 44 *International Organization* 283 – 315.

<sup>75</sup> *Ibid.*

<sup>76</sup> Keohane, *After Hegemony*, *supra* note 68; Christine Ingebritsen, "Norm Entrepreneurs: Scandinavia's Role in World Politics" (2002) 37:1 *Cooperation and Conflict* 11 – 23; Adam Bower, *Norms Without the Great Powers: International Law and Changing Social Standards in World Politics* (Oxford: Oxford University Press, 2017).

<sup>77</sup> Price, *Reversing the Gun Sights*, *supra* note 3 at 630 – 631.

<sup>78</sup> *Ibid* at 635.

The "transnational activist networks" account of Keck and Sikkink is well known in international relations literature as a movement for norm change through the domestic and international efforts of activist groups and other norm entrepreneurs who put pressure on states and other actors both at the local and international levels to support a new norm.<sup>80</sup> To generate new norms, domestic groups who are in support of the norm form a coalition with other groups of similar objectives. The coalition includes non-governmental organizations within or outside their country with the aim of establishing a strong transnational network with the capacity to mount pressure on states from both domestic and international platforms.<sup>81</sup> The combination of efforts through this coalition results in a "spiral"<sup>82</sup> or "cascade"<sup>83</sup> endorsement of the norm. By the same token, the ability and influence of international organizations,<sup>84</sup> non-governmental organizations (NGOs),<sup>85</sup>

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<sup>79</sup> Ryszard Cholewinski, Paul de Guchteneire, & Antoine Pecoud, eds., *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (New York: Cambridge University Press, 2009).

<sup>80</sup> Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, New York: Cornell University Press, 1998) [Keck & Sikkink, *Activists Beyond Borders*].

<sup>81</sup> Alison Brysk, "From Above and Below: Social Movements, the International System and Human Rights in Argentina" (1993) 26:3 *Comparative Political Studies* 259; Alison Brysk, *From Tribal Village to Global Village: International Relations and Indian Rights in Latin America* (Stanford: Stanford University Press, 2000).

<sup>82</sup> Thomas Risse & Kathryn Sikkink, "The Socialization of Human Rights into Domestic Practices: Introduction" in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) 1 – 38.

<sup>83</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4.

<sup>84</sup> William Ascher, "New Development Approaches and the Adaptability of International Agencies: The Case of the World Bank" (1983) 37 *International Organization* 415 – 439; Michelle Miller-Adams, *The World Bank in the 1990s: Understanding Institutional Change* (Ph.D Dissertation, Columbia University, New York, 1997) [unpublished]; David Strang & Patricia Mei Yin Change, "The International Labour Organization and the Welfare State: Institutional Effects on National Welfare Spending, 1960 – 1980" (1993) 47 *International Organization* 235 – 262; Simon Rushton, "The UN Secretary-General and Norm Entrepreneurship: Boutros Boutros-Ghali and Democracy Promotion" (2008) 14:1 *Global Governance* 95 – 110; Phil Orchard, "The Norm Entrepreneurship of the United Nations High Commissioner for Refugees" in Phil Orchard, *Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge: Cambridge University Press, 2014) at 173 – 202.

<sup>85</sup> Keck & Sikkink, *Activists Beyond Borders*, *supra* note 80; Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001) [Clark, *Diplomacy of Conscience*].

and prominent societal figures<sup>86</sup> in bringing about a new international norm have been acknowledged in the literature.

## 2.5 Stages of International Norm Development

Sandholtz's dispute-driven theory is a robust explanation of the different processes and stages of norm change. In addition to Sandholtz's theory of international norm change, this work has also benefitted from other theories of the norm life cycle by Finnemore and Sikkink,<sup>87</sup> Ann Marie Clark,<sup>88</sup> and the more recent approach suggested by Gest *et al.*<sup>89</sup> This section provides a synthesis of these theories as they relate to the subject-matter of this dissertation.

Sandholtz launched the first salvo of his dispute-driven theory of international norm change in 2007 when he published his work *Prohibiting Plunder: How Norms Change*.<sup>90</sup> In that work, he argued that “international norms evolve as actions trigger disputes about the meaning and application of rules.” Sandholtz used the terms “rules” and “norms” interchangeably throughout this work arguing that since rules like norms prescribe standards of conduct, they are both the same. His dispute-driven theory of international norm change stems from the realization of the huge gap between general rules and specific actions that are exogenous to the general rule. Granted that rules and by extension laws are couched in general language and that there are indeed exceptions (within the conceivable foresight of the makers of the rule) to most general

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<sup>86</sup> Price, *Reversing the Gun Sights*, *supra* note 3 at 623; Kenneth Rutherford, “The Evolving Arms Control Agenda: Implications of the Role of NGOs in Banning Antipersonnel Landmines” (2000) 53 *World Politics* 74 – 114 at 100 – 105 & 111 [Rutherford, *The Evolving Arms Control Agenda*].

<sup>87</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4.

<sup>88</sup> Clark, *Diplomacy of Conscience*, *supra* note 85.

<sup>89</sup> Gest *et al.*, *Tracking the Process of International Norm Emergence*, *supra* note 5.

rules, the dynamic nature of human society often leads to unforeseen specific events and actions that fall outside the purview of not just the general rule but also its exceptions. When this happens, arguments are bound to ensue about the meaning and application of the existing rules to the new social phenomenon leading inevitably to the modification of the existing rules.<sup>91</sup>

Sandholtz's dispute-driven cycle of international norm change builds on the assumption that the process of norm change in international society results from the incessant interplay between rules and events. Since rules and by extension laws are couched in general language, there are bound to be disputes or arguments on the application of the general rule to specific events or issues that are not contemplated by the general rule. Thus, disputants engage in arguments for and against why the general rule must apply to the particular situation with the aid of precedents and metanorms. This frictional approach, Sandholtz argued, inevitably leads to the transmutation of the general rule thereby paving the way for the emergence, recognition, and acceptance of a new rule. In his words,

[t]he cycle begins with the constellation of existing norms which provides the normative structure within which actors decide what to do, decide how to justify their acts, and evaluate the behaviour of others. Because rules cannot cover every contingency and because conflicts among rules are commonplace, actions regularly trigger disputes. Actors argue about which norms apply and what the norms require or permit. As actors seek to resolve disputes, they reason by analogy, invoke precedents, and give reasons...The outcome of such discourses is always to change the norms under dispute...<sup>92</sup>

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<sup>90</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 1.

<sup>91</sup> *Ibid.*

<sup>92</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24 at 6.

Sandholtz contends that this is the structure of the development of all international norms. Convinced about the general application of this theory, he investigates its utility first to the almost four centuries-old practice of looting the spoils of war and how the rules prohibiting this practice evolved.<sup>93</sup> Moreover, Sandholtz applies this theory to the evolution of contemporary international norms on piracy, conquest, terrorism, extraterritoriality, slavery, genocide, refugees and asylum, humanitarian intervention, and the emerging right to democracy.<sup>94</sup> Sandholtz teases out four developmental phases for his theory – the existing normative context, the event or action that triggers a normative dispute, the ensuing arguments, and the resulting modification of international rules. In what follows, I will analyze each of these stages in the context of the *1951 Refugee Convention*,<sup>95</sup> its *1967 protocol*<sup>96</sup> and their relationship or application to the cross-border disaster displacement conundrum.

### 2.5.1 The Existing Rule

While Sandholtz illustrates this initial phase with a proverbial rational maximizer who must engage in reasoning about social norms to estimate expected payoffs, the gist of this phase is about how actors who are familiar with the existing societal normative rules as well as the standards for interpreting and applying them relate to the rules by ensuring that their acts and omissions do not run afoul of the rules. At the time of the adoption of the *1951 Refugee Convention* and its *1967 Protocol*, states had an understanding of the purpose of these legal

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<sup>93</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 1.

<sup>94</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24.

<sup>95</sup> The *1951 Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [*1951 Refugee Convention*].

<sup>96</sup> The *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967) [*1967 Protocol*].

documents and the consequent legal obligations that these treaties imposed on them.<sup>97</sup> While the purpose of the *1951 Refugee Convention* is to define who is a refugee, their rights and the legal obligations of states towards them, the *1967 Protocol* was adopted to remove the geographical and temporal limitations of the *1951 Refugee Convention*.<sup>98</sup> With this understanding, states that ratified these instruments did not only make a commitment to implement them, but most of them also took steps to internalize these rules by reflecting them in their local immigration, refugee, and asylum law.<sup>99</sup>

Ratifying states are thus bound by the international refugee rules making the refugee convention and its protocol the international basis for determining how states treat refugees arriving at their border. Any state that refuses to welcome refugees as was recently the case with Syrian refugees in some parts of Europe risks incurring international outcry and open condemnation.<sup>100</sup> States and other international actors are in agreement that the refugee convention and its protocol are

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<sup>97</sup> The Preambles to the *1951 Refugee Convention* and the *1967 Protocol*; See also the *Travaux Préparatoires* to the *1951 Refugee Convention* analysed with Commentary by Dr. Paul Weis, online: <<http://www.unhcr.org/4ca34be29.html>>.

<sup>98</sup> Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed. (New York: Oxford University Press, 2007).

<sup>99</sup> Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009).

<sup>100</sup> Jack Redden, “UNHCR urges Europe to do more to help Syrian Refugees” UNHCR (11 July 2014) <<http://www.unhcr.org/news/latest/2014/7/53bfcd969/unhcr-urges-europe-to-help-syrian-refugees.html>>; Melissa Fleming & Jonathan Clayton, “UNHCR Urges Humane Treatment for Refugees, Urges Collective Action on Issue” UNHCR (25 August 2015) <<http://www.unhcr.org/news/latest/2015/8/55dc749d6/unhcr-urges-humane-treatment-refugees-urges-collective-action-issue.html>>; Catholic Online, “Europe’s Shame: Fifty Migrants Drown in Three Days in Refugee Ships enroute to Greece” Catholic (1 November 2015), online: Catholic.Org <<http://www.catholic.org/news/international/europe/story.php?id=65099>>; Simon Israel, “Syria Refugees: Former Judges Condemn Government Response” Channel 4 News (12 October 2015), online: Channel 4 News <<http://blogs.channel4.com/simon-israel-home-affairs/migrants-judges-condemn-government-response/1377>>; International Committee of the Fourth International (ICFI), “Demonstrators Condemn Brutal Treatment of Refugees in Berlin, Germany” World Socialist Web Site (21 October 2015), online: WSWS.Org <<https://www.wsws.org/en/articles/2015/10/21/demo-o21.html>>.

the existing governing rules on refugee and asylum issues.<sup>101</sup> This is amplified by the fact that as at April 2015, 145 states are parties to the *1951 Refugee Convention*, 146 states are parties to the *1967 Protocol*, and 142 states, including major powers like Japan and Russia are parties to both the *1951 Refugee Convention* as well as to its *1967 Protocol*.<sup>102</sup> Indeed, 148 states are parties to one or both of these instruments as at April 2015.<sup>103</sup> Essentially, these legal documents have not only influenced the identities and preferences of states and other global actors on refugee and asylum issues but have also shaped their choices.

### **2.5.2 The Dispute or the Triggering Event**

Because of the impossibility of foreseeing all conceivable situations when formulating a societal rule, rule makers are not capable of creating a rule that would fit all future situations and actions. Thus, disputes are bound to ensue between actors when a situation, conduct or omission arises that is outside the contemplation of the rule makers and by implication falling beyond the scope of the extant rule.<sup>104</sup> Sandholtz argues that norms by their nature generate disputes. He identifies two important features of rules that make their immediate or future disputation unavoidable – “internal contradictions” and “incompleteness”. On internal contradictions, he uses the example of how the right to freedom of expression may clash with the right to be protected from libelous

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<sup>101</sup> This is not to say that the refugee norm is not contested as the account by Philip Orchard reveals in Philip Orchard, *Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge: Cambridge University Press, 2014). Suffice it to say that almost all norms are contested one way or the other. However, the focus of this research is not on the contestation of the *1951 Refugee Convention* as well as its *1967 Protocol*. Rather, it is on the fact that the refugee convention and its protocol emerged as norms, cascaded and were internalised by States as reflected in the immigration and refugee law of most countries that are signatories to these instruments.

<sup>102</sup> United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, online: UNHCR <<http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>>.

<sup>103</sup> *Ibid.*

<sup>104</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 1.

publications and slander and how humanitarian intervention or the responsibility to protect violates the UN Charter principle that forbids states from interfering in the domestic affairs of another state.<sup>105</sup> Legal disputes arose when a law seeking to prevent the exploitation of prostitutes clashed with prostitutes' right to personal liberty and the dignity of the human person.<sup>106</sup> Disputes also arose when a law proscribing the drawing and possession of child pornography collided with the right to freedom of expression.<sup>107</sup> And so was the case when the right to freedom of religion crashed into the norm on sexual orientation.<sup>108</sup>

On incompleteness, Sandholtz argues that “no system of rules can be complete, in the sense that rules cannot spell out the behavioural requirements for every situation, nor can they foresee all possible circumstances or disagreements.” Continuing further, he reasons that while some acts or conducts would constitute a clear violation of a rule and seen as such by the majority of the members of the society, some other acts or conducts are borderline in that whether or not they violate the rule is *debatable*. It is this “debate” that constitutes Sandholtz’s second phase of the norm life cycle. Going back to my analysis of the *1951 Refugee Convention* and its *1967 Protocol*, the phenomenon of the people displaced across international borders by climate change and disasters revealed the “incompleteness” of these legal documents.<sup>109</sup> The refugee treaties being products of post-war Europe do not contemplate cross-border displacement by disasters

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<sup>105</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 2(4).

<sup>106</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

<sup>107</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45.

<sup>108</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

<sup>109</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (New York: Oxford University Press, 2012) [McAdam, *Climate Migration and International Law*].

including the effects of climate change.<sup>110</sup> Notwithstanding this fact, the issue is not as straightforward as that as several commentators have argued for and against the question whether the *1951 Refugee Convention* protects cross-border disaster-displaced persons.<sup>111</sup>

Sandholtz believes that certain occurrences in international society trigger disputes among global actors about the scope, meaning and application of extant rules. He identifies the outbreak of war, major technological advancements and innovations, and major political revolutions as instances of these occurrences.<sup>112</sup> Whenever these occurrences happen and depending on their scale and significance, they often provoke new questions and arguments about the applicability or otherwise of existing rules. Looking at the case of war for example, the anti-plunder norm developed through a process of dispute and argumentation on the propriety and the continued use of the age-long norm which encouraged and promoted the looting of the spoils of war by the conqueror.<sup>113</sup> One major omission on Sandholtz's list of occurrences likely to trigger a normative dispute is climate change. Climate change is already having a significant impact on ecosystems,

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<sup>110</sup> This is evident from the definition of refugees in article 1A of the *1951 Refugee Convention* which does not cover cross-border environmental or climate change displacement. Moreover, there is no mention of climate change or environmental disaster as a current or future driver of forced migration to which the 1951 Refugee Convention could apply in the *Travaux Préparatoires* of the *1951 Refugee Convention*. See also Walter Kalin, "Conceptualising Climate-Induced Displacement" in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 81 – 103 at 88.

<sup>111</sup> For those that argued for, see Jessica Cooper, "Environmental Refugees: Meeting the Requirements of the Refugee Convention" (1998) 6 *New York University Environmental Law Journal* 480 – 529; Christopher M. Kozoll, "Poisoning the Well: Persecution, the Environment, and Refugee Status" (2004) 15 *Colorado Journal of International Environmental Law and Policy* 271 - 307. For those that argued against, see Christel Cournil, "The Protection of 'Environmental Refugees' in International Law" in Etienne Piguet, Antoine Pecoud & Paul de Guchteneire, eds., *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) 359 – 387; McAdam, *Climate Migration and International Law*, *supra* note 109. Note however that the views shared by most authoritative international refugee scholars, and which I agree with is that cross-border disaster-displaced persons are not "refugees" within the meaning of that term in the *1951 Refugee Convention*. Thus, they are neither contemplated nor protected by this treaty and its protocol.

<sup>112</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24 at 11.

<sup>113</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 1.

economies, and communities.<sup>114</sup> Perhaps, the greatest single impact of global climate change is on human mobility thereby provoking argumentation on the traditional understanding and rule on forced displacement and ultimately altering this understanding and rule.<sup>115</sup>

### **2.5.3 Arguments, Precedents, and Ethical Consideration**

Once a dispute arises due to a specific action, occurrence or triggering event with respect to the scope and application of an existing rule, Sandholtz argues that the norm life cycle enters a new phase – a phase where advocates of a new norm and the defenders of the status quo engage in argumentative normative reasoning by drawing from previous instances known in legal circles as precedents to back up their respective claims.<sup>116</sup> Additionally, these actors also bolster their arguments by alluding to ethical considerations and practices.<sup>117</sup> At this stage, the advocacy and persuasive abilities of norm entrepreneurs are crucial. This is the stage where the strategies of other norm scholars like framing, grafting and proselytization by celebrities and other important societal figures can be harnessed by norm entrepreneurs to generate international awareness around the fledgling norm. At this stage, the ultimate goal of those promoting the new norm is to secure the consensus of states and other actors. Consensus is key in the formulation of a new international norm as upon it lies the basis for international law.<sup>118</sup>

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<sup>114</sup> Nicholas H. Stern, *The Economics of Climate Change: The Stern Review* (New York: Cambridge University Press, 2007).

<sup>115</sup> Kirsten Hastrup & Karen Fog Olwig, eds., *Climate Change and Human Mobility: Global Challenges to the Social Sciences* (New York: Cambridge University Press, 2012).

<sup>116</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24 at 331 – 332.

<sup>117</sup> *Ibid* at 15 – 19.

<sup>118</sup> *S.S. Lotus case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10 at 18.

Sandholtz's third stage of the norm life cycle is similar in substance to some of the propositions by other norm scholars. Ann Marie Clark, like Sandholtz, has developed four stages of international norm development in the context of torture, disappearances, and extrajudicial executions.<sup>119</sup> Focusing on the pivotal role of Amnesty International and other NGOs in the development of international human rights norms, Clark identifies the following phases for the emergence of human rights norms: fact finding, consensus building, principled norm construction, and norm application. Under the "fact finding" and "consensus building" stages of the norm life cycle, information gathering and interpretation of facts are critical to the process of norm emergence.<sup>120</sup> Here, NGOs or other advocates of new norm identify specific human rights violations highlighting the limitation of the current applicable norm and setting the stage for a nuanced reaction or debate among actors on these issues. Once information about a specific human rights violation is readily available, Clark argues that the consensus building phase would be triggered. Essentially this stage involves a realization by the new norm advocates or entrepreneurs and the defenders of the status quo that the old norm has outlived its usefulness and that a new norm should be formulated for a better protection framework.<sup>121</sup> The major mechanisms needed for this phase of the norm life cycle according to Clark are publication and discussion of the available information. And this is reasonable since consensus among the relevant stakeholders and actors cannot be achieved without a clear understanding of the issues through the availability of the relevant information followed by rounds of discussion entailing questioning and clarifications.

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<sup>119</sup> Clark, *Diplomacy of Conscience*, *supra* note 85.

Finnemore and Sikkink argue that two factors are important for a successful development of a new norm. These factors are norm entrepreneurs and an organizational platform. Norm entrepreneurs, as hinted earlier, are agents or promoters who are willing to stick out their necks in condemning an existing state of affairs in an issue area and in turn offering or suggesting a better alternative. Norm entrepreneurs, they argue, can succeed in achieving their objectives by using persuasion as their major tool and also by “framing” or re-framing the issues involved so as to resonate with broader public feeling and sensibility. They recount how “suffragettes chained themselves to fences, went on hunger strikes, broke windows of government buildings, and refused to pay taxes as ways of protesting their exclusion from political participation.”<sup>122</sup> Price also recounts how transnational activists campaigning for the ban on anti-personnel land mines in the 1990s adopted a variety of attention-seeking strategies to attract both local and international audiences including the “placing of mountains of shoes on legislative grounds to symbolize those who no longer need footwear.”<sup>123</sup>

The “framing” strategy has been used by a number of actors in bringing cross-border environmental displacement to the international limelight. It would be recalled that as far back as the 80s, Essam El-Hinnawi while writing on environmental disasters and the huge number of the population likely to be displaced within and across international borders chose to refer to the displaced populations as “environmental *refugees*”.<sup>124</sup> Norman Myers in sustaining this public

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<sup>120</sup> *Ibid* at 32 – 33.

<sup>121</sup> *Ibid* at 33 – 34.

<sup>122</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 897.

<sup>123</sup> Price, *Reversing the Gun Sights*, *supra* note 3 at 618.

<sup>124</sup> Essam El-Hinnawi, *Environmental Refugees* (New York: UN Environmental Programme, 1985) [El-Hinnawi, *Environmental Refugees*].

perception of the population being displaced and who will be displaced by climate change and environmental impact continued to use this terminology to describe them.<sup>125</sup> This description was strategic as it made the phenomenon of a mass exodus of persons on account of climate change and environmental disasters to resonate with the international public. The decision of President Mohammed Nasheed of the Maldives to hold his cabinet's meeting underwater in 2009 was also a framing strategy on climate change, disasters, and human mobility.<sup>126</sup> Other framing strategies have also been adopted such as displaying photos of homes and communities, and persons driving cars or riding bicycles who are almost submerged by water<sup>127</sup> or calculating the time per seconds within which some persons are being displaced by disasters and other environmental hazards.<sup>128</sup> There is an account in chapter 4 which analyses how the Nansen Initiative successfully deployed framing as a norm development technique to secure the consensus of states on cross-border disaster displacement.

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<sup>125</sup> Norman Myers, "Environmental Refugees in a Globally Warmed World" (1993) 43 *BioScience* 752; Norman Myers & Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995); Norman Myers, "Environmentally-Induced Displacements: The State of the Art" in IOM/UNHCR, *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration* (Geneva: IOM/UNHCR International Symposium, 1996); Norman Myers, "Environmental Refugees" (1997) 19 *Population and Environment* 167; Norman Myers, "Environmental Refugees: A Growing Phenomenon of the 21<sup>st</sup> Century" (2002) 357 *Philosophical Transactions of the Royal Society: Biological Sciences* 609; Norman Myers, "Environmental Refugees: An Emergent Security Issue" A paper presented at the 13<sup>th</sup> Economic Forum, Prague, on May 23 – 27, 2005.

<sup>126</sup> Mail Foreign Service, "Maldives Government Highlights the Impact of Climate Change...by Meeting Underwater", Mail Online (20 October 2009), online: The Daily Mail <<http://www.dailymail.co.uk/news/article-1221021/Maldives-underwater-cabinet-meeting-held-highlight-impact-climate-change.html>>.

<sup>127</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement Websites at <<https://www.nanseninitiative.org/>>.

<sup>128</sup> The presentation by Professor Walter Kaelin during the Global Consultations of the Nansen Initiative on Disaster-Induced Cross-Border Displacement in Geneva, Switzerland on October 12, 2015, available on file; The tweets by Professor Jane McAdam on Twitter on October 12, 2015 available online at <<https://twitter.com/profjmcadam/status/653492828916453376>>.

Finnemore and Sikkink argue further that promoters of norms need some sort of organizational platform to advance the cause of their campaign. They argue that this platform could be already existing or established specifically for the purpose of promoting the norm.<sup>129</sup> Since norm entrepreneurs generally but not always target states as the principal norm obligation holders, the availability of institutional platforms like the United Nations (UN), and the World Bank is essential as a rallying point for securing the attention and support of states on the fledgling norm, and to facilitate its socialization and internalization.<sup>130</sup> Finnemore and Sikkink also argue that organizational platform is critical for an emergent norm to reach a threshold and move toward norm cascade though they caution that the institutionalization of a fledgling norm in international rules and organization is not a necessary condition for the norm to cascade. They argue that in some situations institutionalization may occur after a norm cascade.<sup>131</sup>

In a recent account of how international norms emerge in the context of six separate international norm agendas,<sup>132</sup> Gest *et al* identify six stages of international norm development.<sup>133</sup> Stages 1 to 4 of this account echoes the views which Sandholtz expressed in his theory on the need for argument, persuasion, and advocacy around a fledgling norm. Stage 1 is the “agenda setting

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<sup>129</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 899.

<sup>130</sup> *Ibid* at 900.

<sup>131</sup> *Ibid*.

<sup>132</sup> These international norm agendas are the UN Guiding Principles on Internal Displacement; the *International Labour Organization Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, 37 I.L.M 1233 [ILO 1998 Declaration]; the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, A/RES/45/158 (entered into force 1 July 2003) [*Migrant Workers Convention*]; the *Convention on the Rights of Persons with Disabilities*, A/RES/61/106 and *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, A/RES/61/106, Annex II [CRPD]; the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 10 December 1999, 2131 U.N.T.S. 83 (entered into force 22 December 2000) [CEDAW]; and the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 3 December 1997, 2056 U.N.T.S. 211 (entered into force 1 March 1999) [Mine Ban Treaty].

stage”. This is where the publicity or awareness around the norm being promoted is managed. What the authors describe under this stage aligns with what Finnemore and Sikkink term “framing” the issue so it could attract public attention.<sup>134</sup> For those international norm agendas that did not require public awareness in their formative stages such as the ILO 1998 Declaration and the Migrant Workers Convention, the authors suggest that these agendas gained traction through diplomatic and institutional influences. The problematization of the rights at work which led to the formulation of the ILO 1998 Declaration, they say, was achieved through an institutional consolidation of support at an international and intergovernmental levels. They argue that the campaign for the Migrant Workers Convention was driven largely by diplomats from major migrant-worker-sending states who were interested in articulating a new UN-based protection framework for migrant workers following their dissatisfaction with the ILO frameworks on the issue.<sup>135</sup>

Stage 2 is what the authors classify as “consolidation of support”. The authors argue that the most significant hurdle for nascent norm creation efforts is the challenge of moving from the agenda setting stage to building greater support for that agenda.<sup>136</sup> To surmount this challenge, the authors emphasize the role of conferences as effective platforms for norm entrepreneurs to clearly articulate their ideas and seek the support of states and other actors for the emerging norm. The authors make copious references to several local and international conferences that were instrumental in promoting all the six identified international norm agendas and how these

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<sup>133</sup> Gest *et al*, Tracking the Process of International Norm Emergence, *supra* note 5.

<sup>134</sup> Finnemore & Sikkink, International Norm Dynamics, *supra* note 4 at 897.

<sup>135</sup> Gest *et al*, Tracking the Process of International Norm Emergence, *supra* note 5 at 163.

<sup>136</sup> *Ibid* at 162.

conferences enhanced the support of states and other relevant actors for these international norms.<sup>137</sup>

Stage 3 is the “institutional approach”. In addition to the need for conferences as a support mechanism for a budding norm agenda, there is also the need for an organizational platform upon which norm promoters, states, and other actors can initiate negotiation processes for the formalization of the fledgling norm. While the authors identify this as the third phase in the life of the budding norm, they also suggest that this phase could happen early enough to pre-empt the public awareness phase. The authors distinguish the institutional approach stage from the “institutionalization” requirement suggested by Finnemore and Sikkink.<sup>138</sup> They contend that the process of institutionalization identified by Finnemore and Sikkink is a potential mechanism for the ultimate internalization of a norm that marks the final stage of a norm’s life cycle. However, they argue that their “institutional approach” only addresses the need for an organizational home where new norm advocates and the defenders of the status quo including states and other relevant stakeholders can negotiate the rules and principles governing the new norm. Though not mentioned by the authors, I am also of the view that the authors’ use of the phrase “organizational platforms” does not bear the same connotation with the way that phrase has been used by Finnemore and Sikkink. While Finnemore and Sikkink used it as meaning that all norm entrepreneurs should have an organizational platform for *promoting* an emergent norm, the authors used it as a platform for *negotiating* the formalization of an emergent norm in the form of a declaration or a treaty.

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<sup>137</sup> *Ibid* at 164 – 166.

After institutional approach comes “negotiation” which is the fourth stage in the norm evolution process by Gest *et al.* Here, the authors explore the various negotiation strategies that norm entrepreneurs could adopt to checkmate states’ sovereignty-based resistance to the adoption and assimilation of a new international norm. In particular, the authors identify the potency of the moral urgency of the issue which the fledgling norm seeks to address as well as the simplicity of the adoption of the new norm as factors which may persuade states and other actors in giving the new norm a second thought. States are also concerned about their international perception or reputation in the community of nations. Since no state prefers to be labeled as a lawbreaker, human rights violator or a non-conformist, the authors argue that these are some of the sentiments that norm entrepreneurs could capitalize on to get states to fully support the norm agenda.<sup>139</sup>

Relating this sub-section to cross-border disaster displacement, I argue that the Nansen Initiative effectively managed the argument stage on the need to recognize and protect the population displaced by climate change and disasters. This is the “platform” initiated by the United Nations High Commissioner for Refugees (“UNHCR”) and led from 2012 – 2015 by the governments of Switzerland and Norway. It would seem like all other fora of argumentation on the recognition and protection of cross-border disaster-displaced persons ranging from the publication of journal articles and texts to the holding of several local and international conferences on this issue were superseded by the Nansen Initiative. Since its establishment in 2012, the Nansen Initiative

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<sup>138</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4.

sustained the arguments and campaign for the recognition and protection of the populations displaced across international borders by disasters including the effect of climate change. The Initiative achieved this by traversing regions and learning about this issue and citing precedents to states with the aim of creating a global consensus on the issue as a platform for creating a new protection norm.

As already indicated, persuasion and arguments are the principal weapons that norm entrepreneurs use during this stage.<sup>140</sup> The role of arguments as a powerful tool for actuating societal change has been recognized in the literature.<sup>141</sup> However, Sandholtz cautions that arguments that are most useful to norm entrepreneurs must be by analogy and must be consistent. He also contends that norm entrepreneurs' "winning arguments" must be grounded in foundational metanorms of universality, equality, and individual dignity, and must be supported by most of the world's leading powers.<sup>142</sup> Moreover, he emphasizes the quantity, quality and recency of precedents in securing the support of states and other actors for a new norm.<sup>143</sup> The Nansen Initiative adopted all of these strategies, and as would be seen in chapter 4 of this dissertation, they account for the success of the Initiative.

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<sup>139</sup> See also Rutherford, *The Evolving Arms Control Agenda*, *supra* note 86 at 104.

<sup>140</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 1 at 14 – 23.

<sup>141</sup> Neta Crawford, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (New York: Cambridge University Press, 2002).

<sup>142</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24 at 15 – 17.

<sup>143</sup> *Ibid* at 17 – 18.

#### 2.5.4 Rule Change

A necessary consequence of arguments and persuasion, Sandholtz argues, is a mutation of the rules. This could take the form of alteration to the existing rule or an outright creation of a new rule. Whichever way an argument goes on the scope, meaning, and application of an existing international norm, change to the extant rule is the only constant factor. In the words of Sandholtz, “the outcomes of arguments inevitably modify the rules. The rule may become more clear or less, more specific or less, more qualified by exceptions or less, but it cannot remain unchanged.”<sup>144</sup> This is what Clark puts forward as the third phase of her theory on international norm emergence.<sup>145</sup> Clark refers to this stage as “principled norm construction” arguing that it entails the formulation or drafting of legal rules and principles embodying the concepts of “right” and “wrong” for regulating the behaviour of states and other actors in the specific issue area.<sup>146</sup> This stage involves complex negotiations and lobbying between NGOs and other norm entrepreneurs and states with respect not only to the conceptual and contextual meaning to be ascribed to the specific human rights problem but also on the scope and contents of the obligation that would be imposed on states and other actors for the actualization of the new protection agenda. During this stage, Clark emphasizes the importance of mastery of human rights principles and legal drafting skills. She also advises Amnesty International and other advocacy groups participating at this stage of the norm evolution to “remain wary of the ways in which human rights rhetoric may be manipulated for political purposes.”<sup>147</sup>

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<sup>144</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 1 at 20.

<sup>145</sup> Clark, *Diplomacy of Conscience*, *supra* note 85.

<sup>146</sup> *Ibid* at 34 – 35.

<sup>147</sup> *Ibid* at 35.

During this stage in the norm life cycle, norm entrepreneurs must also adopt strategies and mechanisms which could foster the reception and acceptance of the newly formulated norms by states and other actors. As part of Gest *et al*'s negotiation stage of the norm life cycle, the authors identify other negotiation tools such as the availability of "opt-out provisos or watered down obligations" in treaty documents.<sup>148</sup> They cite the example of the Migrant Workers Convention where most of the absolute rights and obligation provisions melted into advisory or recommendatory provisions during the negotiation stage so as to make the Migrant Workers Convention more attractive to states. They also mentioned the example of the CEDAW Optional Protocol where an opt-out clause was inserted in article 10 thereof as a way of appeasing states who were opposed to an inquiry procedure as demanded by the treaty. More useful negotiation tools, according to the authors, include shunning naming and shaming where necessary in favour of the development of a more cordial working relationship with the government and representatives of the "worst-offending" states as was demonstrated by Francis Deng in his dealing with Sudan on the need for that state to accept and domesticate the UN Guiding Principles on Internal Displacement.<sup>149</sup>

An international norm agenda could also opt for a restatement of the existing legal standards rather than creating new ones as a way of allaying the fears and reluctance of states towards new legal standards.<sup>150</sup> Additionally, states' reluctance in recent times at taking on new binding legal obligations might inform the decision of norm entrepreneurs to call for the adoption of a non-binding legal instrument in the form of a declaration, principles, or policy as a way of

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<sup>148</sup> Gest *et al*, Tracking the Process of International Norm Emergence, *supra* note 5.

formalizing an international norm agenda. Experience has shown, particularly concerning the Universal Declaration of Human Rights and the UN Guiding Principles on Internal Displacement that soft legal instruments are capable of entrenching a strong normative framework in a specific issue area just like treaty law.<sup>151</sup>

Relating this sub-section to the problem of cross-border disaster displacement, I argue that the outcome of the Nansen Initiative's three-year campaign and consensus building on cross-border disaster displacement has culminated in the formulation and endorsement of the Protection Agenda by at least 109 states. Though persuasive and not binding, the Protection Agenda is arguably a new protection norm for cross-border disaster-displaced persons.<sup>152</sup> According to the theory of Finnemore and Sikkink therefore, a new norm has emerged thus fulfilling their first stage of the norm life cycle – norm emergence.

After a norm is negotiated and formulated, the next stage is for the norm to be endorsed or adopted as the case may be and for states and other stakeholders to pledge their commitments in

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<sup>149</sup> *Ibid* at 169.

<sup>150</sup> *Ibid*.

<sup>151</sup> Egon Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law" (1959) 53 *Diverse Systems of World Public Order Today* 217 – 229; John Dugard, "The Influence of the Universal Declaration as Law" (2009) 24:1 *Maryland Journal of International Law* 85 – 93; Tom Obokata & Rory O'Connell, "Ambition, Achievement and Potential: The UK and the Universal Declaration of Human Rights at Sixty" (2010) 14:3 *The International Journal of Human Rights* 394 – 406; Marco Odello & Sofia Cavandoli, eds., *Emerging Areas of Human Rights in the 21<sup>st</sup> Century: The Role of the Universal Declaration of Human Rights* (London: Routledge Taylor & Francis Group, 2011); Roberta Cohen, "The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting" (2004) 10 *Global Governance* 459 – 480; Hannah Entwisle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement" (2005) 19:3 *Georgetown Immigration Law Journal* 369 – 390; Simon Bagshaw, *Developing a Normative Framework for the Protection of Internally Displaced Persons* (Leiden: Brill Academic Publishing, 2005); Phil Orchard, "Protection of Internally Displaced Persons: Soft Law as a Norm-Generating Mechanism" (2010) 36:2 *Review of International Studies* 281 – 303.

<sup>152</sup> For a fuller analysis of this argument, see Chapter 5.

applying and implementing it.<sup>153</sup> Gest *et al* note that this endorsement does not necessarily imply that the norm will be internalized and implemented citing the example of treaties which require ratification and possibly domestication for the norm to attain the full force of law at the national level. However, adopting or signing a treaty or other legal instruments does carry a duty of good faith from the adopting or signing state – a soft obligation not to engage in acts or omissions that negate the letter and the spirit of the legal instrument codifying the new norm.<sup>154</sup>

Finnemore and Sikkink's theory of the norm life cycle involves three stages – norm emergence which occurs when a new norm is formulated as theorized by Sandholtz, norm cascade, and norm internalization. Between norm emergence and norm cascade lies a threshold or what they termed “tipping point”, which is the point at which critical mass of *relevant* state actors endorse the norm. “Relevant state actors” means those states whose conducts or practices would be principally affected or curtailed by the new norm. In the words of Finnemore and Sikkink, relevant state actors, or “critical states” as they termed it “are those without which the achievement of the substantive norm goal is compromised.”<sup>155</sup> The campaign by transnational activist networks against the deployment of landmines as a weapon of warfare reached a new height when it was supported by countries considered to be producing and or using these weapons such as France and Britain but also states whose people were the primary victims of landmines such as Mozambique and Cambodia and others.<sup>156</sup> Thus, where for example a new norm such as the Protection Agenda seeks to protect persons moving across borders as a result of

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<sup>153</sup> Gest *et al*, Tracking the Process of International Norm Emergence, *supra* note 5.

<sup>154</sup> *Ibid* at 171.

<sup>155</sup> Finnemore & Sikkink, International Norm Dynamics, *supra* note 4 at 901.

<sup>156</sup> Price, Reversing the Gun Sights, *supra* note 3.

disaster and the deleterious effects of climate change, the relevant state actors in this regard would be less of the states of origin of the displaced persons but more of destination countries. Following from the thesis of Finnemore and Sikkink on this issue, therefore, one may conclude that such a norm has the proclivity to cascade at the point where a critical mass of destination countries adopts it. It is arguable that the Protection Agenda not only reached a tipping point during its public presentation in October 2015 in Geneva when some notable destination countries endorsed it but also cascaded with over 100 countries openly endorsing it.

How do we know when a norm tips? Finnemore and Sikkink offer useful insights. They maintain that a norm reaches a tipping point when it is supported by at least one-third of the total number of states in the system. This position has not been challenged in the literature and to that extent remains reliable until the contrary is established. In strengthening their view, they allude to treaty provisions that require that the treaties would not come into force except and until a specified number of countries ratify it. They argue that these treaty provisions specifying the number of countries that must ratify them before they receive the force of law “may be a useful proxy for the critical mass necessary to say that a norm exists.”<sup>157</sup> Once a norm tips, it heads towards cascade. At this stage, there is a bandwagon effect leading more states to endorse the norm even without local or international pressure as was the case with the Protection Agenda. Whereas the tool for attaining the first stage of the norm life cycle is persuasion, the major tool for achieving the second stage is international socialization comprising emulation, praise, and ridicule.<sup>158</sup> Finnemore and Sikkink rephrase these factors in the context of international politics as

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<sup>157</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 901.

“diplomatic praise or censure, either bilateral or multilateral, which is reinforced by material sanctions and incentives.” They argue that in addition to states other norm entrepreneurs such as international organizations and NGOs act as agents of socialization for the complete internalization of norms.

When a norm tips and cascades, how do norm entrepreneurs ensure that adopted norms are implemented or enforced by states and other actors? This is the preoccupation of the commitment stage which is the last stage of the norm life cycle as propounded by Gest *et al.* According to them, the commitment stage involves systematic steps to ensure that the newly adopted norm is not only internalized through domestic legislation but also implemented. Clark also discussed “applying new norms to ongoing cases that challenge principles.”<sup>159</sup> Efforts of norm entrepreneurs, including those of Amnesty International and other NGOs, will amount to nothing if formalized international norms are not applied. Perhaps this is the most important of all stages of norm development whether as formulated by Clark or some other norm scholars. The role and influence of Amnesty International and other NGOs become particularly necessary during this phase for sustaining the activism and campaigns around the new international norm, monitoring states’ compliance and efforts at internalization, and naming and shaming errant states and other actors. Although Clark’s four-phased theory of international norm development was tested and applied to the evolution of international norms on disappearances, torture, and political killings, it is undoubtedly applicable to other spheres of international relations where norms have emerged. To say that the utility of this theory to other fledgling norm area or extant

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<sup>158</sup> Kenneth Waltz, *Theory of International Politics* (Reading, Mass: Addison-Wesley, 1979) cited by Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4.

norms is limited, as argued by some authors,<sup>160</sup> simply because the theory uses disappearances, torture, and extrajudicial executions as case studies undermines the theory's ability to explain in a general sense how norms grow.

In addition, Finnemore and Sikkink suggest that norm cascade precedes norm internationalization which is their last stage of the norm life cycle. A norm becomes internalized when such a norm becomes widely accepted to the extent that conformity with it is almost "taken for granted" or "automatic". At this point, states do not only ratify or endorse the instrument formalizing the norm but also take a conscious effort to enact local legislations that would give legal effect to the norm and ensure compliance. They suggest that professional training, as well as iterated behaviour and habit, are powerful mechanisms contributing to the universal internalization of norms. Perhaps what is most important about this account of the norm life cycle and which should be noted is that not all norms complete this three-stage life cycle. Some may emerge but may not cascade and where a norm fails to cascade it might be difficult to expect such a norm to be widely accepted to the point of internalization. While it is arguable that the Protection Agenda has scaled through the first two stages of the norm life cycle as propounded by Finnemore and Sikkink, it is too early to determine at this time whether the norm will be internalised or implemented by states and other actors. Chapter 6 however, offers a useful foresight on this issue.

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<sup>159</sup> Clark, *Diplomacy of Conscience*, *supra* note 85 at 35.

<sup>160</sup> Gest *et al*, *Tracking the Process of International Norm Emergence*, *supra* note 5 at 156.

## 2.6 Justifying the Choice of the Theoretical Framework

Katzenstein's definition of norms remains the most influential in the norm literature. For this reason, I have relied substantially on it as the authoritative theory on how to identify a norm while drawing further inspiration and knowledge from the norm definitions offered by other international relations scholars. On international norm compliance theories, I have demonstrated no preference. As will be seen below and later in Chapter 6, all of the theories of international norm compliance are relevant to this dissertation in explaining the reasons why states that have adopted the Protection Agenda might implement it and why more states may adopt and implement it.

So why have I chosen the dispute-driven cyclical model of international norm change as the overarching theoretical framework for understanding how the Protection Agenda emerged? Firstly, its elaborated four developmental phases ((a) the pre-existing rule; (b) the triggering events or disputes about the application of the pre-existing rule; (c) advancement of arguments, precedents and persuasion by actors; and (d) the resultant change in the rule) provide an understanding of the stages of events that have unfolded and are still unfolding in relation to cross-border disaster displacement. The *1951 Refugee Convention* provides what is arguably the "general protection rule" on cross-border forced migration. Climate change and natural disasters have introduced a new twist to the factors traditionally understood as responsible for forced cross-border movement within the architecture of international refugee and asylum law. Anecdotal evidence, however, shows that though climate change and natural disasters are not solely responsible for international displacement, they nevertheless act as threat multipliers in this regard leading inescapably to both internal and cross-border displacement.

Disputes have ensued between states, international and nongovernmental organizations, and among scholars as well as civil society at large on the applicability of the *1951 Refugee Convention* to cross-border disaster displacement. Since the majority of the actors now agree that the *1951 Refugee Convention* does not contemplate cross-border environmental movement, arguments have been thrown back and forth on why this new category of forced migrants needs to be protected. It was this argumentation process that led to the establishment of the Nansen Initiative in October 2012 to facilitate the consensus of states on the protection agenda for cross-border disaster-induced displacement which was formally presented to the world community by the Nansen Initiative on October 12 – 13, 2015 in Geneva, Switzerland. The Protection Agenda represents what could arguably be regarded as the "shared understandings" of states (not necessarily all states) and other actors on this issue, and it epitomizes the final stage of the dispute-driven theory which is rule change. There is also the possibility, through future cycles, of further future development of the new protection norm for cross-border disaster-displaced persons in the form of soft or hard international law. As noted by Sandholtz, "the prohibition of plunder developed over about 150 years, through multiple cycles."<sup>161</sup>

Secondly, this theory not only consolidates the legalization and transnational networks accounts of norm change, but it also goes further by highlighting their relevance and compatibility. For example, concepts such as "norm entrepreneur" and "tipping points" which are extremely useful terms in understanding the cyclical model of norm change are original inventions of the

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<sup>161</sup> Email correspondence from Professor Wayne Sandholtz, dated Wednesday February 11, 2015 (on file with me).

transnational networks.<sup>162</sup> Sandholtz also discusses how his conception of international norm change also shares important affinities with Harold Koh's Transnational Legal Process framework.<sup>163</sup> He argues that Koh's claim that international norms emerged where "one or more transnational actors provokes an interaction or series of interactions with another which forces an interpretation or enunciation of the global norm applicable to the situation" is the crux of his theory.<sup>164</sup> Furthermore, he argues that Koh's concept of internalization is compatible with the dispute-driven theory in that once rules are modified or created through the rigorous process of argumentation and persuasion, states are likely to domesticate the rules. He cites the examples of the internalization of anti-terrorism rules by many states pursuant to the Security Council resolutions after the deadly 9/11 terrorist attack, the domestication of anti-plunder rules as well as the international standards for the treatment of refugees by most states.

Thirdly, this theory in conjunction with others in the literature offers useful insights on how the Nansen Initiative was able to convince more than 100 states to support the Protection Agenda on cross-border disaster-displaced persons. Though beyond the scope of this chapter, it would be seen later in the dissertation how the work of the Initiative embodies all of the factors which make up a "winning argument" as advanced by Sandholtz.<sup>165</sup> Sandholtz argues that for an argument to be persuasive and hence accepted by states as the basis for the formulation of a new norm, it must address three factors which are power, foundational norms, and precedent.<sup>166</sup>

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<sup>162</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4 at 896 – 905.

<sup>163</sup> Harold H. Koh, "Why Do Nations Obey International Law?" (1997) 106:8 *Yale Law Journal* 2599 – 2659 [Koh, *Why Do Nations Obey International Law?*].

<sup>164</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24 at 8.

<sup>165</sup> See Chapter 4.

<sup>166</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24 at 15 – 19.

Norms change when they are supported by one or more of the great world powers as they can convince other states through their diplomatic, negotiation and media influences.<sup>167</sup> Norms also change when arguments supporting their change are grounded in one or more foundational norms of universality, equality and individual dignity.<sup>168</sup> And lastly, norms will change when multiple, recent precedents support arguments advocating for their change.<sup>169</sup> It is this aspect of the theory that will be useful later on in this dissertation in testing the strength or otherwise of the Nansen Initiative.<sup>170</sup>

Finally, coming from a legal background, I find Sandholtz's theory easy to comprehend not only because of his judicious use of legal terminologies to explain his claims but also because of his knowledge of international law which he deployed in espousing his theory. Terms like domestication, jury, customary international law, *opinio juris*, state practice, litigation, judicial precedents, evidence, and so on, simplified the reading and aided my understanding. The author also makes the cyclical model of international norm change fascinating by comparing its argumentation phase with the way lawyers prepare and argue on behalf of their clients in courts. While the decision maker in a court setting is the judge and the jury, it is the "peer of states" at the international level that needs to be convinced on why a particular rule should be recognized and accepted.<sup>171</sup> Moreover, the use of landmark decisions of the Supreme Court of the United

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> It should be noted that Sandholtz does not propose that these points are exclusive of the other factors suggested by other scholars, which may persuade states to accept a new rule of practice. Sandholtz's points complement rather than compete with the other factors in the literature.

<sup>171</sup> Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 24 at 12.

States in the cases of *Brown v. Board of Education*<sup>172</sup> and *Miranda v. Arizona*<sup>173</sup> to further explain how a long-standing general rule might be challenged and subsequently abrogated makes the theory particularly appealing and most importantly relevant to the subject matter of this dissertation.

## **2.7 Compliance with International Norms**

As indicated, once a norm emerges and cascades, the next phase is norm internalisation. This is the phase where compliance is key and states submit themselves to the dictates of the norm. Several reasons have been given in the literature for why states obey norms. As a general rule, consent is the basis for the international legal obligation of states. Even where a norm has attained the status of customary international law, international legal obligations would not arise against a state that has refused (and persistently so) to be bound by the norm conveying such legal obligations.<sup>174</sup> Thus, it is important when considering why states obey international law, to determine not only why states agree to support a new international law but also why they conform to the dictate of the existing norms which they have already supported though I hasten to add that the reasons could be the same for both. These reasons are relevant about the Protection Agenda of the Nansen Initiative. In Chapter 4, I highlight why majority of states supported the Nansen Initiative and the Protection Agenda. It makes sense to examine why the 109 states that have endorsed this document might comply with it and why some other states that are yet to signify their intention to support it might do so. While this section provides the

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<sup>172</sup> 347 U.S. 483 (1954).

<sup>173</sup> 384 U.S. 436 (1966).

theoretical framework for compliance with international norms, Chapters 4 and 5.5 respectively provide the analysis of this theory about why states adopted the Protection Agenda, and why they may take a step further to implement or comply with it.

To the realists, the whole idea of compliance with international law is unreasonable. Realists believe that the concept of “international law” is fictional and incapable of commanding obedience due to lack of enforcement mechanism or coercion.<sup>175</sup> This suggests that, to realists, coercion is the basis for legal compliance. Buttressing this point, Krauthammer while emphasising the worthlessness of international law alluded to series of international scenarios where international law has been violated without any repercussions.<sup>176</sup> He also lamented the inability of the World Court to enforce its own decisions, its inability to follow binding precedents, and the possibility for the court to “change its mind whenever the General Assembly changes its makeup”.<sup>177</sup> All of this not only makes the World Court both “capricious and impotent” but ultimately makes international law “an ass”.<sup>178</sup>

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<sup>174</sup> Anglo-Norwegian Fisheries Case (*U.K v. Nor.*), 1951 I.C.J. 117; North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*) I.C.J. Reports 1969, p.3 (Dissenting Judgement of Judge Sorensen at p. 247).

<sup>175</sup> Charles Krauthammer, “The Curse of Legalism” (1989) 201:19 *The New Republic* 44 [Krauthammer, *The Curse of Legalism*]; Terry Nardin, “Ethical Traditions in International Affairs” in Terry Nardin & David R. Mapel, eds., *Traditions of International Ethics* (New York: Cambridge University Press, 1992) at 13.

<sup>176</sup> Krauthammer, *The Curse of Legalism*, *ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

Realists also have a rationalistic approach to compliance issues – that states only comply with international law where it serves their interest.<sup>179</sup> Louis Henkin once echoed a rationalist suggestion on compliance which noted that “since there is no body to enforce the law, nations will comply with international law only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance.”<sup>180</sup> This “cynic’s formula” notwithstanding, Henkin enthused that “law observance, not violation, is the common way of nations.”<sup>181</sup> Indeed, he stated that “it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations all of the time.”<sup>182</sup> International relations and legal scholars whose work reflects rationalism are Robert Keohane,<sup>183</sup> Duncan Snidal,<sup>184</sup> John Setear,<sup>185</sup> and Kenneth Abbott.<sup>186</sup>

But is it true that nations obey international law for fear of punishment or sanctions? Empirical works have suggested otherwise. Some scholars have argued that states generally have the propensity to comply with international law without the necessity of sanctions.<sup>187</sup> Commenting

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<sup>179</sup> Kenneth N. Waltz, *Man, the State, and War: A Theoretical Analysis* (New York: Columbia University Press, 2001); Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979) [Henkin, *How Nations Behave*].

<sup>180</sup> Henkin, *How Nations Behave*, *ibid* at 49.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid* at 47

<sup>183</sup> Robert O. Keohane, “International Relations and International Law: Two Optics” (1997) 38:2 *Harvard International Law Journal*, 487 – 502.

<sup>184</sup> Duncan Snidal, “Coordination Versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes” (1985) 79:4 *The American Political Science Review* 923 – 942.

<sup>185</sup> John K. Setear, “An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law” (1996) 37:1 *Harvard International Law Journal* 139 – 229.

<sup>186</sup> Kenneth W. Abbott, “Modern International Relations Theory: A Prospectus for International Lawyers” (1989) 14:2 *Yale Journal of International Law* 335 – 411; Kenneth W. Abbott, “‘Trust but Verify’: The Production of Information in Arms Control Treaties and Other International Agreements” (1993) 26:1 *Cornell International Law Journal* 1 – 58.

<sup>187</sup> Abram Chayes & Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Massachusetts: Harvard university Press, 1996) [Chayes & Chayes, *The New*

on the uselessness of sanction as a way of ensuring states' compliance with their legal obligations, Abram Chayes and Antonia Chayes were categorical in describing efforts to include sanctions in modern treaty negotiations as “a waste of time.”<sup>188</sup> In their words:

The deficiencies of sanctions for treaty enforcement are related to their costs and legitimacy. The costs of military sanctions are measured in lives, a price contemporary publics seem disinclined to pay except for the most urgent objectives, clearly related to primary national interests. The costs of economic sanctions are also high, not only for the state against which they are directed, where sanctions fall mainly on the weakest and most vulnerable, but also for the sanctioning states. When economic sanctions are used, they tend to be leaky. Results are slow and not particularly conducive to changing behaviour. The most important cost, however, is less obvious. It is the serious political investment required to mobilise and maintain a concerted military or economic effort over time in a system without any recognised or acknowledged hierarchically superior authority.<sup>189</sup>

While denouncing sanction as a factor influencing states' compliance with international law, the Chayeses proposed the managerial theory of compliance by suggesting that “the fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organisation, and the wider public.”<sup>190</sup> This approach rejected the view that state interests drive compliance since this presupposes that states' violation of international law is planned and premeditated. According to the authors, this is not always the case. In formulating the “managerial” theory of compliance, the authors highlighted the main reasons or what they called “causes of noncompliance” with international law. These

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Sovereignty]. This view tallies with Louis Henkin's view on the same subject where he stated that “in fact, we know – although effective “sanctions,” as that term is commonly used, are indeed lacking – that nations do generally observe laws and obligations.” See Henkin, *How Nations Behave*, *supra* note 179 at 49.

<sup>188</sup> Chayes & Chayes, *The New Sovereignty*, *ibid* at 2.

<sup>189</sup> *Ibid.*

noncompliance root causes are “ambiguity and indeterminacy of treaty language, limitations on the capacity of parties to carry out their undertakings, and the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.”<sup>191</sup> The managerial approach thus comes as a way to deal with these noncompliance problems through states’ “participation in the treaty regime, attending meetings, responding to requests, and meeting deadlines.”<sup>192</sup> The authors proposed that all of this “may lead to a realignment of states’ domestic priorities and agendas, setting policies in motion that will operate to improve performance over time.”<sup>193</sup> This institutional approach bears semblance with Martha Finnemore’s theory of national interests and how international organisations socialise and redefine states’ preferences and actions.<sup>194</sup>

Denying the institutional or managerial theory of compliance, Thomas Franck propounded a theory of fairness – that the fairness of international law dictates states’ compliance much more than institutional influence.<sup>195</sup> Franck’s work is representative of one of the two divisions of the liberal theory of compliance. The other branch of the liberal theory of compliance, which I will return to shortly, is that which argues that it is the domestic structure of liberal states that engender compliance. Franck’s “fairness” approach draws inspiration from his earlier work – *the*

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<sup>190</sup> *Ibid* at 25.

<sup>191</sup> *Ibid* at 10.

<sup>192</sup> *Ibid* at 22.

<sup>193</sup> *Ibid*.

<sup>194</sup> Martha Finnemore, *National Interests in International Society* (Ithaca, New York: Cornell University Press, 1996) [Finnemore, *National Interests in International Society*].

<sup>195</sup> Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995) [Franck, *Fairness in International Law and Institutions*].

*Power of Legitimacy Among Nations*<sup>196</sup> - and suggested that legitimacy and distributive justice have critical roles to play in assessing states' fidelity to international rules. He argues that "a belief in the law's legitimacy re-enforces the perception of its fairness and encourages compliance."<sup>197</sup> Franck believes that nations obey rules "because they perceive the rule and its institutional penumbra to have a high degree of legitimacy."<sup>198</sup> Legitimacy, as used in his works, and as applicable to the rule among states "is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."<sup>199</sup>

Within the second division of liberalism are scholars who argue that liberal states comply and ultimately obey international law based on their domestic structure.<sup>200</sup> According to this theory, compliance with international rules depends on whether the state in question can be characterised as liberal in the sense of having a democratic government that respects and protects peoples' rights through the unfettered role of an independent judiciary. The ideology here seems to be that once a state is run in line with the tenets of the rule of law and separation of powers where each arm of government carries out its responsibility within a democratic context, it is the case that such a state will comply with not just local or domestic laws but also with international law. The

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<sup>196</sup> Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) [Franck, *The Power of Legitimacy Among Nations*].

<sup>197</sup> Franck, *Fairness in International Law and Institutions*, *supra* note 195 at 3.

<sup>198</sup> Franck, *The Power of Legitimacy Among Nations*, *supra* note 196 at 25.

<sup>199</sup> *Ibid* at 24.

<sup>200</sup> Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" (1997) 51:4 *International Organisation* 513 – 553; Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6:4 *European Journal of International Law* 503 – 538.

flip-side of this will be states under the whims and caprices of a dictator or a government that is fundamentally illegitimate. States in this scenario are unlikely to respect their domestic laws and policies let alone international rules and regulations.

There have been many criticisms trailing both the realist and liberal accounts of international legal compliance. Shirley Scott, for example, notes that realism and liberalism have advanced explanations that have insufficiently addressed the core source of states' obligation and allegiance to international law.<sup>201</sup> Scott argues that “not only do the realist and liberal traditions of IR theory not identify and define a political obligation towards international law, but they do not even define the source of the political influence of international law.”<sup>202</sup> Taking a rather positivist approach, Scott argues that “the source of the binding quality of legal rules is the consent of states themselves.”<sup>203</sup> She notes that “consent underpins and provides coherence to the mass of rules, principles, and concepts of international law as a whole, providing a foundation for sources jurisprudence.”<sup>204</sup>

Constructivists assert that states' compliance with international law is linked not only to national identity but also to the international society.<sup>205</sup> This is unlike the rationalists who believe that states obey international law only when it serves their national interests, and the liberal compliance theory of the legitimacy of rules and domestic structures. Emphasising the influence

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<sup>201</sup> Shirley V. Scott “Identifying the Source and Nature of a State’s Political Obligation Towards International Law” (2005) 1:1 *The Journal of International Law and International Relations* 49 – 60.

<sup>202</sup> *Ibid* at 54.

<sup>203</sup> *Ibid* at 51.

<sup>204</sup> *Ibid*.

of international society on states preferences and actions, Martha Finnemore once noted that “the international system can change what states want. It is constitutive and generative, creating new interests and values for actors. It changes state action, not by constraining states with a given set of preferences from acting but by changing their preferences.”<sup>206</sup> Social constructivists value the role of norms in shaping and re-shaping national identities.<sup>207</sup> To the constructivists, “nations thus obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance.”<sup>208</sup> Constructivists argue that states interests or preferences, including their behaviour and the decision whether to comply with or disobey international legal rules are socially constructed.<sup>209</sup>

Harold Koh has criticised not only the managerial approach by the Chayeses and the fairness approach by Franck but has also criticised rationalist and constructivist approaches to international legal compliance.<sup>210</sup> Offering a hybrid “transnational legal process”<sup>211</sup> approach, Koh argues that “the short answer to the question, “Why do nations obey international law?” is not simply: “interest”; “identity”; “identity-formation”; and/or “international society”.”<sup>212</sup> He argues further that “a complete answer must also account for the importance of *interaction*

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<sup>205</sup> Nicholas Greenwood Onuf, *World of Our Making: Rules and Rules in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989).

<sup>206</sup> Finnemore, *National Interests in International Society*, *supra* note 194 at 5 – 6.

<sup>207</sup> Katzenstein, *The Culture of National Security*, *supra* note 18.

<sup>208</sup> Koh, *Why Do Nations Obey International Law?*, *supra* note 163 at 2634.

<sup>209</sup> Alexander Wendt, *Social Theory of International Politics* (New York: Cambridge University Press, 1999); Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (New York: Cambridge University Press, 1989).

<sup>210</sup> Koh, *Why Do Nations Obey International Law?*, *supra* note 163.

<sup>211</sup> Harold H. Koh, “Transnational Legal Process” (1996) 75:1 *Nebraska Law Review* 181 – 207.

<sup>212</sup> Koh, *Why Do Nations Obey International Law?*, *supra* note 163 at 2634.

within the transnational legal process, *interpretation* of international norms, and domestic *internalisation* of those norms as determinants of why nations obey.”<sup>213</sup> So what is the rationale for this answer? In his words, “because most compliance comes from obedience; most obedience comes from norm-internalisation; and most norm-internalisation comes from participation in legal process, particularly transnational legal process.”<sup>214</sup> Singling out works by Franck and the Chayeses for a critique, he maintains that “both the managerial and the fairness accounts of the compliance story omit a thoroughgoing account of transnational legal process: the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalised by domestic legal systems.”<sup>215</sup>

Koh explains further that nations obey international law for the same reasons why they sometimes disobey it. He noted that there are five “cumulative” reasons why states obey and disobey international rules. He listed the reasons as “power and coercion; self-interest; reasons of liberal theory – both rule legitimacy and political identity; communitarian reasons; and reasons of legal process.”<sup>216</sup> He describes “transnational legal process” in two ways and emphasises the importance and the relevance of both to compliance:

The first is a so-called “international legal process” in the Benthamite sense, namely, a government-to-government, horizontal process where nation-states interact in intergovernmental fora, with the main goal of promoting compliance with international norms. The other strand I call “vertical process,” or “transnational legal process,” where state and nonstate actors interact in a variety of domestic and international fora with the

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<sup>213</sup> *Ibid.*

<sup>214</sup> Harold H. Koh, “Transnational Legal Process After September 11th” (2004) 22:3 Berkeley Journal of International Law 337 – 354 at 339 [Koh, Transnational Legal Process After September 11th].

<sup>215</sup> Koh, Why Do Nations Obey International Law?, *supra* note 163 at 2602.

goal of encouraging norm violators to accept norms into their internal value sets so that they obey those norms, not just comply with them, as a matter of domestic law.<sup>217</sup>

Jeffrey Checkel sought to bridge the gap between the rationalist and constructivist compliance frameworks by arguing that social interaction or cost/benefits analysis between States was not sufficient to guarantee compliance but a blend of interaction and interest coupled with argumentative persuasion will yield a better result towards compliance.<sup>218</sup> Argumentative persuasion, within the context of compliance with international norms, “is a social process of interaction that involves changing attitudes about cause and effect in the absence of overt coercion. It is thus a mechanism through which preference change may occur.”<sup>219</sup> The power of argument and persuasion are critical to the goals of norm entrepreneurs.<sup>220</sup> With Checkel’s account on compliance, however, norm entrepreneurs do not cease to use the influence of persuasion and argument simply because the norms they were promoting have emerged. Rather, the utility of argument and persuasion extends beyond norm promotion to norm compliance.<sup>221</sup> Thus, it is by social learning and persuasion that states respect and obey international norms.

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<sup>216</sup> Koh, *Transnational Legal Process After September 11<sup>th</sup>*, *supra* note 214.

<sup>217</sup> *Ibid* at 339.

<sup>218</sup> Jeffrey T. Checkel, “Why Comply? Social Learning and European Identity Change” (2001) 55:3 *International Organisation* 553 – 588.

<sup>219</sup> *Ibid* at 562.

<sup>220</sup> Neta Crawford, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (New York: Cambridge University Press, 2002).

<sup>221</sup> Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009).

One theory of compliance that is explicit in its application to both treaty and soft law is Brunnee and Toope's interactionalism.<sup>222</sup> In their "interactional account" of "why states comply with international law, or why not?", the authors utilise a blend of Lon Fuller's criteria of legality and a constructivist approach to international relations to answer this question. The authors argue that nations obey the law when their idea of "law" is rooted in "shared understandings", "criteria of legality", and "practice of legality".<sup>223</sup> Shared understandings are generated through the various campaigns and proselytisation activities of norm entrepreneurs, as well as by the work of epistemic communities. Thus, "shared understanding may emerge, evolve or fade through processes of social interaction and social learning."<sup>224</sup> The authors adopt Lon Fuller's criteria of legality to underscore the material characteristics of a valid legal norm. States and other actors will only be able to "reason" with international rules when the rules meet the criteria of legality.<sup>225</sup> These criteria of legality demand that:

Legal norms must be general, prohibiting, requiring or permitting certain conduct. They must also be promulgated, and therefore accessible to the public, enabling citizens to know what the law requires. Law should not be retroactive, but prospective, enabling citizens to take the law into account in their decision-making. Citizens must also be able to understand what is permitted, prohibited or required by law – the law must be clear: law should avoid contradiction, not requiring or permitting and prohibiting at the same time; law must be realistic and not demand the impossible; its requirements of citizens must remain relatively constant; finally, there should be congruence between legal norms and the actions of officials operating under the law.<sup>226</sup>

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<sup>222</sup> Jutta Brunnee & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) [Brunnee & Toope, *Legitimacy and Legality in International Law*].

<sup>223</sup> *Ibid* at 88 – 125.

<sup>224</sup> *Ibid* at 56 – 65.

The third and the last factor of compliance pull, according to the authors, is the “practice of legality.” International obligation must not only be validly created but must be practiced and adhered to. The authors argue that while shared understandings and criteria of legality are compliance pull factors, the existence of a culture of mutual respect and reciprocity also imbue “fidelity to the law”. Drawing inspiration from Etienne Wenger and Emanuel Adler’s ideas of communities of practice, the authors argue that “interactional law does not arise simply because a community of practice has grown around a given issue or norm. Only when this community is engaged in a practice of legality, can shared understandings, be they procedural or substantive, modest or ambitious, be produced, maintained or altered.”<sup>227</sup> Simply put, under the “practice of legality” element of the international interactional law account of Brunnee and Toope, a state complies with international law, be it hard or soft, even when it is against that state’s interest, because of the belief that another state facing a similar situation will also comply with the law. This “belief” is made possible by an established practice of legality and this practice of legality ultimately fosters a culture of compliance by states with international law.

## **2.8 Conclusion**

I am not pretending to have exhausted all the literature on international norms. However, I have attempted to review some of the notable international relations scholarship on this subject. Fueled by the constantly changing normative values of what is appropriate and what is not concerning specific actions, situations or events, international norms evolve in cycles. Each of these cycles entails distinct phases with the successful completion of each stage leading to the

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<sup>225</sup> *Ibid* at 20 – 55.

<sup>226</sup> *Ibid* at 26.

next. Scholars are in agreement about this while some have even argued that not all fledgling norms make it through all the stages of normative development. I will argue later in the dissertation that the protection agenda is an international policy document and that it is normative. The processes leading to this norm did not start with the Nansen Initiative but way back into the 80s with the work of Essam El-Hinnawi.<sup>228</sup> Moreover, this norm is prone to further development as an adaptation into new domestic or international climate change, disaster management, or humanitarian laws or treaties or indeed as a standalone international treaty on cross-border disaster displacement. It may also be infused into domestic and regional legislations on immigration and asylum.

For those norms that make it through all the processual phases of norm development, their emergence as norms does not guarantee their success as there is a difference between when a norm emerges and whether that norm succeeds or fails. A norm succeeds when it is achieving the purpose for which it was formulated. A norm succeeds not just because several states have endorsed or in the case of a treaty, ratified it. While this may contribute further to the emergence of the norm, it does not mean that the norm is successful. A norm succeeds not only when it is endorsed or ratified by “critical states without which the achievement of the substantive norm goal is compromised”<sup>229</sup> but when states and other actors implement the norm. Thus, compliance with a new norm is critical to gauging the success or weakness or failure of that new norm. A new norm setting the standards for the recognition and treatment of cross-border disaster-displaced persons has emerged in the form of the Protection Agenda of the Nansen Initiative.

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<sup>227</sup> *Ibid* at 62 – 65.

Whether or not this norm succeeds is beyond the scope of this dissertation – that is certainly a question for future research. This is because it is too early to determine how many of the states that have adopted the Protection Agenda are implementing it. Indeed, with the establishment of the Platform on Disaster Displacement as a post-Nansen Initiative process in July 2016, it appears that efforts are now being channelled toward promoting the implementation of the Protection Agenda.<sup>230</sup> To that extent, this dissertation will assess the robustness of the Protection Agenda by examining such factors and indicators such as the caliber of developed destination countries that adopted it, and the nature of the implementation framework that states have adopted.

In the meantime, it is necessary to interrogate the circumstances leading to the establishment of the Nansen Initiative in the global efforts at recognizing and protecting cross-border disaster displaced persons. Before the creation of the Nansen Initiative, were there any international or regional efforts towards addressing the plights of the population displaced by climate change and environmental events? Why were the existing legal frameworks such as the international refugee law, international migration law, internal displacement law, and international human rights law not able to adequately address cross-border disaster-displacement? Was it possible for any of the existing refugee and migration organizations like the United Nations Refugee Agency and the International Organization for Migration to fill this organizational gap rather than establishing the Nansen Initiative? Simply put, why was the Nansen Initiative necessary? The next chapter addresses these questions in detail.

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<sup>228</sup> El-Hinnawi, *Environmental Refugees*, *supra* note 124.

<sup>229</sup> Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 4.

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<sup>230</sup> See Chapter 6.

## **Chapter 3: Cross-Border Disaster Displacement: Setting the Stage for the Establishment of the Nansen Initiative**

*“The absence of a clear international legal framework to respond to people displaced by climate change has resulted in calls from a variety of sectors for a new international instrument to protect so-called ‘climate refugees’”<sup>1</sup>*

### **3.1 Introduction**

This chapter examines the state of affairs that led to the birth of the Nansen Initiative. The chapter begins by reviewing the data index of some notable refugee and disaster displacement organisations as well as the works of relevant scholars dealing with the number of those that have been displaced and those that will be displaced by climate change and disasters. Next, the chapter focuses on the inadequacy of the legal framework that existed before the adoption of the Protection Agenda for protecting cross-border disaster-displaced persons. This then leads to a chronological examination of efforts and concerns from scholars, regions and international organizations about disaster displacement and the protection of the displaced population. The chapter closes with an account of how the Nansen Initiative was established highlighting the role of the United Nations High Commissioner for Refugees (the “UNHCR”) in this regard.

### **3.2 Who and What Will Be Affected by Disaster and Climate Change?**

It seems both platitudinous and hyperbolic to assert that all creation within a territory plagued by climate change or disaster are liable to be affected – from human beings to other animals as well

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<sup>1</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (New York: Oxford University Press, 2012) at 187 [McAdam, *Climate Change, Forced Migration, and International Law*].

as the entire ecosystem. When an environmental disaster strikes within a given geographical territory, everything and anything – both living and non-living – within that jurisdiction is potentially at risk. For the purpose of this study however, my focus is on the risk to the human population. So how many people would be displaced by disaster and climate change? This is a very difficult question to answer as any given figures would be speculative. Indeed, it has been noted that the collection of accurate statistics of refugees and other displaced persons is a yeoman job and that where statistics are given, they are perpetually prone to controversy and dispute.<sup>2</sup> Yet, it is important to have an idea of how many people would be or have been displaced as a core requirement for a successful inquiry to the resolution of refugee problems and other complex emergencies.<sup>3</sup> As it is difficult to predict the accurate numbers of those that would be displaced in the future by disasters and climate change, scholars have adopted a looking-back approach to this issue. They rely on annual displacement indexes by reputable refugee and disaster displacement organisations and Non-Governmental Organisations (NGOs) which often release annual displacement reports based on refugee crises and environmental events in the past year(s) as a prognosis for the number of people that might be displaced in the future.<sup>4</sup>

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<sup>2</sup> Jeff Crisp, ““Who Has Counted the Refugees?”: UNHCR and the Politics of Numbers” in *New Issues in Refugee Research – Working Paper No. 12* (Geneva: UNHCR, 1999).

<sup>3</sup> *Ibid*; Vikram Odedra Kolmannskog, *Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration* (Oslo: Norwegian Refugee Council, 2008).

<sup>4</sup> Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) [Piguet & Laczko, *People on the Move in a Changing Climate*]; Jane McAdam, “The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement” (2015) 3:1 *Migration Studies* 131 – 142 [McAdam, *The Emerging New Zealand Jurisprudence*].

Based on the data in some relatively old literature, the number of people that would be displaced by disasters and climate change had been estimated to be between 25 million to one billion.<sup>5</sup> These figures have been discredited as overly exaggerated and highly unreliable.<sup>6</sup> By "collecting, cross-checking and analysing secondary data from an expanding range of sources related to rapid-onset weather-related and geophysical hazard events", the Norwegian Refugee Council in 2013 estimated that 32.4 million people were displaced in 82 countries in 2012 alone due to environmental disasters while around 144 million people were displaced in 125 countries over the period of five years from 2008 – 2012.<sup>7</sup> In the period between 2008 – 2012, about two and a half million people were displaced in some developed countries but 98 percent of the people displaced during this period were from developing countries.<sup>8</sup> Providing regional estimates of the people displaced by environmental events in the year 2012, the report notes that 22.2 million people in 22 countries were displaced in Asia, 8.2 million in 27 countries in Africa, 1.8 million people in 18 countries in Americas, 129,000 people in 9 countries in Oceania and 74,000 people in 6 countries in Europe.<sup>9</sup>

In the first half of 2017 alone, 4.5 million people have been displaced by environmental disasters across 76 countries.<sup>10</sup> The 2017 report of the Norwegian Refugee Council indicates that there

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<sup>5</sup> Norman Myers, "Environmental Refugees: An Emergent Security Issue" (13th Economic Forum, Prague, 23 – 27 May, 2005); Nicholas H. Stern, *The Economics of Climate Change: The Stern Review* (New York: Cambridge University Press, 2007) at 3 [Stern, *The Economics of Climate Change*]; Christian Aid, *Human Tide: The Real Migration Crisis* (Christian Aid, 2007).

<sup>6</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 1 at 26.

<sup>7</sup> Internal Displacement Monitoring Centre, *Global Estimates 2012: People Displaced by Disasters* (Oslo: Norwegian Refugee Council, 2013) at 6.

<sup>8</sup> *Ibid* at 7.

<sup>9</sup> *Ibid* at 27 - 30.

<sup>10</sup> Internal Displacement Monitoring Centre, *Provisional Mid-Year Figures: Internal Displacement in 2017* (Oslo: Norwegian Refugee Council, 2017).

were 31.1 million people displaced by conflict, violence and disasters in 2016.<sup>11</sup> The 2016 report of the Council could not provide definite total figures of the people displaced by disasters in the year 2015.<sup>12</sup> However, the report estimates that around 19.2 million people were displaced across 113 countries in 2015.<sup>13</sup> While South and East Asia had the highest incidence of disasters and displacement, the report notes that “no region of the world was unaffected”.<sup>14</sup> The 2015 edition of this report estimated that more than 19.3 million people were displaced by disasters in 100 countries in 2014 and that one person per second had been displaced by environmental events per year since 2008 averaging 26.4 million people.<sup>15</sup> The report notes that in the last seven years, an average of 22.5 million people have been displaced per year by climate or weather-related disasters.<sup>16</sup> In other words, 62,000 people were displaced on a daily basis within the last seven years. The report concludes that “latest historical models suggest that even after adjusting for population growth, the likelihood of being displaced by a disaster today is 60 percent higher than it was four decades ago”.<sup>17</sup> Generally, people in low-income countries are more vulnerable to disaster displacement while a significant portion of the population in high-income countries would also be affected.<sup>18</sup> The report notes that about 1.8 million people were displaced in high-income countries in 2014 with Europe experiencing double of its average level of displacement

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<sup>11</sup> Internal Displacement Monitoring Centre, *GRID 2017: Global Report on Internal Displacement* (Oslo: Norwegian Refugee Council, 2017).

<sup>12</sup> Internal Displacement Monitoring Centre, *GRID 2016: Global Report on Internal Displacement* (Oslo: Norwegian Refugee Council, 2016).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Internal Displacement Monitoring Centre, *Global Estimates 2015: People Displaced by Disasters* (Oslo: Norwegian Refugee Council, 2015) at 8. According to this report, the number of people displaced per year from 2008 is as follows: 2008 = 36.5 million; 2009 = 16.7 million; 2010 = 42.4 million; 2011 = 15 million; 2012 = 32.4 million; 2013 = 22.3 million; and 2014 = 19.3 million.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

for the past seven years in 2014 – about 190,000 persons were displaced.<sup>19</sup> China, India and the Philippines were singled out as countries which experienced the highest level of displacement not only in 2014 but over the last seven years.<sup>20</sup>

### **3.3 Existing Legal Framework**

This section examines the existing legal frameworks on forced displacement such as those involving refugees and internally displaced persons and why the frameworks do not address cross-border disaster mobility. The section also focuses, albeit briefly, on international migration law, international human rights law and their inadequacy in protecting cross-border disaster-displaced persons.

#### **3.3.1 International Refugee Law**

The term ‘refugee’ refers to 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.”<sup>21</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* at 9.

<sup>20</sup> *Ibid.*

<sup>21</sup> Article 1A (2) of the *1951 Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [*1951 Refugee Convention*] read in conjunction with the *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967) [*1967 Protocol*].

In recent times, climate change and environmental conditions have introduced new species of displaced persons popularly known as ‘climate change refugees’. This description is controversial in that it does not fall within the provisions of article 1A of the *1951 Refugee Convention* as well as its *1967 Protocol*.<sup>22</sup> It is therefore a misnomer to describe them as “refugees”. Persons outside the State of their nationality seeking refugee status under the *1951 Refugee Convention* must establish two ingredients: that they are being persecuted and that the persecution is as a result of race, religion, nationality, membership of a particular social group or political opinion.<sup>23</sup>

It may be appropriate here to raise the question: what is persecution and do the deleterious impacts of climate change on persons and the environment qualify as “persecution”? Quite unfortunately, the *1951 Refugee Convention* does not define what persecution means and this term is also not defined in any international instrument.<sup>24</sup> Articles 31 and 33 of the Convention however refer to those whose life or freedom ‘was’ or ‘would be’ threatened,<sup>25</sup> and from this, ‘it may be inferred that a threat to life or freedom *on account of race, religion, nationality, political*

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<sup>22</sup> See Jane McAdam, “Climate Change ‘Refugees’ and International Law,” at 6, online: New South Wales Bar Association <<http://www.nswbar.asn.au/circulars/climatechange1.pdf>> [McAdam, Climate Change ‘Refugees’ and International Law] where the author says “since 1985, the term ‘environmental refugees’ has been floating about, but the choice of the term ‘refugee’ is highly controversial.” See also Norman Myers & Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995); Essam El-Hinnawi, *Environmental Refugees* (New York: UN Environmental Programme, 1985); Astri Suhrke & Annamaria Visentin, “The Environmental Refugee: A New Approach” (1991) Ecodecision 73.

<sup>23</sup> Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3d ed. (New York: Oxford University Press, 2007) 21 [Goodwin-Gill & McAdam, *The Refugee in International Law*].

<sup>24</sup> UN High Commissioner for Refugees, *Handbook and Guidelines on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR /1P/4/ENG/REV.3, para 51 – 65; Atle Grahl-Madsen, *The Status of Refugees in International Law: Refugee Character*, Vol. 1 (Leyden: A.W Sijthoff, 1966) 188 – 216; James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) 99 – 134.

<sup>25</sup> Goodwin-Gill & McAdam, *The Refugee in International Law*, *supra* note 23 at 90.

*opinion or membership of a particular social group* is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.’<sup>26</sup>

On whether environmental events attributable to climate change may be understood as persecution under the *1951 Refugee Convention* and its *1967 Protocol*, McAdam argues that “storms, salination, rising sea levels and floods may be harmful, but they do not constitute ‘persecution’ according to the way that term has been interpreted.”<sup>27</sup> While it is true that climate-induced environmental degradation may constitute a threat to life or freedom, the implicit requirement under the *1951 Refugee Convention* that the persecutor must be a human agent is missing. For the purpose of bringing them under the *1951 Refugee Convention* mechanism, it has been argued that environmental refugees do currently fit within the Convention definition of ‘refugees’ by claiming that government-induced environmental degradation is a form of persecution. Furthermore, that such persecution is taking place for reasons of environmental refugees’ membership in a social group.<sup>28</sup>

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<sup>26</sup> UN High Commissioner for Refugees, *Handbook and Guidelines on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR /1P/4/ENG/REV.3, para 51.

<sup>27</sup> McAdam, *Climate Change ‘Refugees’ and International Law*, *supra* note 22.

<sup>28</sup> Jessica Cooper, “Environmental Refugees: Meeting the Requirements of the Refugee Convention” (1998) 6 *New York University Environmental Law Journal* 480–529; Christopher M. Kozoll, “Poisoning the Well: Persecution, the Environment, and Refugee Status” (2004) 15 *Colorado Journal of International Environmental Law and Policy* 271. On membership of a particular social group, see generally Alex Aleinikoff, “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group’” in Erika Feller, Volker Turk & Frances Nicholson, eds., *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003) 263.

While it is true that government-induced environmental degradation could amount to persecution for a *1951 Refugee Convention* reason,<sup>29</sup> the broad subject of climate change-induced displacement ceases to be “climate change-induced” if the environmental degradation which leads to displacement is “government-induced”. Government-induced environmental degradation which could be termed persecutory fits within the envisaged possibility of the Convention.<sup>30</sup> This is so because under the Convention, there must be an identified persecutor which is usually the home government of the person seeking a refugee status or a non-state actor. The idea therefore is that the person being persecuted flees that State and crosses international border to another State to seek refuge. However, in the latter case, the persecutor cannot be identified *per se*; it is not an entity which is subject to international law. Alternatively, one might argue that the ‘persecutor’ in such a case is the ‘international community’, and industrialized countries in particular, whose failure to reduce greenhouse gas emission has resulted in the predicament now confronting them.<sup>31</sup> However, this proposition stands the *1951 Refugee Convention* on its head. As McAdam accurately explained:

These are the very countries to which movement might be sought if the land becomes unsustainable. This delinking of the actor of persecution from the territory from which flight occurs is a complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is

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<sup>29</sup> *SERAC and CESR v. Nigeria, Decision regarding Communication No 155/96, ACHPR/COMM/A044/1, ‘15<sup>th</sup> Annual Activity Report of African Commission on Human and Peoples’ Rights’ (7 May 2002) Annex V, para 44.*

<sup>30</sup> Jane McAdam, “Climate Change, Displacement and the Role of International Law and Policy” (2011) A Paper Presented at the International Dialogue on Migration organized by the International Organization for Migration on 29 – 30, March 2011, online: <<https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/SessionIII-Paper-McAdam-Session.pdf>>.

not escaping his or her government, but rather is seeking refuge from – yet within – countries that have contributed to climate change.<sup>32</sup>

Assuming without conceding that climate change qualifies as ‘persecution’, it would yet again be impossible to establish the *1951 Refugee Convention* requirement that the persecution must be as a result of race, religion, nationality, membership of a particular social group or political opinion. These shortcomings therefore show that neither the *1951 Refugee Convention* nor the *1967 Protocol* applies to cross-border climate change or environmental movements.

The case of *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*<sup>33</sup> brings to the fore the confusion inherent in determining the legal status of the people who have fled their country of nationality on account of climate change or other environmental impacts. The appellant in this case is a Kiribati national and a father of three children who were born in New Zealand. He and his wife relocated to New Zealand ostensibly as migrant workers having in reality been forced to flee by the various environmental and resource threats facing Kiribati. After the expiration of his immigration status, the appellant as the

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<sup>31</sup> See Intergovernmental Panel on Climate Change (IPCC), *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (Cambridge: Cambridge University Press, 1990) 8; IPCC, *Climate Change 2007: Synthesis Report: Summary for Policymakers* (Cambridge: Cambridge University Press, 2007) at 5, 6, 12 & 13.

<sup>32</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 1 at 45.

<sup>33</sup> [2013] NZHC 3125 [*Teitiota's Case*]. The analysis here relates only to the judgment of the New Zealand High Court on the appeal filed by the applicant after his refugee application was refused by the New Zealand Immigration and Protection Tribunal. The New Zealand High Court dismissed his appeal and his further appeals to the New Zealand Court of Appeal and the New Zealand Supreme Court were both unsuccessful. The New Zealand Court of Appeal judgments is reported in *Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688 while the New Zealand Supreme Court judgment is reported in *Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107. The applicant and his wife alongside their three children have since been deported back to Kiribati in September 2015. See Tim McDonald, “The Man Who Would Be The First Climate Change Refugee” BBC News (5 November 2015), online: BBC News <<http://www.bbc.com/news/world-asia-34674374>>.

applicant before the New Zealand Immigration and Protection Tribunal sought to be allowed permanent residence in the New Zealand under both the *Immigration Act 2009* and the *1951 Refugee Convention* as well as its *1967 Protocol* as a "climate change refugee". This application was denied by the Immigration and Protection Tribunal (Tribunal) hence this appeal. The New Zealand High Court confirmed the decision of the Tribunal in its entirety. The court, per Priestly J, held that by no stretch of imagination could those displaced by climate change fit into the existing architecture of the *1951 Refugee Convention*. Thus, the hope of an expansion to the refugee definition which was held by various human rights groups, and commentators because of this case was dashed. From this decision therefore, it is safe to conclude that the people who are forced to move internationally due to climate change events are not refugees according to the convention definition. The *1951 Refugee Convention* and its *1967 Protocol* do not recognise natural or human-made environmental disasters as a driver of forced migration.

### **3.3.2 UN Guiding Principles on Internal Displacement**

In contrast, the *UN Guiding Principles on Internal Displacement* recognises natural or human-made environmental disasters as a driver of forced migration. Principle 2 of the *UN Guiding Principles on Internal Displacement* defines internally displaced persons (IDPs) as “persons or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and *who have not crossed an internationally recognized state border.*”<sup>34</sup>

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<sup>34</sup> Emphasis mine.

The applicant in *Teitiota's case* actually claimed status as an IDP but it should be noted that this claim lacks merit. Not surprisingly, the Tribunal did not agree with him on this issue. His attempt to raise this issue again on appeal to the High Court of New Zealand was unsuccessful. It was held that "an internally displaced person, as the name suggests, is a person displaced inside his or her country. As soon as such a person leaves his or her country of origin, the Guiding Principles are no longer applicable...an internally displaced person cannot meet the requirements of the Refugee Convention, quite simply because such a person, in terms of Article 1A(2), is not "outside their country of nationality".<sup>35</sup> A person ceases to be internally displaced the moment that person crosses an internationally recognized state border. In other words, even if that person can show that he/she has been forced to leave his/her places of habitual residence as a result of natural or human-made disaster such as climate change, the person must still remain within the confines of the country wherein such natural or human-made disaster took place, or cease to fall under the *UN Guiding Principles on Internal Displacement*.

### **3.3.3 International Migration Law**

Granted that the people moving across international borders due to climate change are neither refugees nor IDPs, what is their legal status? The current international framework addressing international mobility is based on a distinction between "refugees" and "migrants" and what theoretically distinguishes refugees from migrants is the cause of departure: forced or

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<sup>35</sup> *Teitiota's Case*, *supra* note 33 at *para.* 23 – 24.

involuntary in the case of refugees and voluntary in the case of migrants.<sup>36</sup> The imputation of voluntariness to the categorization of those moving on account of environmental factors as "migrants" simply for that purpose is debatable considering the circumstances leading to their flight. These are people who do not have means of livelihood as farming and other agricultural endeavours have become permanently impossible. Rising sea levels have continuously swept away their houses rendering some of them homeless with little or no assistance from their national government. The inability of their government to respond to these challenges is not for malicious reasons but principally because the government does not have the necessary resources to surmount the problem. The issue becomes tragic when in the case of the atoll States in the Pacific, the entire society risks the possibility of submergence thereby becoming permanently uninhabitable. Would it then be fair to say that the people who decide to move for these reasons are doing so voluntarily? There lies the inapplicability of the international migration law framework to cross-border disaster displacement and the inappropriateness of the term "migrants" in describing those who are forced to cross international borders on account of climate change and environmental events.

In fact, studies have demonstrated that the boundaries between voluntary and involuntary movements are blurred and that refugees are part of complex migratory phenomena.<sup>37</sup> Scholars are of the opinion that in practice, human mobility is a complex phenomenon. Giulia Scalettaris,

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<sup>36</sup> Giulia Scalettaris, "Refugees or Migrants? The UNHCR's Comprehensive Approach to Afghan Mobility into Iran and Pakistan" in Martin Geiger & Antoine Pécoud, eds., *The Politics of International Migration Management* (New York: Palgrave Macmillan, 2010) 252 [Scalettaris, Refugees or Migrants?].

<sup>37</sup> Oliver Bakewell, "Repatriation and Self-Settled Refugees in Zambia: Bringing Solutions to the Wrong Problems" (2000) 13:4 *Journal of Refugee Studies* 356.

citing Anthony Richmond<sup>38</sup> and David Turton<sup>39</sup> opines that "there is recognition among scholars today that it is impossible to apply the term "forced migration" to the real world in a way that enables one to separate out a discrete class of migrants. In fact, a clear-cut distinction between forced migration and non-forced migration does not account for the way migratory processes actually work and take place in the real world".<sup>40</sup> And because of complications such as this, it has been argued that protection of migrants outside the internationally recognized refugees and asylum system should be based on needs and not status.<sup>41</sup>

International migration law pathways are not entirely inapplicable to cross-border disaster displacement. For those moving due to gradual environmental degradation (which arguably suggests some measure of voluntariness) as opposed to sudden environmental disasters (which is arguably involuntary), the suggestion is that they could take advantage of the existing internationally recognized migration law pathways such as for educational, professional or career reasons.<sup>42</sup> Studies have shown that people have used the educational and professional migration law pathways in the form of further academic studies and search for better jobs abroad to 'flee' from oppressive and corrupt political regimes.<sup>43</sup> In the course of their academic and career years

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<sup>38</sup> Anthony A. Richmond, "Sociological Theories of International Migration: The Case of Refugees" (1988) 36:2 *Current Sociology* 7 – 25.

<sup>39</sup> David Turton, "Refugees, Forced Resettlers and 'Other Forced Migrants': Towards A Unitary Study of Forced Migration" in *New Issues in Refugee Research - Working Paper No. 94* (Geneva: UNHCR, 2003).

<sup>40</sup> Scalettaris, *Refugees or Migrants?*, *supra* note 36.

<sup>41</sup> Linde Thomas, "Mixed Migration: A Humanitarian Counterpoint" (2011) 30:1 *Refugee Survey Quarterly* 89; Jane McAdam, "The Refugee Convention as a Rights Blueprint for People in Need of International Protection" in Jane McAdam, ed., *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008).

<sup>42</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 1.

<sup>43</sup> *Ibid.*

abroad, most of them have taken advantage of the existing immigration laws in their countries of vocation to apply for permanent residency.<sup>44</sup>

Countries like Canada and the United States, to mention a few, have permanent residency application programs which encourage qualified persons to apply. Upon being successful, such persons have the legal right to relocate and live in these countries as permanent residents<sup>45</sup> – and ultimately though subject to the immigration and citizenship laws of these countries – they may become citizens. Notwithstanding the relevance of immigration law to cross-border disaster-displacement, the greatest argument against these migration pathways is that they are generally expensive and only a few people could afford them. This is particularly true of the people living in the Pacific island states who are most vulnerable to the devastating effects of climate change and yet lack the necessary resources to relocate due to poor national economy.

Apart from permanent residency applications, some countries such as Finland and Sweden prior to the establishment of the Nansen Initiative made some legislative changes to their immigration law to recognize and accommodate persons displaced by disasters and environmental events.<sup>46</sup> However, it is unclear whether anyone has been recognized and accommodated in these countries as a cross-border disaster-displaced person. The United States on the other hand has a temporary protection mechanism known as the “Temporary Protection Status” (TPS) through

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<sup>44</sup> *Ibid.*

<sup>45</sup> U.S Department of State, Travel.State.Gov, *Diversity Visa Program* online: <[http://travel.state.gov/visa/immigrants/types/types\\_1318.html](http://travel.state.gov/visa/immigrants/types/types_1318.html)>; *Immigration and Refugee Protection Act* (S.C 2001, c. 27), s. 12.

<sup>46</sup> See section 88(1) of Finland’s *Aliens Act 2004*, 301/2004 and Chapter 4, section 2(3) and Chapter 5, section 1 of Sweden’s *Aliens Act 2005*, 716/2005.

which the US refrains from deporting citizens of a country engulfed by disasters.<sup>47</sup> This protection measure is not automatic – the affected country must request the assistance of the US under this protection framework.<sup>48</sup> While this is a good initiative, it is fraught with some disadvantages. First, it offers only a temporary and not a permanent protection measure to cross-border disaster-displaced persons. Second, it neither offers nor confers legal rights – this is a purely discretionary mechanism. Third, it does not admit anyone into the US as a cross-border disaster-displaced person but only applies to those who are already in the US at the time of the disaster. By contrast, Canada’s immigration law has the potential to admit cross-border disaster-displaced persons as permanent as opposed to temporary residents. While no one has been admitted into Canada as a cross-border disaster-displaced person, it has been argued that if Canada decides to extend refugee-type protection to “climate migrants”, legislative changes would not be required but regulatory or policy changes might be needed.<sup>49</sup> This is because of the “flexibility of the Canadian immigration and refugee law, particularly the provisions dealing with the grant of permanent residency status to a “convention refugee” or a “person in similar circumstances”, the entrenchment of the *non-refoulement* principle, and the grant of status to people on humanitarian and compassionate considerations”.<sup>50</sup>

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<sup>47</sup> *Immigration and Nationality Act*, s. 244(b), 8 USC s. 1254a(b).

<sup>48</sup> *Ibid.*

<sup>49</sup> Penny Becklumb, “Climate Change and Forced Migration: Canada’s Role” *Parliamentary Information and Research Service* (9 February 2010), online: Parliament of Canada <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-04-e.htm>>.

<sup>50</sup> *Ibid.*

### 3.3.4 International Human Rights Law

As a way of exploring possible protection options, there are international human rights that could trigger the application of complementary protection to those displaced by disaster and climate change. These rights include but are not limited to the right to life and the right not to be subjected to cruel, inhuman or degrading treatment.<sup>51</sup> These rights are guaranteed under national,<sup>52</sup> regional,<sup>53</sup> and international human rights law<sup>54</sup> and courts and other treaty bodies have considered them as engaging the non-*refoulement* principle in international law.<sup>55</sup> Refugee scholars have analysed how these rights might be available in the context of complementary protection to those who fall outside the traditional refugee situation and hence outside the

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<sup>51</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 1.

<sup>52</sup> While it is impracticable due to time and space constraints to cite the provisions of the constitution of most states where the right to life and the right not to be subjected to torture, or cruel, inhuman or degrading punishment are contained, it is modest to say that most states' constitutions guarantee these right drawing inspirations not just from the Universal Declaration of Human Rights but also from other relevant international and regional human rights treaties protecting them.

<sup>53</sup> For some regional human rights treaties guaranteeing the right to life and the right not to be subjected to torture, cruel, inhuman or degrading treatment, see *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (entered into force 21 October 1986) art. 4 & 5 [ACHPR]; *Arab Charter on Human Rights*, 22 May 2004, (entered into force 15 March 2008) art. 5 & 8 [AChHR]; *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force 18 July 1978) art. 4 & 5 [ACHR]; *European Convention on Human Rights*, 4 November 1950, ETS No. 5, (entered into force 3 September 1953) art. 2 & 3 [ECHR].

<sup>54</sup> Some international human rights instruments containing the right to life and the right not to be subjected to torture, cruel, inhuman or degrading treatment are the *Universal Declaration of Human Rights*, GA Res 217A(III) (1948), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) art. 3 & 5 [UDHR]; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, arts. 6 & 7, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 art. 6 & 37 (entered into force 2 September 1990) [CRC]. Moreover, there is a separate treaty proscribing torture in any form and under any guise within the jurisdiction of member states party: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987) [CAT].

<sup>55</sup> *Soering v. United Kingdom*, (1989) 11 EHRR 439; *Z and T v. United Kingdom*, App. No. 27034/05 (ECtHR, 28 February 2006); *Sufi & Elmi v. United Kingdom*, App. No. 8319/07 (ECtHR, 28 June 2011); *Ahani v. Canada* Communication No. 1051/2002 (29 March 2004) UN Doc. CCPR/C/80/D/1051/2002 (15 June 2004); Committee on the Rights of the Child, "General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin" UN Doc. CRC/GC/2005/6 (1 September 2005) at para. 27; Human Rights Committee, "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para. 12.

protection of the *1951 Refugee Convention* and its *1967 Protocol*.<sup>56</sup> Complementary protection may be based on a human rights treaty or on more generalized humanitarian principles, such as providing assistance to persons fleeing from generalized violence.<sup>57</sup> Notably, human rights law has expanded states' non-*refoulement* obligations beyond the refugee category to include people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment.<sup>58</sup>

Complementary protection is in theory plausible but it is only useful to those who have already found their way into the jurisdiction of another state and are, perhaps, in the process of being deported. It cannot be used as a basis for seeking entry into another state by people displaced by climate change impacts. Furthermore, there is the need to examine whether and to what extent people who are displaced by environmental impacts can establish that there is a real likelihood of risk, threat or danger to their right to life as contained in international and regional human rights treaties if they are deported to their country of origin in order for the complementary protection obligation to be triggered. The same standard of proof will be expected when they invoke complementary protection obligation on the ground that they will be subjected to cruel, inhuman or degrading treatment if they are deported to their country of origin from where they fled because of environmental degradation that is possibly occasioned by climate change.

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<sup>56</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (New York: Oxford University Press, 2007); Matthew Scott, "Natural Disasters, Climate Change and Non-*Refoulement*: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?" (2014) 26:3 *International Journal of Refugee Law* 404 – 432.

<sup>57</sup> Deborah Perluss & Joan Fitzpatrick Hartman, "Temporary Refuge: Emergence of a Customary Norm" (1986) 26 *Virginia Journal of Intl Law* 551; Guy S. Goodwin-Gill, "Non-*Refoulement* and the New Asylum Seekers" (1986) 26 *Virginia Journal of Intl Law* 897; Kay Hailbronner, "Non-*Refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?" (1986) 26 *Virginia Journal of Intl Law* 857.

<sup>58</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 1 at 53.

### 3.4 Concerns about Disaster Displacement before the Establishment of the Nansen

#### Initiative

Until the mid to late 1980s, studies and research rarely considered environmental degradation as a major source of forced displacement. The linkages between environmental events and migration were investigated by works such as those of El-Hinnawi,<sup>59</sup> Jacobson,<sup>60</sup> Mathews,<sup>61</sup> and Myers.<sup>62</sup> Though several commentators have criticised these works as scholarly unsound and overly exaggerated,<sup>63</sup> they nonetheless succeeded in generating international awareness around the relationship between environmental events and migration.

With the report of the Intergovernmental Panel on Climate Change (IPCC) in 1990 which recognised that “the greatest single impact of climate change might be on human migration with millions of people displaced by shoreline erosion, coastal flooding, and agricultural

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<sup>59</sup> Essam El-Hinnawi, *Environmental Refugees* (New York: UN Environmental Programme, 1985).

<sup>60</sup> Jodi Jacobson, “Environmental Refugees: Yardstick of Habitability” (1988) *Worldwatch* Paper No. 86.

<sup>61</sup> Jessica Tuchman Mathews, “Redefining Security” (1989) 68:2 *Foreign Affairs*.

<sup>62</sup> Norman Myers, “Environment and Security” (1991) 81 *Foreign Policy*. Myers went on to engage with this issue in several different works. See for example: Norman Myers, “Environmental Refugees in a Globally Warmed World” (1993) 43 *BioScience* 752; Norman Myers & Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995); Norman Myers, “Environmentally-Induced Displacements: The State of the Art” in IOM/UNHCR, *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration* (Geneva: IOM/UNHCR International Symposium, 1996); Norman Myers, “Environmental Refugees” (1997) 19 *Population and Environment* 167; Norman Myers, “Environmental Refugees: A Growing Phenomenon of the 21<sup>st</sup> Century” (2002) 357 *Philosophical Transactions of the Royal Society: Biological Sciences* 609; Norman Myers, “Environmental Refugees: An Emergent Security Issue” A paper presented at the 13<sup>th</sup> Economic Forum, Prague, on May 23 – 27, 2005.

<sup>63</sup> Astri Suhrke, “Pressure Points: Environmental Degradation, Migration and Conflict”. A paper presented at the Workshop on Environmental Change, Population Displacement, and Acute Conflict held at the Institute for Research on Public Policy, Ottawa, Canada (June 1991); McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 1.

disruption,”<sup>64</sup> the issue successfully gained the attention of states and other stakeholders. The International Organisation for Migration (IOM), and other agencies such as the International Federation of the Red Cross (IFRC) and the Norwegian Refugee Council were key organisations that sustained global awareness about the perilous relationship between climate change and other environmental disasters and forced displacement.<sup>65</sup> IOM’s involvement with environmental migration dates back to the early 90s.<sup>66</sup> In a report jointly published by the IOM and the Refugee Policy Group on the nexus between environmental events and migration in 1992, IOM stated that “large numbers of people are moving as a result of environmental degradation that has increased dramatically in recent years. The number of such migrants could rise substantially as larger areas of the earth become uninhabitable as a result of climate change.”<sup>67</sup> In further recognition of the impacts of environmental events on human mobility and those of human mobility on the environment, the IOM in conjunction with the UNHCR and the Refugee Policy Group in 1996 organised a symposium examining these inter-relationships.<sup>68</sup> The symposium was significant in setting a global framework for action by states and other stakeholders to address environmental migration.<sup>69</sup>

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<sup>64</sup> Intergovernmental Panel on Climate Change, *First Assessment Report* (Cambridge: Cambridge University Press, 1990) at 20 [IPCC, *First Assessment Report*].

<sup>65</sup> Nina Hall, “Moving Beyond its Mandate? UNHCR and Climate Change Displacement” (2013) 4:1 *Journal of International Organization Studies* 91 – 108 [Hall, *Moving Beyond its Mandate*].

<sup>66</sup> Foreword by the Director General of the International Organization for Migration, Ambassador William lacy Swing in Frank Laczko & Christine Aghazarm, eds., *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva: International Organization for Migration, 2009).

<sup>67</sup> Frank Laczko & Christine Aghazarm, “Introduction and Overview: Enhancing the Knowledge Base” in Frank Laczko & Christine Aghazarm, eds., *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva: International Organization for Migration, 2009) 7 – 40 at 13.

<sup>68</sup> International Organisation for Migration, *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migrations*, April 21 – 24, 1996, Geneva, online: IOM <[http://publications.iom.int/system/files/pdf/environmentally\\_induced.pdf](http://publications.iom.int/system/files/pdf/environmentally_induced.pdf)>

This global action on environment and displacement arguably started in Europe in the late 1990s.<sup>70</sup> For example, the European Parliament adopted the Environment, Security and Foreign Policy resolution on January 28, 1999, recognising that “threats to the environment” and “all those factors, which affect the poorest and most vulnerable populations of the world are constantly increasing the incidence of so-called ‘environmental refugees’.”<sup>71</sup> Relying on the research published by the Climate Institute in Washington wherein the numbers of environmental refugees had been estimated to have exceeded the number of traditional refugees, the European Parliament expressed alarm at the direct and indirect pressures of forced displacement on the European Union regarding immigration and justice policies, development assistance, humanitarian aid, security problems and regional instability in other parts of the world.<sup>72</sup> These concerns led to efforts by some Green Members of the European Parliament to legally recognise “environmental refugees” or “ecological refugees” in 2001 and 2004, but these were unsuccessful.<sup>73</sup>

In Africa, the growing concern about the social and political impacts of environmental displacement led the African Union in 2006 to adopt the Migration Policy Framework for Africa.<sup>74</sup> The Framework not only identifies disasters and other environmental hazards as sources of displacement but also recommends the taking of national and regional measures in

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<sup>69</sup> *Ibid.*

<sup>70</sup> European Parliament, Environment, Security and Foreign Affairs, Resolution on the Environment, Security and Foreign Policy, 28 January 1999, A4-0005/1999.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Aurelie Sgro, “Towards Recognition of Environmental Refugees by the European Union” (2008) 6 REVUE Asylon(s), online: <<http://www.reseau-terra.eu/article844.html>>.

<sup>74</sup> African Union, Migration Policy Framework for Africa, Executive Council, Ninth Ordinary Session, Banjul, The Gambia, 25 – 29 June, 2006, online: <<http://www.unhcr.org/4d5258ab9.html>>.

addressing the issue.<sup>75</sup> In addition to calling for increasing collaboration with relevant international agencies on the basis of strengthening research and data gathering on the connection between migration and the environment, the Framework recommends the implementation of relevant and targeted environmental protection programmes for mitigating impacts.<sup>76</sup>

With the 2007 synthesis report of the IPCC which noted that drought, intense tropical cyclone, and increased incidence of extreme high sea level were likely recipes for devastating population movement, the issue was increasingly explored by the UNHCR and the Inter-Agency Standing Committee (IASC).<sup>77</sup> By 2007, the UNHCR became increasingly involved in the campaign and international efforts around climate change and environmental migration. In his opening statement to the UNHCR Executive Committee in 2008, former High Commissioner Antonio Guterres while highlighting some of the migration push factors of the 21st century, pointed out that “the process of climate change and the increased incidence of natural disasters are threatening lives in many parts of the planet.”<sup>78</sup> He concluded that “as a result of these trends, growing numbers of people are on the move, leaving their homes to look for greater security and better opportunities.”<sup>79</sup>

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<sup>75</sup> *Ibid* at para. 6.3.

<sup>76</sup> *Ibid.*

<sup>77</sup> The IASC is primarily responsible for the inter-agency coordination of humanitarian assistance.

<sup>78</sup> Antonio Guterres, “Opening Statement to UNHCR Executive Committee”, 59th Session of the Executive Committee of the High Commissioner’s Program, Geneva, 6 October 2008.

<sup>79</sup> *Ibid.*

In recognition of the growing concerns by the UNHCR and other humanitarian organizations about climate change and displacement, the IASC in 2008 created an informal group on migration, displacement and climate change. The IASC established a Task Force on Climate Change “to raise awareness of and integrate climate change into various humanitarian agency programmes and to encourage increased inter-agency analysis and cooperation”.<sup>80</sup>

While the work of the IASC on raising awareness and integrating climate change into the work of the various humanitarian agency has succeeded with evidence from the work of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) , the IFRC, and the UNHCR, the ongoing and enhanced awareness in Europe around climate change and displacement is noteworthy. In March 2008, the European Commission in conjunction with the High Representative of the Union for Foreign Affairs and Security Policy in a paper prepared for the European Council noted that climate change would have a huge influence on global migration patterns.<sup>81</sup> The European Parliament in June 2008 organised the Climate Migration Conference and adopted a Declaration on Climate Migration calling on member States to protect climate change displaced persons.<sup>82</sup> The European Parliament also emphasised the importance of status determination for those displaced by climate change and advocated for the adoption of a protocol on climate migration to the United Nations Framework Convention on Climate Change

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<sup>80</sup> Jane McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010 - 2013" (2014) 29:2 *Refuge* 11 - 26 at 12 [McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement"].

<sup>81</sup> High Representative & the European Commission, “Climate Change and International Security”, 14 March 2008.

<sup>82</sup> The European Parliament, Declaration on Climate Migration, Brussels, Belgium, 11 June 2008.

with increased attention given to the issue within the European Union.<sup>83</sup> In September of 2008, the European Commission through the Environmental Change and Forced Migration Scenarios project otherwise known as EACH-FOR conducted a multi-country research on environmentally induced migration with preliminary findings which suggest that “disasters, development, and slow-paced environmental change are three factors that contribute to environmentally induced migration.”<sup>84</sup> The Council of Europe Parliamentary Assembly in a December 2008 report on environmentally induced migration and displacement suggested the formulation of an additional protocol to the European Convention on Human Rights on the right to a healthy and safe environment.<sup>85</sup>

There were also significant developments on climate change and migration in Asia and the Pacific. The Pacific Island Forum,<sup>86</sup> an intergovernmental organisation which enhances cooperation between the countries in the Pacific Ocean, is at the forefront of activism and advocacy on the survival of its member states and their people from climate change. Thus, the Pacific Island Forum adopted the *Niue Declaration on Climate Change* in 2008.<sup>87</sup> Among other recommendations geared towards protecting member states from climate change and

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<sup>83</sup> The European Parliament, Agora on Climate Change: The European Parliament Asks for Citizens’ Input, Brussels, Belgium, 12 – 13 June 2008, online: <[http://forum.agora.europarl.europa.eu/jiveforums/servlet/JiveServlet/download/35-489-815-367/Final\\_Texts\\_SOLIDARITY\\_EN\\_Final.pdf](http://forum.agora.europarl.europa.eu/jiveforums/servlet/JiveServlet/download/35-489-815-367/Final_Texts_SOLIDARITY_EN_Final.pdf)>.

<sup>84</sup> EACH-FOR (2008) “Preliminary Findings from the EACH-FOR Project on Environmentally Induced Migration”, online: <[http://seri.at/wp-content/uploads/2009/08/EACH-FOR\\_Preliminary\\_Findings\\_-\\_Final\\_Version.pdf](http://seri.at/wp-content/uploads/2009/08/EACH-FOR_Preliminary_Findings_-_Final_Version.pdf)>.

<sup>85</sup> Council of Europe Parliamentary Assembly, “Environmentally Induced Migration and Displacement: A 21st Century Challenge”, Report of the Committee on Migration, Refugees and Population, COE Doc. 11785, 23 December 2008, paras. 6.3 & 121.

<sup>86</sup> Founded in 1971 as the South Pacific Forum but changed its name in 1999 to Pacific Islands Forum to reflect and include states in both the north and south of the Pacific, including Australia.

<sup>87</sup> Pacific Islands Forum, The Niue Declaration on Climate Change, 19 August 2008, online: <<http://www.pacificdisaster.net/pdnadmin/data/documents/9458.html>>.

environmental disasters, the Niue Declaration encourages increased adaptation and mitigation efforts including the relocation of displaced populations where necessary.<sup>88</sup> As climate change continued to threaten the territorial existence of states in the Pacific and other small island states while unleashing environmental disasters in other regions of the world, the government of the Maldives in 2009 convened the Climate Vulnerable Forum (CVF) to sensitise the industrialised international community on the need to drastically reduce their carbon emissions. During this event, the Maldives and ten other climate vulnerable countries adopted the *Male' Declaration*, which embodies their commitment to green economy and carbon neutrality.<sup>89</sup>

Following ceaseless advocacy and research on the relationship between environmental events and displacement by the United Nations, other humanitarian organisations and scholars, this issue made its way into the *Cancun Adaptation Framework* in 2010.<sup>90</sup> The Conference of the Parties (COP16) adopted the *Cancun Adaptation Framework* in December 2010 after a three-years negotiation process on adaptation to climate change.<sup>91</sup> Paragraph 14(f) of the Framework “invites state parties to enhance action on adaptation taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances by undertaking measures to enhance understanding, coordination and cooperation with regard to climate change induced

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<sup>88</sup> *Ibid.*

<sup>89</sup> Climate Vulnerable Forum, Male' Declaration of the Climate Vulnerable Forum, 10 November 2009, online: <<http://www.the cvf.org/wp-content/uploads/2013/08/Declaration-of-the-CVF-2009.pdf>>.

<sup>90</sup> Koko Warner, “Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations” (Geneva: United Nations High Commissioner for Refugees, 2011), online: <<http://www.unhcr.org/542e9b3e9.html>>.

<sup>91</sup> *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, FCCC Dec 1/CP.16, UNFCCC, 16<sup>th</sup> Sess, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011).

displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.”<sup>92</sup> Scholars have highlighted the legal weaknesses of this provision while also advancing its advocacy significance.<sup>93</sup> While its legal weakness includes that it is not a binding provision, its advocacy strength lies principally in the recognition of climate change as a driver of migration with calls on states to take appropriate measures in fostering understanding, coordination, and cooperation on climate change-induced displacement. Indeed, states and institutions have invoked this provision as a justification for various regional and international efforts for addressing environmental displacement.<sup>94</sup>

As Europe remains the most active region on climate change and displacement issue, the region yet again made significant contributions between 2011 – 2012 to the international discourse on climate change and migration. In July 2011 for example, the Council of the European Union adopted the Council Conclusions on EU Climate Diplomacy, which reiterated climate change’s capacity for “migratory pressures and desertification.”<sup>95</sup> The Council also emphasised that “climate change and environmental deterioration, including that caused by man-made activities, are key threat factors to be monitored by EU early warning mechanisms.”<sup>96</sup> In 2012, the Council established an overarching framework for migration and asylum in the European Union.<sup>97</sup> This

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<sup>92</sup> *Ibid* at para. 14(f).

<sup>93</sup> McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement", *supra* note 80.

<sup>94</sup> See Walter Kalin, “From the Nansen Principles to the Nansen Initiative” (2012) 41 *Forced Migration Review* at 49; Margareta Wahlstrom, “Chairperson’s Summary” in *The Nansen Conference: Climate Change and Displacement in the 21st Century, Oslo, Norway, June 5-7, 2011* (Oslo: Norwegian Refugee Council, 2011) at 19, para. 10, online: <<http://www.unhcr.org/4ea969729.pdf>>.

<sup>95</sup> Council of the European Union, Council Conclusions on EU Climate Diplomacy, 3106<sup>th</sup> Foreign Affairs Council Meeting, Brussels, Belgium, 18 July 2011.

<sup>96</sup> *Ibid* at para. 4.

<sup>97</sup> Council of the European Union, Council Conclusions on the EU Global Approach to Migration and Mobility, Brussels, Belgium, 29 May 2012.

framework recognises, among other things, “the need to further explore the linkages between climate change, migration, and development, including the potential impact of climate change on migration and displacement.”<sup>98</sup>

While there were widespread concerns and actions across regional and international spheres on climate change and disaster displacement, it is noteworthy that there was no international consensus on the form and content of the much-touted protection for the displaced population. Thus, the onerous yet historic task of generating the consensus of states and other stakeholders on this issue fell on the Nansen Initiative. Section 3.5 below examines the processes leading to the establishment of the Nansen Initiative. Of particular focus is the role of both the former High Commissioner for Refugees, Antonio Guterres and the UN Refugee Agency in facilitating the birth of the Nansen Initiative on Disaster-Induced Cross-Border Displacement.

### **3.5 The Establishment of the Nansen Initiative**

Two processes were pivotal to the establishment of the Nansen Initiative. The first was the United Nations Framework Convention on Climate Change (UNFCCC) negotiation leading to the Cancun Agreement in 2010 and the second was the 60<sup>th</sup> Anniversary of the Refugee Convention.<sup>99</sup> Paragraph 14(f) of the *Cancun Adaptation Framework* encourages understanding, cooperation and coordination among states not only on climate displacement but also on climate migration and planned relocation. Thus, paragraph 14(f) provides a basis for the series of events and efforts at regional and global levels on climate change displacement, including those of the

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<sup>98</sup> *Ibid.*

UNHCR in 2011. States have also relied on this provision to call for the “commencement of an international dialogue for an appropriate framework” to address human displacement induced by climate change.<sup>100</sup>

Before the UNHCR’s major steps in 2011 towards convincing states to adopt a global guiding framework to address climate-related movement, the organisation had made it a point of duty in preceding years to alert states of the danger which climate change poses to migration. Notably in 2007, Antonio Guterres noted that “almost every model of the long-term effects of climate change predicts a continued expansion of desertification, to the point of destroying livelihood prospects in many parts of the globe. And for each centimetre the sea level rises, there will be one million more displaced”.<sup>101</sup> While addressing a press conference at the United Nations Climate Change Conference in Copenhagen in 2009, the former High Commissioner for Refugees predicted that climate change would become the biggest driver of forced migration both within and outside national territories in the not too distant future.<sup>102</sup> Guterres noted that 20 million people were displaced in 2008 by climate change related events while states, cultures and

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<sup>99</sup> Interview with the Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kalin, in Geneva, Switzerland, on October 7, 2015 available on file with me [Interview with Professor Kalin]

<sup>100</sup> Dhaka Ministerial Declaration of the Climate Vulnerable Forum, 14 November 2011, para. 8: “In particular, we call for the immediate implementation of paragraph 14(f) of the Cancun Agreements, which recognises that migration is a viable adaptation strategy to address human displacement induced by climate change, and includes undertaking measures to enhance understanding, coordination and cooperation with regard to climate-induced displacements, migration and planned relocation, and in this respect call for the commencement of an international dialogue for an appropriate framework”, online: <<http://www.thecvf.org/wp-content/uploads/2013/08/Declaration-of-the-CVF-2011.pdf>>.

<sup>101</sup> Antonio Guterres, “Opening Statement”, 58th Session of the Executive Committee of the High Commissioner’s Program, Geneva, 1 October 2007.

<sup>102</sup> United Nations High Commissioner for Refugees, “Climate Change Could Become the Biggest Driver of Displacement: UNHCR Chief” Copenhagen, Denmark, 16 December 2009, online: <<http://www.unhcr.org/4b2910239.html>>.

identities were in jeopardy of submergence by rising sea levels.<sup>103</sup> He suggested, for the first time, that “there may be a need for new legal instruments” to address the situation.<sup>104</sup> The UNHCR further re-echoed this view in 2010 in a background paper on protection gaps and responses, the outcomes of which formed the basis for the UNHCR activities in 2011 marking the 60<sup>th</sup> and 50<sup>th</sup> anniversaries of the *1951 Refugee Convention* and the *1961 Convention on the Reduction of Statelessness* respectively.<sup>105</sup> In that paper, the UNHCR suggested that there should be a global response to the plights of persons displaced by climate change, the basis of such response must be legal or normative, and this response might involve additional tools to complement the existing ones – a position which UNHCR sustained throughout 2011.<sup>106</sup> The adoption of paragraph 14(f) of the Cancun Agreement, therefore, was an important “precursor to UNHCR’s actions in 2011” on the need for a new legal instrument on climate change displacement.<sup>107</sup>

Working towards achieving its goal of offering a lasting solution to climate change migration quagmire, the UNHCR convened an expert roundtable on climate change and displacement in Bellagio, Italy in February 2011. The UNHCR assembled 15 experts from 19 countries who were working in governments, academia, NGOs, and international organisations on climate change and displacement issues. These experts were commissioned to determine, among other related issues, whether there was a need for additional instruments to protect climate change displaced

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> United Nations High Commissioner for Refugees, “Protection Gaps and Responses”, 2010 High Commissioner’s Dialogue on Protection Challenges, Background Paper, 30 November 2010, online: <<http://www.unhcr.org/4cebeeee9.html>> at 4.

<sup>106</sup> *Ibid*; McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement", *supra* note 80.

persons. The experts submitted that there was “no need for a new set of principles in relation to internal displacement in the context of climate change” because the “Guiding Principles on Internal Displacement, as a reflection of existing international law, apply to situations of internal displacement caused by climate-related processes.”<sup>108</sup> However, the experts had a contrary opinion on cross-border movement on account of climate change and environmental events. On this, the experts recommended that “there is a need to develop a global guiding framework or instrument to apply to situations of external displacement other than those covered by the 1951 Convention, especially to displacement resulting from sudden-onset disasters.”<sup>109</sup> Moreover, the experts emphasised the importance of the fundamental principles of humanity, human dignity, human rights, and international cooperation to the responses to climate-related displacement.<sup>110</sup> For effective application of these principles to climate-related movement, the experts noted that due consideration must be given to age, gender, diversity, consent, empowerment, participation and partnership and that states must be willing to operate under the principles of international cooperation and burden and responsibility sharing.<sup>111</sup>

With the above recommendations flowing from the experts roundtable on climate change and displacement, the UNHCR was categorical during the Nansen Conference in June 2011 in not only calling for the development of “a global guiding framework for situations of cross-border displacement resulting from climate change and natural disasters” but also in its determination to

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<sup>107</sup> McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement", *ibid* at 13.

<sup>108</sup> The United Nations High Commissioner for Refugees, Summary of Deliberations on Climate Change and Displacement, April 2011, online: <<http://www.unhcr.org/4da2b5e19.pdf>> at 5.

<sup>109</sup> *Ibid* at 2.

<sup>110</sup> *Ibid* at 1.

<sup>111</sup> *Ibid* at 9.

secure the pledges of states on this issue during the December 2011 ministerial meeting.<sup>112</sup> The Nansen Conference ended with the adoption of a set of ten principles called the Nansen Principles. While most of these principles focus on internal displacement resulting from climate change, Principle IX specifically addresses cross-border displacement. This principle notes that “a more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters” and it urges “states, working in conjunction with UNHCR and other relevant stakeholders, to develop a guiding framework or instrument in this regard.”<sup>113</sup> This provision probably provided the required impetus for the UNHCR during the ministerial meeting in 2011 to invite states to pledge to develop a normative framework on climate change displacement.

At the December 2011 UNHCR’s Ministerial Meeting in Geneva, the UNHCR finally succeeded in eliciting pledges from a notably small number of states who agreed “to cooperate with interested states, UNHCR and other relevant actors with the aim of obtaining a better understanding of cross-border movements at relevant regional and sub-regional levels, identifying best practices and developing consensus on how best to assist and protect the affected people.”<sup>114</sup> In all, only five states made this pledge out of a total of about 155 states that attended

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<sup>112</sup> United Nations High Commissioner for Refugees, “Nansen Conference on Climate Change and Displacement: Statement by Antonio Guterres, United Nations High Commissioner for Refugee” Statements by High Commissioner, Oslo, Norway, 6 June 2011, online: <<http://www.unhcr.org/4def7ffb9.html>>.

<sup>113</sup> Centre for International Climate and Environmental Research, The Government of Norway & The Norwegian Refugee Council, *The Nansen Conference: Climate Change and Displacement in the 21st Century*, (Oslo: Norwegian Refugee Council, 2011) at 5, online: <<http://www.unhcr.org/4ea969729.pdf>>.

<sup>114</sup> United Nations High Commissioner for Refugees, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons* (Geneva: UNHCR, 2012) at 38.

the event.<sup>115</sup> As already pointed out, this was a small fraction of the states in attendance at that meeting but was sufficient to establish the Nansen Initiative as a forum for further dialogue and research on cross-border disaster displacement, including the building of international consensus on the issue.

In fulfilling their pledges, the governments of Switzerland and Norway jointly established the Nansen Initiative in October 2012 as a state-led bottom up approach committed to the protection of cross-border disaster displaced persons including those displaced by climate change. It is an intergovernmental process with a three-year time frame for building the consensus of states on the development of the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* (“the Protection Agenda”)<sup>116</sup> through a multi-stakeholder involvement.

### **3.6 Conclusion**

This chapter has shown the trajectory of the climate-migration conundrum from the obscurity of its understanding by states to the present state of knowledge where states are arguably now in agreement that there is a nexus between disasters – whether or not occasioned by climate change – and cross-border movement. Given the reticence of states on the protection of climate “refugees” as evidenced by the number of states that made pledges during the UNHCR 2011 ministerial meeting, how was the Nansen Initiative subsequently able to bring more states on

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<sup>115</sup> McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement", *supra* note 80. “The pledge was made jointly by Norway and Switzerland, and endorsed by Costa Rica, Germany, and Mexico.”

<sup>116</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement Websites at <<https://www.nanseninitiative.org/wp-content/uploads/2015/10/Agenda-Final-Draft.pdf>>.

board as members of the steering committee, including a developed and powerful state like Australia? Other than those states forming members of the steering committee, the Nansen Initiative also succeeded in drafting in more than forty more states as Friends of the Nansen Initiative.<sup>117</sup> This group of states agrees in principle with the work of the Initiative and are willing to support its outcome.<sup>118</sup> They include some of the major migrants-destination countries such as the United States, France, New Zealand, and so on but exclude Canada and the United Kingdom.<sup>119</sup> How was the Initiative able to achieve this? How did the Nansen Initiative carry out its mandates and how did this contribute to the legitimacy of its overall outcome? Most importantly, how was the Nansen Initiative able to secure the endorsement of the outcome of its work – the Protection Agenda – by 109 UN member states within three years of its work? Chapter 4 provides answers to these questions, including how the Nansen Initiative as a norm entrepreneur was able to utilize advocacy and persuasion in achieving its objectives in line with the different theories on the evolution of norms. In summary, Chapter 4 notes that the Nansen Initiative was able to generate the consensus of states on the recognition and protection of cross-border disaster displaced persons principally by reframing the issue from “climate change” to “humanitarianism”.

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<sup>117</sup> The Nansen Initiative, *Fleeing Floods, Earthquakes, Droughts and Rising Sea Levels: 12 Lessons Learned About Protecting People Displaced by Disasters and the Effects of Climate Change* (Geneva: The Nansen Initiative, 2015) at 43.

<sup>118</sup> The Nansen Initiative, *Towards a Protection Agenda for Disaster-Induced Cross-Border Displacement*, Information Note, 25 April 2013 at 9. ; Interview with Professor Kalin, *supra* note 99.

<sup>119</sup> Interview with Professor Kalin, *supra* note 99; Interview with the Representative of Switzerland in Geneva on October 13, 2015 available on file with me; Interview with the Representative of Norway in Geneva on October 13, 2015 available on file with me.

## Chapter 4: The Nansen Initiative on Cross-Border Disaster Displacement

*“The Nansen Initiative’s primary purpose is to build consensus among affected states about how they could adequately respond to the challenge of cross-border displacement in the context of disasters, including the adverse impacts of climate change.”*

- Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kaelin.<sup>1</sup>

### 4.1 Introduction

Considering the lack of agreement among states on the interplay between environmental events and cross-border mobility, it became necessary to educate the international community about the reality of this phenomenon. Thus, there was the need to have a vehicle or platform not just to educate states on the issue but also to facilitate a global consensus on it. The United Nations High Commissioner for Refugees (UNHCR) made efforts to spearhead this task.<sup>2</sup> However, states apparently guided by their knowledge of the mandates of the UNHCR resisted this move.<sup>3</sup> They contended that while the mandates of the UNHCR relate to refugeehood, internal displacement, and other form of forced migration, it does not extend to cross-border disaster displacement.<sup>4</sup>

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<sup>1</sup> Walter Kälin, “The Nansen Initiative: Building Consensus on Displacement in Disaster Contexts” (2015) 49 Forced Migration Review 5 – 7 [Kälin, The Nansen Initiative].

<sup>2</sup> UNHCR, Intergovernmental Event at the Ministerial Level of Member States of the United Nations on the Occasion of the 60<sup>th</sup> Anniversary of the 1951 Convention Relating to the Status of Refugees and the 50<sup>th</sup> Anniversary of the 1961 Convention on the Reduction of Statelessness (7 – 8 December, 2011), Background Note for the Roundtables, UN Doc HCR/MINCOMMS/2011/08 (18 November 2011).

<sup>3</sup> UNHCR Executive Committee, “Summary Record of the 631st Meeting” (29 September 2009), UN Doc A/AC.96/SR.631 at 4, para. 16, and at 8, para. 39.

<sup>4</sup> *Ibid*; UNHCR Executive Committee, “Questions and Answers on UNHCR’s Protection Cluster Coordination Role in Natural Disasters” (23 February, 2011), UN Doc EC/62/SC/INF./1 at para. 22.

It seems states were more interested in an entirely new platform with the UNHCR and the International Organization for Migration (IOM) as partners, but not as the main drivers of the platform. Thus, “taking into account many states’ desire to have an informal process outside of the UN system to address the challenges of disaster-induced cross-border displacement”, the governments of Norway and Switzerland launched the Nansen Initiative in October 2012.<sup>5</sup> The overarching purpose of the Nansen Initiative was to build the consensus of states on “cross-border displacement in the context of disasters and climate change”<sup>6</sup> and to make recommendations for the standard of treatment of the affected population before, during and after displacement. The Initiative had a three-year lifespan to fulfil its mandates, and this timeline expired in December 2015. In October 2015 in Geneva, Switzerland, the Nansen Initiative presented the result of its fieldwork and research on disaster-induced cross-border movement in a document popularly known as the Protection Agenda.

The purpose of this chapter is to holistically examine the Nansen Initiative focusing particularly on its mandate, organizational structure, *modus operandi*, including its consensus building strategy, and the legal, operational and institutional challenges that the Initiative encountered while carrying out its work. In particular, this chapter interrogates the mechanisms through which the Nansen Initiative was able to generate states’ strong interest in and support for an issue which was previously marred by controversies and lack of political will. The analysis highlights the role and purpose of the Nansen Initiative in the global efforts aimed at addressing the

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<sup>5</sup> The Nansen Initiative, Towards a Protection Agenda for Disaster-Induced Cross-Border Displacement, Information Note, 25 April 2013 at 7 [The Nansen Initiative, Information Note].

<sup>6</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement Website at <<https://www.nanseninitiative.org/>>.

concerns of persons displaced across international borders by climate change and other environmental events.

I begin this chapter with a brief discussion of what informed the name “Nansen” in the work of the Initiative. Next, I examine, in succession, the mandate and organizational structure, as well as the *modus operandi* of the Initiative. This will then lead to a retrospective examination of the international consensus building strategy of the Nansen Initiative on cross-border environmental mobility. The highlight of the work of the Nansen Initiative was the overwhelming support which states gave to the Protection Agenda. More than 100 countries including the United States of America, Canada, Australia, Belgium, China, New Zealand, France, Finland, Germany, Netherlands, Ireland, Italy, Norway, Sweden, Switzerland, and Spain endorsed the Protection Agenda.<sup>7</sup> Considering the disposition of the current Trump administration in the United States towards immigrants, its support for the Protection Agenda is questionable. Given the complex nature of cross-border disaster-displacement and the resulting reluctance of states prior to the year 2012 to articulate an action plan on cross-border disaster-displacement, how was the Nansen Initiative able to achieve this feat? I argue that issue-framing, a powerful tool earlier discussed in Chapter 2 and often used by norm entrepreneurs, played a significant role in states’ perception and reception of the work of the Nansen Initiative. Also forming part of the consensus building strategy are the way and manner with which the Initiative was able to use some foundational metanorms, precedents and influence of states as major proselytisation strategies. Wayne Sandholtz has described these strategies as “winning arguments” the strength of which makes a

good case for norm entrepreneurs.<sup>8</sup> States' perception of the Protection Agenda as a legitimate document and the roles of the Nansen Initiative in fostering this perception were significant contributions to the consensus-building process.

I then move on to highlight some of the achievements of the Nansen Initiative globally and regionally emphasising the extent to which the Initiative's regional consultations in the Pacific, Central America, Greater Horn of Africa, SouthEast Asia and South Asia have influenced its work. The work of the Nansen Initiative was not without some challenges in legal, organisational and operational terms. I will discuss some of these challenges. Finally, I will bring this chapter to a close with a conclusion which emphasises the role of the Nansen Initiative in the international struggle not only to recognise migration as an adaptation measure to climate change and disasters but also to recognise and protect cross-border climate change and disaster-displaced persons. Furthermore, I will emphasise that the Nansen Initiative has arguably fulfilled its principal purpose – to generate international consensus for the treatment of cross-border disaster-displaced persons.

#### **4.2 The Name “Nansen” in the Nansen Initiative**

The Nansen Initiative was named after Fridtjof Nansen (1861 – 1930) who was a Norwegian scientist, polar explorer, diplomat, and humanitarian. In addition to his accomplishments as a champion skier and ice skater, Fridtjof Nansen dedicated the last part of his life to services for

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<sup>7</sup> The Nansen Initiative, The Nansen Initiative Global Consultation, Conference Report, Geneva, 12 – 13 October, 2015 at 61. .

and on behalf of refugees. He was the first High Commissioner for Refugees under the League of Nations from 1920 – 1930.<sup>9</sup> In this capacity, and “as Europe struggled to rebuild after the first world war, he directed the League of Nations’ first major humanitarian operation – the repatriation of 450,000 prisoners of war.”<sup>10</sup> This extraordinary humanitarian service earned him a Nobel Peace Prize in 1922.<sup>11</sup> As part of his efforts to protect refugees, particularly those whose governments wilfully refused to provide them travelling passports as well as those that were stateless, Nansen designed what became known as the “Nansen Passport” as an “internationally recognised identification paper” for these refugees.<sup>12</sup>

As the reality of climate change and its devastating impacts on human mobility became increasingly compelling with no clear-cut legal and policy solution, the government of Norway in June 2011 hosted the Nansen Conference on Climate Change and Displacement in the 21st Century to commemorate the 150th anniversary of the birth of Fridtjof Nansen.<sup>13</sup> Moreover, since the subject matter of climate change and the need to protect the displaced population are grounded in science and humanitarianism, the government of Norway through this conference

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<sup>8</sup> Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (New York: Oxford University Press, 2007) [Sandholtz, *Prohibiting Plunder*]; Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) [Sandholtz & Stiles, *International Norms and Cycles of Change*].

<sup>9</sup> UNHCR, “About Fridtjof Nansen”, online: UNHCR <<http://www.unhcr.org/about-fridtjof-nansen.html>>; Ivor C. Jackson, *The Refugee Concept in Group Situations* (The Hague: Martinus Nijhoff Publishers, 1999).

<sup>10</sup> UNHCR, “About Fridtjof Nansen”, online: UNHCR <<http://www.unhcr.org/about-fridtjof-nansen.html>>.

<sup>11</sup> Asle Sveen, “Fridtjof Nansen: Scientist and Humanitarian” (15 March 2001), online: Nobelprize.org <[http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1922/nansen-article.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1922/nansen-article.html)>.

<sup>12</sup> UNHCR, “About Fridtjof Nansen”, online: UNHCR <<http://www.unhcr.org/about-fridtjof-nansen.html>>; *Minutes of the Inter-Governmental Conference on Refugee Questions*, League of Nations Doc. R/I.G.C. – 10 – 1926 at 4; *Report by the High Commissioner*, League of Nations Doc. 1926.XIII.2 (1926) at 5; James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991); Guy S. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford: Oxford University Press, 1978) at 42 – 44.

<sup>13</sup> UNHCR, *The Nansen Conference: Climate Change and Displacement in the 21st Century*, Oslo, Norway, June 5 – 7, 2011, online: UNHCR <<http://www.unhcr.org/4ea969729.pdf>>.

decided “to honour Fridtjof Nansen’s legacy as a scientist, polar explorer, and international humanitarian.”<sup>14</sup> This conference:

gathered together academic experts, representatives of governments, international agencies and civil society, with the objective of arriving at a set of recommendations for action. Topics for discussion included the vulnerability, resilience and capacity for adaptation of communities in areas that are prone to disasters and environmental changes due to climate change; the protection of displaced people; and the promotion of action to help prevent or manage displacement.<sup>15</sup>

The Nansen Conference ended with an adoption of ten set of principles known as the Nansen Principles.<sup>16</sup> Nine of these principles deal with internal displacement resulting from climate change and environmental disasters while only one focuses on cross-border environmental displacement.<sup>17</sup> With the pledge spearheaded by Norway and Switzerland during the UNHCR Ministerial Meeting in December 2011 to cooperate with states and other relevant stakeholders on cross-border disaster displacement, the Nansen Initiative was established. Notably, the first sentence of Principle IX of the Nansen Principles, which is the principle dealing with cross-border disaster displacement, was adopted *verbatim* as the first sentence in the pledge jointly made by Norway and Switzerland. Thus, “taking into account the relevance of the Nansen Conference and its resulting Nansen Principles, the process flowing from the Norwegian-Swiss pledge was dubbed the “Nansen Initiative”.<sup>18</sup>

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Centre for International Climate and Environmental Research, The Government of Norway & The Norwegian Refugee Council, *The Nansen Conference: Climate Change and Displacement in the 21st Century*, (Oslo: Norwegian Refugee Council, 2011) at 5, online: <<http://www.unhcr.org/4ea969729.pdf>>.

<sup>17</sup> *Ibid.*, Principle IX.

<sup>18</sup> The Nansen Initiative, Information Note, *supra* note 5 at 3.

### 4.3 Mandate and Organizational Structure

The Nansen Initiative “is a state-led, bottom-up consultative process intended to build consensus on the development of a protection agenda addressing the needs of people displaced across international borders by natural disasters, including the effects of climate change.”<sup>19</sup> At first glance, there seems to be a contradiction in terms with the use of “bottom-up” approach with an Initiative that is largely state-driven. In the context of the Nansen Initiative, however, “bottom-up” suggests that the Initiative intends to use developments at the local level to influence international law on the need to recognise and protect the population displaced across international borders by disasters and climate change. Since this was an initiative that stemmed out of a pledge made by Norway and Switzerland during the 2011 UNHCR Ministerial Meeting in Geneva, the terms of reference or the mandate was determined by the two countries as follows:

A more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters, including where climate change plays a role. We therefore pledge to cooperate with interested States, UNHCR and other relevant actors with the aim of obtaining a better understanding of such cross-border movements at relevant regional and sub-regional levels, identifying best practices and developing consensus on how best to assist and protect the affected people.<sup>20</sup>

With the pledge or statement above, the Nansen Initiative mapped out the focus of its work as involving the building of “consensus on key principles and elements regarding the protection of

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<sup>19</sup> *Ibid* at 1.

<sup>20</sup> United Nations High Commissioner for Refugees, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons* (Geneva: UNHCR, 2012) at 38.

persons displaced across borders in the context of natural disasters and climate change that will set the agenda for future action at domestic, regional and international levels.”<sup>21</sup> The Initiative decided that the outcome of its work would be the Protection Agenda with three core pillars:

1. **Standards for the treatment** of people displaced across borders regarding admission, stay, status, and transition to solutions; and
2. **International cooperation and solidarity** between states and with the international community before (preparedness), during (admission, temporary protection), and after (durable solutions) a natural disaster;
3. **Operational responses**, including in the areas of preparedness, cross-border assistance, solutions, and the respective roles of relevant disaster management, humanitarian, development, and climate change actors.<sup>22</sup>

The Nansen Initiative planned that the Protection Agenda would cover three main phases in the forced migration movement. These are “preparedness *before* displacement occurs, protection (including admission to other countries) and assistance *during* displacement, and transition to durable solutions in the *aftermath* of the disaster.”<sup>23</sup> Furthermore, the Protection Agenda was designed to embody the following:

- a. a common understanding of the issue, its dimensions and the challenges faced by relevant stakeholders;
- b. good practices and tools for the protection of persons displaced across borders in the context of natural disasters;
- c. key principles on the three areas of standards of protection of displaced people, inter-state/international cooperation, and operational responses;

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<sup>21</sup> The Nansen Initiative, Information Note, *supra* note 5 at 5.

- d. recommendations on the respective roles and responsibilities of relevant actors and stakeholders; and
- e. an action plan for follow-up.<sup>24</sup>

States and cross-border disaster displaced persons are the primary stakeholders in the work of the Nansen Initiative. Structurally, the Steering Group, Consultative Committee, Group of Friends, the Envoy of the Chairmanship and a Secretariat in Geneva made the work of the Nansen Initiative possible. The Steering Group was a group of nine states representing the global north and south. With Norway and Switzerland chairing this group, the other members were Australia, Bangladesh, Costa Rica, Germany, Kenya, Mexico, and the Philippines. This group of states initiated, hosted, oversaw and steered the activities of the Nansen Initiative, with UNHCR and IOM as Standing Invitees.<sup>25</sup> The Consultative Committee “informed the process through expertise provided by representatives from international organisations addressing displacement and migration issues, climate change and development researchers, think tanks, and NGOs.”<sup>26</sup> Nansen’s Group of Friends “comprised of states that would like to be associated with the Nansen Initiative, and propose comments, proposals, and contributions to the work of the Initiative.”<sup>27</sup> Professor Walter Kalin was the Envoy of the Chairmanship of the Nansen Initiative. In this capacity, he “represented the Initiative throughout the process, and provided strategic guidance

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at 6.

<sup>24</sup> *Ibid.* As it would be seen in Chapter 5, the Nansen Initiative did not deviate from the planned scope, contents and structure of the Protection Agenda. No part of the adopted Protection Agenda is *ultra vires* – the document reflects the aims, goals and aspirations of not just the Nansen Initiative and other actors within the cross-border disaster displacement network but also of States.

<sup>25</sup> The Nansen Initiative, Information Note, *supra* note 5 at 9.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

and input.”<sup>28</sup> Finally, the Secretariat “supported the process with additional strategic, research, and administrative capacity.”<sup>29</sup>

#### ***4.4 Modus Operandi***

The Nansen Initiative carried out its work with five expected outcomes. The first outcome was the organisation of intergovernmental sub-regional consultations in sub-regions that are particularly prone to the devastating effect of climate change. These regions are the Pacific, Central America, the Horn of Africa, South-East Asia, and South Asia. As a consultative process, the Nansen Initiative through these sub-regional consultations provided “a forum for stakeholders to exchange experience and approaches, with the potential to develop sub-regional, regional and international convergence on how to best assist and protect people displaced due to natural disasters.”<sup>30</sup> Essentially, these consultations were required as an “opportunity for states to exchange experiences, share good practices and build consensus on key normative, institutional and operational elements of a protection regime.”<sup>31</sup> Arguably, these consultations also bolstered trust among the actors making them willing to fully cooperate with the Initiative throughout the process. In the Pacific, consultations were held in the Cook Islands and Fiji while in Central America, they were held in Costa Rica and Guatemala.<sup>32</sup> Kenya hosted the consultation in the Horn of Africa with Philippines and Thailand doing same in South-East Asia.<sup>33</sup> Nepal and

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* at 7.

<sup>31</sup> *Ibid* at 6.

<sup>32</sup> The Nansen Initiative, The Nansen Initiative Global Consultation, Conference Report, Geneva, 12 – 13 October, 2015 at 26 (footnote 13), [The Nansen Initiative Global Consultation Conference Report].

<sup>33</sup> *Ibid.*

Bangladesh hosted the final set of Nansen Initiative consultations in South Asia.<sup>34</sup> Additional civil society meetings on disaster displacement in West Africa, Southern Africa, and South America took place in Germany, South Africa, and Ecuador respectively over the course of 2013 – 2015.<sup>35</sup> Such was the extent of the inclusive approach of the Nansen Initiative leading to its dialogue and interaction with more than 100 countries, including over 150 NGOs, 15 United Nations Agencies and 30 academic institutions.<sup>36</sup>

The second outcome of the Nansen Initiative was the establishment of a consolidated knowledge base “on displacement dynamics and protection challenges in natural disaster situations in five identified sub-regions, including through commissioned research.”<sup>37</sup> In addition to the outcomes of the series of intergovernmental and civil society consultations, the commissioned research<sup>38</sup> not only assisted the Nansen Initiative to identify normative gaps but also determined the contents of the Protection Agenda.<sup>39</sup>

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Fleeing Floods, Earthquakes, Droughts and Rising Sea Levels: 12 Lessons Learned About Protecting People Displaced by Disasters and the Effects of Climate Change* (Wabern: Ast & Fischer, 2015) at 43.

<sup>37</sup> The Nansen Initiative, Information Note, *supra* note 5 at 6.

<sup>38</sup> For example, Patricia Weiss Fagan, “Receiving Haitian Migrants”, Nansen Initiative, December 2013; David J. Cantor, “Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters: States of the Regional Conference on Migration and Others in the Americas”, Nansen Initiative, December 2014; Tamara Wood, “Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts”, Nansen Initiative, 2014; Nicolas Rodriguez Serna, “South American Background Paper”, Nansen Initiative, June 2015.

<sup>39</sup> The Nansen Initiative Global Consultation Conference Report, *supra* note 32 at 8; Government of Switzerland, “The Strength of a People is Measured by the Well-Being of its Weakest Members: For A Better Protection of Those Displaced by Natural Disaster”, Opening Address by His Excellency, Mr. Didier Burkhalter, Federal Councillor and Head of the Federal Department of Foreign Affairs, Government of Switzerland, Nansen Initiative Global Consultation, 12 October 2015, Geneva, Switzerland.

The third outcome of the Nansen Initiative was the creation of a global dialogue. This is closely connected with the sub-regional consultations but differed in that the Nansen Initiative ignited a global rather than regional discourse on cross-border disaster displacement.<sup>40</sup> It fed the outcomes of its findings into the existing international frameworks and processes such as the United Nations Framework Convention on Climate Change, the Sendai Framework, the United Nations 2030 Agenda for Sustainable Development, and the World Humanitarian Summit.<sup>41</sup> “It also became a focal point for researchers and organisations working in the area – a hub that connected scholars, policymakers, practitioners and officials – and organically became a depository and ‘go to’ point for up-to-date information.”<sup>42</sup>

Formulating the Protection Agenda was the fourth outcome of the Nansen Initiative. As it will be fully discussed in Chapter 5, the Protection Agenda provides normative, institutional, and operational guidance on cross-border disaster displacement.<sup>43</sup> Drafted as recommendations and couched in hortatory tones, the Protection Agenda sets standards for the recognition and protection of cross-border disaster displaced persons. Indeed, the document was intended *ab initio* to be a standard-setting document as reflected in its three core pillars.<sup>44</sup> It is a policy norm that is not only expected to be implemented by states, especially those states that endorsed it, but

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<sup>40</sup> Kälin, The Nansen Initiative, *supra* note 1.

<sup>41</sup> *Ibid.*

<sup>42</sup> Jane McAdam, “From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement” (2016) 39:4 UNSW Law Journal 1518 – 1546 at 1525 [McAdam, From the Nansen Initiative to the Platform on Disaster Displacement].

<sup>43</sup> Kälin, The Nansen Initiative, *supra* note 1.

<sup>44</sup> See The Nansen Initiative, Information Note, *supra* note 5 at 5; The Nansen Initiative Global Consultation Conference Report, *supra* note 32; The Nansen Initiative on Disaster-Induced Cross-Border Displacement Websites at <<https://www.nanseninitiative.org/wp-content/uploads/2015/10/Agenda-Final-Draft.pdf>>.

also to be integrated by states and relevant national, regional, and international organisations into their own normative frameworks.<sup>45</sup>

Finally, the Nansen Initiative identified a follow-up process to its work upon completion.<sup>46</sup> Dissemination and implementation of the Protection Agenda which was adopted in October 2015 were of paramount importance.<sup>47</sup> Yet, the Nansen Initiative was to end in December of the same year. The Nansen Initiative maintained that there was the need to continue to have a global forum for the discussion of issues and sharing of knowledge around cross-border disaster displacement.<sup>48</sup> This plan by the Nansen Initiative led to the establish of the Platform on Disaster Displacement in May 2016 to continue with the post-Nansen process.<sup>49</sup>

The “bottom-up” approach which is associated with the undertakings of the Nansen Initiative becomes clearer when one examines its *modus operandi* as outlined above. Presented on a scale, the sub-regional consultations happened at the “grassroots” level and thus occupied the lower level of the scale. Following this are the consolidated knowledge base, global dialogue, the Protection Agenda, and dissemination, implementation and follow-up in ascending order. It

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<sup>45</sup> The Nansen Initiative Global Consultation Conference Report, *supra* note 32.

<sup>46</sup> Kälin, The Nansen Initiative, *supra* note 1.

<sup>47</sup> Walter Kalin, Message from Prof. Walter Kaelin – Envoy of the Chairmanship at the Nansen Initiative Global Consultation, Geneva, Switzerland, 12 October 2015; The Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, Final Draft at II [The Protection Agenda] at para. 125(i).

<sup>48</sup> The Nansen Initiative, Information Note, *supra* note 5 at 7; Interview with the Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kalin, in Geneva, Switzerland, on October 7, 2015 available on file with me [Interview with Professor Kalin]; Interview with the Representative of Norway in Geneva on October 13, 2015 available on file with me [Interview with the Representative of Norway]; Interview with the Representative of Australia in Geneva on October 8, 2015 available on file with me [Interview with the Representative of Australia]; Interview with the Representative of Switzerland in Geneva on October 13, 2015 available on file with me

should be noted that the work of the Nansen Initiative succeeded in part due to the experience and expertise of its Envoy. As noted by Elizabeth Ferris, Professor Kalin’s “strategic vision for the work and the high international esteem in which he is held” accounted for much of the progress made by the Nansen Initiative.<sup>50</sup> Similarly, Jane McAdam notes that “as a highly skilled international lawyer, he was mindful of the importance of linguistic precision and the boundaries of normative protection, and as an experienced former senior UN office holder, he understood the proclivities and sensitivities of state actors as well.”<sup>51</sup>

#### **4.5 International Consensus-Building**

The role of consensus in international relations cannot be over-emphasised. States agree and chart out an action plan on an issue confronting the international community through consensus. Consensus is the bedrock of international law. Commenting on the importance of consensus in international law and relations, the Permanent Court of International Justice (PCIJ) in the case of the S.S “Lotus” held that “international law governs relations between independent states.”<sup>52</sup> The PCIJ held further that “the rules of law binding upon states, therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”<sup>53</sup> It should however be noted

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[Interview with the Representative of Switzerland]; The Nansen Initiative Global Consultation Conference Report, *supra* note 32.

<sup>49</sup> For more information and discussion of the Platform on Disaster Displacement, see Chapter 6.

<sup>50</sup> Elizabeth Ferris, “Climate Change, Migration and the Incredibly Complicated Task of Influencing Policy”, Speech Delivered at the Conference on Human Migrations and the Environment: Futures, Politics, Invention, Durham University (1 July 2015) at 8.

<sup>51</sup> McAdam, From the Nansen Initiative to the Platform on Disaster Displacement, *supra* note 42 at 1523.

<sup>52</sup> *S.S. Lotus case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10 at 18.

<sup>53</sup> *Ibid.*

that it has been almost a century since Lotus was decided. Some would argue that the position espoused by Lotus has changed dramatically, while others see it as still reflecting the bottom line in relation to consent in the international legal system.

The quest for the consensus of states as a precondition for the formulation of rules, principles, and best practices for regulating cross-border disaster movement led to the creation of the Nansen Initiative. While, as we will see in Chapter 5, the Protection Agenda embodies most of the principles and theories of international norms discussed in Chapter 2, I hypothesize that the Nansen Initiative was principally able to fulfill its primary role of building the consensus of states on the standards of recognition and treatment of cross-border disaster-displaced persons through issue framing, foundational metanorms, precedents, and influence of some notable migrants-destination states. This is in addition to the all-inclusive nature of the work of the Initiative which undoubtedly clothes the final outcome of its work – the Protection Agenda – with a garment of legitimacy.

#### **4.5.1 Framing**

Framing is a communication tool used by social scientists, including political psychologists and sociologists.<sup>54</sup> The term “frame”, introduced by Marvin Minsky in the field of artificial intelligence, refers to a particular way or form of expressing knowledge.<sup>55</sup> Gamson and Lasch argued that the framing of an idea as well as the reasons and justifications for such framing

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<sup>54</sup> Volha Charnysh, Paulette Lloyd & Beth Simmons, “Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons” (2015) 21:2 *European Journal of International Relations* 323 – 351.

<sup>55</sup> Marvin Minsky, *Frames: Artificial Intelligence Laboratory Memorandum* (Massachusetts: Massachusetts Institute of Technology Press, 1978).

embody what they called “interpretive packages”.<sup>56</sup> They noted that “the “frame” component of the interpretive packages suggests a central organizing idea for understanding events related to the issue in question while the “reasons” component is the piece of argument that one might make in justifying or arguing for a particular position on an issue”.<sup>57</sup> Known as “frame alignment” by social movement theorists, framing is a way of “rendering events or occurrences meaningful, frames function to organize experience and guide action, whether individual or collective.”<sup>58</sup> Framing is particularly a helpful strategy for representing an otherwise complex and vexed issue in a manner which not only strikes a fair balance between the parties involved but resonates more with the interest of the parties. It is in this context that I intend to analyze the consensus building strategy of the Nansen Initiative on the hitherto vexed issue of ‘environmental refugees’ or climate change displacement. Thus, the definition that underscores this context is the one offered by Rein and Schon. These scholars defined framing as:

a way of selecting, organizing, interpreting, and making sense of a complex reality to provide guideposts for knowing, analyzing, persuading, and acting. A frame is a perspective from which an amorphous, ill-defined, problematic situation can be made sense of and acted on.<sup>59</sup>

Contemporary international relations scholars have identified the role of framing in securing the consensus of states on an issue of concern to the international community. Finnemore and

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<sup>56</sup> William A. Gamson & Kathryn E. Lasch, “The Political Culture of Social Welfare Policy” in Shimon E. Spiro & Ephraim Yuchtman-Yaar, eds., *Evaluating the Welfare State: Social and Political Perspectives* (New York: Academic Press, 1983) 397 – 415.

<sup>57</sup> *Ibid.*

<sup>58</sup> David A Snow, et al., “Frame Alignment Processes, Micromobilization, and Movement Participation” (1986) 51 *American Sociological Review* 464 – 481.

<sup>59</sup> Martin Rein & Donald Schon, “Reframing Policy Discourse” in Frank Fischer and John Forester, eds., *The Argumentative Turn in Policy Analysis and Planning* (Durham: Duke University Press, 1993) 145 – 166 at 146.

Sikkink noted that “the construction of cognitive frames is an essential component of norm entrepreneurs' political strategies, since, when they are successful, the new frames resonate with broader public understandings and are adopted as new ways of talking about and understanding issues.”<sup>60</sup> Price also emphasizes how the framing of landmines as a humanitarian rather than a disarmament issue set the stage for not only the stigmatization of mines but also its widespread ban.<sup>61</sup>

While scholars and other actors have used framing in the past as a communication strategy in getting states to protect cross-border disaster-displaced persons, such efforts have achieved limited success – they certainly succeeded in creating a global awareness around the issue but failed to secure the agreement or consensus of states on its resolution.<sup>62</sup> Generally, international efforts for the protection of cross-border disaster-displaced persons underwent three different framings. Firstly, scholars, international organizations, and NGOs framed cross-border environmental movement as a refugee issue. At various times beginning in the 80s, they erroneously labeled the population displaced by environmental events as “environmental

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<sup>60</sup> Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887 – 917 at 897.

<sup>61</sup> Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" (1998) 52:3 International Organization, 613 – 644 [Price, Reversing the Gun Sights].

<sup>62</sup> Essam El-Hinnawi, *Environmental Refugees* (New York: UN Environmental Programme, 1985) [El-Hinnawi, Environmental Refugees]; Norman Myers, “Environmental Refugees in a Globally Warmed World” (1993) 43 *BioScience* 752; Norman Myers & Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995); Norman Myers, “Environmentally-Induced Displacements: The State of the Art” in IOM/UNHCR, *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration* (Geneva: IOM/UNHCR International Symposium, 1996); Norman Myers, “Environmental Refugees” (1997) 19 *Population and Environment* 167; Norman Myers, “Environmental Refugees: A Growing Phenomenon of the 21<sup>st</sup> Century” (2002) 357 *Philosophical Transactions of the Royal Society: Biological Sciences* 609; Norman Myers, “Environmental Refugees: An Emergent Security Issue” A paper presented at the 13<sup>th</sup> Economic Forum, Prague, on May 23 – 27, 2005; Mail Foreign Service, “Maldives Government Highlights the Impact of Climate Change...by Meeting Underwater”, Mail Online (20 October 2009),

refugees”.<sup>63</sup> This description was not only misleading but counter-productive<sup>64</sup> – it was used to describe the population displaced by environmental events at a period when states were already reluctant to fulfill their obligations to political refugees under the *1951 Refugee Convention*.<sup>65</sup> Most refugee camps in the global south were in a state of disrepair, and overcrowded as the number of refugees rose from a few million in the 70s to about 10 million in the late 80s and up to around 25 million in the mid-90s.<sup>66</sup> This was an era when *non-entrée* policies by developed states were rife.<sup>67</sup> Developed states, ostensibly for humanitarian considerations, intervened in the affairs of many third world countries to forestall an outbreak of refugee crises.<sup>68</sup> Erika Feller aptly captured the apathy of the developed states towards traditional refugees thus:

In the developed world where there are sophisticated asylum systems and a long tradition of active political support for refugee protection, the changes were no less significant. There has been, particularly in recent years, a major reshaping of asylum policies, provoked by a shared concern in the industrialized countries about the overburdening of

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online: The Daily Mail <<http://www.dailymail.co.uk/news/article-1221021/Maldives-underwater-cabinet-meeting-held-highlight-impact-climate-change.html>>.

<sup>63</sup> El-Hinnawi, *Environmental Refugees*, *ibid*; Jodi Jacobson, “Environmental Refugees: Yardstick of Habitability” (1988) *Worldwatch* Paper No. 86; Norman Myers, “Environmental Refugees in a Globally Warmed World” (1993) 43 *BioScience* 752; Norman Myers, “Environmental Refugees” (1997) 19 *Population and Environment* 167; Norman Myers, “Environmental Refugees: A Growing Phenomenon of the 21<sup>st</sup> Century” (2002) 357 *Philosophical Transactions of the Royal Society: Biological Sciences* 609; Norman Myers, “Environmental Refugees: An Emergent Security Issue” A paper presented at the 13<sup>th</sup> Economic Forum, Prague, on May 23 – 27, 2005. Note that some commentators still use the term “environmental refugees”. See for example, Albrecht Eike & Plewa Malte Paul, “International Recognition of Environmental Refugees” (2015) 45:2 *Environmental Policy and Law* 78 – 84. However, authoritative scholars on refugees and disaster displacement have since consigned this term to the dustbin.

<sup>64</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (New York: Oxford University Press, 2012) [McAdam, *Climate Change, Forced Migration, and International Law*].

<sup>65</sup> Erika Feller, “International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future” (2001) 83:843 *IRRC* 581 – 605 [Feller, *International Refugee Protection 50 Years On*].

<sup>66</sup> *Ibid*.

<sup>67</sup> *Non-entrée* was a strategy which the developed states adopted in the years following the Second World War to keep refugees away from their borders, “including visa requirements on the nationals of refugee-producing states, carrier sanctions, burden shifting arrangements, and even the forcible interdiction of refugees at frontiers and in international waters.” See James C. Hathaway, “Preface: Can International Refugee Law Be Made Relevant Again?” in James C. Hathaway, ed., *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff Publishers, 1997) xvii – xxix at xx.

<sup>68</sup> *Ibid*.

the structures they have in place to handle claims, about rising costs associated with running their systems and about problems stemming from difficulties in applying refugee concepts to mixed groups of arrivals, and by a substantial misuse of asylum systems.<sup>69</sup>

Clearly, this was not an appropriate time to introduce a new set of refugees outside those traditionally recognized as such by the *1951 Refugee Convention*. Thus, it was unsurprising that states took no significant action or steps in addressing cross-border environmental displacement issues during those periods.

The report of the IPCC in 1990 which stated that climate change may have its greatest impact on human mobility, heralded the second framing on cross-border disaster displacement.<sup>70</sup> The rhetoric thus changed from a refugee issue to a climate change issue. States, international organizations, NGOs, and scholars, switched from the “environmental refugee” label to “climate refugee” or “climate migrant” label.<sup>71</sup> Whether we look at the issue as either a climate or “migration” issue, none of these framings was helpful in securing the interest of states on cross-border environmental movement, particularly the destination countries. The reasons for the

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<sup>69</sup> Feller, *International Refugee Protection 50 Years On*, *supra* note 65 at 588 – 589.

<sup>70</sup> Intergovernmental Panel on Climate Change, *First Assessment Report* (Cambridge: Cambridge University Press, 1990) at 20 [IPCC, *First Assessment Report*].

<sup>71</sup> Michael B. Gerrard & Gregory E. Wannier, eds., *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2015); Xing-Yin Ni, “A Nation Going Under: Legal Protection for “Climate Change Refugees”” (2015) 38:2 *Boston College International and Comparative Law Review* 329 – 366; Etienne Piguat & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014); Quentin Wodon, *et al*, eds., *Climate Change and Migration: Evidence from the Middle East and North Africa Region* (Washington, DC: The World Bank, 2013); McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 64; Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010); Frank Laczko & Christine Aghazarm, eds., *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva: International Organization for Migration, 2009); Mail Foreign Service, “Maldives Government Highlights the Impact of Climate Change...by Meeting Underwater”, Mail Online (20 October 2009), online: The Daily Mail

reticence of states are obvious. Notwithstanding the views of climate skeptics who doubt the reality of climate change, a growing number of states now agree that climate change is not only real but also that developed countries are responsible for the majority of the historic greenhouse gas emissions.<sup>72</sup> States have reflected this understanding in successive climate negotiations and instruments through the principle of common but differentiated responsibility and respective capabilities.<sup>73</sup> Developed as a principle of equity and fairness, the common but differentiated responsibility principle “is one of the cornerstones of sustainable development and a guiding principle of international cooperation and solidarity.”<sup>74</sup> This principle has two elements – “common” implies that certain risks such as climate change, natural disasters, and terrorism affect all countries and that all states should cooperate to minimize or possibly eliminate such risks.<sup>75</sup> The “differentiated” element of the principle highlights the differing reparatory responsibilities of states based on their developmental and financial capabilities.<sup>76</sup>

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<http://www.dailymail.co.uk/news/article-1221021/Maldives-underwater-cabinet-meeting-held-highlight-impact-climate-change.html>.

<sup>72</sup> Jonas Ebbesson & Phoebe Okowa, eds., *Environmental Law and Justice in Context* (New York: Cambridge University Press, 2009).

<sup>73</sup> Christopher D. Stone, “Common But Differentiated Responsibilities in International Law” (2004) 98:2 *American Journal of International Law*, 276 – 301; Rachel Boyte, “Common But Differentiated Responsibilities: Adjusting the ‘Developing’/‘Developed’ Dichotomy in International Environmental Law” (2010) 14 *New Zealand Journal of Environmental Law* 63 – 101; Jutta Bruneel & Charlotte Streck, “The UNFCCC as a Negotiation Forum: Towards Common But More Differentiated Responsibilities” (2013) 13:5 *Climate Policy* 589 – 607.

<sup>74</sup> Ruxandra M. Petrescu-Mag, *et al.*, “The “Common But Differentiated Responsibility” Viewed as a Soft Law Instrument and Its Reflection in Some International Environmental Acts” (2013) 5:1 *AES Bioflux* 10 – 14.

<sup>75</sup> Christopher D. Stone, “Common But Differentiated Responsibilities in International Law” (2004) 98:2 *American Journal of International Law*, 276 – 301.

<sup>76</sup> *Ibid.*

Robyn Eckersley has argued that the principle of common but differentiated responsibility provides a basis for states to receive “climate refugees”.<sup>77</sup> Eckersley established what she called “the rights of ‘climate refugees’ to choose their host state.” This right arose, she argued, owing to the varying contribution of all states to the plights of ‘climate refugees’ and the corresponding responsibility of states to provide “a form of partial compensation for the injustice and trauma.”<sup>78</sup> No doubt, this work is both ambitious and optimistic. However, while the principle of common but differentiated responsibility has resulted in financial and technical assistance to developing states by the developed states, predicating the issue of climate change and displacement on this principle as a way of creating an obligation on states to receive cross-border climate change displaced persons will be difficult.<sup>79</sup> Nor did this line of argument engender the needed political will of states and their understanding on this issue. The main obstacle to achieving this possibility remains that of legal causation.<sup>80</sup> As Roger Zetter observes: “there are substantial conceptual and empirical problems in identifying this cause-effect link, and the extent to which the linkage is direct”.<sup>81</sup> Commenting on the basis for which states accept responsibility for the consequences of their actions in the context of the ban on anti-personnel (AP) landmines, Price notes that “it seems likely that this phenomenon would tend to be more powerful the more direct

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<sup>77</sup> Robyn Eckersley, “The Common But Differentiated Responsibilities of States to Assist and Receive ‘Climate Refugees’” (2015) 14:4 *European Journal of Political Theory* 481 – 500 [Eckersley, The Common But Differentiated Responsibilities of States to Assist and Receive ‘Climate Refugees’].

<sup>78</sup> *Ibid.*

<sup>79</sup> Commenting on this issue, one author notes that “not the least of these is the highly politicised issue of whether developed countries are seriously prepared to adopt this responsibility: the evidence to date on emission controls, mitigation and the failure of Copenhagen indicate a poor prognosis.” See Roger Zetter, “Protecting People Displaced by Climate Change: Some Conceptual Challenges” in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 131 – 150 at 146 [Zetter, Protecting People Displaced by Climate Change].

<sup>80</sup> Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Leiden: Martinus Nijhoff, 2005); McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 64.

and simple the chains of cause and effect. The mines issue was a simple one to educate about, unlike, say, the often more complex attributions of responsibility for other tragedies such as starvation”.<sup>82</sup> This lack of direct cause and effect of greenhouse gas emissions on forced migration probably explains why the common but differentiated responsibility principle has not been applied in any climate change negotiations or instruments to cross-border climate change displacement – not even in the historic Paris Agreement.<sup>83</sup>

The common but differentiated responsibility principle is by no means a settled principle of law. Issues regarding its formulation, legal nature and practice are not fixed.<sup>84</sup> Generally accepted as applicable to the provision of financial and technical assistance on climate change issues, states still sometimes disagree on the scope and extent of the application of this principle. Part of the disagreement relates to the application of the principle in the light of “the multiplication of states groups within the developing countries category and the rise of emerging economies - some of them being today’s major greenhouse gas emitters.”<sup>85</sup> This has called into question the overarching framework of the common but differentiated responsibility principle in the UNFCCC and the Kyoto Protocol which required *only* the developed countries to assume ambitious greenhouse gas mitigation targets.<sup>86</sup> The developed countries have criticised this arrangement. As a way of avoiding another round of controversy similar to the one that trailed

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<sup>81</sup> Zetter, Protecting People Displaced by Climate Change, *supra* note 79 at 138.

<sup>82</sup> Price, Reversing the Gun Sights, *supra* note 61 at 623.

<sup>83</sup> Lavanya Rajamani, “Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics” (2016) 65 International and Comparative Law Quarterly 493 – 514 [Rajamani, Ambition and Differentiation in the 2015 Paris Agreement].

<sup>84</sup> Thomas Deleuil, “The Common But Differentiated Responsibilities Principle: Changes in Continuity After the Durban Conference of the Parties” (2012) 21:3 Review of European Community & International Environmental Law 271 – 281.

<sup>85</sup> *Ibid* at 272.

the Kyoto Protocol, Rajamani notes that the common but differentiated responsibility principle under the Paris Agreement is applicable differently to different issue areas rather than a rule of general application as was the case under the UNFCCC and the Kyoto Protocol.<sup>87</sup> The summary of my argument here is that framing cross-border environmental displacement as a climate change issue or creating a responsibility for states to receive the displaced population under the common but differentiated responsibility principle did not secure the required consensus of states on the issue.

Similarly, describing climate-related movement as “migration” rather than displacement or those moving as a result of environmental activities as “migrants” has only further complicated the salience of the issues surrounding environmental displacement. The idea of “migration” or “migrants” imports two understandings. The first understanding is that a migrant is someone who voluntarily leaves his or her country for another country usually for economic reasons.<sup>88</sup> The second understanding is that such a migrant has a home-country to return to if he or she is denied entry into another.<sup>89</sup> In other words, while the term “refugees” has a connotation of forced movement, and lack of alternative safe country which is a basis why states and other actors recognise and protect refugees, the term “migrants” lacks such understanding.<sup>90</sup> Whereas countries have specific responsibilities and obligations under international law to receive

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<sup>86</sup> Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement*, *supra* note 83.

<sup>87</sup> *Ibid.*

<sup>88</sup> Diane C. Bates, “Environmental Refugees? Classifying Human Migrations Caused by Environmental Change” (2002) 23:5 *Population and Environment*, 465 – 477.

<sup>89</sup> Kalena E. Cortes, “Are Refugees Different From Economic Immigrants? Some Empirical Evidence on the Heterogeneity of Immigrant Groups in the United States” (2004) 86:2 *The Review of Economics and Statistics*, 465 – 480.

refugees into their territory and protect them, they do not owe these obligations to migrants. As a rule, “countries deal with migrants under their own immigration laws and processes.”<sup>91</sup> And since the vast majority of states did not recognise climate change as a legal immigration pathway or category under their respective national immigration laws, the “migrants” framing also failed to achieve the desired consensus of states on the recognition and protection of the displaced population.

One of the consensus building strategies of the Nansen Initiative was to frame climate change or environmental displacement as a “disaster” issue. This is the third framing around cross-border environmental displacement and arguably the most successful one. Through this framing, the Nansen Initiative de-emphasises but does not deny the role of climate change in cross-border mobility. In the lead up to the creation of the Nansen Initiative and particularly with the IPCC report in 1990 which identifies climate change as a driver of forced migration, a huge body of research emerged which interrogated the extent to which climate change or environmental degradation leads to migration.<sup>92</sup> In other words, one of the questions which engaged the attention of scholars was whether or not climate change alone caused people to move.<sup>93</sup> While scholars have differing views on this question, the current state of research views climate change as only contributing to existing drivers of migration, thus acting as a “stressor” or “threat

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<sup>90</sup> Adrian Edwards, “‘Refugee’ or ‘Migrant’: Which is Right?” *The United Nations High Commissioner for Refugees* (27 August 2015), online: UNHCR <<http://www.unhcr.org/55df0e556.html>>; Jeremy Hein, “Refugees, Immigrants, and the State” (1993) 19 *Annual Review of Sociology*, 43 – 59.

<sup>91</sup> *Ibid.*

<sup>92</sup> Richard Black, “Environmental Refugees: Myth or Reality?” in *New Issues in Refugee Research – Working Paper No. 34* (Geneva: UNHCR, 2001); Stephen Castles, “Environmental Change and Forced Migration: Making Sense of the Debate” in *New Issues in Refugee Research – Working Paper No. 70* (Geneva: UNHCR, 2002).

multiplier” as opposed to being the sole cause of forced movement.<sup>94</sup> Indeed, the Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kalin holds the view that “climate and climate change *per se* do not trigger the movement of people, but some of their effects, in particular, sudden and slow-onset disasters, have the potential to do so.”<sup>95</sup> This view may have informed why the Nansen Initiative hinged the focal point of its work on “disasters” and not “climate change”. Since its creation in 2012, the Nansen Initiative and the envoy of its chairmanship have been choosing their words carefully, preferring to include the term “climate change” within the broader context of disaster.<sup>96</sup> While stating the aim of the Nansen Initiative in a 2012 article, Professor Kalin did not make any direct reference to climate change. In that article, he stated that “the Nansen Initiative aims to build consensus among states about how to best address cross-border displacement in the context of *sudden- and slow-onset disasters*”.<sup>97</sup> He maintained this frame throughout the article making little or no reference to climate change.

By framing cross-border environmental displacement as a humanitarian rather than a climate change issue, the Nansen Initiative succeeded in securing not just the attention but the consensus

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<sup>93</sup> James Morrissey, “Environmental Change and Forced Migration: A State of the Art Review”, Background Paper for the Workshop on Environmental Change and Migration: Assessing the Evidence and Developing Norms for response, 8 – 9 January, 2009, Refugees Studies Centre, Oxford, United Kingdom.

<sup>94</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 64; Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014).

<sup>95</sup> Walter Kalin, “Conceptualising Climate-Induced Displacement” in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 81 – 103 at 84. See also Kälin, The Nansen Initiative, *supra* note 1 at 5 where he emphasises “the multi-causal nature of displacement, particularly following slow-onset hazards and other gradual effects associated with climate change, and highlighted that such population movements are occurring **in the context of** disasters and climate change rather than being exclusively **caused by** such events.” [emphasis added in the original text].

<sup>96</sup> See documents and information on the Nansen Initiative’s website all of which consistently frame cross-border environmental displacement as a disaster/humanitarian issue while downplaying but not denying the climate change dimensions of it.

<sup>97</sup> Walter Kalin, “From the Nansen Principles to the Nansen Initiative” (2012) 41 *Forced Migration Review* at 49.

of states on this issue in many ways. Firstly, this framing eliminates the “fault-liability” argument or reasoning which climate change narratives import to cross-border environmental displacement discourse<sup>98</sup> and paves the way for humanitarian considerations by states.<sup>99</sup> Neither international law nor international relations suggest that states have a duty or an obligation to receive refugees because they are liable or responsible for the forced migration of those refugees.<sup>100</sup> Rather, the duty or obligation of states towards refugees is arguably humanitarian but backed by international refugee law – to protect refugees by preventing their return to places where their lives will be in jeopardy.<sup>101</sup> Secondly, this framing universalises the phenomenon of cross-border environmental displacement rather than presenting it as an issue affecting only a portion of the globe. Disaster is a universal phenomenon – no country is beyond disaster though its mitigation, impacts, and adaptation to it vary by country. While rich and technologically advanced countries are more likely to be able to prepare for and minimise disaster risks, poor

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<sup>98</sup> Eckersley, The Common But Differentiated Responsibilities of States to Assist and Receive ‘Climate Refugees’, *supra* note 77; Aurelie Lopez, “The Protection of Environmentally-Displaced Persons in International Law” (2007) 37:2 *Environmental Law* 365 – 409; Derek R. Bell, “Environmental Refugees: What Rights? Which Duties?” (2004) 10:2 *Res Publica* 135 – 152; Molly Conisbee & Andrew Simms, *Environmental Refugees: The Case for Recognition* (London: New Economics Foundation, 2003).

<sup>99</sup> Peter Penz, “International Ethical Responsibilities to ‘Climate Change Refugees’” in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 151 – 173; Joanna Hunt, *Establishing a Right to Humanitarian Assistance for the “Environmentally Displaced”* (LL.M Thesis, Faculty of Law, University of Toronto, 2005) [unpublished].

<sup>100</sup> Erika Feller, Volker Turk, & Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).

<sup>101</sup> James Mansfield, “Extraterritorial Application and Customary Norm Assessment of *Non-Refoulement*: The Legality of Australia’s ‘Turn-Back’ Policy” (2015) 17 *University of Notre Dame Australia Law Review*, 18 – 58; Andrea Freiberger, “The United States Response to Humanitarian Refugee Obligations: Inconsistent Application of Legal Standards and Its Consequences” (2010) 33 *Washington University Journal of Law and Policy*, 297 – 327; Arthur C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (New York: Oxford University Press, 2002); Office of the United Nations High Commissioner for Refugees, *The State of the World’s Refugees, 1997 – 98: A Humanitarian Agenda* (Oxford: Oxford University Press, 1997); Robert Gorman, *Mitigating Misery: An Inquiry into the Political and Humanitarian Aspects of U.S and Global Refugee Policy* (Lanham: University Press of America, 1993).

countries in the global south are likely to be more vulnerable.<sup>102</sup> Nonetheless, events in the global scene are replete with disasters striking not only in the global south but also in the global north with attendant consequences such as death, displacement, and other sundry dangers.<sup>103</sup>

Framing cross-border environmental displacement as a disaster or humanitarian issue was strategic as it made the issue resonate with existing disaster and humanitarian normative structures.<sup>104</sup> Humanitarian framing of issues has recorded huge success not only in consensus building on other issue areas but also in the generation of norms regulating the behaviour of states on those issues. Between 1917 and 1922 for example, there was a major Russian and Armenian refugee crisis in Europe. During this period, bad governance had led to a large-scale exodus of people who fled for safety from political persecution. States, therefore, under the League of Nations, greatly moved by moral, humanitarian and political considerations, became convinced that their immigration laws would have to recognize the reality of forced international movements of people. In the words of Guy Goodwin-Gill, “the exclusive jurisdiction of States to control the entry of persons into their territory was therefore constrained by an increased

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<sup>102</sup> Jon Barnett & Michael Webber, "Migration as Adaptation: Opportunities and Limits" in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 37; Neil Adger, et al, "Assessment of Adaptation Practices, Options, Constraints and Capacity" in Martin Parry et al, eds., *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007) Ch. 17.

<sup>103</sup> Susana B. Adamo & Alexander M. de Sherbinin, "Migration and Environmental Change in North America (USA and Canada)" in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 135 – 153; Mark Mulligan, Sophia Burke, & Caitlin Douglas, "Environmental Change and Migration Between Europe and Its Neighbours" in Etienne Piguet & Frank Laczko, eds., *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (New York: Springer, 2014) 49 – 79.

<sup>104</sup> Andrew P. Cortell & James W. Davis, "Understanding the Domestic Impact of International Norms: A Research Agenda" (2000) 2:1 *International Studies Review* 65 – 88; Richard Price, *The Chemical Weapons Taboo* (Ithaca: Cornell University Press, 1997).

recognition of protection as a humanitarian duty.”<sup>105</sup> Furthermore, humanitarian consideration also strengthened the international refugee legal framework owing to outrageous atrocities and crimes against humanity committed during World War II which led to mass displacement and refugee crisis.

There are two other instances in history where norm entrepreneurs secured the consensus of states by ingeniously framing their issue of concern as a humanitarian issue. Though these issues are not forced migration-related as we have with the Nansen Initiative and international refugee framework, they are useful in understanding the fecundity of situating an otherwise complex issue in a humanitarian context. The first issue is the treatment of medical personnel, and wounded soldiers as non-combatants during an outbreak of war and the second is the consensus of states banning landmines.<sup>106</sup> In each of these cases, the norm entrepreneurs achieved success only when campaigns and advocacy around their issues of interest were structured in humanitarian frames. In the case of the treatment of medical personnel and wounded soldiers, Henry Dunant in his book *A Memory of Solferino* gave a gory but vivid description of the carnage that he witnessed at the battle of Solferino.<sup>107</sup> He lamented how soldiers were deserted once wounded and how they died miserably due to lack of medical care and basic needs.<sup>108</sup> The

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<sup>105</sup> Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford: Clarendon Press, 1978) 138.

<sup>106</sup> Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1985); Price, *Reversing the Gun Sights*, *supra* note 61.

<sup>107</sup> Henry Dunant, *A Memory of Solferino* (Washington DC: The American National Red Cross, 1939) [Dunant, *A Memory of Solferino*].

<sup>108</sup> *Ibid* at 47.

highlight of this book, which he sent to “sovereigns, government ministers, army generals, writers, and well-known philanthropists”<sup>109</sup> were the questions:

Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?<sup>110</sup> On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet at Cologne or Chalons, would it not be desirable that they should take advantage of this sort of Congress to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries?<sup>111</sup>

The humanitarian norm that Dunant and his colleagues were attempting to promote met with resistance by the Geneva Public Welfare Society.<sup>112</sup> However, through a continuous framing of the issue as a humanitarian one coupled with relentless proselytization, Dunant’s first question gave birth to the International Red Cross and Red Crescent Movement while his second question “marks the starting point of contemporary international humanitarian law.”<sup>113</sup> The power of humanitarian frames ultimately led to the adoption of the original Geneva Convention in 1864 by all the states that attended the diplomatic conference where the convention was negotiated:

As is rarely the case at diplomatic congresses, there was no question of a confrontation over contradictory interests, nor was it necessary to reconcile opposing requests. Everyone was in agreement. The sole aim was to reach formal agreement on a humanitarian principle

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<sup>109</sup> Francois Bugnion, “Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: From Solferino to the Original Geneva Convention (1859 – 1864)” (2012) 94:888 *International Review of the Red Cross* 1299 – 1338 at 1306 [Bugnion, Birth of an Idea].

<sup>110</sup> Dunant, *A Memory of Solferino*, *supra* note 107 at 85.

<sup>111</sup> *Ibid* at 93.

<sup>112</sup> Bugnion, Birth of an Idea, *supra* note 109 at 1308 – 1311.

<sup>113</sup> *Ibid* at 1306.

which would mark a step forward in the law of nations, namely the neutrality of wounded soldiers and of all those looking after them.<sup>114</sup>

Moving on to the banning of landmines, transnational civil society led by the International Committee of the Red Cross in the 1990s successfully reframed states' use of AP landmines from a military or national security issue to a humanitarian issue.<sup>115</sup> To achieve their objectives, “more than one hundred individuals representing over seventy NGOs in twenty countries” organized themselves under an umbrella group – the International Campaign to Ban Landmines (ICBL).<sup>116</sup> Undeterred by the series of diplomatic deadlocks that characterised this campaign, the ICBL continued to reel out relevant information in both print and online media platforms which contained not only the staggering statistics of landmines worldwide but also the casualty statistics and graphic images of landmine victims from around the world, especially Cambodia.<sup>117</sup> All of this, combined with several local and international rallies and diplomatic lobbying resulted in the adoption of a ban treaty by 122 states in 1997.<sup>118</sup>

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<sup>114</sup> The Geneva Congress, Report to the Federal Council by General Guillaume-Henri Dufour, Gustave Moynier and Lehmann, Plenipotentiary Switzerland, Imprimerie Fick, Geneva, 1864, at 3 cited in Bugnion, Birth of an Idea, *supra* note 109 at 1324 – 1325.

<sup>115</sup> Price, Reversing the Gun Sights, *supra* note 61; Jody Williams, Stephen Goose, & Mary Wareham, eds., *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security* (Lanham, MD: Rowman & Littlefield, 2008).

<sup>116</sup> Price, Reversing the Gun Sights, *ibid* at 620.

<sup>117</sup> Kenneth R. Rutherford, *Disarming States: The International Movement to Ban Landmines* (Santa Barbara: Praeger, 2011); Miguel de Larrinaga & Claire Turenne Sjolander, “(Re)presenting Landmines from Protector to Enemy: The Discursive Framing of a New Multilateralism” in Maxwell A. Cameron, Robert J. Lawson, & Brian W. Tomlin, eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) at 381 – 408.

<sup>118</sup> *Ibid.*

#### 4.5.2 Foundational Metanorms

Apart from issue-framing, the Nansen Initiative utilised other strategies in presenting its case in an acceptable form before states. Sandholtz argues that arguments which promote certain fundamental values such as the dignity of the human person, universality of international rules, and equality of all persons before the law are often persuasive and difficult to oppose.<sup>119</sup> The Nansen Initiative discovered, through its 3-year expedition, that some fifty-three countries have not returned foreigners to areas afflicted by disasters.<sup>120</sup> This reinforced the determination of the Nansen Initiative to study the policies and practices of those states as a template for a universal rule on the treatment and protection of cross-border disaster-displaced persons. The Initiative also re-affirmed the salience of the fundamental human rights of cross-border disaster-displaced persons, urging states to have “full respect” for them.<sup>121</sup> While the principles of humanity and human dignity will be discussed in more details in Chapter 5, it should be noted that the Nansen Initiative was not just concerned about the forced displacement of people due to disasters but emphasises that such movement must be done with dignity. Thus, the Agenda consolidates recommendations and best practices that will enhance “migration with dignity” in line with the yearning and aspirations of the citizens of most small island states who are more vulnerable to the devastating effects of disasters and climate change.<sup>122</sup> Out of the overwhelming number of states that supported the Protection Agenda, it may be difficult to determine how many of them

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<sup>119</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 8 at 21 – 22; Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 8 at 17.

<sup>120</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Fleeing Floods, Earthquakes, Droughts and Rising Sea Levels: 12 Lessons Learned About Protecting People Displaced by Disasters and the Effects of Climate Change* (Wabern: Ast & Fischer, 2015) at 20.

<sup>121</sup> The Protection Agenda, *supra* note 47 at pg. III.

<sup>122</sup> Harriet Farguhar, ““Migration with Dignity”: Towards a New Zealand Response to Climate Change Displacement in the Pacific” (2015) 46:1 Victoria University of Wellington Law Review 29 – 55; Karen E. McNamara, “Cross-Border Migration with Dignity in Kiribati” (2015) 49 Forced Migration Review 62.

supported this instrument based on any of the foundational metanorms. However, the desire for the protection of the fundamental rights of those displaced across borders by disasters was a motivating factor for Switzerland and Bangladesh to join the Steering Committee of the Nansen Initiative.<sup>123</sup>

### 4.5.3 Precedents

Recency and the quantity of precedents allow norm entrepreneurs to justify their support for a fledgling norm. Precedents also have the capacity to convince states and other actors to support a new norm. As noted by Sandholtz, “arguments are stronger when they can reference similar instances in which the norm being asserted was similarly applied”.<sup>124</sup> As indicated earlier, one of the major selling points for the Protection Agenda was the argument by the Nansen Initiative suggesting that some countries were already welcoming cross-border disaster-displaced persons. In the executive summary to the Protection Agenda, the Nansen Initiative stated that it “has identified at least 50 countries that in recent decades have received or refrained from returning people in the aftermath of disasters, in particular, those caused by tropical storms, flooding, drought, tsunamis, and earthquakes.”<sup>125</sup> The purpose of this disclosure was to show the international community that a few states have already begun recognising and protecting those displaced across borders by disasters and that this should serve as a basis for other states to emulate this gesture.

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<sup>123</sup> Interview with the Representative of Switzerland, *supra* note 48; Interview with the Representative of Bangladesh in Geneva on October 6, 2015 available on file with me [Interview with the Representative of Bangladesh].

<sup>124</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 8 at 22; Sandholtz & Stiles, *International Norms and Cycles of Change*, *supra* note 8 at 17.

<sup>125</sup> The Protection Agenda, *supra* note 47 at pg. I.

Although the Nansen Initiative did not disclose the identity of the states that have refused to send cross-border disaster-displaced persons back to danger, it is now a matter of public knowledge that even before the endorsement of the Protection Agenda by states, Greece, Finland, Italy and Sweden already had domestic law and policy in place for the recognition and protection of cross-border disaster-displaced persons.<sup>126</sup> Considering that these are developed countries, it is particularly helpful for the overall aims and objectives of the Nansen Initiative. This is because most countries in the global south rarely turn back cross-border disaster-displaced persons arriving at their borders. Kenya, for example, has a long history of accepting not just convention refugees but cross-border disaster-displaced persons from Somalia and other neighbouring countries.<sup>127</sup> The challenge has always been with refugee flow from the global south to the global north. Moreover, if some notable migrants' countries of destination such as Italy, Finland, and Sweden have shown an indication of their readiness either to receive cross-border disaster-displaced persons or not to return those of them already present in their countries to environmentally dangerous zones, that is certainly the kind of attitude that the Nansen Initiative would like other developed states to emulate. Furthermore, the Nansen Initiative's reference to some fifty countries that have refrained from declining admission to cross-border disaster-displaced persons or outrightly deporting them to disasters, including the examples of Greece,

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<sup>126</sup> Sheila Murray, "Environmental Migrants and Canada's Refugee Policy" (2010) 27:1 *Refuge* 89 – 102; Christel Cournil, "The Question of the Protection of 'Environmental Refugees' from the Standpoint of International Law" in Étienne Piguet, Antoine Pécoud & Paul De Guchteneire, eds., *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) 359 – 387. See for example, section 88 (1) of Finland's *Aliens Act 2004*, 301/2004 and Chapter 4, section 2(3) and Chapter 5, section 1 of Sweden's *Aliens Act 2005*, 716/2005.

<sup>127</sup> Interview with the Representative of Kenya in Geneva on October 9, 2015 available on file with me [Interview with the Representative of Kenya].

Italy, Finland and Sweden, may have convinced some other states to support the Protection Agenda.

#### 4.5.4 Influence of States

While the emergence of international norms does not necessarily require the support of hegemon or great powers,<sup>128</sup> “acceptance by most of the world’s leading powers is necessary for norm change.”<sup>129</sup> The endorsement of a norm by some great powers may generate a bandwagon effect, making other states do the same.<sup>130</sup> A norm may also tip or cascade after its endorsement by some developed states.<sup>131</sup> It appears that the Nansen Initiative understood this point. Hence, apart from having some developed states on board as members of the Steering Committee, more than forty countries including developed states such as the United States, France, Belgium, Netherlands, Italy, Sweden, Finland, and others not only supported the Protection Agenda as the outcome of the work of the Nansen Initiative but also supported the work of the Initiative *ab initio* as “group of friends.”<sup>132</sup> With this foundation, it was easy for the “group of friends” to openly show their unwavering support for the Protection Agenda through their endorsements. It is possible that some other states, outside this group, were indirectly influenced in their decision to endorse the Protection Agenda by the group of friends.

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<sup>128</sup> Adam Bower, “Norms Without the Great Powers: International Law, Nested Social Structures, and the Ban on Antipersonnel Mines” (2015) 17:3 *International Studies Review* 347 – 373.

<sup>129</sup> Sandholtz, *Prohibiting Plunder*, *supra* note 8 at 21.

<sup>130</sup> *Ibid.*

<sup>131</sup> Price, *Reversing the Gun Sights*, *supra* note 61; Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52:4 *International Organization* 887 – 917 [Finnemore & Sikkink, *International Norm Dynamics and Political Change*].

#### 4.5.5 Legitimacy

Legitimacy as a principle of international law is one of the bases through which the validity of a law can be determined.<sup>133</sup> In addition, legitimacy fosters compliance with international law.<sup>134</sup> This principle contributed to states' support for and their acceptance of the Protection Agenda. One striking strategy that is emblematic of the work of the Nansen Initiative was its all-inclusive multi-stakeholder approach. Understanding that consensus is the basis of international law and that consensus breeds legitimacy, the Nansen Initiative reached out to states and other actors in carrying out its tasks. The Nansen Initiative organised seven regional intergovernmental consultations and five regional civil society meetings around the world.<sup>135</sup> There were eighty Nansen Initiative Consultative Committee members including researchers, NGOs, and international and regional organisations from about five continents.<sup>136</sup> Apart from a group of over forty countries forming the Nansen Initiative Group of Friends in Geneva with Morocco and the European Union as chairs, the Nansen Initiative consulted more than 100 countries and more than ten regional organisations in five continents.<sup>137</sup> Not only did the Nansen Initiative involve more than 150 NGOs and fifteen United Nations Agencies in its consultations, it also engaged more than thirty academic institutions in its consultative process.<sup>138</sup> In all the twelve

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<sup>132</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Fleeing Floods, Earthquakes, Droughts and Rising Sea Levels: 12 Lessons Learned About Protecting People Displaced by Disasters and the Effects of Climate Change* (Wabern: Ast & Fischer, 2015) at 43.

<sup>133</sup> Jutta Brunnee & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) [Brunnee & Toope, *Legitimacy and Legality in International Law*].

<sup>134</sup> Ian Hurd, "Legitimacy and Authority in International Politics" (1999) 53:2 *International Organisation* 379 – 408; Brunnee & Toope, *Legitimacy and Legality in International Law*, *ibid.*

<sup>135</sup> *Fleeing Floods, Earthquakes, Droughts and Rising Sea Levels: 12 Lessons Learned About Protecting People Displaced by Disasters and the Effects of Climate Change* (Wabern: Ast & Fischer, 2015) at 43.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

consultations that the Nansen Initiative organised around the world, there was a total of almost 1,000 participants.<sup>139</sup>

The Nansen Initiative sought the views of these entities and obtained inputs from them, not just about its activities but particularly about the Protection Agenda. Indeed, there was a consultative committee workshop in April 2015 where the Draft Protection Agenda was presented and reviewed.<sup>140</sup> The draft Protection Agenda was put in the public domain and comments were invited from relevant stakeholders.<sup>141</sup> In the end, what came out was an agenda for the protection of cross-border disaster-displaced persons facilitated by the Nansen Initiative but which nevertheless reflects the views and contributions of all stakeholders. Though with disapproval from Russia and some other states who preferred to be neutral or indifferent, the Protection Agenda radiates an aura of legitimacy arguably leading to its overwhelming endorsement by a vast majority of states and other stakeholders.<sup>142</sup>

#### **4.6 Achievements**

The major achievement of the Nansen Initiative was not only the formulation of the Protection Agenda but also getting it adopted by an impressive number of states, including many major destination countries. In this section, the plan is to highlight, in general terms, the basic achievements of the Nansen Initiative. By using the disaster/humanitarian frame, the Nansen

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<sup>139</sup> *Ibid.*

<sup>140</sup> The Nansen Initiative, Consultations on the Protection Agenda, (April 2015), online: <<https://www.nanseninitiative.org/protection-agenda-consultation/#tab-1422467069-1-33>>.

<sup>141</sup> *Ibid.*

<sup>142</sup> Refugees International, Statement by Alice Thomas on Behalf of the Refugees International at the Nansen Initiative Global Consultation, Geneva, Switzerland, 12 October 2015.

Initiative arguably achieved more progress than previous international efforts on the recognition and protection of cross-border disaster-displaced persons. It held meetings with government officials and members of the civil society in Central America, Greater Horn of Africa, Pacific, Southeast Asia and South Asia. Through these regional consultations, “the Nansen Initiative reached out widely and consulted with governments and civil society from more than one hundred countries”.<sup>143</sup> Part of the conclusion of these intergovernmental meetings was an affirmation of the primary responsibility of states not only to recognise and protect persons displaced by disasters but also to prevent disaster displacements.<sup>144</sup> The Initiative “tore down thematic silos” by engaging the experience and expertise of disaster, climate change, refugee, migration, human rights, humanitarian and environmental professionals in deliberating upon and drafting its final outcome.<sup>145</sup>

The work of the Nansen Initiative has led to a paradigm shift in the *Sendai Framework on Disaster Risk Reduction 2015 – 2030* (Sendai Framework). The Sendai Framework is an international document on disaster risk reduction which was adopted by UN member states at the World Conference on Disaster Risk Reduction in Sendai, Japan on March 14 – 18, 2015. This document was subsequently adopted by the UN General Assembly in June 2015. In the 2014 draft of this document, displacement was not mentioned in any of the operative parts.<sup>146</sup> A tacit

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<sup>143</sup> Government of Switzerland, “The Strength of a People is Measured by the Well-Being of its Weakest Members: For A Better Protection of Those Displaced by Natural Disaster”, Opening Address by His Excellency, Mr. Didier Burkhalter, Federal Councillor and Head of the Federal Department of Foreign Affairs, Government of Switzerland, Nansen Initiative Global Consultation, 12 October 2015, Geneva, Switzerland [Opening Address by H.E., Mr. Didier Burkhalter].

<sup>144</sup> Kälin, The Nansen Initiative, *supra* note 1.

<sup>145</sup> Opening Address by H.E., Mr. Didier Burkhalter, *supra* note 143.

<sup>146</sup> Interview with Professor Kalin, *supra* note 48.

reference was only made to it in the preambular section.<sup>147</sup> However, as a result of the recommendation made by the Nansen Initiative to the negotiators, the final draft of the Sendai Framework includes copious references and provisions relating to displacement and migration under different headings.<sup>148</sup> The recommendation made by the Nansen Initiative to the Sendai Framework drafting committee was part of the outcomes of the regional consultations of the Nansen Initiative.<sup>149</sup> This recommendation was keenly contested – it was part of the six remaining issues that were pending at the last hour, shortly before midnight.<sup>150</sup> Notwithstanding the fierce contestation, the recommendation was adopted by the negotiators.<sup>151</sup> According to Professor Kälin, “the Initiative has also contributed to conversations surrounding the negotiations of the 2015 Paris Climate Change Agreement.”<sup>152</sup> These conversations resulted in the establishment of a task force on displacement with a mandate “to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”<sup>153</sup> Though this provision lacks important operational and funding details about the task force, it is remarkable in that this was the first time that the United Nations Framework Convention on Climate Change will be considering climate change as a driver of displacement.

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<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> Kälin, *The Nansen Initiative*, *supra* note 1 at 6.

<sup>153</sup> United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session, held in Paris from 30 November to 13 December 2015*, UNFCCC Dec 1/CP.21, UN Doc. FCCC/CP/2015/10/Add.1 (29 January 2016) at paras. 49 – 50.

Furthermore, the work of the Nansen Initiative has led to the inclusion of climate change and disasters as drivers of forced migration in the Brazil Declaration and Action Plan – Cartagena +30 Process adopted in December 2014.<sup>154</sup> Moreover, the Nansen Initiative participated and contributed immensely at the regional consultations of the World Humanitarian Summit working “together with interested states and relevant stakeholders in order to strengthen preparedness, response and coordination capacity within the humanitarian system”.<sup>155</sup> “The draft Strategy for Climate and Disaster Resilient Development in the Pacific, and the Regional Conference on Migration (Puebla Process) February 2015 workshop” both reflect inputs from the work of the Nansen Initiative.<sup>156</sup> In the Puebla Process, for example, “Central and North American Member States discussed effective practices generated from the regional consultations of the Nansen Initiative for utilising temporary humanitarian protection mechanisms in disaster contexts”.<sup>157</sup> In the June 2016 meeting of the Regional Conference on Migration member states in Honduras, Costa Rica presented a document known as the “*Protection of Persons Moving Across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries (2016)*”.<sup>158</sup> This Guide to effective practices was drafted by the Nansen Initiative “to create more harmonised responses by the RCM member countries to disaster-related movement.”<sup>159</sup> The Regional Conference on Migration Member Countries are Belize, Canada, Costa Rica,

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<sup>154</sup> Interview with Professor Kalin, *supra* note 48; Opening Address by H.E., Mr. Didier Burkhalter, *supra* note 143.

<sup>155</sup> Opening Address by H.E., Mr. Didier Burkhalter, *supra* note 143.

<sup>156</sup> Kalin, The Nansen Initiative, *supra* note 1 at 7.

<sup>157</sup> *Ibid.*

<sup>158</sup> McAdam, From the Nansen Initiative to the Platform on Disaster Displacement, *supra* note 42.

<sup>159</sup> *Ibid* at 1519.

Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States.<sup>160</sup>

Other than the Protection Agenda, which contains policy options and arrangements not only for the protection of the displaced population but also addressing the prevention of displacement, adaptation measures, resilience, and capacity building, the Nansen Initiative also made recommendations for the issuance of “humanitarian visas, stays of deportation, granting refugee status in exceptional cases, bilateral or regional arrangements on free movement of persons, expediting normal migratory channels, or the issuance of work permits”.<sup>161</sup> Through its three-year research expedition in five sub-regions, the Nansen Initiative “identified the need to review the potential applicability of existing regional agreements to address cross-border displacement in disaster contexts, or, when absent, to consider the development of temporary protection, admission and stay arrangements linked to durable solutions”.<sup>162</sup>

#### 4.7 Challenges

Its successes notwithstanding, the work of the Nansen Initiative experienced some legal, institutional and operational difficulties. The main legal challenge that the Initiative had to grapple with relates to the lack of a normative framework for the protection of cross-border disaster displaced persons. Paradoxically, the central focus of the work of the Nansen Initiative was to fill this normative gap.<sup>163</sup> The interpretation and the legal implications of some terms

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<sup>160</sup> Regional Conference on Migration, online: <<http://www.rcmvs.org/>>.

<sup>161</sup> Kälin, The Nansen Initiative, *supra* note 1 at 6.

<sup>162</sup> *Ibid.*

<sup>163</sup> The Nansen Initiative, Information Note, *supra* note 5.

relevant to cross-border disaster displacement such as “slow-onset disaster” and “sudden-onset disaster” in determining the voluntary and otherwise nature of movement was daunting. This is because sudden-onset disasters such as floods, earthquakes, tsunamis or volcanic eruptions are generally understood to be responsible for forced or involuntary movement of people. Technically, the victims of sudden-onset disasters deserve protection. However, slow-onset disasters such as droughts, desertification, and rising sea levels are not capable of “forcible” movement of people. Those who move due to slow-onset disasters are arguably moving by choice or volition with the implication of lack of entitlement to protection. The Nansen Initiative expressed the complexity of this distinction in relations to its work in the following words:

From a protection perspective, distinguishing between a slow-onset and sudden-onset disaster is necessary, but generally accepted criteria to identify the tipping point at which a primarily voluntary movement turns into forced displacement do not yet exist.<sup>164</sup>

In resolving this issue, the Nansen Initiative drafted the Protection Agenda in such a way as to make it applicable to persons displaced by disasters generally, whether sudden or slow-onset with particular emphasis on the *effects* of these disasters.<sup>165</sup> In justifying its inclusion of persons displaced by slow-onset disasters within its protective framework, the Nansen Initiative reasoned that “slow-onset disasters[...]are taken into account[...]as in their end phase, they may make it impossible for people to remain in the affected areas. The relevant distinction should not be the

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<sup>164</sup> *Ibid* at 4.

<sup>165</sup> The Protection Agenda, *supra* note 47.

character of the disaster, but rather whether it triggers displacement, understood as the (primarily) forced movement of persons as opposed to (primarily) voluntary migration.”<sup>166</sup>

The Nansen Initiative also faced institutional and operational challenges in that “no single operational agency or organisation at the international level is explicitly mandated to assist and protect persons displaced internally or across borders in the context of natural disasters.”<sup>167</sup>

Consequently, as the Nansen Initiative carried on its work over the course of 2012 – 2015 crisscrossing regions and continents in search of knowledge on cross-border disaster displacement and possible approaches to recognise and protect the displaced population, its concern was principally on the dissemination and implementation of its recommendations.<sup>168</sup>

This concern was legitimate for two reasons. First, the Nansen Initiative was not established as an “organisation” in the strict legal sense of that term. It was just an “initiative”. In working towards dissemination and implementation of the Protection Agenda, therefore, the role of an organisation empowered with these mandates cannot be over-emphasised. Indeed, “sociologists studying organisations have emphasised the roles of organisations in institutionalising and propagating cultural norms – norms that define identities, interests, and social realities”,<sup>169</sup> and in the context of cross-border disaster displacement, the Nansen Initiative does not represent such kind of “organisation”.

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<sup>166</sup> The Nansen Initiative, Information Note, *supra* note 5 at 3. For more discussion of the criteria for distinguishing between forced and voluntary movements of persons, see Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (Geneva: United Nations High Commissioner for Refugees, 2012) at 62 – 67.

<sup>167</sup> The Nansen Initiative, Information Note, *supra* note 5 at 5.

<sup>168</sup> Interview with Professor Kalin, *supra* note 48.

<sup>169</sup> Martha Finnemore, *National Interests in International Society* (Ithaca, New York: Cornell University Press, 1996) at 3.

Secondly, dissemination and implementation could not be done without a permanent organisational platform. Even if the Nansen Initiative considered itself to be an organisation, the challenge continued to be how to disseminate and implement the Protection Agenda given that its work would come to an end by December 2015. International norm scholars have highlighted the role of organisational structure not only in facilitating international norm emergence but also in norm implementation, compliance, and internalisation.<sup>170</sup> In overcoming this challenge, however, the Nansen Initiative initiated steps, at the twilight of its mandate, to have an organisational platform that would continue its work regarding dissemination and implementation.<sup>171</sup> The successor organisation of the Nansen Initiative invested with the mandate to disseminate and promote the implementation of the Protection Agenda is the Platform on Disaster Displacement.<sup>172</sup>

#### **4.8 Conclusion**

This chapter has attempted to provide an overview of the mandate and activities of the Nansen Initiative focusing in particular on the strategic use of framing as a tool for generating the consensus of states on the guiding principles and global best practices for addressing the concerns of cross-border disaster-displaced persons. As a “state-led bottom-up approach” on

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<sup>170</sup> Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001); Justin Gest *et al*, "Tracking the Process of International Norm Emergence: A Comparative Analysis of Six Agendas and Emerging Migrants' Rights" (2013) 19 *Global Governance* 153 – 185; Harold H. Koh, “Transnational Legal Process After September 11th” (2004) 22:3 *Berkeley Journal of International Law* 337 – 354.

<sup>171</sup> Interview with Professor Kalin, *supra* note 48.

cross-border disaster displacement, the Nansen Initiative enjoyed the generous support of not only the governments of Norway and Switzerland but also of the governments of Kenya, Philippines, Bangladesh, Mexico, Costa Rica, Australia, and Germany all of whom acted as steering committee members. The UNHCR and IOM acted as standing invitees to the steering committee. A consultative committee comprising of “representatives from international organizations dealing with displacement and migration issues, climate change and development, researchers, think tanks, and NGOs also informed and supported the process through the experience of its members.”<sup>173</sup> This is in addition to the “Group of Friends of the Nansen Initiative” made up of “interested states who contributed to the work of the Initiative with comments and proposals” and chaired by Morocco and the European Union.<sup>174</sup>

The combined effect of the goodwill that the Nansen Initiative enjoyed bolstered the attitude of states towards its work. Government officials, citizens and members of the civil society turned out in large numbers in the regions where the Nansen Initiative held consultations.<sup>175</sup> The goodwill continued to the global consultation held in October 2015 in Geneva, Switzerland. Over 361 participants representing governments, international organizations, academic institutions and civil society attended that event.<sup>176</sup> During this event, 109 states, which includes the United

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<sup>172</sup> For more details on the Platform on Disaster Displacement, see Chapter 6.

<sup>173</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement Website at <<https://www.nanseninitiative.org/>>.

<sup>174</sup> *Ibid*; Interview with the Representative of Australia, *supra* note 48.

<sup>175</sup> See the Outcome Reports of the Nansen Initiative Regional Consultations in the Pacific, Central America, Greater Horn of Africa, Southeast Asia and South Asia. Available online at The Nansen Initiative on Disaster-Induced Cross-Border Displacement Website at <<https://www.nanseninitiative.org/>>.

<sup>176</sup> The Nansen Initiative Global Consultation Conference Report, *supra* note 32 at 8.

States openly supported the Protection Agenda.<sup>177</sup> This also includes twelve other states which registered for the event but could not attend. This group of twelve states nevertheless pledged their support and commitment to the Protection Agenda.<sup>178</sup> In total, therefore, 109 countries endorsed the Protection Agenda. Part of what may have contributed to this overwhelming support by states could be the inclusive approach of the Nansen Initiative. The regional consultations of the Initiative not only bolstered consensus but also contributed to the legitimacy and feasibility of the overall outcome – the Protection Agenda. As pointed out by Refugees International during the Global Consultation, the Protection Agenda is “legitimate and feasible because it was developed through a highly transparent process that was (a) led by states themselves, (b) developed with the participation of a wide range of stakeholders and experts, and (c) informed by highly contextual, regional specific, research and evidence.”<sup>179</sup>

No doubt, “the Nansen Initiative has kick-started a global dialogue on human mobility in the context of disasters and climate change.”<sup>180</sup> The Initiative has fulfilled its consensus building mandate and the Protection Agenda, as well as its overwhelming states endorsement attests to this claim. The next stage in the global efforts at protecting cross-border disaster-displaced

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<sup>177</sup> There is an assumption that Canada has also endorsed the Protection Agenda as it is now one of the Steering Committee Member States of the Platform on Disaster Displacement. The Platform on Disaster Displacement is a post-Nansen Initiative process which principally focuses on dissemination and implementation of the Protection Agenda. See Chapter 6 for more details on the Platform on Disaster Displacement. Considering the disposition of the current Trump administration in the United States towards immigrants, its support for the Protection Agenda is questionable.

<sup>178</sup> *Ibid* at 61.

<sup>179</sup> Refugees International, Statement by Alice Thomas on Behalf of the Refugees International at the Nansen Initiative Global Consultation, Geneva, Switzerland, 12 October 2015.

<sup>180</sup> Opening Address by H.E., Mr. Didier Burkhalter, *supra* note 143.

persons is the implementation of the Protection Agenda by states.<sup>181</sup> Emphasising the importance of this stage, one of the keynote speakers during the Global Consultation admonished states and other participants as follows:

I wish to end my remarks by urging all of us to take the next step. Many good plans fall victim to lethargy and failure to match words with action, either due to lack of will or resources, often never leaving the paper on which plans are recorded. I therefore call on all concerned parties to accelerate the implementation of the recommendations from this conference – all with a view to promoting safe and legal intra-regional mobility.<sup>182</sup>

However, what are the contents of the Protection Agenda? Is this a normative document within the parameters set by international relations literature on norms? These and other questions will engage my attention in the next chapter.

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<sup>181</sup> Closing Remarks by the Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kalin at the Global Consultation of the Nansen Initiative, Geneva, Switzerland, 12 October 2015; Opening Address by H.E., Mr. Didier Burkhalter, *ibid*; Closing Address by His Excellency, Mr. Morten Høglund, State Secretary, Ministry of Foreign Affairs, Government of Norway, at the Global Consultation of the Nansen Initiative, Geneva, Switzerland, 12 October 2015.

<sup>182</sup> Keynote Address by His Excellency Mr. William Lacy Swing, Director-General, International Organization for Migration (IOM), at the Global Consultation of the Nansen Initiative, Geneva, Switzerland, 12 October 2015.

## Chapter 5: The Nansen Initiative's International Protection Agenda

*“Provisions of treaties may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties, while, on the other hand, instruments of lesser dignity may influence or control the conduct of States and individuals to a certain degree, even though their norms are not technically binding. It is inevitable that in the course of negotiation and compromise, those who write international instruments will set down on paper whatever will secure agreement, even though the resulting product may not fall into the neat categories to which lawyers are addicted.”<sup>1</sup>*

*“Norms [...] are rules or normative principles that are somehow accepted in and by particular groups.”<sup>2</sup>*

### 5.1 Introduction

The bureaucracy and the political will required for the negotiation of treaties are increasingly becoming clogs in the wheel of progress. States and other actors are frequently resorting to other forms of informal international lawmaking that are arguably outside the scope of article 38(1) of the *Statute of the International Court of Justice*.<sup>3</sup> There is a growing concern about the legal status of such informal legal instruments including the inevitable disagreement about their normative value.<sup>4</sup> However, there is a gargantuan volume of literature welcoming and supporting

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<sup>1</sup> Richard R. Baxter, “International Law in her ‘Infinite Variety’” (1980) 29:4 *International and Comparative Law Quarterly* 549 – 566 at 564 – 565 [Baxter, *International Law in her ‘Infinite Variety’*].

<sup>2</sup> Geoffrey Brennan, Lina Eriksson, Robert E. Goodin, & Nicholas Southwood, *Explaining Norms* (Oxford: Oxford University Press, 2013) at 4 [Brennan, Eriksson, Goodin & Southwood, *Explaining Norms*].

<sup>3</sup> *Statute of the International Court of Justice*, 59 Stat. 1031; T.S. 993; 39 *AJIL Supp.* 215, 18 April 1946, art. 38 [*ICJ Statute*].

<sup>4</sup> Jan Klabbers, “The Undesirability of Soft Law” (1998) 67:4 *Nordic Journal of International Law* 381 – 391 [Klabbers, *The Undesirability of Soft Law*].

the introduction of informal international lawmaking into international legal discourse.<sup>5</sup> Some have argued that article 38(1) of the *ICJ Statute* on sources of international law is not only dated but misleading and that contemporary international law is incompatible with the traditional notion of custom.<sup>6</sup>

The age-old disagreement about the normative value of international soft law or informal international lawmaking seems to be afflicting the Nansen Initiative's *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* ("the Protection Agenda").<sup>7</sup> There is some confusion regarding the normative status of this document. Many of the interview respondents during my research fieldwork were quick to dismiss the idea that the Protection Agenda or some of its contents are normative in nature.<sup>8</sup> Some others were of the view that it was too early to determine whether or not the Protection Agenda is normative.<sup>9</sup> However, after a careful study of the Protection Agenda and weighing it against international relations literature on norms, I am of the view that many of the provisions/recommendations in

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<sup>5</sup> Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment" (1991) 12:2 *Michigan Journal of International Law* 420 – 435; Jurgen Friedrich, *International Environmental "Soft Law": The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Heidelberg: Springer, 2013) [Friedrich, *International Environmental "Soft Law"*]; Ramses A. Wessel, *et al.*, "Upholding the Rule of Law in Informal International Lawmaking Processes" (2014) 6:1 *Hague Journal on the Rule of Law* 75 – 95.

<sup>6</sup> Alan Boyle & Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007) [Boyle & Chinkin, *The Making of International Law*]; Robert Y. Jennings, *What is International Law and How Do We Tell It When We See It?* (Deventer/The Netherlands: Kluwer, 1983) [Jennings, *What is International Law and How Do We Tell It When We See It?*].

<sup>7</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement Websites at <<https://www.nanseninitiative.org/wp-content/uploads/2015/10/Agenda-Final-Draft.pdf>>.

<sup>8</sup> Interview with the Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kalin, in Geneva, Switzerland, on October 7, 2015 available on file with me [Interview with Professor Kalin]; Interview with the Representative of Norway in Geneva on October 13, 2015 available on file with me [Interview with the Representative of Norway]; Interview with the Representative of Australia in Geneva on October 8, 2015 available on file with me [Interview with the Representative of Australia].

this document, as well as the procedures leading to their formulation, their endorsement by states, and the consequential call for their “implementation” are typical of norms.

We have seen in Chapter 2 that all laws, be they treaties, customs, judicial decisions or soft law, are norms. In order to determine whether the Protection Agenda is normative, we must find out whether it possesses the key criteria for normativity as outlined in the examined norm literature in Chapter 2. There is also the need to locate or situate it within the categories of laws as understood in international law. Sources of international law under article 38(1) of the *ICJ Statute* are international conventions or treaties, international customs, and general principles of law. These are technically referred to as the “law-making” sources, while judicial decisions as well as the teachings of the most highly qualified publicists are the “law-determining” sources. The Protection Agenda is not an international convention or treaty. Neither is it an international custom. Nor is it a judicial decision or teaching of commentators. This chapter argues that the Protection Agenda fits instead within the soft law framework of international law. No wonder it has been tagged a “policy document”.<sup>10</sup> Arguably, it could also fit within the “general principles of law” framework of article 38(1) of the *ICJ Statute* notwithstanding the fact that it is not labelled as “principles”. This is because, as we shall see below, the Protection Agenda

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<sup>9</sup> Interview with the Representative of Switzerland in Geneva on October 13, 2015 available on file with me [Interview with the Representative of Switzerland]; Interview with Professor Jane McAdam on December 6, 2015 available on file with me [Interview with Professor McAdam].

<sup>10</sup> Interview with Professor Kalin, *supra* note 8; Jane McAdam, “From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement” (2016) 39:4 UNSW Law Journal 1518 – 1546 [McAdam, From the Nansen Initiative to the Platform on Disaster Displacement].

incorporates and builds upon principles of human rights law, international humanitarian law, and refugee law.<sup>11</sup>

What determines whether an instrument or document is a soft law and hence a norm is not its title but its substantive contents and purpose. Furthermore, relying on the “teachings” of the late Judge of the International Court of Justice and former Professor of International Law at Harvard University, Richard Baxter, and other recent texts, this chapter argues that the varieties of international law in general and soft law in particular are infinite.<sup>12</sup> These include policies, recommendations, best practices, guidelines, code of conduct, and any other document that seeks to document in a soft form the “collective expectations for the proper behaviour of actors with a given identity.”<sup>13</sup> Thus, no matter the title or the unwieldy drafting style of these infinite varieties of international law, this chapter argues that they can be considered norms.

Even if we concede that the Protection Agenda is a “toolbox” as has been described,<sup>14</sup> I assert in this chapter that this is indeed what norms are – a toolbox for regulating the behaviour of states and other actors on a given issue or subject. To that extent, I argue that the Protection Agenda or some portions of it are normative. To put my analysis in the proper perspective and context, the starting point in this chapter will be to examine the contents of the Protection Agenda with a

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<sup>11</sup> The Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, Final Draft [The Protection Agenda] at Executive Summary, pg. III.

<sup>12</sup> Baxter, International Law in her ‘Infinite Variety’, *supra* note 1; Friedrich, *International Environmental “Soft Law”*, *supra* note 5.

<sup>13</sup> Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) at 5 [Katzenstein, *The Culture of National Security*].

<sup>14</sup> Interview with Professor Kalin, *supra* note 8; McAdam, From the Nansen Initiative to the Platform on Disaster Displacement, *supra* note 10.

view to determining its nature or character. I will then juxtapose the Protection Agenda with the body of scholarship on norms to determine whether it is normative. Bolstering its normative status, I will highlight some notable established norms or principles of international law which the Protection Agenda mirrors and argue that these parts of the Protection Agenda if not all of the Protection Agenda are normative. In order to balance the scale of the arguments in this chapter, I will be examining some possible opposing views. In other words, I will be examining some possible arguments that could be made against the normative status of the Protection Agenda. As expected, I will be taking a stand by arguing that the Protection Agenda or some parts of it are normative. The chapter also examines the Nansen Initiative and the Protection Agenda post-2015 highlighting the role and purpose of the Platform on Disaster Displacement. The chapter ends by adding its voice to the on-going global call for the implementation of the Protection Agenda. This is the only way for this new international protection norm to succeed as its non-implementation does not deny its existence but rather indicates its weakness.

## **5.2 The Protection Agenda**

The final outcome of the work of the Nansen Initiative is the Protection Agenda. This document embodies most of the findings and conclusions from the regional intergovernmental consultations and civil society meetings conducted by the Nansen Initiative in the Greater Horn of Africa, Central America, South-East Asia, South Asia, and in the Pacific between 2013 and 2015. The Protection Agenda also benefitted from a wide array of research on disaster displacement commissioned by the Nansen Initiative. The principal goal of the Protection

Agenda “is to enhance understanding, provide a conceptual framework, and identify effective practices for strengthening the protection of cross-border disaster-displaced persons”.<sup>15</sup>

The Protection Agenda, like other soft law instruments, is arguably a document of compromise when evaluated in the context of the lack of political will by states to negotiate a new binding international convention on cross-border disaster displacement.<sup>16</sup> Rather than creating new legal obligations for the already disinterested group of migrant-destination states, “the agenda supports an approach that focuses on the integration of effective practices by states and (sub-) regional organisations in accordance with states’ specific situations and challenges”.<sup>17</sup> “The Protection Agenda is situated in the context of increased international and regional recognition of the challenges of human mobility in the context of disasters and climate change, such as the Conference of the Parties to the UN Framework Convention on Climate Change, the Sendai Framework for Disaster Risk Reduction 2015 – 2030, the UN’s 2030 Agenda for Sustainable Development, and the World Humanitarian Summit”.<sup>18</sup>

The Protection Agenda is divided into three main parts. Part One contains recommendations and best practices for protecting cross-border disaster-displaced persons. This part is further subdivided into three parts with the first subpart dealing with “admission and stay of cross-border disaster-displaced persons” and the second subpart dealing with “non-return of foreigners abroad

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<sup>15</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement, online: <<https://www.nanseninitiative.org/global-consultations/>>.

<sup>16</sup> Armin Schäfer, “Resolving Deadlock: Why International Organisations Introduce Soft Law” (2006) 12:2 European Law Journal, 194 – 208.

<sup>17</sup> The Protection Agenda, *supra* note 11.

<sup>18</sup> *Ibid.*

at the time of a disaster”. The third subpart addresses “finding lasting solutions for cross-border disaster-displaced persons”. Part One contains several paragraphs with salient provisions for guaranteeing the recognition and protection of cross-border disaster-displaced persons. For example, paragraph 32 acknowledges the difficulties inherent in determining when a movement across an international border is forced or voluntary for the purpose of determining the status of the persons involved in such movement. However, paragraph 33 highlights factors which states could consider in determining who is or who is not a cross-border disaster-displaced person. One notable achievement of paragraph 33 is the creation of the status now known as “cross-border disaster-displaced person” as a substitute for the hitherto controversial descriptions such as “environmental refugee”, “climate refugee” or “climate change refugee”. Though not a “legal status” in the strict legal sense as the refugee legal status, it is a “term of art”<sup>19</sup> that will be useful not just to states in describing those arriving at their borders as a result of environmental disasters and climate change but also to scholars, NGOs, and the civil society in describing this category of displaced persons. This paragraph provides that:

Someone may be considered a cross-border disaster-displaced person where he/she is seriously and personally affected by the disaster, particularly because

- i. an on-going or, in rare cases, an imminent and foreseeable disaster in the country of origin poses a real risk to his/her life or safety;
- ii. as a direct result of the disaster, the person has been wounded, lost family members, and/or lost his/her (means of) livelihood; and/or
- iii. in the aftermath and as a direct result of the disaster, the person faces a real risk to his/her life or safety or very serious hardship in his/her country, in particular due to the fact that he/she cannot access needed humanitarian protection and assistance in that country,

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<sup>19</sup> Interview with Professor McAdam, *supra* note 9.

- a. because such protection and assistance is not available due to the fact that government capacity to respond is temporarily overwhelmed, and humanitarian access for international actors is not possible or seriously undermined, or
- b. because factual or legal obstacles makes it impossible for him/her to reach available protection and assistance.<sup>20</sup>

Part Two of the Protection Agenda focuses on “managing disaster displacement risk in the country of origin”. This Part is sub-divided into four parts. Subpart one addresses the reduction of “vulnerability and building resilience to displacement risk.”<sup>21</sup> Facilitation of migration with dignity,<sup>22</sup> and “planned relocation with respect for people’s rights”<sup>23</sup> are addressed in subparts two and three respectively while subpart four focuses on “addressing the needs of internally displaced persons in disaster contexts.”<sup>24</sup>

Part Three contains “priority areas for future action.” The goal of this part is the recommendation of effective practices that will lead to the overall implementation of the Agenda. Like Part Two, Part Three of the Agenda is sub-divided into four. Subpart one addresses the collection of data and enhancement of knowledge on cross-border disaster-displacement. This subpart laments the dearth of “comprehensive, reliable and timely global data on cross-border disaster-displacement” despite the efforts of “academic institutions, and non-governmental and international governmental organisations and agencies” on the issue.<sup>25</sup> Subpart two of part three of the Protection Agenda emphasises the use of humanitarian protection measures for those displaced

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<sup>20</sup> The Protection Agenda, *supra* note 11 at para. 33.

<sup>21</sup> *Ibid* at paras. 77 – 86.

<sup>22</sup> *Ibid* at paras. 87 – 93.

<sup>23</sup> *Ibid* at paras. 94 – 98.

across borders by climate change and environmental disasters.<sup>26</sup> Paragraph 114 identifies that while some states have local laws and policies which guarantee humanitarian assistance for cross-border disaster-displaced persons, most other states do not have this kind of arrangement. The paragraph recommends “improved accountability for protection and assistance” not only in states that do not have local laws and policies but also in those that do. Subpart three addresses “strengthening the management of disaster displacement risk in the country of origin”.<sup>27</sup> A closer look reveals that this subpart is not saying anything new as it predominantly re-echoes Part Two of the Protection Agenda.<sup>28</sup> To facilitate follow-up and implementation of the Protection Agenda, subpart four, which is captioned “Possible Next Steps” recommends the continuation of “a forum for dialogue among interested States to further discuss how best to protect cross-border disaster-displaced persons, and prevent disaster displacement, where possible”.<sup>29</sup> It also recommends “cooperation and coordination between international organisations and agencies, and other relevant actors, in order to ensure a comprehensive approach to cross-border disaster-displacement”.<sup>30</sup>

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<sup>24</sup> *Ibid* at paras. 99 – 105.

<sup>25</sup> *Ibid* at para. 112.

<sup>26</sup> *Ibid* at paras. 114 – 115.

<sup>27</sup> *Ibid* at paras. 116 – 124.

<sup>28</sup> Just like Part Two of the Agenda from paragraphs 76 – 105, this subpart addresses the following issues: (a) “integrating human mobility within disaster risk reduction and climate change adaptation strategies, and other relevant development processes”; (b) “facilitating migration with dignity as a potentially positive way to cope with the effects of natural hazards and climate change”; (c) “improving the use of planned relocation as a responsive measure to disaster risk and displacement”; and (d) “ensuring that the needs of IDPs displaced in disaster situations are addressed by relevant laws and policies”.

<sup>29</sup> The Protection Agenda, *supra* note 11 at para. 125(i).

<sup>30</sup> *Ibid* at para. 125(ii).

The Protection Agenda rests on three core pillars. The first is the “standards for the treatment of people displaced across borders regarding admission, stay, status, and transition to solutions”.<sup>31</sup> In other words, the Agenda not only proposes rules and best practices for addressing the protection needs of those displaced across borders by environmental and climate changes but also formulates a “status” or an identity for these persons. The second key pillar upon which the Agenda rests is on “international cooperation and solidarity between States and with the international community before, during, and after a natural disaster”.<sup>32</sup> It is fascinating to see the Nansen Initiative drawing heavily upon the age-long duty of States to cooperate with one another as enshrined in the *Charter of the United Nations*<sup>33</sup> as well as on the international refugee law principles of solidarity, burden-sharing and good neighbourliness in advocating for the protection of cross-border disaster-displaced persons. The third core pillar of the Protection Agenda focuses principally on the “operational responses, including in the areas of preparedness, cross-border assistance, solutions, and the respective roles of relevant disaster management, humanitarian, development, and climate change actors”.<sup>34</sup>

Regarding style and structure, the Protection Agenda was drafted in clear language devoid of legalese and with aspirational tone. The structure of the Agenda is also simple. It contains an executive summary, an introduction, the three main parts which have been briefly discussed above, and annexes. For fuller details and understanding of the Protection Agenda, refer to the Protection Agenda in the Appendices to the dissertation.

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<sup>31</sup> The Nansen Initiative, Towards a Protection Agenda for Disaster-Induced Cross-Border Displacement, Information Note, 25 April 2013 [The Nansen Initiative, Information Note] at 5.

<sup>32</sup> *Ibid.*

<sup>33</sup> 26 June 1945, 1 U.N.T.S XVI (entered into force 24 October 1945) at art. 1(3) [*UN Charter*].

### 5.3 Is the Protection Agenda Normative?

It was Finnemore and Sikkink who asked the question: “how do we know a norm when we see one?”<sup>35</sup> Lying at the core of this question is the admission of the complex character of a norm requiring the enunciation of guideposts or attributes for unpacking its existence. Here, I compare and, if necessary, contrast the Protection Agenda with some leading works on the meaning of norms. The goal is to determine the extent to which the Agenda satisfies the key ingredients or attributes running through some selected definitions of norms as a basis for determining its normative status.

Running through all of the definitions of norms canvassed in Chapter 2 are four basic criteria for determining what constitutes a norm. In no particular order, the first is that a norm sets standards of behaviour. This means that norms are not only regulatory but obligatory, and the obligations flowing from norms could be hard or soft. Secondly, the literature reveals that norms may create or establish an identity. Norms may define not just the right holder but also the obligation holder. Thirdly, norms radiate a general quality of “oughtness” because they are inherently evaluative. And lastly, a norm must be generally shared and accepted by the group or community to which it is addressed. While inter-subjectivity connotes the “sharedness” of a norm, its “acceptedness” is technically known as legitimacy. Legitimacy of a norm is often demonstrated by states and other actors by way of endorsement, adoption, or ratification of the instrument or document

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<sup>34</sup> The Nansen Initiative, Information Note, *supra* note 31 at 5.

<sup>35</sup> Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 *International Organization* 887 – 917 [Finnemore & Sikkink, *International Norm Dynamics and Political Change*] at 892.

embodying the norm. Each of these criteria will now be tested with the Protection Agenda so as to verify its normative status.

A scrutiny of the Protection Agenda shows that it is a document which embodies standards of behaviour by states not just on the protection of cross-border disaster-displaced persons but also on managing disaster displacement risks in the country of origin. It defines rights and obligations making it fall squarely within the definition offered by Keohane and Kratochwil at which they defined norms as “standards of behaviour defined in terms of rights and obligations”.<sup>36</sup> Philpott defines norms as “rules viewed as obligatory by the broad majority of people living under them”.<sup>37</sup> Undoubtedly, the Protection Agenda contains some salient, albeit soft obligations for states and other actors towards cross-border disaster displaced persons. In turn, it also contains some identifiable rights of cross-border disaster displaced persons before, during and after an environmental event. Some of these rights and obligations are adaptations from the existing human rights, refugee law and international law principles.

Most norms are regulatory in that they prescribe and proscribe certain behaviours of states and other actors.<sup>38</sup> Here, the definition of norms offered by Mearsheimer is instructive: “a set of rules that stipulate the ways States should cooperate and compete with each other. They prescribe

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<sup>36</sup> Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, N.J: Princeton University Press, 1984) at 57; Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (New York: Cambridge University Press, 1989) at 59.

<sup>37</sup> Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton, NJ: Princeton University Press, 2010) at 21.

<sup>38</sup> Katzenstein, *The Culture of National Security*, *supra* note 13; Friedrich Kratochwil, “The Force of Prescription” (1984) 38:4 *International Organisation* 685 – 708.

acceptable terms of State behaviour, and proscribe unacceptable kinds of behaviour”.<sup>39</sup> The Protection Agenda aims to regulate the behaviour of states on cross-border disaster displacement. The Protection Agenda contains both prescriptive and proscriptive provisions. It generally spells out how states and other actors will protect cross-border disaster-displaced persons, management of disaster displacement risk in the country of origin, and recommendations for future actions on priority areas.<sup>40</sup> By seeking to achieve these purposes, the Protection Agenda fulfils the actual purpose of international law – governing or regulating international relations.

Another major attribute of a norm is the constitution of identity. Katzenstein in his description of norms argues that “in some situations, norms operate like rules that define the identity of an actor, thus, having ‘constitutive effects’ that specify what actions will cause relevant others to *recognise a particular identity*.”<sup>41</sup> Katzenstein was arguably referring to international norms that not only prescribe rights and obligations but also create an identity or status for those who should benefit from the regulated behaviour of states and other actors. Status determination is highly significant under domestic, regional, and international law because it defines the rights and obligations of the subject of a norm.<sup>42</sup> As further evidence that the Protection Agenda meets the constitutive element of a norm as theorised by Katzenstein, and hence normative, paragraph 33 not only creates “cross-border disaster-displaced person” as a status or identity but also offers

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<sup>39</sup> John J. Mearsheimer, “The False Promise of International Institutions” (1994-5) 19:3 *International Security* 5 – 49 at 8.

<sup>40</sup> The Protection Agenda, *supra* note 11.

<sup>41</sup> Katzenstein, *The Culture of National Security*, *supra* note 13. Emphasis mine.

<sup>42</sup> Anna Schmidt, “Status Determination and Recognition” in Alexander Betts & Phil Orchard, eds., *Implementation and World Politics: How International Norms Change Practice* (New York: Oxford University Press, 2014); Sarah Marsden, *Law’s Permissions, Law’s Exclusions: Precarious Migration Status in Canada* (Ph.D Dissertation, University of British Columbia, Vancouver, 2013) [unpublished].

useful insights as to who may qualify and how states may identify them.<sup>43</sup> Like the *1951 Refugee Convention*, the Protection Agenda justifies the non-admission by states of cross-border disaster-displaced persons who are engaged in criminal activities or who pose national security risks.<sup>44</sup> Arguably, a criminal conviction evidences a criminal activity, and in that sense, the *1951 Refugee Convention* and the Protection Agenda have a similar exception to the *non-refoulement* rule.

Two other attributes of norms are worth noting. The first is that whatever must be taken as a norm must have a quality of “oughtness”.<sup>45</sup> In the opinion of Finnemore and Sikkink, it is the “quality of oughtness that sets norms apart from the other kinds of rules”.<sup>46</sup> Similarly, Florini views the quality of oughtness as “the essence of the distinctiveness of a norm”.<sup>47</sup> The second attribute is that whatever purports to be a norm must be shared or accepted by a particular group.<sup>48</sup> Florini equates this attribute to legitimacy and argues that this is the most important attribute of a norm: “the most important characteristic of a norm is that it is considered a

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<sup>43</sup> The Protection Agenda, *supra* note 11 at para. 33.

<sup>44</sup> *Ibid.*

<sup>45</sup> Ann Florini, “The Evolution of International Norms” (1996) 40 *International Studies Quarterly* 363 – 389 [Florini, *The Evolution of International Norms*]; Finnemore & Sikkink, *International Norm Dynamics and Political Change*, *supra* note 35.

<sup>46</sup> Finnemore & Sikkink, *International Norm Dynamics and Political Change*, *ibid* at 891.

<sup>47</sup> Florini, *The Evolution of International Norms*, *supra* note 45 at 364.

<sup>48</sup> Brennan, Eriksson, Goodin & Southwood, *Explaining Norms*, *supra* note 2; Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (New York: Oxford University Press, 2007) [Percy, *Mercenaries*]; Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca: Cornell University Press, 1995); Jutta Brunnee & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010); Florini, *The Evolution of International Norms*, *supra* note 45; Finnemore & Sikkink, *International Norm Dynamics and Political Change*, *supra* note 35.

legitimate behavioural claim. No matter how a norm arises, it must take on an aura of legitimacy before it can be considered a norm.”<sup>49</sup>

The Nansen Initiative through its work found out that though cross-border disaster displacement was an issue, some countries around the world already accepted this challenge and had devised a way to surmount it. The Initiative found out “that at least fifty-three countries have received and/or did not return foreigners in various types of disaster situations.”<sup>50</sup> Part of the work of the Initiative was to study the processes and practices deployed by these countries and documenting them in the form of the Protection Agenda. Thus, the Protection Agenda contains best practices and standards by which states *ought* to behave on matters concerning cross-border disaster displacement. The Agenda, among other recommendations, is simply urging states to discard the idea of sending cross-border disaster-displaced persons back to danger and instead to recognise, admit, and protect them. This and many other provisions underscores the quality of *oughtness* of the Protection Agenda giving credence to its normative status.

One attribute that further confirms the normative status of the Protection Agenda is its acceptance by states. It is on record that some 109 countries endorsed the Protection Agenda at a global conference held in Geneva in October 2015.<sup>51</sup> During the formal presentation and endorsement in Geneva, states took the decision whether or not to endorse the Protection Agenda

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<sup>49</sup> Florini, *The Evolution of International Norms*, *ibid* at 364 – 365.

<sup>50</sup> The Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Fleeing Floods, Earthquakes, Droughts and Rising Sea Levels: 12 Lessons Learned About Protecting People Displaced by Disasters and the Effects of Climate Change* (Wabern: Ast & Fischer, 2015) at 20.

<sup>51</sup> The Nansen Initiative, *The Nansen Initiative Global Consultation, Conference Report*, Geneva, 12 – 13 October, 2015 [The Nansen Initiative Global Consultation Conference Report 2015].

seriously. Ordinarily, there was no need for on-the-spot endorsement as states preferences and disposition to the Agenda could be gleaned by their respective subsequent practices regarding cross-border disaster-displacement. Nor was there a need for states to file out one after the other to approve or disapprove the Agenda as they did. To underscore the seriousness of the exercise, some state representatives declined to endorse the Agenda on-the-spot because they were awaiting instructions from the government of their countries.<sup>52</sup> In particular, Russia dissociated itself from the Protection Agenda by refusing to endorse it.<sup>53</sup> Part of the reasons given for this denunciation was that “there is a number of mechanisms already in place to deal with this phenomenon and a number of existing international fora to discuss the ways and means of cooperation in this regard.”<sup>54</sup> The essence of Russia’s refusal to endorse the Protection Agenda buttresses the fact that those states that endorsed it could be bound by it. All this may become matters for appraisal in the future when determining the extent to which states expect to be bound by the Protection Agenda.

States’ endorsement of the Protection Agenda inevitably led to the call for its implementation. Because norms prescribe standards of behaviour, they are implementable. Almost all the speakers during the public presentation of the Protection Agenda in Geneva admonished states and other relevant actors to implement it.<sup>55</sup> For example, the Envoy of the Chairmanship,

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<sup>52</sup> These States are Algeria, Jordan, and Rwanda. See The Nansen Initiative, The Nansen Initiative Global Consultation, 12 – 13 October 2015, Official Delegations (Provisional List).

<sup>53</sup> *Ibid.*

<sup>54</sup> Ms. Anastasia Bagdatieva, “Statement of the Russian Federation During the Nansen Initiative Global Consultation”, Nansen Initiative Global Consultation, 13 October 2015, Geneva, Switzerland (available on file with me).

<sup>55</sup> See Government of Switzerland, “The Strength of a People is Measured by the Well-Being of its Weakest Members: For A Better Protection of Those Displaced by Natural Disaster”, Opening Address by His Excellency, Mr. Didier Burkhalter, Federal Councillor and Head of the Federal Department of Foreign Affairs, Government of

Professor Walter Kalin stated that “with the potential negative impacts of climate change looming before us, there is no better time than now to act on the wealth of experiences and practices set out in the Protection Agenda.”<sup>56</sup> The Federal Councillor and Head of the Department of Foreign Affairs of Switzerland, Mr. Didier Burkhalter, in his Opening Address during the presentation of the Protection Agenda “encouraged committed countries to take up leadership as regional champions in order to make use of the findings of the Nansen Initiative and implement the Protection Agenda in accordance with their regional realities.”<sup>57</sup>

One striking decision by states in formulating the Protection Agenda was to make it non-binding. While the nature and influence of soft law are discussed later in this chapter, a number of reasons might explain why states decided to opt for the soft legal framework as a preliminary solution to the plights of cross-border disaster-displaced persons. There is no denying the fact that the formulation and endorsement of the Protection Agenda by states is not the end in itself but a significant beginning of efforts by states towards what may become a harder set of obligations for the protection of cross-border disaster-displaced persons. Duncan and Snidal have argued that “soft law is sometimes designed as a way station to harder legalization, but often it is preferable

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Switzerland, Nansen Initiative Global Consultation, 12 October 2015, Geneva, Switzerland [Opening Address by H.E., Mr. Didier Burkhalter]; Closing Address by His Excellency, Mr. Morten Høglund, State Secretary, Ministry of Foreign Affairs, Government of Norway, at the Global Consultation of the Nansen Initiative, Geneva, Switzerland, 12 October 2015; Keynote Address by His Excellency Mr. William Lacy Swing, Director-General, International Organization for Migration (IOM), at the Global Consultation of the Nansen Initiative, Geneva, Switzerland, 12 October 2015; Walter Kalin, Message from Prof. Walter Kaelin – Envoy of the Chairmanship at the Nansen Initiative Global Consultation, Geneva, Switzerland, 12 October 2015 [Walter Kalin, Message from Prof. Walter Kaelin].

<sup>56</sup> Walter Kalin, Message from Prof. Walter Kaelin, *ibid.*

<sup>57</sup> Opening Address by H.E., Mr. Didier Burkhalter, *supra* note 55.

on its own terms.”<sup>58</sup> These authors identified further reasons why states may prefer “softer legalization” to a treaty-based solution to an issue of international concern. These include the simplicity of procedure and formulation,<sup>59</sup> the possibility of a learning process and discourse for states and other actors,<sup>60</sup> and the facilitation of compromise between actors with different interests and values.<sup>61</sup>

The initial question put forward by Finnemore and Sikkink on how to recognise a norm did not go without an answer. In one breadth, they seemed to argue that a norm embodies “shared moral assessment” and “a quality of oughtness” – whatever possesses these qualities is a norm.<sup>62</sup> On the other breadth, they admitted that there are no direct answers to the question as “we can only have indirect evidence of norms just as we can only have indirect evidence of most other motivations for political action (interests or threats, for example).”<sup>63</sup> Thus, this creates a scenario of the well-known elephant test which in the words of Lord Justice Stuart-Smith, “it is difficult to describe, but you know it when you see it”.<sup>64</sup> I believe that the Protection Agenda is a “shared moral assessment” by states on cross-border disaster-displacement and that this document

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<sup>58</sup> Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance” (2000) 54:3 International Organization 421 – 456 [Abbott and Snidal, Hard and Soft Law in International Governance].

<sup>59</sup> The conception and drafting of the Protection Agenda did not involve lengthy and costly negotiations that are typical for treaties.

<sup>60</sup> The establishment of the Platform on Disaster Displacement (PDD) as a post-Nansen process will certainly facilitate these. The PDD creates a platform for states and other actors to engage in discourses and activities that will lead to a better understanding of cross-border disaster displacement and thereby foster a more adequate and effective protection framework for cross-border disaster-displaced persons. For a brief description of the mandate and work of the PDD, see Chapter 6.

<sup>61</sup> Abbott and Snidal, Hard and Soft Law in International Governance, *supra* note 58.

<sup>62</sup> Finnemore & Sikkink, International Norm Dynamics and Political Change, *supra* note 35 at 892.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Cadogan Estates Ltd. v. Morris*, EWCA Civ. 1671 (4 November 1998) at para. 17. See also A.O. Headman, “Is Our Promissory Note A Security?” (22 November 2012) online: < <http://www.cohnekinghorn.com/Is-Our-Promissory-Note-A-Security>> where the author uses the abductive reasoning “if it looks like a rose, if it smells like a rose or if it tastes like a rose, it is probably a rose”.

contains an overall sense of “oughtness”. Combined with the other attributes of norms already discussed above such as creating standards of behaviour and constitution of identities, the normative status of the Protection Agenda is beyond doubt.

### 5.3.1 Reflection of Existing Norms

International human rights, refugee, and humanitarian law are the foundation upon which the Protection Agenda was developed.<sup>65</sup> Thus, it is not surprising to see a reflection of some principles of human rights, refugee, and humanitarian law in many of its provisions. Some of these principles are the principle of humanity, the principle of human dignity, the *non-refoulement* principle, and the responsibility to protect. The Agenda also embodies the general international law duty of states to cooperate as enshrined under the *UN Charter*.<sup>66</sup> The argument here is not to say that the restatement of these norms in the Protection Agenda makes it a binding legal document as has been argued for a similar soft law document.<sup>67</sup> Rather the argument is that their restatement in the Protection Agenda is a further evidence of its normative character.

While commenting on the significance of a soft law which reflects existing or emerging international law norms, Mauro Barelli argues, within the context of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), that some factors should be considered. These factors are the strong relationship between the soft law and existing hard law, the potential of the soft law to influence the creation of a future international treaty on the subject

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<sup>65</sup> The Protection Agenda, *supra* note 11 at Executive Summary at pg. III.

<sup>66</sup> *UN Charter*, *supra* note 33 at art. 56.

which it covers, and the ability of the soft law to have significant effects on the formation of customary international law.<sup>68</sup> While a discussion of the last two factors in relation to the Protection Agenda is premature at this time, an examination of the first factor is in order. This is what this section seeks to achieve. It should be noted that some of the existing international law principles and norms reflected in the Protection Agenda and which will be examined below were suggested by McAdam as the overarching framework upon which a global “guiding principles” for the protection of cross-border disaster-displaced persons such as the Protection Agenda must rest.<sup>69</sup> Some others have been suggested by other notable commentators.<sup>70</sup>

### **5.3.1.1 *The Principle of Humanity***

After appointing Mr. Eduardo Valencia-Ospina as Special Rapporteur, the International Law Commission (ILC) in 2007 commenced work on the Draft Articles on the Protection of Persons in the Event of Disasters. Article 6 of this work provides that "response to disaster shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable."<sup>71</sup> The 2010 report of the ILC has characterized the principles of humanity, neutrality and impartiality

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<sup>67</sup> Oscar M. Garibaldi, “The Legal Status of General Assembly Resolutions: Some Conceptual Observations” (1979) 73 Proceedings of the Annual Meeting (American Society of International Law) 324 – 327 [Garibaldi, *The Legal Status of General Assembly Resolutions*].

<sup>68</sup> Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58:4 *International and Comparative Law Quarterly*, 957 – 983.

<sup>69</sup> These are the principle of humanity, the principle of human dignity, and the duty of States to cooperate with one another. See Jane McAdam, “Climate Change Displacement and International Law: Complementary Protection Standards” in *Legal and Protection Policy Research Series* (Geneva: UNHCR, 2011); Jane McAdam, *Climate Change, Forced Migration, and International Law* (New York: Oxford University Press, 2012) [McAdam, *Climate Change, Forced Migration, and International Law*].

<sup>70</sup> Erika Feller, “The Responsibility to Protect: Closing the Gaps in International Protection Regime” in Jane McAdam, ed., *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008) 283-293.

as important safeguards for the relationship between relevant actors, while also guaranteeing that the needs of affected persons were given priority.<sup>72</sup> In the report of the ILC, there were debates as to whether these principles were principles of international law or principles for the International Red Cross Movement. On the principle of humanity, the view was expressed in its favour that it "was the cornerstone for the protection of persons in international law since it placed the affected persons at the centre of the relief process and recognized the importance of his or her rights and needs."<sup>73</sup>

That the principle of humanity is well-rooted in international law is not in doubt. In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>74</sup> the International Court of Justice (ICJ) made reference to and approved its earlier Opinion on the *Legality of the Threat or Use of Nuclear Weapons*<sup>75</sup> whereat the court had stated that "a great many rules of humanitarian law are so fundamental to the respect of the human person and elementary considerations of humanity that they are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."<sup>76</sup> It was further the court's view that

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<sup>71</sup> ILC, Sixty-Second Session, *Draft Articles on the Protection of Persons in the event of Disasters* (3 May-4 June and 5 July-6 August 2010) UN Doc. A/CN.4/L.776 [*ILC Draft Articles*].

<sup>72</sup> ILC, *Report on the Work of its Sixty-Second Session* (3 May-4 June and 5 July-6 August 2010), UN Doc. A/65/10 at para. 309 [*ILC Report*].

<sup>73</sup> *Ibid* at para. 310.

<sup>74</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 157 [*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*].

<sup>75</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 79.

<sup>76</sup> See also *Corfu Channel Case (United Kingdom v. Albania)*, [1949] I.C.J. Rep. 4 at 22; *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)* [1970] I.C.J. Rep. 3 at para. 34.

"these rules incorporate obligations which are essentially of an *erga omnes* character."<sup>77</sup> While linking articles 98 and 18(2) of the *United Nations Convention on the Law of the Sea*<sup>78</sup> to the principle of humanity, McAdam is of the view that "the duty to render assistance in cases of distress or *force majeure* is based on the elementary considerations of humanity."<sup>79</sup>

The Nansen Initiative undoubtedly keyed into this principle, and the Protection Agenda certainly reflects it. Provisions dealing with the principles of humanity are sprinkled in the Protection Agenda. It foreshadows the sections of the Agenda dealing with the humanitarian protection mechanisms for the admission and stay of cross-border disaster-displaced persons in paragraphs 46 – 57. Notably, paragraph 47 makes far-reaching recommendation to states for enhancing the humanitarian protection of cross-border disaster-displaced persons. Among other recommendations, states are required to issue humanitarian visas or suspend visa requirements for cross-border disaster-displaced persons where necessary. In particular, paragraphs 48, 49, 50, 54 and 55 further identify tools by which states could give effect to the principle of humanity. Under paragraph 48 which deals with regular migration pathway, the Agenda recommends that states should expedite the processing of immigration applications for cross-border disaster-displaced persons, waive certain requirements or application fees, and apply "humanitarian and compassionate" considerations in processing immigration applications. In addition, states are to grant "a visa waiver for non-national residents to sponsor relatives from disaster-affected countries. States are also expected to "expand the use of pre-existing work quotas to target people from disaster-affected areas." Paragraph 49 recommends the free movement of persons

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<sup>77</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 74.

based on some pre-existing regional or bilateral agreements on the free movement of persons while paragraph 50 recommends the admission of cross-border disaster-displaced persons through the granting of temporary entry and stay. Paragraph 54 notes and recommends bilateral and multilateral agreements which could facilitate the movement of pastoralists “to access water and grazing lands for the survival of their livestock” in times of drought and environmental stress. Paragraph 55 recommends the grant of refugee status and other applicable human rights protection in deserving cases to cross-border disaster-displaced persons.

Under Part Three of the Protection Agenda which focuses on the priority areas for future actions, paragraph 107(2) provides for the enhancement of the use of humanitarian protection measures for cross-border disaster-displaced persons. Details of these measures are stated in paragraphs 114 – 115. These include the need for states to review their existing domestic immigration laws and policies to ascertain the extent to which these laws and policies may protect cross-border disaster-displaced persons. There is also the need for states to “explore the need to harmonize approaches to admission, stay and non-return of cross-border disaster-displaced persons at (sub-)regional levels”, and to develop and harmonize their existing disaster risk management and humanitarian response mechanism for the benefit of cross-border disaster-displaced persons. States are further expected to “establish mechanisms in support of governments at the UN Country Team or Humanitarian Country Team level to determine the respective roles and responsibilities of international organizations and agencies to address the protection and assistance needs of cross-border disaster-displaced persons in the receiving country.”

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<sup>78</sup> 10 December 1982, 1833 U.N.T.S 396 (entered into force 16 November 1994) [*UN Law of the Sea*].

### 5.3.1.2 *The Principle of Human Dignity*

George Kateb once noted that “the core idea of human dignity is that on earth, humanity is the greatest type of beings.”<sup>80</sup> The *UN Charter* highlights human dignity – the second paragraph of its preamble reaffirms faith *inter alia*, in fundamental human rights and in the dignity and worth of the human person.<sup>81</sup> The first paragraph of the preamble to the UDHR as well as its first article contains references to human dignity.<sup>82</sup> Virtually all known regional and international human rights instruments contain distinct provisions which emphasize the dignity of the human person. Thus, human dignity has been described as the basis for the whole theory of human rights.<sup>83</sup> Article 7 of the *ILC Draft Articles* embodies a provision which enjoins states, intergovernmental organizations, and NGOs to respect and protect the inherent dignity of the human person when responding to disasters.<sup>84</sup>

In elaborating on this provision, the ILC report says that human dignity was a source of human rights and not a right *per se* which entails obligations. This view by the ILC seems to be misconceived. All human rights come with duties and obligations, and a right becomes “artificial to the point of flippancy” where it does not come with corresponding obligation(s).<sup>85</sup> Again, there seems to be no support for the assertion that human dignity is not a right. As noted earlier,

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<sup>79</sup> McAdam, *Climate Change, Forced Migration, and International Law*, *supra* note 69 at 262.

<sup>80</sup> George Kateb, *Human Dignity* (Cambridge, MA: Harvard University Press, 2011) 3 [Kateb, *Human Dignity*].

<sup>81</sup> *UN Charter*, *supra* note 33 at Preamble.

<sup>82</sup> *Universal Declaration of Human Rights*, GA Res 217A(III) (1948), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [*UDHR*] at Preamble & art. 1.

<sup>83</sup> Izabela Bratiloveanu, "Human Dignity in International Law: Issues and Challenges" (2012) 7:1 EIRP Proceedings 154; Kateb, *Human Dignity*, *supra* note 80.

<sup>84</sup> *ILC Draft Articles*, *supra* note 71 at art. 7.

almost all human rights instruments are replete with provisions on human dignity.<sup>86</sup> The courts have also upheld the sanctity of the dignity of the human person.<sup>87</sup> On the people moving due to environmental events, therefore, it is arguable that any condition, occasioned by environmental events, which makes habitation or livelihood impossible for an individual is an affront to human dignity which international law must address.

Paragraphs 71, 87 – 93, and 95 of the Protection Agenda not only “codify” but also refine this foundational principle of human rights. Paragraph 71 for example emphasises the need for states to cooperate not only with themselves but also with international organisations “to ensure that returnees are received with respect for their safety, dignity, and human rights.” Indeed, a whole subsection was created in the Protection Agenda for the “facilitation of migration with dignity in the context of natural hazards and climate change”<sup>88</sup> while highlighting steps that states could take to ensure “planned relocation with respect for people’s rights.”<sup>89</sup> Paragraphs 88 and 120 each set out lists of effective practices that states could adopt to protect the dignity of cross-

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<sup>85</sup> Hersch Lauterpacht, “The Universal Declaration of Human Rights” (1948) 25 B.Y.I.L. 354 – 381 at 374; Paul Weis, “Draft United Nations Convention on Territorial Asylum” (1980) 50:1 B.Y.I.L. 151 – 171 at 151.

<sup>86</sup> See for example, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, arts. 6 & 7, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR] at Preamble; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 ILM 368 (entered into force 3<sup>rd</sup> January 1976) [ICESCR] at Preamble; *Charter of Fundamental Rights of the European Union*, [2010] OJ C83/389 at Preamble; *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123 (entered into force 18th July 1978) at Preamble, arts. 5, 6, & 11; *African Charter on Human and Peoples’ Rights*, 17 June 1981, 21 ILM 58 (entered into force 21st October 1986) at art. 5; *Arab Charter on Human Rights*, 22 May 2004, (entered into force 15th March 2008) at Preambles & arts. 2, 3, 17, 20, 33, & 40.

<sup>87</sup> See for example, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] I.C.J. Rep. 3 at *para.* 25 where it was held that: “...dignity has no price. It is one of those intangible assets, on which it is impossible to put a price in money terms. When a person, whether legal or natural, gives up his dignity, he loses the essence of his natural or legal personality.”; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment 687-688 (September 2 1998).

<sup>88</sup> Protection Agenda, *supra* note 11 at paras. 87 – 93.

<sup>89</sup> *Ibid* at 95.

border disaster-displaced persons. The practices include but are not limited to the revision of the existing bilateral and regional agreements on migration, simplification of travel and customs documents and processes, and the provision of educational training for competitive employment purposes to cross-border disaster-displaced persons. The provision of “cultural orientation and other pre-departure training” for documented cross-border disaster-displaced persons, and the reduction of the costs of remittances from their host country are some of the expectations flowing from the principle of human dignity in the context of the Protection Agenda.

The Protection Agenda emphasizes one of the reasons why the principle of human dignity is important to cross-border disaster-displaced persons. Paragraph 91 indicates that disaster displacement “exacerbates the negative circumstances of impoverished, unskilled, or otherwise vulnerable individuals and families by placing them in a more precarious situation than if they had stayed in their place of origin. To avoid this situation, paragraph 107(3)(b) reiterates the facilitation of “migration with dignity as a potentially positive way to cope with the effects of natural hazards and climate change”.

### ***5.3.1.3 The Duty to Cooperate***

Article 55 of the *UN Charter* aims for the actualization of some purposes “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>90</sup> Article 56 thereof reaffirms the commitments of UN Member States “to take joint

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<sup>90</sup> *UN Charter*, *supra* note 33 at art. 55.

and separate action in *cooperation* with the Organization for the achievement of these purposes.”<sup>91</sup> Cooperation among the UN Member States is one of the fundamental objectives upon which the UN was founded. In highlighting the purposes and principles of the United Nations, article 1(3) of the *UN Charter* states that one of the purposes and principles of the United Nations is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." The fourth principle in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*<sup>92</sup> also *inter alia*, places a duty on states to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

While none of the above provisions makes reference to international co-operation in terms of refugee or environmental disasters occasioning displacement, the UN Committee on Economic, Social and Cultural Rights in *General Comment No. 14* says that:

States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.<sup>93</sup>

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<sup>91</sup> *Ibid* at art. 56.

<sup>92</sup> UNGA Res. 2625 (XXV), 24 October 1970, UN Doc. A/8028.

<sup>93</sup> Committee on Economic, Social and Cultural Rights, *General Comment 14*, U.N. Doc. E/C.12/2000/4 at *para.* 40 (2000).

Agnes Hurwitz has advocated for the scope and contents of states' duty to cooperate as it relates to refugee problems.<sup>94</sup> She says that the international refugee law “principles of solidarity and burden-sharing and the principle of good neighbourliness are derived from the duty to cooperate.”<sup>95</sup> She explains that the principle of solidarity was connected with the emergence of new independent states in the 1960s “and was presented as a subset of the ‘new principle of global equity whereby those nations that have the necessary means are expected to assist those that do not.’”<sup>96</sup> The principle of good neighbourliness, which is closely related to it, enjoins states to respect their international law obligations to one another. As noted by Hurwitz, “the multiplication of relations between states has led to the broadening of the concept, which now also encompasses many forms of international cooperation between states, even if they are not neighbours.”<sup>97</sup>

The relevance of the combined effect of these principles which make up the international law duty of states to cooperate with one another to the people moving due to environmental events and other forms of displacement has been affirmed by the United Nations General Assembly.<sup>98</sup> The United Nations High Commissioner for Refugees Expert Meeting in 2011 has also emphasised that cooperative arrangements can address “initial displacement or emergency response” by giving temporary protection or *prima facie* refugee status to the people displaced.<sup>99</sup>

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<sup>94</sup> Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009).

<sup>95</sup> *Ibid* at 138.

<sup>96</sup> *Ibid* at 139.

<sup>97</sup> *Ibid* at 168.

<sup>98</sup> UNGA, Res. 65/264, 28 January 2011.

<sup>99</sup> UN High Commissioner for Refugee, "International Cooperation to Share Burden and Responsibilities", June 2011 at 14.

The Nansen Initiative throughout its work also emphasised the importance of solidarity and cooperation by states to the protection of cross-border disaster-displaced persons.<sup>100</sup> One of the three core pillars of the Protection Agenda is the “international cooperation and solidarity between states and with the international community before (preparedness), during (admission, temporary protection), and after (durable solutions) a natural disaster.”<sup>101</sup> With regard to preparedness, the Protection Agenda warns that the impact of climate change and disaster on human mobility “call for increased preparedness, solidarity and cooperation by states, (sub-)regional organizations and the international community to prevent, avoid, and respond to disaster displacement and its causes.”<sup>102</sup> This is because disaster displacement has the potential to affect every state “either as a country of destination, transit or origin.”<sup>103</sup>

The Protection Agenda stresses the importance of not just cooperation among interested states on how best to protect cross-border disaster-displaced persons but also among international organizations and agencies on this issue.<sup>104</sup> States may also cooperate regionally to harmonize humanitarian measures to bridge the gap in the law and policy for the recognition and protection of cross-border disaster-displaced persons.<sup>105</sup> To ensure lasting solutions to the concerns of cross-border disaster-displaced persons, paragraph 71 of the Protection Agenda identifies states’ duty to cooperate with one another as a precondition for guaranteeing the safety and human rights of cross-border disaster-displaced persons. The Protection Agenda also identifies states’

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<sup>100</sup> The Protection Agenda, *supra* note 11 at pg. I, para. 24.

<sup>101</sup> The Nansen Initiative, Information Note, *supra* note 31 at 5.

<sup>102</sup> The Protection Agenda, *supra* note 11 at pg. I – II, paras. 7 & 8.

<sup>103</sup> *Ibid* at pg. II.

<sup>104</sup> *Ibid* at pg. VI, & para. 41.

<sup>105</sup> The Protection Agenda, *supra* note 11 at para. 59.

obligation not to return cross-border disaster-displaced persons back to countries or areas affected by disasters as a measure of cooperation with the country of origin of the cross-border disaster-displaced persons.<sup>106</sup>

Noting that “facilitating migration with dignity requires cooperation with destination countries,”<sup>107</sup> the Protection Agenda recognizes “the 2030 Agenda for Sustainable Development which contains a commitment to cooperate internationally to ensure the humane treatment of displaced persons, and to build the resilience of those in vulnerable situations to climate-related extreme events and other disasters.”<sup>108</sup> At the regional level, the Protection Agenda notes that regional cooperation could lead not only to the harmonization of legal provisions and policies addressing cross-border disaster-disaster-displacement<sup>109</sup> but also to the return and sustainable reintegration of cross-border disaster-displaced persons.<sup>110</sup> Transboundary cooperation is also expected from States “to address displacement risks in areas with common eco-systems such as river basins or coastlines.”<sup>111</sup>

#### **5.3.1.4 Non-Refoulement**

The principle of *non-refoulement* generally forbids returning a person to any country where his or her life is threatened. Plender defines *refoulement* as: "an administrative act, regulated as to its exercise by rules of international law, whereby the authorities appointed by a state refuse to

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<sup>106</sup> *Ibid* at paragraph 68.

<sup>107</sup> *Ibid* at paragraph 76.

<sup>108</sup> *Ibid* at paragraph 83.

<sup>109</sup> *Ibid* at paragraph 114.

<sup>110</sup> *Ibid* at paragraph 115(iv).

<sup>111</sup> *Ibid* at paragraph 81.

admit a particular person to the state's territory, and thereupon return him to the country whence he came."<sup>112</sup> Goodwin-Gill and McAdam in explaining the evolution of *non-refoulement* in the context of immigration control in continental Europe argued that “*refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission to those without valid papers.”<sup>113</sup> The 1933 *Convention relating to the International Status of Refugee*<sup>114</sup> was the first international refugee instrument to make reference to the *non-refoulement* principle, and the United Nations confirmed its support for the principle following World War II in 1946.<sup>115</sup> This principle is now contained in article 33 of the *1951 Refugee Convention* with the exception that an individual who is regarded as a security threat to his or her host country cannot enjoy the protection offered by the *non-refoulement* principle.<sup>116</sup> As a general rule, recognition as a refugee under the *1951 Refugee Convention* is not a prerequisite for the application of the principle.<sup>117</sup> In appropriate cases, the *non-refoulement* principle could be invoked under some other international treaties without the necessity of a refugee status determination.<sup>118</sup> This explains the reason why this principle is

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<sup>112</sup> Richard Plender, *International Migration Law* (Dordrecht: Martinus Nijhoff Publishers, 1988) at 425.

<sup>113</sup> Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed. (New York: Oxford University Press, 2007) at 201.

<sup>114</sup> 28 October 1933, 159 L.N.T.S 3663.

<sup>115</sup> The General Assembly resolved that no refugee or displaced person who has validly raised an objection not to be taken to their countries of origin will be returned. UNGA Res. 8(1), 12 February 1946, at *para.* (c)(ii).

<sup>116</sup> *1951 Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [*1951 Refugee Convention*], art. 33(1) & (2).

<sup>117</sup> James Mansfield, “Extraterritorial Application and Customary Norm Assessment of *Non-Refoulement*: The Legality of Australia’s ‘Turn-back’ Policy” (2015) 17 *University of Notre Dame Australia Law Review* 18 – 58 at 52; UNHCR, Executive Committee Conclusion, No. 82 [1997] at *para.* (d)(i); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) 2 [6]; Guy S. Goodwin-Gill, “Commentary: *Non-Refoulement* and the New Asylum Seekers” (1986) 26 *Virginia Journal of International Law*, 897 at 902.

<sup>118</sup> See for example, *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, art. 3 (entered into force 26 June 1987); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 7, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976); *Convention for the Protection of Human*

particularly applicable in situations of mass influx of refugees which conceivably includes mass exodus occasioned by environmental events.<sup>119</sup>

The Protection Agenda in its Executive Summary and as a way of invoking the *non-refoulement* principle indicates that “at least 50 countries in recent decades have received or refrained from returning people in the aftermath of disasters.”<sup>120</sup> From states’ perspectives and in line with the provisions of the Protection Agenda, protecting cross-border disaster-displaced persons generally takes one of two forms – admitting them into states’ territories or refusing to return them to countries or areas that have been affected by environmental disasters.<sup>121</sup> The Agenda indicates that returning cross-border disaster-displaced persons “may place their lives and health at risk or expose them to serious hardship because of lack of access to adequate assistance and protection.”<sup>122</sup> In protecting cross-border disaster-displaced persons, the Protection Agenda in paragraph 39 and 55 invokes the *non-refoulement* provisions under international and regional human rights law as well as refugee law. Under paragraphs 64 – 69, the Protection Agenda

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*Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, art. 3, Eur. T.S. 5. See also *Soering v. The United Kingdom*, 1/1989/161/217, European Court of Human Rights, (7 July 1989). For a comparison of the *non-refoulement* principle in the Torture Convention and other treaties, including the *1951 Refugee Convention*, see David Weissbrodt & Isabel Hortreiter, “The Principle of *Non-Refoulement*: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the *Non-Refoulement* Provisions of Other International Human Rights Treaties” (1999) 5 *Buff. Hum. Rts. L. Rev.* 1 – 73.

<sup>119</sup> In the separate opinion of Judge Weeramantry in the International Court of Justice *Case Concerning the Gabcikovo-Nagymaros Project*, [1997] I.C.J. Rep. 7 at 91, it was held that the protection of the environment “is a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the *Universal Declaration* and other human rights instruments.” The European Court of Human Rights case of *Budayeva v. Russia* (ECtHR, 20 March 2008) also expanded the meaning of the right to life to include the duty of States to protection from natural disasters. From the foregoing therefore, it is submitted that environmental disasters which endanger life and make continued habitation in a particular geographical area impossible is sufficient to trigger the application of the *non-refoulement* principle under international refugee law.

<sup>120</sup> See also paragraph 3 of the Protection Agenda.

<sup>121</sup> The Protection Agenda, *supra* note 11 at pg. III & para. 30.

recommends that states refrain from returning citizens of a country affected by an environmental disaster to their country of origin. The Protection Agenda refers to this category of persons as “cross-border disaster-displaced persons *sur place*” – a description similar to refugee *sur place* under international refugee law.<sup>123</sup> For clarity, a refugee *sur place* “is a person who was not a refugee when he/she left his/her country but who becomes a refugee due to circumstances arising in his/her country of origin during his/her absence.”<sup>124</sup> Paragraph 65 not only recommend the suspension of deportation measures for cross-border disaster-displaced persons *sur place* but also the extension or changing of their existing migration status on humanitarian grounds. There is also the requirement for the provision of adequate information to cross-border disaster-displaced persons *sur place* “on the possibility to benefit from protection and their rights and responsibilities once such protection has been granted.”<sup>125</sup>

Furthermore, the Protection Agenda recommends that states should not return or turn-back cross-border disaster-displaced persons so as to allow cross-border disaster-displaced persons “to send back remittances in support of their family members in disaster-affected areas.”<sup>126</sup> The Agenda recommends that states could guarantee *non-refoulement* to cross-border disaster-displaced persons by law or based on *ad hoc* decisions.<sup>127</sup> The Agenda however recognizes three basic exceptions to the *non-refoulement* principle: voluntary return by a cross-border disaster-

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<sup>122</sup> *Ibid* at paragraph 66.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid* at pg. 34.

<sup>125</sup> *Ibid* at paragraph 65.

<sup>126</sup> *Ibid* at paragraph 67.

<sup>127</sup> *Ibid* at paragraph 68.

displaced person,<sup>128</sup> criminal activities, and national security threats posed by the cross-border disaster-displaced person.<sup>129</sup> In the case of voluntary return, paragraph 71 recommends that states may develop criteria and mechanisms to determine when and how cross-border disaster-displaced persons may return to their home country. If cross-border disaster-displaced persons cannot return to their country of origin due to a continuing environmental disaster, states may consider settling them in a new place within their country of origin or in a third country.<sup>130</sup>

### 5.3.1.5 *Responsibility to Protect (“R2P”)*

Responsibility to protect is a relatively new international law norm which developed from the popular yet controversial principle of humanitarian intervention.<sup>131</sup> The history of humanitarian intervention is traceable to the Cold War era when the United Nations Security Council was effectively paralysed by the use of veto exercisable by the five permanent members in that the veto power was used to ensure that no actions that threatened the interests of the permanent five was taken.<sup>132</sup> Article 39 of the *UN Charter* provides that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall decide what measures shall be taken to maintain or restore international peace and security.” Although the *UN Charter* does not define what may constitute threat to the peace, breach of the peace, or acts of aggression but the practice of the United Nations as an institution has been to characterize

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<sup>128</sup> *Ibid* at paragraphs 71 & 72.

<sup>129</sup> *Ibid* at paragraph 33.

<sup>130</sup> *Ibid* at paragraph 72.

<sup>131</sup> Alex J. Bellamy, “The Responsibility to Protect Turns Ten” (2015) 29:2 *Ethics & International Affairs*, 161 – 185; Jennifer M. Welsh, “The Responsibility to Protect at Ten: Glass Half Empty or Half Full?” (2015) 51:2 *The International Spectator*, 1 – 8.

<sup>132</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) [Orford, *Reading Humanitarian Intervention*].

almost anything that might lead to a humanitarian crisis in these categories. For example, the former UN Secretary General; Kofi Annan has stated that climate change and its accompanying environmental degradation belong to the category of soft threats to international peace and security which the United Nations must confront.<sup>133</sup> Furthermore, the Security Council also seems to have adopted a broad interpretation of this phrase. As rightly stated by Orford:

The range and nature of resolutions passed by the SC since the Gulf War relating to the former Yugoslavia, Somalia, Rwanda, Haiti and East Timor have been interpreted as suggesting that the SC is willing to give the phrase 'threats to the peace' a broad interpretation and to treat the failure to guarantee democracy or human rights, or to protect against humanitarian abuses, as either a symptom, or a cause, of threats to peace and security.<sup>134</sup>

Although the Security Council was willing to give the phrase 'threats to the peace' a broad interpretation, its internal power politics have rendered it almost incapable of giving practical effects to its theories. The idea of an emerging norm of a responsibility to protect civilians from large-scale violence was proposed by the *High-Level Panel on Threats, Challenges, and Change* in 2004 though the concept was introduced in the report of the International Commission on Intervention and State Sovereignty which was established by the Canadian government in the year 2000.<sup>135</sup> It was recognized during the 2005 World Summit (High-Level Plenary Meeting of the 60th Session of the General Assembly), and that was how the principle of responsibility to protect became part of the discourse in international law. The responsibility to protect operates

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<sup>133</sup> Kofi Annan, The Secretary-General Address to the General Assembly, United Nations, New York 23 September 2003, online: <http://www.un.org/webcast/ga/58/statements/sg2eng030923.html>.

<sup>134</sup> Orford, *Reading Humanitarian Intervention*, *supra* note 132 at 3.

<sup>135</sup> UN, "A More Secured World: Our Shared Responsibility", Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2 December 2004).

on three key pillars which are that the state has the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing; that the international community has a responsibility to encourage and assist states in fulfilling this responsibility and that the international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes.<sup>136</sup>

It would seem as if this principle has no practical application to populations in emergency situations like human-made or natural disasters since it focuses on atrocities and crimes against humanity. However, while arguing for the applicability of the foundational principles which underlie the principle of responsibility to protect to, say, climate change<sup>137</sup> and its consequent deleterious effects on humanity, Lloyd Axworthy and Alan Rock were of the opinion that "although R2P itself is uniquely and solely intended to deal with situations of mass atrocity, when R2P is 'unbundled' and its component principles examined, it becomes clear that those foundational principles can be applied to other problems that engage humanity as a whole."<sup>138</sup> Erika Feller, while also not expressly including people moving due to environmental events has argued that the principle of responsibility to protect "could go quite some way to redressing root causes of displacement, which from UNHCR's perspective is a positive step."<sup>139</sup> She listed war,

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<sup>136</sup> UN, Outcome Document of the 2005 United Nations World Summit, UN Doc. A/RES/60/1 at *para.* 138-139 (24 October 2005).

<sup>137</sup> The authors did not mention climate change in this part of their work but rather they referred to 'other problems that engage humanity as a whole'. The inference about climate change can however be drawn because the thematic pre-occupation of the work seems to be on climate change.

<sup>138</sup> Lloyd Axworthy & Allan Rock, "R2P: A New and Unfinished Agenda" (2009) 1 *Global Responsibility to Protect* 54-69 at 64.

<sup>139</sup> Erika Feller, "The Responsibility to Protect: Closing the Gaps in International Protection Regime" in Jane McAdam, ed., *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008) 283-293 at 284.

poverty, disparities between rich and poor peoples and nations, migration push-and-pull factors, and environmental issues as some of these root causes of displacement.

The Nansen Initiative seems to have tapped into this sentiment when it re-affirmed that the primary responsibility for protecting citizens lies with states. In the words of Professor Kalin, “the consultations have affirmed the primary responsibility of States to prevent displacement when possible, and, when it cannot be avoided, to protect displaced people as well as find durable solutions for their displacement.”<sup>140</sup> Stressing the importance of preparedness as a critical strategy for combating disasters and displacement, the Nansen Initiative emphasised that “these current and emerging realities call for increased preparedness, solidarity, and cooperation by States, (sub-) regional organisations and the international community to prevent, avoid, and respond to disaster displacement and its causes.”<sup>141</sup>

In addition to cross-border disaster-displaced persons, the Agenda also recognizes the responsibility of states to protect IDPs in accordance with international law.<sup>142</sup> On the responsibility of states before the outbreak of a disaster, the Protection Agenda notes that “state responsibility includes preparing for foreseeable disasters and take reasonable measures to prevent threats to the lives and property of people, including preventing displacement.”<sup>143</sup> Since

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<sup>140</sup> Walter Kälin, “The Nansen Initiative: Building Consensus on Displacement in Disaster Contexts” (2015) 49 Forced Migration Review 5 – 7 at 5 – 6.

<sup>141</sup> The Protection Agenda, *supra* note 11 at pg. I – II.

<sup>142</sup> *Ibid* at paragraph 102.

<sup>143</sup> *Ibid* at paragraph 77.

prevention is at the core of R2P,<sup>144</sup> one of the “reasonable *prevention* measures” which the Agenda suggests is planned relocation. Paragraph 21 of the Agenda recommends that in areas with high level of disaster risks, States through their appropriate authorities may move affected persons to safer areas “and provided with conditions for rebuilding their lives.”<sup>145</sup> Other measures include:

- a. elaboration of climate change adaptation and disaster risk management strategies and laws;
- b. construction of sea-walls, dams, dykes, and earthquake resistant buildings in disaster-prone areas;
- c. establishment of preparedness and early warning systems to the population living in disaster-prone areas; and
- d. enhancing the resilience and adaptive capacity of people likely to be displaced by improving their housing, education, food security, and health care needs.<sup>146</sup>

During disasters, paragraph 47 of the Protection Agenda contains recommendations on how states could offer humanitarian protection to cross-border disaster-displaced persons. Some of these recommendations have been discussed above, and there would be no need to discuss them again in this sub-section. Post-disaster obligations of states which includes planned relocation and reintegration in the case of voluntary return have also been discussed.<sup>147</sup>

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<sup>144</sup> Jennifer Welsh, “The Responsibility to Prevent: Assessing the Gap between Rhetoric and Reality” (2016) 51:2 *Cooperation and Conflict*, 216 – 232; Jennifer M. Welsh, “The Responsibility to Protect at Ten: Glass Half Empty or Half Full?” (2015) 51:2 *The International Spectator*, 1 – 8.

<sup>145</sup> The Protection Agenda, *supra* note 11 at paragraph 21.

<sup>146</sup> *Ibid* at paragraph 78.

<sup>147</sup> *Ibid* at paragraphs 71 – 73.

## **5.4 Testing Counter Arguments**

A number of arguments could be made that the Protection Agenda is not a norm. Since some might argue that a document or instrument must be a law within the context of international law to be regarded as a norm, the question may arise as to whether or not the Agenda is an “international law”. It is also possible to contest the normative status of the Protection Agenda on temporal grounds. In other words, it could be argued that it is too early to determine whether or not the Agenda is a norm as there is no evidence yet to show that it is already influencing the behaviour or practice of states on cross-border disaster displacement. There is also the political dimension to this issue. Given the erstwhile reticence of states on cross-border disaster displacement and their unwillingness to take on additional obligations on this issue, it could be argued that the Protection Agenda is not normative as to be so would mean that there is now an obligation on states to protect cross-border disaster-displaced persons. The list here is not exhaustive but certainly points to the possible major legal and political reasons why the Agenda might fail the normativity test. I examine these reasons below and conclude that each has significant weaknesses.

### **5.4.1 “Not a Law”**

Article 38(1) of the *ICJ Statute* is often cited as an authoritative provision on what constitutes international law. This article provides, in order of significance, that conventions, customs, principles, judicial precedents and teachings of scholars are the recognised law-making and law-determining sources of international law. There is no need to discuss whether the Protection Agenda is a convention or a custom. It is not. In addition, a discussion of the “judicial

precedents and teachings of scholars” provisions of article 38(1) of the *ICJ Statute* would be redundant. However, while the Protection Agenda is neither an international convention nor a custom, it is arguable that it shares an affinity with the “principles” provision of article 38(1) of the *ICJ Statute*.

The phrase “general principles” of law does not lend itself to easy definition.<sup>148</sup> However, it is widely acknowledged in the literature that a principle need not be universal to be “general”.<sup>149</sup> Thus, “general principles” of law refers to principles of law that are “general in the sense of being applied by the principal systems of the world.”<sup>150</sup> Examples in this regard include human rights principles, civil and common law principles of contract, and other international law principles such as those contained in humanitarian and refugee laws. Does the Protection Agenda contain some of these principles? From a careful reading of the Protection Agenda, and other important documents of the Nansen Initiative,<sup>151</sup> it is not in doubt that the Protection Agenda was intended to be and is indeed a repertoire of basic principles of human rights, refugee, and humanitarian law in addition to international principles and best practices as they relate to cross-border disaster displacement. To this extent, the Protection Agenda is a “principles document” and hence a law within the context of that term in international law. Confirming the legal and normative status of a soft law instrument which embodies an existing principles of law, Jonathan

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<sup>148</sup> Jennings, *What is International Law and How Do We Tell It When We See It?*, *supra* note 6 at 4.

<sup>149</sup> H.C. Gutteridge, “The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice” (1952) 38 *Problems of Public and Private International Law*, 125 – 134 [Gutteridge, *The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice*]; Christian J. Tams & James Sloan, eds., *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013).

<sup>150</sup> Gutteridge, *The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice*, *ibid* at 127.

Charney “has given weight to the extent participating states are made aware that the proposed rule is a refinement, codification, crystallisation or progressive development of existing principles of law, and the level of widespread support for the rule.”<sup>152</sup> However, as the obligations in the Protection Agenda are non-binding, it represents an example of a growing list of international soft law.

Would it matter to its legal status that it was labelled “an agenda” rather than “principles” as used under article 38(1)(c)? And what is the implication of its drafting style which is unwieldy and different from the other types of soft law such as the *UN Guiding Principles on Internal Displacement*, *Universal Declarations of Human Rights*, Resolutions of the United Nations General Assembly, and so on? It should be noted that the nomenclature of an international instrument does not determine its legal or normative status.<sup>153</sup> Nor is the drafting style of an international legal document a decisive factor. In *Qatar v. Bahrain*, the ICJ observed that “international agreements may take a number of forms and be given a diversity of names”.<sup>154</sup> What indicates and dictates the categorization of a document or instrument as a norm – be it soft

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<sup>151</sup> See for example, the Nansen Initiative’s Conceptual Note, Information Note, *supra* note 31, Reports of the Regional Consultative Meetings, and The Nansen Initiative Global Consultation Conference Report, *supra* note 51.

<sup>152</sup> Jonathan Charney, “Universal International Law” (1993) 87 *American Journal of International Law* 529 cited in Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 66 – 67.

<sup>153</sup> *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) 1994 ICJ Rep. 6 [*Qatar and Bahrain*]; Vera Gowlland-Debbas, “The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties” in Christian J. Tams & James Sloan, eds., *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 25 – 52.

<sup>154</sup> *Qatar and Bahrain*, *supra* note 153

or hard law – is “its actual content and function.”<sup>155</sup> A deeper study of the content and function of the Protection Agenda exposes it effectively as a norm as understood in the literature.

In contemporary international law, there is an inexhaustive list of what constitutes soft law.<sup>156</sup> Alan Boyle and Christine Chinkin stated that “from a law-making perspective the term is simply a convenient description for a variety of non-legally binding instruments used in contemporary international relations.”<sup>157</sup> Memorandum of Understanding, Action Plans or International Programs, Declaration of Principles, International Recommendations such as the Protection Agenda, Operational Procedures and Safeguard Policies, and Technical Standards, are all examples of non-binding instruments.<sup>158</sup> Boyle and Chinkin provided further examples of soft law as follows:

It encompasses *inter alia* inter-state conference declarations; UN General Assembly instruments; interpretative guidance adopted by human rights treaty bodies and other autonomous intergovernmental institutions; codes of conduct, guidelines and recommendations of international organisations. Also potentially included within the category of soft law are the common international standards adopted by transnational networks of national regulatory bodies, NGOs, and professional and industry associations. Finally, the term “soft law” can also be applied to non-treaty agreements between states or between states and other entities that lack the capacity to conclude treaties.<sup>159</sup>

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<sup>155</sup> Friedrich, *International Environmental “Soft Law”* at 15.

<sup>156</sup> Joost Pauwelyn, Ramses Wessel, & Jan Wouters, eds., *Informal International Lawmaking* (Oxford: Oxford University Press, 2012); Friedrich, *International Environmental “Soft Law”*, *supra* note 5; Hartmut Hillgenberg, “A Fresh Look at Soft Law” (1999) 10:3 *European Journal of International Law* 499 – 515.

<sup>157</sup> Boyle & Chinkin, *The Making of International Law*, *supra* note 6 at 212.

<sup>158</sup> Friedrich, *International Environmental “Soft Law”*, *supra* note 5 at 15 – 141.

<sup>159</sup> Boyle & Chinkin, *The Making of International Law*, *supra* note 6 at 212 – 213.

Thus, the Protection Agenda, labelled as a “policy document” or simply as “protection agenda” does not lend itself to easy recognition not only as a type of “soft law” but also as a norm in the way that a treaty and principles are traditionally recognised.<sup>160</sup> As noted by Richard Baxter in the initial quotation in the beginning of this chapter, the “break-away” from the traditional formal and informal procedures and formats of international law making such as treaties, principles or declarations which lawyers and legal scholars are traditionally “addicted” might pose a major problem in recognising a different type of international legal instrument.<sup>161</sup> Nonetheless, since it is incumbent on makers of international law to determine the form of the document that will secure the agreement of states and other actors on a given issue, the advice is for lawyers and legal scholars to keep an open mind in this regard.<sup>162</sup> This is because, as reasoned by Richard Baxter, the varieties of international law are necessarily infinite.<sup>163</sup> It is increasingly becoming impossible to create a boundary of international law.

Informal international legal instruments have generated enduring international norms notwithstanding their informal nature. Notwithstanding fierce opposition,<sup>164</sup> there is a growing recognition of international law-making through non-binding instruments.<sup>165</sup> It is now evident

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<sup>160</sup> Alexander Betts & Phil Orchard, eds., *Implementation and World Politics: How International Norms Change Practice* (New York: Oxford University Press, 2014) [Betts & Orchard, *Implementation and World Politics*].

<sup>161</sup> Baxter, International Law in her ‘Infinite Variety’, *supra* note 1.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> Gennady Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff Publishers, 1993) [Danilenko, *Law-Making in the International Community*]; Jan Klabbers, “The Redundancy of Soft Law” (1996) 65 *Nordic Journal of International Law*, 167 – 182 [Klabbers, *The Redundancy of Soft Law*].

<sup>165</sup> Gunther F. Handl, *et al.*, “A Hard Look at Soft Law” (1988) 82 *Proceedings of the Annual Meeting (American Society of International Law)* 371 – 395 [Handl, *et al.*, *A Hard Look at Soft Law*]; Stefan Oana, “Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law (2012) 37:1 *European Law Review* 49 – 69; Friedrich, *International Environmental “Soft Law”*, *supra* note 5; Ramses A. Wessel, *et al.*,

that relying solely on the formal traditional sources of international law such as treaties and customs has become inadequate for dealing with all of the contemporary issues requiring international rules, thus paving the way for the improvisation of other informal international law instruments as supplements.<sup>166</sup> As one author notes, “the broadening subject matter of international regulation, the claims by and against non-state actors, and the global challenges posed by, *inter alia*, environmental degradation, decreasing natural resources, sustainable development, human rights violations, and disarmament have created an international setting that requires diversified forms and levels of law-making”.<sup>167</sup>

Soft law has made an inroad, particularly in the areas of international environmental law, international economic law, and international human rights law.<sup>168</sup> Throughout this dissertation, I have made copious references to the initially soft nature of the UDHR and how this document evolved into a global human rights principles with some provisions, if not the whole document, now regarded as customary international law. The UDHR also served as an inspiration for the negotiation and adoption of the *International Covenant on Civil and Political Rights*<sup>169</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>170</sup> Interestingly, the UDHR was originally adopted by the UN General Assembly as representing “merely a high moral

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“Upholding the Rule of Law in Informal International Lawmaking Processes” (2014) 6:1 Hague Journal on the Rule of Law 75 – 95.

<sup>166</sup> Geoffrey Palmer, “New Ways to Make International Environmental Law” (1992) 86:2 American Journal of International Law 259 – 283.

<sup>167</sup> Christine Chinkin, “Normative Development in the International Legal System” in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000) 21 – 42 at 22 [Chinkin, Normative Development in the International Legal System].

<sup>168</sup> Handl, *et al.*, A Hard Look at Soft Law, *supra* note 165.

<sup>169</sup> ICCPR, *supra* note 86.

<sup>170</sup> ICESCR, *supra* note 86.

standard of political behaviour devoid of authoritative effect”.<sup>171</sup> It was its consistent invocation and application by states, intergovernmental organisation, and NGOs, as well as by other subjects of international law that “hardened” the UDHR.<sup>172</sup> Thus, the UDHR presents a classic example of how a soft legal instrument not only contributes to the processes of international lawmaking but how it could be a source of validity to other subsequent international legal instrument.

Still on international human rights law, the *UN Guiding Principles*, a soft legal instrument, successfully became an authoritative international law instrument for the protection of the people displaced within the confines of their countries.<sup>173</sup> Francis M. Deng, the former Representative of the UN Secretary-General on Internally Displaced Persons facilitated the formulation and drafting of this document. Since the submission of the *UN Guiding Principles* in 1998 to the then United Nations Commission on Human Rights, the Heads of State and Government formally recognised the document at the September 2005 World Summit in New York.<sup>174</sup> The United Nations General Assembly, the Organization for Security and Cooperation in Europe (OSCE), the Parliamentary Assembly of the Council of Europe, the African Union (formerly Organisation of African Unity) and the Economic Community of West African States (ECOWAS) have all endorsed the UN Guiding Principles.<sup>175</sup> And just as was done by Francis M. Deng, it will also be recalled that Walter Kälin, the succeeding Representative of the UN Secretary-General on

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<sup>171</sup> Handl, *et al.*, A Hard Look at Soft Law, *supra* note 165 at 395.

<sup>172</sup> *Ibid.*

<sup>173</sup> Simon Bagshaw, *Developing a Normative Framework for the Protection of Internally Displaced Persons* (New York: Transnational Publishers Inc., 2005).

<sup>174</sup> Walter Kalin, *Guiding Principles on Internal Displacement: Annotations* (Washington, DC: The American Society of International Law, 2008).

Internally Displaced Persons formulated the *Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster* in conjunction with John Holmes, the former UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator.<sup>176</sup> Today, these documents are accepted as part and parcel of international law on the subjects which they cover.

As indicated, international environmental law presents, yet another example of an area of international law where soft law documents have generated enduring norms. “The 1972 *Stockholm Declaration* adopted by the UN Conference on the Human Environment, constitutes the normative program of the world community in this matter. Although being only, from a formal point of view, a non-binding resolution, many of its principles, and in particular its Principle 21, have been recalled by governments to justify their legal rights and duties. The subsequent state practice has been, no doubt, influenced by such a provision.”<sup>177</sup> The normative capacity of the 1972 *Stockholm Declaration* began with the establishment of a separate UN organ which focuses principally on the promotion of international environmental law – the United Nations Environment Programme (UNEP) to the adoption of regional recommendations and programs of action on the environment by institutions such as the Council of Europe, Organisation for Economic Cooperation and Development, and the European Economic Community.<sup>178</sup>

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<sup>175</sup> *Ibid.*

<sup>176</sup> Brookings-Bern Project on Internal Displacement, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, March 2008.

<sup>177</sup> Handl, *et al.*, A Hard Look at Soft Law, *supra* note 165 at 383.

In the field of international economic law, the normative roles of the *Declaration on the Establishment of a New International Economic Order*<sup>179</sup> as well as the *Charter of Economic Rights and Duties of States*<sup>180</sup> are tangible reference points. Although these instruments provided a general and somewhat broad new international economic framework, subsequent documents such as the *Draft United Nations Code of Conduct on Transnational Corporations*,<sup>181</sup> though unadopted, provided specificity to an area of the subject. The UN Draft Code of Conduct provides, among others, guidelines encouraging transnational corporations to contribute significantly to the development goals and objectives of their host countries.<sup>182</sup> The *United Nations Draft Code on the Transfer of Technology*<sup>183</sup> and the *United Nations Restrictive Business Practices Code*,<sup>184</sup> adopted by the United Nations General Assembly are specialised documents intended to provide more detailed regulations in the particular fields targeted in the *Declaration on the Establishment of a New International Economic Order* and the *Charter of Economic Rights and Duties of States*.<sup>185</sup>

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<sup>178</sup> *Ibid.*

<sup>179</sup> G.A. Res., 3201 (S-VI), (1974) 13 I.L.M. 715.

<sup>180</sup> G.A. Res., 3281 U.N. GAOR, 29 Sess., Supp. No. 31, U.N. Doc. A/9631 (1975) reprinted in 14 I.L.M. 251 (1975).

<sup>181</sup> U.N. Doc. E/1983/17/Rev.1 (1983) reprinted in 23 I.L.M. 626 (1984) [Draft UN Code of Conduct].

<sup>182</sup> Karl P. Sauvant, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned” (2015) 16 *Journal of World Investment & Trade* 11 – 87 [Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations*]; Sean D. Murphy, “Taking Multinational Corporate Codes of Conduct to the Next Level” (2005) 43:2 *Columbia Journal of Transnational Law* 389 – 433.

<sup>183</sup> U.N. Doc. TD/B/C.6/AC.1/2/Supp.1/Rev.1 (1975).

<sup>184</sup> U.N. Doc. TD/RBP/CONF/10 (1980) reprinted in 19 I.L.M. 815.

<sup>185</sup> Christine Chinkin, “The Challenge of Soft Law: Development and Change in International Law” (1989) 38:4 *International and Comparative Law Quarterly* 850 – 866 at 852 [Chinkin, *The Challenge of Soft Law*]. For more details on the UN Draft Code on the Transfer of Technology and the UN Restrictive Business Practices Code, see Ton J.M. Zijdwijk, “The UNCTAD Code of Conduct on the Transfer of Technology” (1978) 24 *McGill Law Journal* 562 – 626; Stuart E. Benson, “The U.N. Code on Restrictive Business Practices: An International Antitrust Code is Born” (1981) 30:4 *American University Law Review* 1031 – 1048.

With the growing impacts and activities of transnational corporations in their host countries, John Ruggie, the former UN Secretary-General Special Representative on human rights and transnational corporations and other business enterprises, was able to steer the drafting of a set of "Guiding Principles on Business and Human Rights".<sup>186</sup> Resting primarily on states' duty to protect human rights, the corporate responsibility to respect human rights and the need for greater access to remedy for victims of business-related abuses, this soft law outlines recommendations for fostering a cordial relationship between the business activities of transnational corporations and the human rights of people.<sup>187</sup> The United Nations Human Rights Council unanimously endorsed this document in 2011.<sup>188</sup> It has since been in use, with claims that the instrument is not just a non-binding document but "in a grey zone between voluntary and binding" as its "endorsement by the Council established a greater authoritative interpretation of existing obligations."<sup>189</sup>

Since the Protection Agenda ranks within the existing class of informal international law, the foregoing review has demonstrated not only the capacity of soft legal instruments such as this to regulate the behaviour of states and applying soft pressure on them but also to become binding legal instruments based on state practice and *opinio juris*. In addition, the courts also reserve the

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<sup>186</sup> John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013); John G. Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 *Global Governance* 5 – 17.

<sup>187</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework'* (United Nations Human Rights Office of the High Commissioner, 2011).

<sup>188</sup> United Nations General Assembly, Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Rights to Development, A/HRC/RES/17/4.

<sup>189</sup> Sauvart, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations*, *supra* note 182 at 68 – 71.

right to determine how binding soft legal instruments are when called upon to interpret their normative and binding value.<sup>190</sup>

Though no judicial decision has expressly pronounced the Protection Agenda a variety of international law, there are decisions of international courts such that when applied to the Protection Agenda give credence to its normative status. So also are the inferences that could be drawn from the literature especially with reference to the works or “teachings” of highly qualified publicists such as the late ICJ Judges Richard Baxter and Sir Robert Y. Jennings.

The idea that states freely accept rules of law governing their relations on a given issue area is crucial in understanding not only how international law evolves but also what could be recognised as international law.<sup>191</sup> The Protection Agenda not only aims to govern international relations on cross-border disaster displacement but some states who wish to be so governed have by their free will adopted this recommendation. As has been pointed out, the ICJ has also discarded the idea of mapping out a closed list of names, forms, and types of international law.<sup>192</sup> Thus, the fact that the Protection Agenda bears a relatively different name from the others within the soft law framework should not rob it of its legal and normative identity. Even if we agree that bindingness is a decisive factor in determining whether an instrument is an international law,

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<sup>190</sup> I return to a fuller discussion of this issue below in subsection 5.4.3.

<sup>191</sup> *S.S. Lotus case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10.

<sup>192</sup> *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) 1994 ICJ Rep. 6; *Anglo-Iranian Oil Case* (1952) ICJ Rep. 93; *Texaco v. Libya* (1977) 53 ILR 389.

there is a robust jurisprudence of international courts and tribunals to the contrary.<sup>193</sup> Suffice to say, therefore, that the non-binding nature of the Protection Agenda is not sufficient to disqualify it of its normative status as outlined in the norms literature.

There is an extensive volume of literature (both dated and recent) by notable international law scholars proclaiming the normative value of soft law instruments.<sup>194</sup> Conversely, literature disagreeing with the normative contents of soft law are not only relatively dated but few.<sup>195</sup> This state of affairs might tempt one to conclude that perhaps there is now an agreement among scholars that:

- (a) Soft law is a “variety of non-legally binding instruments used in contemporary international relations;”<sup>196</sup>
- (b) The types of soft law are not closed;<sup>197</sup>
- (c) “whether a rule is ‘hard’ or ‘soft’ does not, of course, affect its normative character.”<sup>198</sup>  
“As long as it guides and influences, it is nonetheless a legal norm;”<sup>199</sup>

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<sup>193</sup> *Case Concerning Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, 1974 ICJ Rep. 253; *Aegean Sea Continental Shelf Case (Greece v. Turkey)* 1978 ICJ Rep. 3; *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) 1994 ICJ Rep. 6.

<sup>194</sup> Some of these works have been cited at different times and locations in this chapter and includes Michael Reisman, “The Concept and Functions of Soft Law in International Politics” in Emmanuel Bello & Bola Ajibola, eds., *Essays in Honour of Judge Taslim Olawale Elias* (Dordrecht: Martinus Nijhoff, 1992) at 135 where the author argues that there are three criteria for international law-making. According to him, these criteria are “normative statements, expectations of authority, and communication of the control intention.”

<sup>195</sup> Prosper Weil, “Towards Relative Normativity in International Law?” (1983) 77:3 *American Journal of International Law*, 413 [Weil, *Towards Relative Normativity in International Law*]; Danilenko, *Law-Making in the International Community*, *supra* note 164; Klabbbers, *The Undesirability of Soft Law*, *supra* note 4; Klabbbers, *The Redundancy of Soft Law*, *supra* note 164; Bruno Simma & Philip Alston, “The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles” (1992) 12 *Australian Yearbook of International Law* 82.

<sup>196</sup> Boyle & Chinkin, *The Making of International Law*, *supra* note 6 at 212.

<sup>197</sup> Friedrich, *International Environmental “Soft Law”*, *supra* note 5.

<sup>198</sup> Weil, *Towards Relative Normativity in International Law*, *supra* note 195 at 414.

<sup>199</sup> Alain Pellet, “The Normative Dilemma: Will and Consent in International Law-Making (1992) 12 *Australian Yearbook of International Law* 22 – 53 at 30.

(d) The lines between hard and soft law regarding bindingness are blurry raising the question whether this dichotomy really matters in contemporary international law.<sup>200</sup>

#### 5.4.2 Too Early?

Another point that might be made against the normative status of the Protection Agenda is that it is too early to determine whether or not it is a norm. This argument assumes that a lengthy period of time is crucial to norm emergence. This is not so. While some norms are in existence for a very long time but lose their status either gradually or suddenly as it was the case with conquest,<sup>201</sup> other norms can emerge quickly as was the case with the norm against landmines.<sup>202</sup> Contemporary international norms emerge when a sufficient number of relevant actors endorse the norm.<sup>203</sup> In the case of states, Finnemore and Sikkink put the “sufficient number of relevant actors” at one-third of the total number of states in the system.<sup>204</sup> There are currently 193 member states of the United Nations, and one-third of this would be approximately 65 countries. Applying Finnemore and Sikkink’s proposition to the Protection Agenda, we can see that its endorsement by 109 states confirms that it is a norm. My argument would be different if the number of states’ endorsement was less than 65. In that case, one could argue that perhaps the Protection Agenda has not reached the normative threshold, and that with time it may get there.

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<sup>200</sup> Arnold N. Pronto, “Understanding the Hard/Soft Distinction in International Law” (2015) 48 *Vand. J. Transnat’l L.* 941; Joost Pauwelyn, “Is It International Law or Not, and Does It Even Matter?” in Joost Pauwelyn, Ramses Wessel, & Jan Wouters, eds., *Informal International Lawmaking* (Oxford: Oxford University Press, 2012) 125 – 149; Christine Chinkin, “A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States” (1997) 10:2 *Leiden Journal of International Law* 223 – 247.

<sup>201</sup> Brook Gotberg, “The End of Conquest: Consolidating Sovereign Equality” in Wayne Sandholtz & Kendall Stiles, eds., *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009) 55 – 83.

<sup>202</sup> Richard Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” (1998) 52:3 *International Organization*, 613 – 644 [Price, *Reversing the Gun Sights*].

<sup>203</sup> Finnemore & Sikkink, *International Norm Dynamics and Political Change*, *supra* note 35.

<sup>204</sup> *Ibid.*

Moreover, the temporal argument also confuses norm emergence with customary international law. A rule of law may become customary law where there is sufficient evidence of state practice and *opinio juris*.<sup>205</sup> These requirements are often assumed to necessarily happen over a long period of time. However, this is not always the case. As the ICJ cautioned in the *North Sea Continental Shelf Cases* that:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally purely conventional rule, an indispensable requirement would be that within the period in question, short as it may be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.<sup>206</sup>

In the final analysis, the temporal argument against the normative status of the Protection Agenda seems unconvincing because of its inherent confusions and misconceptions that have been indicated above.

### **5.4.3 Political and Legal Implications**

Acknowledging that the Protection Agenda is normative comes with political and legal implications. Given the history of disagreement and reluctance by states to chart a common front in protecting cross-border disaster-displaced persons and coupled with states' lack of interest to take on additional obligations on this issue, the Nansen Initiative and its steering committee

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<sup>205</sup> *S.S. Lotus case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 1 at 14.

members were extremely cautious with their use of language while carrying out their three-year mandate.<sup>207</sup> Indeed, the Nansen Initiative stated that “it does not aim at creating new legal standards” for states but that the outcomes of its work “may”.<sup>208</sup> I am of the view that this statement was a negotiation strategy, aimed towards getting as many states as possible on board. The views expressed by the Representative of the Philippines, Mr. Jesus R.S. Domingo in his capacity as a member of the Steering Committee of the Nansen Initiative confirm my opinion. He stated that the Protection Agenda was “precisely to be a useful tool but who is our clientele? The 193 UN Member States. How we sell this to them...it depends on our audience. If soft law is what they want to hear we call it “soft law”. If it is just a toolbox, we call it “toolbox”. Don’t worry, it’s something that is not legally binding. So yeah...it’s a bit of salesmanship and marketing involved here but nevertheless it [the Protection Agenda] is a significant step forward.”<sup>209</sup> While the Protection Agenda has truly not created “new” legal obligations for states since the document is a litany of existing legal principles and practices, it is a paradigm shift towards the protection of the erstwhile controversial category of displaced persons – the cross-border disaster-displaced persons. This reality notwithstanding, any attempt by any member of the steering committee, most of whom were my interview respondents, to turn around and admit the normative contents of the Protection Agenda may be counter-productive.

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<sup>206</sup> *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark)*, [1969] I.C.J. Rep. 3 at *para.* 74.

<sup>207</sup> In the words of Professor Kalin, “States are reluctant today in setting standards. The Protection Agenda is an exercise fostering learning, discussion and tools that can be used when confronted with cross-border disaster-displacement. It is a stock-taking and policy document.” See Interview with Professor Kalin, *supra* note 8.

<sup>208</sup> The Nansen Initiative, Information Note, *supra* note 31 at 1.

<sup>209</sup> Interview with the Representative of Philippines in Geneva on October 15, 2015 available on file with me.

From a legal perspective, as a soft law document, the question may arise as to how obligatory the Protection Agenda is since “obligation” imports the idea of bindingness, though I hasten to add, as I have done elsewhere in this Chapter that not all obligations are binding.<sup>210</sup> The term “obligation” as used in this work with respect to the Protection Agenda means nothing more than “duty”. The idea that the term “obligation” means bindingness is Austinian in nature and it presupposes that force, sanction or coercion attaches to “all” obligations.<sup>211</sup> This dogma and assumption about legal obligation has been discarded by scholars such as H.L.A. Hart.<sup>212</sup> Illustrating the difference between obligation as bindingness and obligation as a duty, Hart argues that there is no difference between the Austinian sovereign who governs by coercing behaviour and a gunman who orders someone to hand over his/her money.<sup>213</sup> In both cases, Hart argues that the subject can plausibly be characterized as being “obliged” to comply with the commands, but not as being “duty-bound” or “obligated” to do so.<sup>214</sup> Legal rules are obligatory, according to Hart, because people accept them as standards that exert social pressure for compliance:

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', and 'right' and 'wrong'.<sup>215</sup>

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<sup>210</sup> Baxter, International Law in her ‘Infinite Variety’, *supra* note 1.

<sup>211</sup> John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995).

<sup>212</sup> H.L.A. Hart, *The Concept of Law* (Clarendon: Clarendon Press, 1994) at 250.

<sup>213</sup> *Ibid* at 80.

<sup>214</sup> *Ibid*.

<sup>215</sup> *Ibid* at 56.

Hart here summarizes essentially what soft laws do, and this is the sense in which the term “obligation” as used in this work in relation to the Protection Agenda should be interpreted.

Generally, soft laws are not expected to be binding. However, the lines between hard law and soft law are becoming blurred.<sup>216</sup> A treaty which is a binding legal instrument can incorporate provisions which are not binding, or which involve “soft” obligations. Article 2 of the VCLT does not require that a treaty must create identifiable rights and obligations.<sup>217</sup> An agreement, by article 2 of the VCLT is sufficiently a treaty if it is in writing and is subject to international law.<sup>218</sup> Moreover, that an agreement is contained in a soft instrument or policy document does not make it non-binding. International agreement contained in a Minutes of Meeting has been held to be binding in *Qatar v. Bahrain*.<sup>219</sup> There is a growing inclusion of “soft obligations” in hard law instruments especially in the field of international environmental law and climate change.<sup>220</sup> Attesting to the veracity of this claim, Richard Baxter observed that “it is[...]possible that a treaty could be adopted which would only establish guidelines with which neither states nor transnational corporations nor individuals would be required to comply. A convention so

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<sup>216</sup> Dinah Shelton, “Introduction: Law, Non-Law and the Problem of ‘Soft Law’” in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000) 1 – 18 [Shelton, Law, Non-Law and the Problem of ‘Soft Law’].

<sup>217</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27th January 1980) at art. 2.

<sup>218</sup> Chinkin, *The Challenge of Soft Law*, *supra* note 185.

<sup>219</sup> *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) 1994 ICJ Rep. 6.

<sup>220</sup> For example, “the Paris Agreement is legally binding in forcing governments to accept and cater for the 2C limit. But the commitments on curbing greenhouse gas emissions in line with that goal are not legally binding. This means incoming governments can renege upon them. There are no sanctions for governments that flout the goals”. See Fiona Harvey, “Keep It in the Ground: The Paris Climate Agreement Is Now Official” (4 November 2016), online: *The Guardian* <<https://www.theguardian.com/environment/2016/nov/04/the-paris-climate-agreement-is-now-official>>.

drafted would nevertheless in general apply pressure on states and corporations – just as would, for that matter, a declaration or resolution incorporating guidelines.”<sup>221</sup>

Conversely, “non-binding instruments, in turn, are incorporating supervisory mechanisms traditionally found in hard law texts.”<sup>222</sup> Indeed, there are instances where binding legal obligations have arisen out of a soft law instrument.<sup>223</sup> For example, the *1948 Universal Declaration of Human Rights* was just a mere “declaration” but over time, evolved into a set of binding legal obligation in the form of customary international law.<sup>224</sup> Some resolutions of the General Assembly of the United Nations are also classical examples of soft laws with binding legal obligation.<sup>225</sup>

But why will some treaties not be binding while some soft laws are? In other words, what is the basis for the bindingness of an international document or instrument? Writing in 1979 regarding the resolutions of the UN General Assembly, Garibaldi highlighted two possibilities where these ordinarily soft document could be binding.<sup>226</sup> He claims that resolutions of the UN General Assembly other than those dealing with budgeting and housekeeping will be binding whether or not they derive their validity from established international custom or treaty. He admits that this view is revolutionary as it challenges the traditional sources of law as laid out in Article 38(1) of

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<sup>221</sup> Baxter, *International Law in her ‘Infinite Variety’*, *supra* note 1 at 562.

<sup>222</sup> Shelton, *Law, Non-Law and the Problem of ‘Soft Law’*, *supra* note 216 at 10; Chinkin, *The Challenge of Soft Law*, *supra* note 185.

<sup>223</sup> Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000) at 121 – 556 [Shelton, *Commitment and Compliance*].

<sup>224</sup> *UDHR*, *supra* note 82; Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995/96) 25 *Georgia Journal of International and Comparative Law*, 289 – 392.

<sup>225</sup> Garibaldi, *The Legal Status of General Assembly Resolutions*, *supra* note 67.

<sup>226</sup> *Ibid.*

the *ICJ Statute*.<sup>227</sup> Undoubtedly, this view is controversial and is unlikely to stand the test of legal analysis.<sup>228</sup> Garibaldi's second claim is that while the resolutions of the UN General Assembly are not binding, those of them deriving their validity from either international custom or international agreement are binding.<sup>229</sup> This means "that the General Assembly resolution is an interpretation of a pre-existing norm of the system" or "that the resolution is declaratory of such norm."<sup>230</sup> It could also mean "that the resolution is evidence of a pre-existing norm."<sup>231</sup> If this view holds true, its implication is that those aspects of the Protection Agenda that mirror existing principles and norms of humanitarian law, human rights, and refugee law may be binding.

Chinkin sets out a more nuanced framework for determining the bindingness of not just a soft law document but also a treaty law.<sup>232</sup> These criteria include the form of the instrument, the intention of the parties to it, as well as its subject matter. These factors are "fluid, cumulative, and interlocking" and "none are determinative, and all are context specific."<sup>233</sup> Unless the parties show a contrary intention, a formally concluded treaty is binding.<sup>234</sup> Agreements

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<sup>227</sup> *Statute of the International Court of Justice*, 18 April 1946, art. 38. See also *S.S. Lotus case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10.

<sup>228</sup> Weil, *Towards Relative Normativity in International Law*, *supra* note 195; Ian Brownlie, "The Rights of Peoples in Modern International Law" in James Crawford, ed., *The Rights of Peoples* (New York: Oxford University Press, 1988) 15.

<sup>229</sup> Garibaldi, *The Legal Status of General Assembly Resolutions*, *supra* note 67.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> Chinkin, *Normative Development in the International Legal System*, *supra* note 167 at 37 – 41.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27th January 1980) at art. 26.

contained in other forms such as resolutions, recommendations, minutes of meetings, and orally can also be binding.<sup>235</sup>

The Intention of the parties drawing up an international instrument could form a fulcrum for the inference of bindingness. Factors which the court could take into consideration in determining the intention of the parties include their consent in drawing up the instrument including “the voting patterns and the number and character of dissenting voices,” “the language employed in the agreement, and the subsequent actions of the parties.”<sup>236</sup>

The substance of an instrument is another way of recognising its binding obligations. Where an instrument contains enforcement processes and procedures such as sanctions, penalties, and dispute resolution mechanisms, these may be indicative of the binding nature of that document.<sup>237</sup> Other indicators could be provisions guaranteeing amendment and termination of the agreement as well as the “perceived seriousness of the topic.”<sup>238</sup> From the foregoing, it is safe to conclude that though soft legal documents such as the Protection Agenda are aspirational and non-binding, depending on the circumstances of the case, some soft law or policy documents could create either binding or non-binding obligations. The reality of these possibilities in the context of the Protection Agenda may account for the denial of its normative status by some members of the steering committee of the Nansen Initiative.

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<sup>235</sup> *Qatar and Bahrain*, *supra* note 153.

<sup>236</sup> Chinkin, Normative Development in the International Legal System, *supra* note 167; *Aegean Sea Continental Shelf Case (Greece v. Turkey)* 1978 ICJ Rep. 3 at para. 96.

<sup>237</sup> *Ibid* at 40.

## 5.5 The Protection Agenda and the Nansen Initiative Post 2015

With the adoption of the Protection Agenda by states, one is curious to know whether and how states will match their words with action by implementing it. At least, all of the states forming the steering committee of the Nansen Initiative expressed their desire to see the Protection Agenda implemented. To this end, this section focuses not just on the implementation of the Protection Agenda but also on the Nansen Initiative post-2015.

Considering the success of the Nansen Initiative in facilitating the consensus of states on cross-border disaster-displacement within a relatively short period and the need to sustain the momentum and traction generated, one of the questions on my mind during my research fieldwork was whether or not the Nansen Initiative would truly come to an end by December 2015. Though not an “institution” *per se*, the Nansen Initiative with the backing of the UNHCR and the IOM operated as the institutional framework for the conception and formulation of the Protection Agenda since states preferred an arrangement outside the United Nations for this purpose.<sup>239</sup> As a norm entrepreneur, the Nansen Initiative adopted several strategies to achieve its goals – from ensuring that the membership of its Steering Committee had a balanced representation of states from both the global north and south as a form of encouragement and attraction to other states within these regions, to indoctrinating states on the complex subject of cross-border disaster mobility, the role of the Nansen Initiative on cross-border disaster-displacement is impressive. During the public presentation of the Protection Agenda in Geneva

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<sup>238</sup> *Ibid.*

<sup>239</sup> Interview with Professor Kaelin, *supra* note 8.

in October 2015, almost all the states in attendance agreed that the Protection Agenda should be implemented.

Apart from individual efforts by states to implement the Protection Agenda such as by domesticating it into their local laws for greater effectiveness, the idea of a continuous international platform for dialogue and orientation on cross-border disaster-displacement, particularly for states, was envisioned.<sup>240</sup> This arrangement would be in the form of follow-up meetings or what in the context of the Helsinki Final Act and subsequent instruments such as the Charter of Paris and others was called “review conferences” with the responsibility to “study the implementation of the comprehensive code of conduct elaborated in the various texts.”<sup>241</sup> This approach falls squarely within the prescription offered by the “transnational legal process” for achieving compliance with international rules.<sup>242</sup> Undoubtedly, this approach will further entrench the ideals contained in the Protection Agenda and may result in not just states’ compliance but also in support and endorsement by states that have not yet done so.

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<sup>240</sup> *Ibid*; Interview with the Representative of Switzerland, *supra* note 9; Interview with the Representative of Germany in Geneva on October 15, 2015 available on file with me [Interview with the Representative of Germany]; Interview with the Representative of Kenya in Geneva and Mr. Haron Komen, Kenya’s Acting Commissioner for Refugee Affairs, on October 9, 2015 available on file with me [Interview with the Representatives of Kenya]; Interview with the Representative of Norway, *supra* note 8; Interview with the Representative of Bangladesh in Geneva on October 6, 2015 available on file with me [Interview with the Representative of Bangladesh]; Interview with the Representative of Philippines in Geneva on October 15, 2015 available on file with me [Interview with the Representative of Philippines].

<sup>241</sup> Dinah Shelton, “Compliance with International Human Rights Soft Law” in Edith Brown Weiss, ed., *International Compliance with Nonbinding Accords* (Washington, D.C: The American Society of International Law, 1997) 119 – 142 at 128.

<sup>242</sup> Harold H. Koh, “Why Do Nations Obey International Law?” (1997) 106:8 Yale Law Journal 2599 – 2659 [Koh, Why Do Nations Obey International Law?]; Harold H. Koh, “Transnational Legal Process After September 11th” (2004) 22:3 Berkeley Journal of International Law 337 – 354 [Koh, Transnational Legal Process After September 11th].

All of the States Representatives that I interviewed, including the Envoy of the Chairmanship of the Nansen Initiative, Professor Walter Kaelin, confirmed in unequivocal terms that since the mandate of the Nansen Initiative was for three years – from October 2012 to December 2015, the work of the Initiative ended in December 2015.<sup>243</sup> However, Professor Kaelin and all of the States Representatives that I interviewed expressed interest in an international arrangement, not necessarily the Nansen Initiative, that will take over from the Nansen Initiative and continue to sustain the discussion and efforts on the recognition and protection of cross-border disaster-displaced persons.<sup>244</sup> As at the time of the interview, none of the Steering Committee members was sure of the form and structure of the proposed international arrangement. Considering the enormity and the seriousness of cross-border disaster-displacement, Professor Kaelin suggested putting this task on the agenda of the United Nations: “thus far the work of the Nansen Initiative has taken place outside the United Nations (UN) system. However, it is now time to place cross-border displacement in the context of disasters and climate change back on the UN’s agenda.”<sup>245</sup> He noted further that “to do so requires finding an institutional arrangement for the topic, and for states to take forward the Protection Agenda’s action plan as their own.”<sup>246</sup> He hinted that a plan was underway to have some group of states that would continue the Nansen Initiative’s work.<sup>247</sup>

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<sup>243</sup> Interview with Professor Kaelin, *supra* note 8; Interview with the Representative of Switzerland, *supra* note 9; Interview with the Representative of Germany, *supra* note 240; Interview with the Representative of Kenya, *supra* note 240; Interview with the Representative of Norway, *supra* note 8; Interview with the Representative of Bangladesh, *supra* note 240; Interview with the Representative of Philippines, *supra* note 240.

<sup>244</sup> *Ibid.*

<sup>245</sup> Walter Kälin, “The Nansen Initiative: Building Consensus on Displacement in Disaster Contexts” (2015) 49 *Forced Migration Review* 5 – 7 at 7.

<sup>246</sup> *Ibid.*

<sup>247</sup> Interview with Professor Kaelin, *supra* note 8.

Australia's representative suggested that the IOM or the UNHCR might take over the work of the Nansen Initiative since these organisations also have a history of work related to disaster-displacement.<sup>248</sup> Giving this task to the IOM and UNHCR, Australia maintained, would be about "mainstreaming this issue back into the organisations but still maintaining the core functions of what the Nansen Initiative currently does including reaching out to other fora for keeping this issue in front of people's mind and perhaps even acting as a catalyst for future actions."<sup>249</sup> Having served as co-chair of the Nansen Initiative between 2012 and 2015, Norway would be interested in being part of a post-Nansen Initiative process though not as a co-chair but as an ordinary member.<sup>250</sup> Similarly, Switzerland noted that though the Nansen Initiative ended in December 2015, the post-Nansen process should ideally be driven by interested states from the global north and south.<sup>251</sup> While not disagreeing with the idea of having states from the global north and south as co-chairs of the post-Nansen process, Germany suggested that the chairmanship of this process or arrangement should be rotational.<sup>252</sup> There were also speculations that the Norwegian Refugee Council was interested in continuing with the work of the Nansen Initiative.<sup>253</sup>

During a side event organised by the Governments of Switzerland and Germany at the World Humanitarian Summit in Istanbul in May 2016, states launched a successor to the Nansen

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<sup>248</sup> Interview with the Representative of Australia, *supra* note 8.

<sup>249</sup> *Ibid.*

<sup>250</sup> Interview with the Representative of Norway, *supra* note 8.

<sup>251</sup> Interview with the Representative of Switzerland, *supra* note 9.

<sup>252</sup> Interview with the Representative of Germany, *supra* note 240.

<sup>253</sup> *Ibid.*

Initiative – the Platform on Disaster Displacement (PDD).<sup>254</sup> Participants at the side event included states, the UNHCR, IOM, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the Pacific Conference of Churches, and the Norwegian Refugee Council.<sup>255</sup> As a follow-up to the Nansen Initiative, the PDD seeks principally to implement the Protection Agenda by “addressing knowledge and data gaps”, “promoting policy and normative development in gap areas”, and “promoting policy coherence and mainstreaming human mobility challenges in, and across relevant policy and action areas.”<sup>256</sup> The PDD also promotes the implementation of the Protection Agenda by “enhancing the use of identified effective practices and strengthening cooperation among relevant actors to prevent, when possible, reduce and address cross-border disaster-displacement at the national, regional and international levels.”<sup>257</sup> The overall goal of the PDD is “to strengthen the protection of people displaced across borders in the context of disasters, including those linked to the effect of climate change, and to prevent or reduce disaster displacement risks.”<sup>258</sup>

States are not the only entities taking steps to implement the Protection Agenda. The plans and activities of IGOs and NGOs on the implementation of the Protection Agenda are gaining momentum. Linked to the four strategic priorities of the PDD as highlighted above, non-state actors will be playing key roles in the implementation efforts around the Protection Agenda. In

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<sup>254</sup> Platform on Disaster Displacement, Commitments and Opportunities to Implement the Nansen Initiative Protection Agenda, Background Note and Program, 23 May 2016 at 1 [Platform on Disaster Displacement, Background Note].

<sup>255</sup> *Ibid.*

<sup>256</sup> Platform on Disaster Displacement, Strategic Framework 2016 – 2019, at 2 [Platform on Disaster Displacement, Strategic Framework].

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

the PDD Workplan for 2016 – 2019, IGOs and NGOs such as the UNHCR, IOM, the Norwegian Refugee Council, OCHA, Refugees International, International Center for Human Rights of Migrants, Pacific Conference of Churches, and the Refugee Consortium of Kenya, to mention a few, have scheduled roles to play in the overall dissemination and implementation of the Protection Agenda.<sup>259</sup> For example, the Norwegian Refugee Council in conjunction with other IGOs and NGOs will be establishing a “data and knowledge” working group under the first strategic priority of the PDD.<sup>260</sup> This will entail not only dialogue with relevant stakeholders but also promoting scientific research and coordination on disaster displacement.<sup>261</sup> Refugees International, IOM, and the UNHCR will also be supporting regional partners such as the Regional Mixed Migration Secretariat, the Intergovernmental Authority on Development, and Regional Consultative Processes in the Horn of Africa in analysing trends as well as monitoring and generating data on complex population movements in disaster contexts.<sup>262</sup> Similarly, the International Federation of Red Cross and Red Crescent Societies in conjunction with the IOM, UNHCR, and the South American Network for Environmental Migration will in February 2018 organize a workshop in Central and South America on the effectiveness of humanitarian protection measures on admission and stay for cross-border disaster-displaced persons.<sup>263</sup>

Like the Nansen Initiative, the PDD is also a state-led process, but “a key working principle of the Platform will be multi-stakeholder involvement and strong partnerships between

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<sup>259</sup> Platform on Disaster Displacement, *PDD Workplan (2016 – 2019) – Adopted on 15 January 2017*, online: <<http://disasterdisplacement.org/wp-content/uploads/2015/02/15012017-PDD-Workplan.pdf>>.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

policymakers, practitioners and researchers in order to promote collective outcomes and to further stronger links between policy, normative, technical, and operational work.”<sup>264</sup> Thus, “the Platform constitutes a forum for dialogue, information sharing, and policy and normative development.”<sup>265</sup> Officially, the PDD commenced its work on July 1, 2016, under the chairmanship of Germany, and Bangladesh as the Vice Chairman.<sup>266</sup> This combination fulfils the yearnings and the desire of some states to have two states representing the global north and south as the leaders of the post-Nansen process. Professor Kaelin explained this as a “win-win situation” in that a strong representation from the global south and north in the chairmanship of the post-Nansen process will offer the needed political and financial leadership respectively.<sup>267</sup> Germany’s chairmanship and Bangladesh’s vice chairmanship of the PDD will end in December 2017 after leading the PDD for eighteen months.<sup>268</sup> Thereafter, Bangladesh will assume the chairmanship of this Platform from January 2018 to July 2019, but there is no indication yet of which state will be appointed as the vice chair of the PDD during this period.<sup>269</sup> However, Bangladesh is empowered to “make a proposal to the Steering Group on which country could take its place as next Vice-Chair.”<sup>270</sup>

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<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> Platform on Disaster Displacement, Background Note, *supra* note 254.

<sup>267</sup> Interview with Professor Kaelin, *supra* note 8.

<sup>268</sup> Platform on Disaster Displacement, Addressing the Protection Needs of People Displaced Across Borders in the Context of Disasters and Climate Change, Leaflet, online: <[https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/menschenrechte-menschliche-sicherheit/Leaflet-Platform-on-Disaster-Displacement\\_EN.pdf](https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/menschenrechte-menschliche-sicherheit/Leaflet-Platform-on-Disaster-Displacement_EN.pdf)> [Platform on Disaster Displacement, Leaflet].

<sup>269</sup> *Ibid.*

<sup>270</sup> Platform on Disaster Displacement, Steering Group, Terms of Reference, at 2 [Platform on Disaster Displacement, SG Terms of Reference].

The organisational structure of the PDD comprises of the Steering Group, the Advisory Committee, and the Coordination Unit.<sup>271</sup> The Steering Group is currently made up of about twenty states and the European Union with the UNHCR and the IOM as standing invitees.<sup>272</sup> That the Steering Group of the PDD is larger than that of the Nansen Initiative, which was a group of nine states, is a testament to the growing interest of states not just in the work of the Nansen Initiative but also in the Protection Agenda. It is fascinating to see some states on the PDD Steering Group such as Canada whose disposition to the work of the Nansen Initiative was largely unclear to the Steering Committee of the Nansen Initiative. Responses regarding the level of participation and commitment of Canada to the work of the Nansen Initiative suggested that Canada was not interested.<sup>273</sup> In fact, it was suggested that Canada was “really very critical” of the work of the Nansen Initiative and that explains why Canada did not attend the public presentation of the Protection Agenda in Geneva.<sup>274</sup> Nor is there a record of Canada’s support for or endorsement of the Protection Agenda during the Global Consultations of the Nansen Initiative. However, in less than one year after the public presentation of the Protection Agenda and winding-up of the Nansen Initiative, Canada has developed an interest in the post-Nansen process and is now one of the publicly listed eighteen member states of the PDD Steering Group.<sup>275</sup> While Canada’s interest in the work of the PDD could be attributed to the change in political leadership in November 2015, it could also be explained by Finnemore and Sikkink’s “norm cascade” theory. Several factors, including the influence of other states, the calibre and number of developed states that have endorsed the Protection Agenda, and the sustenance of

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<sup>271</sup> Platform on Disaster Displacement, Leaflet, *supra* note 268.

<sup>272</sup> *Ibid.*

<sup>273</sup> Interview with Professor Kaelin, *supra* note 8; Interview with the Representative of Switzerland, *supra* note 9.

<sup>274</sup> Interview with the Representative of Switzerland, *ibid.*

campaign and dialogue on cross-border disaster displacement issues from the Nansen Initiative to the PDD may be responsible for Canada's behaviour.

By its terms of reference, the Steering Group of the PDD has several objectives and activities. Primarily, the Steering Group's objectives are to "provide political support and commitment to raise awareness on disaster displacement and to disseminate and implement the Protection Agenda, participate actively in the promotion and development of policy priorities and policy interventions, and lend leadership and guidance in the development of the strategy of the Platform."<sup>276</sup> Though the maximum membership of the Steering Group is currently pegged at twenty, this could expand following a suggestion by any member of the Steering Group and the decision whether or not to admit additional state(s) as member(s) of the Steering Group will be reached by consensus.<sup>277</sup> Financial contribution is not a requirement for membership of the Steering Group, but members may voluntarily contribute to the Platform's project funding and initiatives.<sup>278</sup> All that is required from state members is "political commitment" and this includes "contribution to the work of the Platform, attendance of meetings, readiness to volunteer for working groups in line with their interests and capacities, and readiness to use diplomatic channels and fora available to them."<sup>279</sup> Ultimately, the Platform expects Steering Group members to implement the Protection Agenda and act as "regional champions" on both the implementation of the Protection Agenda and the "visibility of the activities of the Platform."<sup>280</sup>

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<sup>275</sup> Platform on Disaster Displacement, Leaflet, *supra* note 268.

<sup>276</sup> Platform on Disaster Displacement, SG Terms of Reference, *supra* note 270.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*

It is the responsibility of the chair of the Platform not only to call meetings but to ensure that the meetings of the Steering Group are regular.<sup>281</sup> While the Chair of the Steering Group is the face of the PDD, the Chair has appointed Professor Kaelin as its Envoy to act on its behalf “for high-level public events and representation in global policy dialogues”.<sup>282</sup>

The Advisory Committee of the Platform on Disaster Displacement supplants the Nansen Initiative’s “Consultative Committee”.<sup>283</sup> Offering technical expertise and advice, “the Advisory Committee consists of, *inter alia*, individuals and representatives of international and regional organisations, research institutions, academia, private sector, non-governmental organisations and other civil society stakeholders.”<sup>284</sup> Members of the Advisory Committee have “expertise in fields such as humanitarian assistance and protection, human rights, migration management, refugee protection, disaster risk reduction, climate change mitigation and adaptation, and development.”<sup>285</sup> Thus, the Advisory Committee provides “expert input and strategic advice to the Chair and Steering Group of the Platform, and as applicable and appropriate, supports the implementation of activities in the Workplan in consultation with the Coordination Unit and the Chair.”<sup>286</sup> The Advisory Committee will also have a Working Group or Task Force based in Geneva which will be its operational arm with the responsibility for coordinating the

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<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*; Platform on Disaster Displacement, The Envoy of the Chair, online: <<http://disasterdisplacement.org/about-us/the-envoy-of-the-chair/>>. It should be noted that the first Envoy of the Chair was Mr. Achim Steiner (October 2016 – June 2017). Professor Kaelin was appointed as Envoy as of July 1, 2017.

<sup>283</sup> Platform on Disaster Displacement, Advisory Committee, Terms of Reference, at 2 [Platform on Disaster Displacement, AC Terms of Reference].

<sup>284</sup> Platform on Disaster Displacement, Leaflet, *supra* note 268.

<sup>285</sup> *Ibid.*

<sup>286</sup> Platform on Disaster Displacement, AC Terms of Reference, *supra* note 283.

“implementation of the activities in the Workplan on an ongoing basis, strengthening operational collaboration, and supporting the mainstreaming of activities within relevant agencies.”<sup>287</sup>

Membership of the Advisory Committee is open-ended, and the Steering Group must unanimously approve new admission.<sup>288</sup> The Chair of the Steering Group will appoint the Chair of the Advisory Committee and meetings of the Advisory Committee will be at the instance of its Chair and will be organised by the Coordination Unit.<sup>289</sup> Arguably, the most important aspect of the Advisory Committee is its working method. “The Advisory Committee meets at least once in a year in Geneva, Switzerland to take stock of progress in implementing the Protection Agenda, share information on effective practices and lessons learned, present new research and new initiatives, assess gaps and challenges and discuss and promote opportunities for further cooperation, coordination, and action.”<sup>290</sup> This presents an opportunity for the PDD to determine when and how states implement the Protection Agenda making the PDD an important platform and mechanism for compliance as the literature on compliance indicates.<sup>291</sup> It is also a strategy for gauging and measuring compliance by states and other actors with the Protection Agenda. Moreover, this may also serve as an avenue for elaborating on the provisions of the Agenda and clarifying the grey ones for effective implementation and compliance. Indoctrination, persuasion, as well as naming and praising, are also powerful tools that the Advisory Committee could use

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<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

<sup>291</sup> Koh, Why Do Nations Obey International Law?, *supra* note 242; Koh, Transnational Legal Process After September 11<sup>th</sup>, *supra* note 242; Jeffrey T. Checkel, “Why Comply? Social Learning and European Identity Change” (2001) 55:3 *International Organisation* 553 – 588.

at this stage in winning over non-conforming states and encouraging states that are implementing the Protection Agenda and complying with it.<sup>292</sup>

The Coordination Unit supports the work of the Steering Group, the Advisory Committee and other “relevant partners at the national, regional and global levels in developing and implementing the Platform’s activities.”<sup>293</sup> Basically, the Coordination Unit has the following functions: “coordination of efforts of key stakeholders to follow-up on the Nansen Initiative and in implementing the Protection Agenda; monitoring, mapping, and analysis of gap areas; and development of recommendations on measures and tools to fill these gaps.”<sup>294</sup> Germany is currently funding the work of the Coordination Unit in particular and the PDD in general and will be doing so till 2018.<sup>295</sup> It is not clear who takes over the funding responsibility after that, but it is safe to conclude, for now, that time will tell. In addition, Germany will provide funding from 2016 – 2018 for the work of two Program Officers working for the Platform on Disaster Displacement but housed within the UNHCR and IOM.<sup>296</sup> The work of these officers will be “to support the implementation of the Platform’s Strategic Framework and Workplan and the mainstreaming of activities within their respective agencies.”<sup>297</sup>

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<sup>292</sup> Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009); Neta Crawford, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (New York: Cambridge University Press, 2002).

<sup>293</sup> Platform on Disaster Displacement, Coordination Unit, Terms of Reference, at 2.

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

Notable international organisations in related fields, such as the UNHCR and IOM have pledged their support for the vision and work of the PDD. The UNHCR Assistant High Commissioner for Protection, Volker Türk speaking on behalf of the UNHCR during the launching of the Platform in Istanbul in May 2016 stated that the UNHCR “pledges concrete action to support states’ efforts to implement the Protection Agenda to reduce and address displacement caused by disasters and the adverse effects of climate change.”<sup>298</sup> During the launching, the IOM, the Norwegian Refugee Council, and other relevant NGOs made strong commitments and pledges to support the Platform and the implementation of the Protection Agenda.<sup>299</sup> However, the extent to which states, international and intergovernmental organisations, NGOs, and other actors are committed to implementing the Protection Agenda remains to be seen.

## 5.6 Conclusion

While not discarding the importance of article 38(1) of the *ICJ Statute* in contemporary international law-making, I have argued in this chapter that the Protection Agenda of the Nansen Initiative is a soft law instrument, meaning that at face value it is not binding. I have demonstrated in this chapter that a soft law instrument or a policy document is normative in so far as it evinces the essential requirements of norms as outlined in the norms literature. Thus, we have seen how some soft legal instruments have developed enduring normative structures in the fields of international environmental law, international economic law, and international human rights law. To the extent that the Protection Agenda seeks to regulate the behaviour of states on

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<sup>298</sup> The United Nations High Commissioner for Refugees, “UNHCR Pledges to Better Protect and Assist People Displaced by Disaster” (27 May 2016), online: UNHCR <<http://www.unhcr.org/news/latest/2016/5/574843f34/unhcr-pledges-better-protect-assist-people-displaced-disaster.html>>.

cross-border disaster-displacement, and this regulation has been accepted with an open endorsement by states, the Protection Agenda is normative. Furthermore, the reflection in the Protection Agenda of some principles of international law such as *non-refoulement*, humanity, human dignity, responsibility to protect, and the duty of states to cooperate with one another reinforces its normative contents. In the interest of balanced assessment, the Chapter has examined possible arguments that could challenge the normative status of the Protection Agenda while offering defences where appropriate. Though not an end in itself but the beginning of a new chapter in the history of international protection for cross-border disaster-displaced persons, the Protection Agenda could transmute into a better protection framework either through domestication by states or the adoption of regional and international treaties. These are parts of the changes expected within the life cycle of a norm.

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<sup>299</sup> Platform on Disaster Displacement, Engagement at (Side) Events WHS, Report of the Side Events.

## Chapter 6: Conclusion

*“The common assumption is that countries comply much better and more fully with binding international agreements than with non-binding legal instruments. Experience suggests an alternative hypothesis: that countries under some circumstances may comply with legally nonbinding instruments as well as they do with binding ones.”<sup>1</sup>*

Filling a gap that exists in any field of international law and relations is not an easy task. Depending on the issues and the interest at stake, bridging a gap that exists in international law generally requires the consensus of states and relevant stakeholders. The conception and birth of the Nansen Initiative were for the actualisation of this goal – to secure the consensus of states on the need to recognise and protect the populations displaced across borders by disasters and climate change. In determining how far the Nansen Initiative was able to achieve this task, I have deployed a number of international norm theories in interrogating the different aspects of the work of the Initiative. Theories of international norm change were crucial in analysing the processes leading to the formulation of the Protection Agenda. Norm theories were also useful in teasing out the constitutive elements of norms through which I was able to conclude that the Protection Agenda embodies all of the required elements of a norm and is consequently normative.

The dissertation has shown that the development of the Protection Agenda can be explained through the dispute-driven theory of international norm change. The *1951 Refugee Convention* being the “existing rule” for the recognition and protection of refugees does not address the concerns of cross-border disaster-displaced persons. Effects of climate change or environmental events on human mobility triggered a global advocacy on the need to recognise and protect cross-border disaster-displaced persons. Thus, scholars, NGOs, the

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<sup>1</sup> Edith Brown Weiss, “Introduction” in Edith Brown Weiss, ed., *International Compliance with Nonbinding Accords* (Washington, D.C: The American Society of International Law, 1997) at 1.

Nansen Initiative and international organisations like the UNHCR and IOM engaged in arguments and counter-arguments using relevant precedents and ethical considerations to support their respective positions. The Nansen Initiative in particular, successfully deployed framing as a tool to reshape the discussion around climate change and forced migration as a humanitarian issue. The result was the formulation by the Nansen Initiative, and adoption of the Protection Agenda by over 100 countries in Geneva in October 2015.

It is too early to fully determine whether and how states are implementing the Protection Agenda, though some implementation efforts exist. Scholarship cutting across law and international relations have shown that states implement and comply with both hard and soft laws. This work has indicated positive prognosis about the likely implementation of and compliance with the Protection Agenda by states and other actors. The implementation could take the form of feeding into an existing or future international hard or soft legal framework. The Protection Agenda could also evolve into a stand-alone international protection framework offering more precision in language and obligations as opposed to its current unwieldy form.<sup>2</sup> Potentially, the Protection Agenda may positively impact the way international law on the subject to which it relates may be developed and understood.<sup>3</sup> Moreover, the chances of its domestication into national and regional laws on disaster displacement are high considering the growing interest of states, international and regional organisations and NGOs, and other actors in the post-Nansen Initiative process. Whatever form the implementation process takes, it is important that the Protection Agenda is implemented at the international, regional, and national levels including within relevant organisations.<sup>4</sup> As the public presentation of the Protection Agenda and its endorsement by

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<sup>2</sup> Interview with Professor Jane McAdam on December 6, 2015 available on file with me.

<sup>3</sup> *Ibid.*

<sup>4</sup> Alexander Betts & Phil Orchard, eds., *Implementation and World Politics: How International Norms Change Practice* (New York: Oxford University Press, 2014).

states in Geneva in 2015 technically marked the end of the Nansen Initiative, the emergence of the PDD as an international mechanism for the implementation and entrenchment of the ideals of the Protection Agenda indicates the determination of the international community to address cross-border disaster displacement going forward. The generous funding by Germany and the increase in the number of the members of the Steering Committee of the Nansen Initiative from nine to eighteen with the PDD further confirm this determination. There is no doubt that the international efforts to recognise and protect cross-border disaster-displaced persons are increasingly gaining traction, and this bodes well for the implementation of the Protection Agenda while also fostering the possibility of compliance by states and other actors. International norm compliance theories have aided the conclusion that a determined and vibrant PDD is crucial to the successful implementation of and compliance with the Protection Agenda.

This work has principally focused on the identity, emergence and compliance with the Protection Agenda as an international protection norm for cross-border disaster-displaced persons. It has also examined the Nansen Initiative as an international norm entrepreneur including the role and significance of the PDD in the promotion and development of the Protection Agenda. Other areas of future research on the international recognition and protection of cross-border disaster displaced persons abound. One of such areas relates to the future of international efforts on the protection of cross-border disaster displaced persons. Apart from monitoring the progress and future of the PDD, it would be interesting to see, beyond speculation and guess work, which states have domesticated the Protection Agenda and whether or not they have welcomed or protected anyone in their country by relying on any of the recommendations contained in the Protection Agenda. There is also the curiosity to know how the Protection Agenda could change into something else other than its current form. There are judicial precedents of international courts and tribunals indicating that a rule

of law could transmute into customary international law within a relatively short period of time. Thus, there is a place for legal research in determining, in the nearest future, the accumulation of state practice and *opinio juris* on the recognition and protection of cross-border disaster displaced persons as well as the absence thereof. The Protection Agenda may lay the foundation for the development of customary international law where there is a noticeable positive change in the behaviour of states that have endorsed the document towards cross-border disaster-displaced persons and if these states owe the basis of their change of behaviour to the Protection Agenda. As noted earlier in the dissertation, it is not only too early to determine this change of behaviour but also beyond the scope of this work to determine why the Protection Agenda might become a rule of customary international law.

An additional new area to explore for research purposes would be the claim by the Nansen Initiative that the Protection Agenda is not creating new obligations for states. The claim is that all the provisions of the Protection Agenda are restatement of existing human rights, refugee, and humanitarian law principles. However, a careful look into some of these provisions may suggest otherwise. For example, a portion of paragraph 88 of the Protection Agenda which deals with migration with dignity seems not only to create new obligations for states but also seems to surpass existing human rights, refugee and humanitarian law scope on the subject.<sup>5</sup>

Lastly, future research work could focus on whether some states would contest the Protection Agenda as a norm by violating it or refusing to comply with it. It would be interesting to see how many and which state precisely would contest this norm although it should be noted that

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<sup>5</sup> The provision requires states to “develop or adapt national policies providing for residency permit quotas or seasonal worker programs in accordance with international labour standards to prioritise people from countries or areas facing natural hazard or climate change impacts”.

Russia already did.<sup>6</sup> Such further research could examine the impact of such contestation on this norm in terms of whether the contestation would weaken the norm or rather strengthen it. International norm scholars have argued that contestation does not necessarily weaken an international norm and that in some cases such contestations contribute to the robustness of the contested norm.<sup>7</sup> It remains to be seen how viable and robust the Protection Agenda would become.

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<sup>6</sup> See Chapter 5.

<sup>7</sup> Jutta Brunnee & Stephen J. Toope, “Norm Robustness and Contestation in International Law: Self-Defence against Non-State Actors” draft prepared for a workshop on “Norms Under Challenge: Unpacking the Dynamics of Norm Robustness,” held 8-10 December 2016 (on file with me); Lisbeth Zimmermann & Nicole Deitelhoff, “Norms Under Challenge: Unpacking the Dynamics of Norm Robustness” draft prepared for a workshop on “Norms Under Challenge: Unpacking the Dynamics of Norm Robustness,” held 8-10 December 2016 (on file with me); Richard Price, “Detecting Ideas and Their Effects” in Robert E. Goodin & Charles Tilly, eds., *The Oxford Handbook of Contextual Political Analysis* (Oxford: Oxford University Press, 2006).

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## **Appendices**

### **The Protection Agenda**

# **AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE**

**FINAL DRAFT**

## EXECUTIVE SUMMARY

### Displacement Realities

Forced displacement related to disasters, including the adverse effects of climate change (disaster displacement), is a reality and among the biggest humanitarian challenges facing States and the international community in the 21st century. Every year, millions of people are displaced by disasters caused by natural hazards such as floods, tropical storms, earthquakes, landslides, droughts, salt water intrusion, glacial melting, glacial lake outburst floods, and melting permafrost. Between 2008 and 2014 a total of 184.4 million people were displaced by disasters, an average of 26.4 million people newly displaced each year. Of these, an annual average of 22.5 million people was displaced by weather- and climate-related hazards. Others have to move because of the effects of sea level rise, desertification or environmental degradation. Looking to the future, there is high agreement among scientists that climate change, in combination with other factors, is projected to increase displacement in the future.

Disaster displacement creates humanitarian challenges, affects human rights, undermines development and may in some situations affect security.

Most disaster displaced persons remain within their own country. However, some cross borders in order to reach safety and/or protection and assistance in another country. While comprehensive and systematic data collection and analysis on cross-border disaster-displacement is lacking, based on available data, Africa along with Central and South America, in particular have seen the largest number of incidences of cross-border disaster-displacement.

The Nansen Initiative has identified at least 50 countries that in recent decades have received or refrained from returning people in the aftermath of disasters, in particular those caused by tropical storms, flooding, drought, tsunamis, and earthquakes. An analysis of the law, relevant institutions and operational responses pertinent to the protection and assistance of cross-border disaster-displaced persons reveals a general lack of preparedness leading to *ad hoc* responses in most cases.

Disaster displacement is multi-causal with climate change being an important, but not the only factor. Population growth, underdevelopment, weak governance, armed conflict, violence, as well as poor urban planning in rapidly expanding cities, are important factors in disaster displacement as they further weaken resilience and exacerbate the impacts of natural hazards, environmental degradation and climate change.

### Preparedness

These current and emerging realities call for *increased preparedness, solidarity and cooperation* by States, (sub-)regional organizations and the international community to prevent, avoid, and respond

The Nansen Initiative is a state-led, bottom-up consultative process intended to identify effective practices and build consensus on key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters, including the adverse effects of climate change. It is based upon a pledge by the Governments of Switzerland and Norway, supported by several States, to cooperate with interested States and other relevant stakeholders, and was launched in October 2012.

to disaster displacement and its causes. Since sudden-onset disasters may occur at any time and slow-onset disasters are likely to arise in many parts of the world, cross-border disaster-displacement is a global challenge. Potentially every State could be confronted with such displacement, either as a country of destination, transit or origin.

### **The Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change**

The Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (hereinafter Protection Agenda), endorsed by a global intergovernmental consultation on 12-13 October 2015 in Geneva, Switzerland, consolidates the outcomes of a series of regional intergovernmental consultations and civil society meetings convened by the Nansen Initiative. To assist States and other actors as they seek to improve their preparedness and response capacity to address cross-border disaster-displacement, the Protection Agenda:

- **Conceptualizes a comprehensive approach to disaster displacement** that primarily focuses on protecting cross-border disaster-displaced persons. At the same time, it presents measures to manage disaster displacement risks in the country of origin;
- **Compiles a broad set of effective practices** that could be used by States and other actors to ensure more effective future responses to cross-border disaster-displacement;
- **Highlights the need to bring together and link multiple policies and action areas to address cross-border disaster-displacement** and its root causes **that to date have been fragmented** rather than coordinated, and calls for the increased collaboration of actors in these fields; and
- **Identifies three priority areas for enhanced action** by States, (sub-)regional organizations, the international community as well as civil society, local communities, and affected populations to address existing gaps.

Rather than calling for a new binding international convention on cross-border disaster-displacement, this agenda supports an approach that focuses on the integration of effective practices by States and (sub-) regional organizations into their own normative frameworks in accordance with their specific situations and challenges.

The Protection Agenda is situated in the context of increased international and regional recognition of the challenges of human mobility in the context of disasters and climate change, such as the Conference of the Parties to the UN Framework Convention on Climate Change, Sendai Framework for Disaster Risk Reduction 2015–2030, UN’s 2030 Agenda for Sustainable Development, and the World Humanitarian Summit. The Nansen Initiative has already successfully contributed its relevant findings and conclusions to several of these processes. Thus, the Protection Agenda aims to further complement and support, rather than duplicate, these international and regional frameworks, processes and action areas by providing relevant evidence and examples of effective practices to address disaster displacement and its causes.

#### **Protection**

This agenda uses “**protection**” to refer to any positive action, whether or not based on legal obligations, undertaken by States on behalf of disaster displaced persons or persons at risk of being

displaced that aim at obtaining full respect for the rights of the individual in accordance with the letter and spirit of applicable bodies of law, namely human rights law, international humanitarian law and refugee law. While highlighting the humanitarian nature of such protection, the agenda does not aim to expand States' legal obligations under international refugee and human rights law for cross-border disaster-displaced persons and persons at risk of being displaced.

### **Protecting Cross-Border Disaster-Displaced Persons**

Providing protection abroad to cross-border disaster-displaced person can take two forms. States can either admit such persons to the territory of the receiving country and allow them to stay at least temporarily, or they can refrain from returning foreigners to a disaster affected country who were already present in the receiving country when the disaster occurred. In both situations, such humanitarian protection is usually provided temporarily, giving rise to the need to find lasting solutions for them.

International law does not explicitly address whether and under which circumstances disaster displaced persons shall be admitted to another country, what rights they have during their stay, and under what conditions they may be returned or find another lasting solution. In the absence of clear provisions in international law, some States, particularly in the Americas, selected regions in Africa and a few States in Europe, have developed a multitude of tools that allow them to admit or not return disaster displaced persons on their territory on an individual or group basis. These humanitarian protection measures are generally temporary, and may be based on regular immigration law, exceptional immigration categories, or provisions related to the protection of refugees or similar norms of international human rights law. The Protection Agenda highlights many effective practices in this regard.

Disaster displaced persons may need to be admitted to another country to escape real risks to their life and health, or access essential humanitarian protection and assistance not available in the country of origin. Absent such immediate needs, States sometimes are also ready to admit persons from disaster-affected countries as an act of international solidarity.

To date, the direct and serious impact of a disaster on a person has been a key consideration guiding admission decisions, including factors such as the seriousness of the disasters' impact, the person's pre-existing vulnerabilities, broader humanitarian considerations, and solidarity with the disaster affected country.

When cross-border disaster-displaced persons are admitted to a country, it is important to clarify their rights and responsibilities for the duration of their stay, taking into account the capacity of receiving States and host communities and the likely duration of stay. Such clarification not only ensures respect for the rights and basic needs of those admitted, but also helps avert the risk of secondary movements to another country.

States and disaster displaced persons may prefer to end cross-border disaster-displacement through voluntary return with sustainable re-integration at the place where displaced persons lived before the disaster. When return to their former homes is not possible or desired, in particular when the area concerned is no longer habitable or too exposed to the risk of recurrent disasters, an alternative way to end cross-border disaster-displacement includes settlement in a new place of residence after return to the country of origin. Particularly when the conditions causing the displacement persist for

an extended period of time or become permanent, finding a lasting solution also may mean facilitating permanent admission in the country that admitted them, or in exceptional cases to a third country.

### **Managing Disaster Displacement Risk in the Country of Origin**

A comprehensive approach to cross-border disaster-displacement also requires tackling disaster displacement risk in the country of origin. Therefore, the Protection Agenda addresses not only the protection and assistance needs of cross-border disaster-displaced persons, but, at the same time, identifies measures to manage disaster displacement risks in the country of origin. These include effective practices to reduce vulnerability and build resilience to disaster displacement risk, facilitate migration and conduct planned relocation out of hazardous areas, and respond to the needs of internally displaced persons.

***Reducing Vulnerability and Building Resilience to Displacement Risk:*** Resilience is a key factor in determining whether and how individuals, families, communities and countries can withstand the impacts of sudden-onset and slow-onset natural hazards and impacts of climate change. Disaster risk reduction activities, infrastructure improvements, urban planning, climate change adaptation measures, land reform, and other development measures to strengthen the resiliency of vulnerable persons or groups of persons are all potential actions to help people remain safely in their homes when faced with natural hazards, and thus substantially reduce the number of disaster displaced persons. Such activities may also help to strengthen host communities' capacity to receive displaced persons, and facilitate finding lasting solutions to end displacement by reducing exposure and building resilience to future hazards. Therefore it is important to specifically address displacement, migration and planned relocation in disaster risk reduction, climate change adaptation and other development plans and strategies.

***Migration with Dignity:*** When living conditions deteriorate in the context of natural hazards and the effects of climate change, individuals and families often use migration as a way to seek alternative opportunities within their country or abroad to avoid situations that otherwise may result in a humanitarian crisis and displacement in the future. Managed properly, migration has the potential to be an adequate measure to cope with the effects of climate change, other environmental degradation and natural hazards. Circular or temporary migration can create new livelihood opportunities, support economic development, and build resilience to future hazards by allowing migrants to send back remittances and return home with newly acquired knowledge, technology and skills. The possibility for permanent migration is particularly important for low-lying small island States and other countries confronting substantial loss of territory or other adverse effects of climate change that increasingly make large tracts of land uninhabitable.

However migration also carries specific risks, in particular for women and children. Migrants might be economically exploited, exposed to dangerous conditions at their place of work or home, face discrimination or become victims of violence or being trafficked.

Measures to help facilitate migration with dignity from countries or areas facing natural hazards or climate change impacts include reviewing existing bilateral and (sub-) regional migration agreements, adopting national quotas or seasonal workers programs, and providing training and education to potential migrants.

**Planned Relocation:** The risks and impacts of disasters, climate change, and environmental degradation have led many governments around the world to move and settle persons or groups of persons to safer areas, both before and after disaster displacement occurs. However, because of the many negative effects associated with past relocation processes (e.g. challenges related to sustaining livelihoods, cultural ties, identity and connection to land), planned relocation is generally considered a last resort after other options have been reasonably exhausted.

Experience shows that planned relocation is more likely to be sustainable if it is undertaken in consultation with and the participation of affected people, including host communities, and with full respect of the rights of relocated people. Additional factors for success include taking into account community ties, cultural values, traditions, and psychological attachments to their original place of residence, and ensuring adequate livelihood opportunities, basic services, and housing in the new location. Systematic engagement with women, in particular, also contributes to a successful outcome of the relocation process. Clear guidance on these issues facilitates planned relocation processes.

**Assisting Internally Displaced Persons:** Since most disaster displacement takes place within countries, the protection of internally displaced persons (IDPs) is particularly important. To be effective, approaches to risk mapping, disaster risk reduction measures, contingency planning, the humanitarian response, as well as efforts to find lasting solutions to disaster displacement often require addressing both internal and cross-border displacement at the same time. Furthermore, although more knowledge and data is required to better understand the relationship, it has been observed that cross-border disaster-displacement could potentially be avoided or reduced if IDPs received adequate protection and assistance following disasters. In particular, a lack of durable solutions is one reason why internally displaced persons may subsequently move abroad.

The UN Guiding Principles on Internal Displacement, which have been recognized by the international community as an “important international framework for the protection of internally displaced persons,” include those displaced in the context of disasters. At the regional level, internal displacement in the context of disasters and climate change is explicitly covered by the AU Kampala Convention. Addressing all stages of disaster displacement in line with these standards within disaster risk management or IDP laws and policies, and clarifying the roles and responsibilities of relevant actors are key elements of preparing an effective response.

### **Priority Areas for Future Action**

Preventing and responding to cross-border disaster-displacement requires enhanced action at the national, (sub-)regional and international level. These effective practices identified in the Protection Agenda provide a starting point to inspire future action, and bring together the many existing policy and action areas discussed in this agenda that have been relatively uncoordinated to date.

As a contribution to future efforts to address cross-border disaster-displacement, this agenda identifies *three priority areas* for action to support the implementation of identified effective practices:

- 1) **Collecting data and enhancing knowledge** on cross-border disaster-displacement;
- 2) **Enhancing the use of humanitarian protection measures** for cross-border disaster-displaced persons, including mechanisms for lasting solutions, for instance by harmonizing approaches at (sub-)regional levels;

3) **Strengthening the management of disaster displacement risk in the country of origin** by:

- a. Integrating human mobility within disaster risk reduction and climate change adaptation strategies, and other relevant development processes;
- b. Facilitating migration with dignity as a potentially positive way to cope with the effects of natural hazards and climate change;
- c. Improving the use of planned relocation as preventative or responsive measure to disaster risk and displacement;
- d. Ensuring that the needs of IDPs displaced in disaster situations are specifically addressed by relevant laws and policies on disaster risk management or internal displacement.

Action in the three priority areas requires concerted efforts at all levels. States should consider establishing at the national level designated institutional leadership to bring together different branches of government to coordinate national planning and response efforts for cross-border disaster-displacement. At the same time, effective implementation of activities requires strong involvement and participation of local authorities; affected communities including, where relevant, indigenous peoples; women; youth; as well as civil society organizations and academia.

Recognizing that most cross-border disaster-displacement takes place within regions and therefore appropriate responses vary from region to region, the roles of regional and sub-regional organizations, for example the African Union and the African regional economic communities or the Pacific Islands Forum, are of primary importance for developing integrated responses. More specialized (sub-)regional mechanisms include Regional Consultative Processes (on migration), human rights mechanisms, disaster risk management centres, climate change adaptation strategies, as well as common markets and free movement of persons arrangements, among others. Contributions by the international community and development partners are also important.

At the global level, international organizations and agencies dealing with issues as diverse as humanitarian action, human rights protection, migration management, refugee protection, disaster risk reduction, climate change adaptation, and development may also contribute. In particular, they can provide technical advice as well as capacity building and operational support to (sub-)regional, national and local authorities to support implementation of the three priority areas, according to their respective mandates and areas of expertise. However, there is a need to more closely cooperate with each other and integrate work in these areas.

To facilitate follow up on the agenda and implementation of activities identified in the three priority areas for action addressing cross-border disaster-displacement, it will be important to continue to provide a forum for dialogue among interested States to further discuss how best to protect cross-border disaster-displaced persons; and enhance cooperation and coordination between international organizations and agencies, and other relevant actors, in order to ensure a comprehensive approach to cross-border disaster-displacement.

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## INTRODUCTION

### I. Displacement Realities

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[1] Forced displacement related to disasters, including the adverse effects of climate change, is a reality and among the biggest humanitarian challenges facing States and the international community in the 21st century. Every year, millions of people are displaced by disasters caused by natural hazards such as floods, tropical storms, earthquakes, landslides, droughts, salt water intrusion, glacial melting, glacial lake outburst floods, and melting permafrost. Between 2008 and 2014 a total of 184.4 million people were displaced by disasters, an average of 26.4 million people newly displaced each year.<sup>1</sup> Of these, an annual average of 22.5 million people was displaced by weather- and climate-related hazards. Others have to move because of the effects of sea level rise, desertification or environmental degradation.

[2] Disaster displacement is large-scale, has devastating impacts on people and their communities, raises multiple protection concerns and undermines the development of many States. These challenges are compounded by the fact that disasters exacerbate pre-existing vulnerabilities. Sick and wounded persons, children, particularly when orphaned or unaccompanied, women headed households, people with disabilities, older persons, migrants, and members of indigenous peoples are often among the most seriously affected survivors of disaster. Least Developed Countries, small island developing States, as well as middle-income countries facing specific challenges, and their populations are hardest hit. While many displaced people are able to return to their homes after a short period of time, tens of millions among them need ongoing protection and assistance as well as support to find lasting solutions to end their displacement.

[3] Most disaster displaced persons remain within their own country. However, some cross borders in order to reach safety and/or protection and assistance in another country. The Nansen Initiative has identified at least 50 countries that in recent decades have received or refrained from returning people in the aftermath of disasters, in particular those caused by tropical storms, flooding, drought, tsunamis, and earthquakes (See Annex). Due to a lack of systematic monitoring of cross-border disaster-displacement this number is far from complete. Presently available global data cover “only the incidence of displacement, and not where displaced people flee to or where they eventually settle.”<sup>2</sup> Thus, current evidence is not sufficient to determine how many people have crossed international borders in disaster contexts.

[4] Africa, and Central and South America in particular have seen incidences of cross-border disaster-displacement (See Annex). In Africa, such displacement largely occurs within the context of flooding and drought, but also volcanic eruptions, while in Central and South America, hurricanes, flooding, landslides and earthquakes most frequently lead to cross-border disaster-displacement. Although the adverse impacts of climate change have already started to prompt population movements in the Pacific region, cross-border displacement is not yet a significant reality. However, the effects of rising sea levels such as submergence, coastal flooding, and coastal erosion will seriously affect the territorial integrity of small island developing States and States with extensive low-lying coastlines, and thus may force substantial parts of their populations to move internally when possible, or abroad. As a continent, Asia has the highest number of people internally displaced as a consequence of disasters, notably those caused by tropical storms, earthquakes, glacial lake outburst floods, landslides and large-scale flooding. While instances of cross-border disaster-

displacement have been rare in Asia, there is some evidence that the impacts of natural hazards and climate change contribute to people migrating abroad. Within Europe, although earthquakes and flooding have displaced substantial numbers of people, there is little evidence of significant displacement or migration to other countries.

[5] Looking to the future, there is high agreement among scientists that climate change, in combination with other factors, is projected to increase displacement in the future, with migration increasingly becoming an important response to both extreme weather events and longer-term climate variability and change.<sup>3</sup> Sea level rise, in particular, is expected to force tens or hundreds of millions of people to move away from low-lying coastal areas, deltas and islands that cannot be protected such as through infrastructure improvement and coastal protection measures.<sup>4</sup>

[6] However, because disaster displacement is multi-causal, climate change will be an important but not the only contributing factor. Population growth, underdevelopment, weak governance, armed conflict and violence, as well as poor urban planning in rapidly expanding cities, are important drivers of displacement and migration as they further weaken resilience and increase vulnerability, and exacerbate the impacts of natural hazards and climate change. Due to this multi-causality and uncertainty regarding the extent to which States will be successful in their attempts to mitigate and adapt to climate change, accurate global quantitative projections are difficult to make.<sup>5</sup> However, it is possible to identify areas particularly exposed to natural hazards and thus identify populations at risk of potential displacement. In particular, significant international movements are likely to become inevitable for the populations of low-lying island States, and coastal States losing significant parts of their territory that lack options for internal movement.

[7] Despite the difficulties of quantitative projections, these scenarios, particularly in light of the adverse impacts of climate change, call for *increased preparedness, solidarity and cooperation* by States, (sub-)regional organizations and the international community to prevent, avoid, and respond to disaster displacement and its causes. As sudden-onset disasters may occur any time and slow-onset disasters are likely to occur in many parts of the world, cross-border disaster-displacement is a global challenge. Already many States have been<sup>6</sup> and potentially every State could be confronted with such displacement, either as a country of destination, transit or origin.

## **II. The Nansen Initiative**

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[8] The Nansen Initiative is a state-led, bottom-up consultative process intended to identify effective practices, drawing on the actual practice and experience of governments, and build consensus on key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters, including the adverse effects of climate change. It is based upon a pledge by the Governments of Switzerland and Norway, supported by several States, to cooperate with interested States and other relevant stakeholders,<sup>7</sup> and was launched in October 2012.<sup>8</sup> The Nansen Initiative builds on paragraph 14(f) of the 2010 UNFCCC Cancun Agreement<sup>9</sup> on climate change adaptation that calls for “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation,” as well as the Nansen Principles that synthesize the outcomes of the 2011 Nansen Conference on Climate Change and Displacement.<sup>10</sup>

[9] The Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, endorsed by a global intergovernmental consultation on 12-13 October 2015 in

Geneva, Switzerland, consolidates the outcomes of a series of regional intergovernmental consultations and civil society meetings convened by the Nansen Initiative.<sup>11</sup>

### **III. Purpose, Scope and Context of the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change**

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#### **A. Purpose**

[10] The purpose of this agenda is to enhance understanding, provide a conceptual framework, and identify effective practices for strengthening the protection of cross-border disaster-displaced persons. In particular, it explores potential measures that States may voluntarily adopt and harmonize to admit such persons on the grounds of humanitarian considerations and international solidarity with disaster affected countries and communities. It also purports to improve action to manage disaster displacement risk in the country of origin to prevent displacement by addressing underlying risk factors, help people move out of areas at high risk of exposure to natural hazards in order to avoid becoming displaced, and effectively address the needs of those displaced within their own country. It highlights key actions areas to be taken by States, (sub-)regional organizations and the international community. Finally, this agenda also identifies ways to enhance the crucial role of affected populations, local communities, and civil society in addressing disaster displacement.

#### **B. Scope**

[11] This agenda addresses displacement in the context of disasters linked to hydro-meteorological and climatological hazards like flooding, tornadoes, cyclones, drought, salt water intrusion and glacial melting as well as geophysical hazards such as earthquakes, tsunamis or volcanic eruptions. It considers the effects of both sudden-onset and slow-onset hazards including, in particular, those linked to the adverse impacts of climate change.<sup>12</sup> The relevant distinction is not the character of the disaster, but rather whether it triggers displacement, understood as the (primarily) forced movement of persons as opposed to (primarily) voluntary migration.

[12] A comprehensive approach to cross-border disaster-displacement also requires tackling disaster displacement risk in the country of origin. Therefore, the Protection Agenda addresses the protection and assistance needs of people who have been displaced across borders (**Part One**) and, at the same time, identifies effective practices to reduce vulnerability and build resilience to disaster displacement risk, facilitate migration out of hazardous areas, conduct planned relocation and respond to the needs of internally displaced persons (**Part Two**). The agenda ends with a list of priority areas for future action at national, (sub-)regional and international levels (**Part Three**).

[13] The Nansen Initiative consultative process identified the specific protection and assistance needs of foreigners caught up in a disaster while abroad. These issues are addressed by the Migrants in Countries in Crisis (MICIC) Initiative,<sup>13</sup> and therefore fall outside of this agenda.<sup>14</sup>

#### **C. Key Notions**

[14] This agenda uses “protection” to refer to any positive action, whether or not based on legal obligations, undertaken by States on behalf of disaster displaced persons or persons at risk of being displaced that aim at obtaining full respect for the rights of the individual in accordance with the letter and spirit of applicable bodies of law, namely human rights law, international humanitarian law and refugee law.<sup>15</sup> While highlighting the humanitarian nature of such protection, the agenda does not aim to expand States’ legal obligations under international refugee and human rights law for cross-border disaster-displaced persons and persons at risk of being displaced.

[15] The term “**disaster**” refers to a “serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources.”<sup>16</sup> For the purposes of the Protection Agenda, disasters refer to disruptions triggered by or linked to hydro-metrological and climatological natural hazards, including hazards linked to anthropogenic global warming, as well as geophysical hazards.

[16] The term “**disaster displacement**” refers to situations where people are forced or obliged to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard. Such displacement results from the fact that affected persons are (i) exposed to (ii) a natural hazard in a situation where (iii) they are too vulnerable and lack the resilience to withstand the impacts of that hazard. It is the *effects* of natural hazards, including the adverse impacts of climate change, that may overwhelm the resilience or adaptive capacity of an affected community or society, thus leading to a disaster that potentially results in displacement.

[17] The above understanding indicates that just as a disaster is complex and multi-causal, so is disaster displacement. In addition to exposure to a natural hazard, a multitude of demographic, political, social, economic and other developmental factors also determines to a large extent whether people can withstand the impacts of the hazard or will have to leave their homes. The Protection Agenda thus recognizes that disaster displacement occurs *in the context* of disasters, including the impacts of climate change, rather than being exclusively caused by a disaster.

[18] Disaster displacement may take the form of spontaneous flight, an evacuation ordered or enforced by authorities or an involuntary planned relocation process. Such displacement can occur within a country (**internal displacement**<sup>17</sup>), or across international borders (**cross-border disaster-displacement**).

[19] “**Humanitarian protection measures**” refer to the laws, policies and practices used by States to permit the admission and stay of cross-border disaster-displaced persons on their territory.<sup>18</sup>

[20] The term “migration” commonly refers to a broad category of population movements.<sup>19</sup> Likewise, the International Organization for Migration’s (IOM) working definition of an “environmental migrant” includes various groups of individuals moving within different contexts: voluntarily or involuntarily, temporarily or permanently, within their own country or abroad.<sup>20</sup> For the purposes of this agenda, and in line with the terminology suggested by paragraph 14(f) of the Cancun Climate Change Adaptation Framework,<sup>21</sup> “**migration**” refers to human movements that are *preponderantly* voluntary insofar as people, while not necessarily having the ability to decide in complete freedom, still possess the ability to choose between different realistic options. In the context of slow-onset natural hazards, environmental degradation and the long-term impacts of climate change, such migration is often used to cope with, “avoid or adjust to”<sup>22</sup> deteriorating environmental conditions that could otherwise result in a humanitarian crisis and displacement in the future.

[21] Authorities or in some cases communities may consider relocation as a way to move out of areas with high levels of disaster risk, or as a solution in cases when return to disaster affected areas would be too dangerous or impossible. Such “**planned relocation**” can be described as “a planned process in which persons or groups of persons move or are assisted to move away from their homes or places of temporary residence, are settled in a new location, *and* provided with the conditions for

rebuilding their lives.”<sup>23</sup> Planned relocation can be voluntary or involuntary, and usually takes place within the country, but may, in very exceptional cases, also occur across State borders.

[22] These three forms of movement as referred to in Paragraph 14(f) of the Cancun Climate Change Adaptation Framework, namely displacement (understood as the primarily *forced* movement of persons), migration (understood as the primarily *voluntary* movement of persons) and planned relocation (understood as planned process of settling persons or groups of persons to a new location), are referred to in this agenda in generic terms as “**human mobility**.”

[23] This agenda uses terminology from the fields of disaster risk management and climate change. “**Risk**” is the “combination of the probability of an event and its negative consequences” and is determined by a combination of exposure to a natural hazard, the vulnerability of an individual or community, and the nature of the hazard itself.<sup>24</sup> “**Exposure**” refers to “people, property, systems, or other elements present in hazard zones that are thereby subject to potential losses.”<sup>25</sup> “**Resilience**” means the “ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions.”<sup>26</sup> “**Adaptation**” refers to “the process of adjustment to actual or expected climate and its effects” that “seeks to moderate or avoid harm or exploit beneficial opportunities.”<sup>27</sup>

#### D. Context

[24] The Protection Agenda is situated in the context of increased international recognition of the challenges of human mobility in the context of disasters and climate change. The 2010 Conference of the Parties to the UN Framework Convention on Climate Change (**Cancun Adaptation Framework**) invited Parties to undertake measures to enhance “understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation,” while the 2012 Doha decision on loss and damage encouraged further work to enhance understanding of how impacts of climate change are affecting “patterns of migration, displacement and human mobility.”<sup>28</sup> The **Sendai Framework for Disaster Risk Reduction 2015–2030** is particularly important as it calls for enhanced action to prevent and mitigate displacement and to address internal and cross-border displacement risk.<sup>29</sup> The UN’s **2030 Agenda for Sustainable Development** recognizes that global challenges threaten “to reverse much of the development progress made in recent decades” include “more frequent and intense natural disasters” as well as the “forced displacement of people.”<sup>30</sup> The **World Humanitarian Summit** process has also identified disaster displacement as a current and emerging humanitarian challenge.<sup>31</sup>

[25] At the regional level, the **2006 African Union Migration Policy Framework for Africa** states that environmental degradation and poverty are a “significant root causes of mass migration and forced displacement in Africa.”<sup>32</sup> In the Americas, the **2014 Brazil Declaration and Plan of Action** recognizes “the challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause in the region” and the need to “give more attention to this matter.”<sup>33</sup> In the Pacific, the Summit of Leaders of the Pacific Islands Development Forum approved the **2015 Suva Declaration on Climate Change**, which states “that climate change is already resulting in forced displacement of island populations and the loss of land and territorial integrity and further highlight[s] that such loss and damage results in breaches of social and economic rights.”<sup>34</sup>

[26] The Nansen Initiative has already successfully contributed its relevant findings and conclusions to several of these processes.<sup>35</sup> Thus, the Protection Agenda aims to further complement and support, rather than duplicate, these international and regional frameworks, processes and action areas by providing relevant evidence and examples of effective practices to address disaster displacement and its causes.

#### IV. Gaps and the Need for Enhanced Action

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[27] Disaster displacement creates humanitarian challenges, affects human rights, undermines development and may in some situations affect security.<sup>36</sup> Projections indicate that climate change will further compound these challenges, increasing vulnerability and exposure to disaster displacement risk, including across international borders.

[28] An analysis of the law, relevant institutions and operational responses pertinent to the protection and assistance of cross-border disaster-displaced persons reveals a general lack of preparedness leading to *ad hoc* responses in most cases. In particular, the following key gaps can be identified:

- *Knowledge and data gaps:* While understanding of the causes, dynamics and magnitude of disaster displacement has been growing in recent years, these phenomena are still not fully understood and conceptualized. Therefore better data, concepts and evidence are needed to develop adequate policies. The development of tools and systems that allow for the systematic gathering and analysis of reliable data on displacement, and human mobility more generally, in the context of disasters and the effects of climate change is particularly needed.
- *Legal gaps:* Persons who have moved *across international borders* in disaster contexts are protected by human rights law, and where applicable, refugee law. However, international law does not address critical issues such as admission, access to basic services during temporary or permanent stay, and conditions for return. While a small number of states have national laws or bilateral or (sub-)regional agreements that specifically address the admission or temporary stay of foreigners displaced by disasters, the vast majority of countries lack any normative framework.
- *Institutional and operational gaps:* While many international agencies and organizations work on the issue of disaster displacement, none is explicitly mandated to assist and protect cross-border disaster-displaced persons, which undermines the predictability and preparedness of their responses. Nor do international agencies and organizations have established mechanisms for cross-border cooperation, particularly regarding the search for lasting solutions for the displaced.
- *Funding gaps:* While existing funding mechanisms respond to immediate humanitarian crises in disaster situations, there is a lack of clarity regarding funding for measures to address cross-border disaster-displacement, and find lasting solutions for displacement. While large and visible disasters usually attract substantial humanitarian funding, small-scale disasters often receive inadequate levels of funding at both domestic and international levels. Finally, there is limited experience in requesting funding for human mobility challenges from adaptation finance sources, and thus, it remains to be seen to what extent climate change adaptation funding and other relevant funding will be available to address human mobility challenges.

[29] The key contributions of the Protection Agenda in assisting States as they seek to improve their preparedness and response capacity to address cross-border disaster-displacement include:

- a. **Conceptualizing a comprehensive approach to cross-border disaster-displacement** that not only focuses on protecting cross-border disaster-displaced persons, but also presents measures to manage disaster displacement risks in the country of origin. These include, in particular, measures to prevent displacement and help people to stay, or when movement is unavoidable, to allow people to move out of harm's way from areas facing high levels of disaster risk and enhance the protection of internally displaced persons;
- b. **Compiling a broad set of effective practices** used by States and other actors that could be used by States, (sub-)regional organizations and the international community to ensure more effective future responses to cross-border disaster-related displacement;
- c. **Highlighting the need to bring together and link policies and action areas to address cross-border disaster-displacement** and its root causes **that to date have been relatively uncoordinated**, and calling for the increased collaboration of actors in these fields. Such areas include humanitarian assistance and protection, human rights protection, migration management, disaster risk reduction, climate change adaptation, and development; and
- d. **Identifying three priority areas for enhanced action** by States, (sub-)regional organizations, the international community and other stakeholders, including civil society, local authorities and local communities, **to address existing gaps** namely: (1) Collecting data and enhancing knowledge on cross-border disaster-displacement; (2) Enhancing the use of humanitarian protection measures for cross-border disaster-displaced persons, including mechanisms for lasting solutions; and (3) Strengthening the management of disaster displacement risk in the country of origin.

## **PART ONE: PROTECTING CROSS-BORDER DISASTER-DISPLACED PERSONS**

[30] Providing protection abroad to cross-border disaster-displaced person can take two forms. States can either admit such persons to the territory of the receiving country and allow them to stay at least temporarily (section I), or they can refrain from returning foreigners to a disaster affected country who were already present in the receiving country when the disaster occurred (section II). In both situations, such humanitarian protection is usually provided temporarily, giving rise to the need to find lasting solutions for them (section III).

### **I. Admission and Stay of Cross-Border Disaster-Displaced Persons**

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[31] International law does not explicitly address whether and under which circumstances disaster displaced persons shall be admitted to another country, what rights they have during their stay, and under what conditions they may be returned or find another lasting solution. However, a number of States have admitted disaster displaced persons relying upon national legislation or the discretionary power of migration authorities. In some cases they have also based their decisions on

applicable refugee law. The following discussion and examples of effective practices are drawn from this experience.

## **A. Identifying the Displaced**

[32] There are no universally recognized criteria to determine, in the context of disasters, when a movement could be characterized as forced across international borders. Although the difference between displacement and migration can be difficult to pinpoint, it is important to distinguish between voluntary and forced movement. Such a distinction underlies responses by States and the international community because it is commonly acknowledged that those forced to leave their country face a heightened degree of vulnerability and thus have specific protection and assistance needs, including how to find a lasting solution to their displacement.

### **1. Effective Practices**

[33] Factors States could consider with regard to establishing criteria to identify cross-border disaster-displaced persons for the purposes of providing protection and assistance include the following:

- ***Assessing the direct and serious impact of the disaster on the individual. Someone may be considered a cross-border disaster-displaced person where he/she is seriously and personally affected by the disaster, particularly because***
  - i. *An on-going or, in rare cases, an imminent and foreseeable disaster in the country of origin poses a real risk to his/her life or safety;*
  - ii. *as a direct result of the disaster, the person has been wounded, lost family members, and/or lost his/her (means of) livelihood; and/or*
  - iii. *in the aftermath and as a direct result of the disaster, the person faces a real risk to his/her life or safety or very serious hardship in his/her country, in particular due to the fact that he/she cannot access needed humanitarian protection and assistance in that country,*
    - a. *because such protection and assistance is not available due to the fact that government capacity to respond is temporarily overwhelmed, and humanitarian access for international actors is not possible or seriously undermined, or*
    - b. *because factual or legal obstacles make it impossible for him/her to reach available protection and assistance.*
- ***Assessing the seriousness of the disaster's impact. This not only depends on objective factors, such as the overall degree of destruction, but also on pre-existing individual vulnerabilities exacerbated by the disaster. For example, sick and wounded persons, children, particularly when orphaned or unaccompanied, women headed households, people with disabilities, older persons and members of indigenous peoples are often among the most seriously affected survivors of disasters.***
- ***Assessing additional factors. Other relevant factors may include considerations of solidarity with an affected country that is temporarily unable to adequately protect and assist all of its citizens due to the disaster, or humanitarian elements, such as strong ties with family members in the country of destination.***
- ***Assessing contrary factors. Subject to applicable refugee and human rights law, and based upon careful examination of each case, factors justifying non-admission may include national security risks posed by the individual or his/her serious criminal activities.***

[34] Effective practices States could consider with regard to establishing mechanisms to identify cross-border disaster-displaced persons include the following:

- *Developing and integrating criteria to identify cross-border disaster-displaced persons (see para. 33) into relevant domestic laws and policies.*
- *Explicitly designating and authorizing competent authorities to permit travel, admission and stay for cross-border disaster-displaced persons in line with such criteria.*
- *Enshrining their legal obligations and commitments in the areas of human rights, refugee protection, the rights of the child, and the protection of trafficked persons (below paras. 39-40; 55-57) in domestic laws and policies on cross-border disaster-displaced persons.*

## **2. Background Information**

### *a) Situations and criteria*

[35] In sudden-onset disaster situations, moving across borders may be the most, or only, reasonable option to seek safety, and protection and assistance. In border regions, for instance, the closest way to safety may be to a neighboring country. In other situations, protection and lifesaving assistance may not be available in-country as a result of widespread destruction of infrastructure and basic services. A disaster may also simply overwhelm the response capacities of affected communities, local and national authorities, international humanitarian actors and civil society alike. Particularly in situations where a disaster occurs amidst an armed conflict, the delivery of humanitarian assistance may be severely hindered by insecurity, a lack of trust of authorities, or discrimination toward certain parts of the population, which could again prompt disaster-affected persons to seek assistance and protection abroad.

[36] Slow-onset natural hazards are more challenging, in that movements occurring as a consequence of the gradual erosion of resilience or as an adaptation measure to environmental stress usually have some element of choice and thus can more easily be qualified as (primarily voluntary) migration. However, when slow-onset hazards that may have been building over many months or years reach an emergency phase within a short period of time, for example when drought “suddenly” contributes to a famine, people may see no other option than to seek food and assistance abroad. Slow-onset hazards, or the cumulative effect of a series of smaller, sudden-onset hazards, may also erode a community’s capacity to withstand what would normally be insignificant sudden-onset hazards. Such disaster scenarios are particularly relevant for low-lying island States, where inhabitants may be prompted to leave their homes and seek assistance and protection abroad on a temporary or, in extreme cases of the land becoming uninhabitable, permanent basis.

[37] In these scenarios, affected persons may need to be admitted to another country to escape real risks to their life and health, or access essential humanitarian protection and assistance not available in the country of origin. Absent such immediate needs, States sometimes are also ready to admit persons from disaster-affected countries as an act of international solidarity.

### *b) Immigration discretion and its limits*

[38] The power to regulate the admission of foreigners on its territory is an inherent right of every State and an attribute of its sovereignty. The flexibility inherent in immigration discretion, in particular, allows countries to grant permission for disaster-affected foreigners to travel to, be admitted to and temporarily stay in the country. International law is silent as to whether and when a

displaced person must be admitted by another State in the context of a sudden-onset or slow-onset disaster, and it does not specify what legal status they should have once admitted. Consequently, States can exercise their power with a broad degree of discretion. It may be used negatively to block the entry of foreigners, or to deny or terminate their permission to stay. It may also be used positively to allow foreigners to enter or stay in the country.

[39] The discretionary power of States in immigration matters is not unlimited, however, and must be exercised with respect for applicable rules of international and national law that may constrain its use in particular circumstances. First, international human rights law, despite the absence of specific jurisprudence, may arguably protect a disaster displaced person against removal in certain limited situations.<sup>37</sup> Regional human rights law may go further and prohibit return to a country where the lack of humanitarian protection and assistance would lead to a situation deemed to be inhuman.<sup>38</sup> Similarly, at least one court has interpreted the “best interests of the child” principle (Article 3 International Convention on the Rights of the Child) to be a “central aspect” in return proceedings, meaning that a child, in principle, cannot be returned to a country if it is not in the child’s best interest, including where he or she would face a real risk of human rights violations.<sup>39</sup> Second, refugee law protects persons against forcible return (*refoulement*)<sup>40</sup> when relevant grounds of persecution occur in a disaster context (below paras. 55-57). Third, persons affected by disasters also continue to benefit from relevant protection under international, regional or national laws relating to victims of trafficking.<sup>41</sup> However, these existing guarantees for non-return find only exceptional and very limited application in disaster scenarios.

[40] Conventions protecting the human rights of migrants do not provide additional protection with regard to admission and non-return.<sup>42</sup> However, States may be bound by bilateral or (sub-)regional agreements guaranteeing free movement to certain categories of persons, which may also be applicable in disaster situations. Some countries have also undertaken preliminary discussions on a possible “right to migration” that could eventually become relevant in disaster situations.<sup>43</sup>

### **3. Gaps and Challenges**

[41] While some countries possess legal provisions to identify those in need of protection abroad in disaster situation, most States lack laws and policies that would provide criteria if cross-border disaster-displaced persons arrived at their borders. Even in regions where relevant legal provisions are more common, such as in the Americas, such approaches could benefit from a certain degree of harmonization to better facilitate regional cooperation in addressing disaster displacement.

#### **B. Preparedness**

[42] States, particularly those in regions exposed to high levels of disaster risk, need to prepare for potential cross-border disaster-displacement to avoid being overwhelmed in the event of a sudden or large-scale influx of people in search of protection and assistance abroad.

##### **1. Effective Practices**

[43] Effective practices States could consider with regard to preparedness include the following:

- *Mapping historical cross-border displacement and migration movements, particularly in disaster contexts, to help identify areas or communities at risk of potential displacement in the future.*
- *Including cross-border displacement scenarios within bilateral or regional disaster contingency planning exercises.*

- *Reviewing existing legal frameworks at the regional and national level and, if relevant, harmonizing them, with respect to receiving cross-border disaster-displaced persons.*
- *To the extent that they do not exist or are inadequate, considering the development of new legal and/or policy frameworks or amending existing ones with clear criteria and procedures to identify cross-border disaster-displaced persons (above para. 33) and permit their travel, admission and stay.*
- *Building the capacity of competent border and immigration authorities through training and technical support to apply relevant legal frameworks and policies for cross-border disaster-displaced persons.*

## **2. Background Information**

[44] Preparedness measures may vary depending on whether a State is a country of origin, transit or destination. States that already experience cross-border disaster-displacement can undertake efforts to improve and refine their responses. States that have not yet experienced such displacement, but which are likely to be impacted by climate change, may need to undertake different preparedness measures.

## **3. Challenges and Gaps**

[45] Very few national and regional disaster contingency planning and response mechanisms acknowledge the potential for cross-border disaster displacement. Similarly, border and immigration authorities in many countries are neither instructed nor trained on how to handle the arrival of people fleeing a disaster from a neighboring country or one further afield.

## **C. Humanitarian Protection Mechanisms for Admission and Stay**

[46] In the absence of clear provisions in international law, some States, particularly in the Americas, selected regions in Africa and a few States in Europe, have developed a multitude of measures that allow them to admit cross-border disaster-displaced persons on their territory. These humanitarian protection measures may be based on regular immigration law, exceptional immigration categories, or provisions related to the protection of refugees or similar norms of international human rights law.

### **1. Effective Practices**

[47] Effective practices States could consider with regard to admission and stay of cross-border disaster-displaced persons include the following:

- *Granting visas that authorize travel and entry upon arrival for people from disaster-affected countries, or temporarily suspending visa requirements.*
- *Prioritizing and expediting the processing of regular migration categories for foreigners from affected countries following a disaster, or waiving certain admission requirements for such categories.*
- *Relying upon regular (sub-)regional or bilateral free movement schemes to permit the temporary entry and stay of disaster displaced persons, and providing for the suspension of documentation requirements in disaster situations, recognizing that such persons may not possess, or have lost and are unable to acquire documentation normally required.*
- *Granting temporary entry and stay for cross-border disaster-displaced persons, such as through the issuance of humanitarian visas or other exceptional migration measures.*
- *Granting entry and temporary stay for a group or “mass influx” of cross-border disaster-displaced persons.*

- *Developing transhumance agreements to facilitate the cross-border movement of pastoralists and their livestock, particularly in situations when drought endangers the health and lives of humans and animals.*
- *Reviewing asylum applications of and granting refugee status or similar protection under human rights law to displaced persons in disaster contexts who meet the relevant criteria under applicable international, regional, or national law.*
- *Exploring at sub-regional and regional levels, where relevant, whether and under what circumstances regional instruments on refugee, and similar protection under human rights law, can and should be interpreted as applying to cross-border disaster-displacement situations.*
- *Reviewing and harmonizing existing humanitarian protection measures at sub-regional and regional levels.*

## **2. Background Information<sup>44</sup>**

### *a. Regular migration categories*

[48] A first tool that has been used by some States consists of admitting cross-border disaster-displaced persons on the basis of regular migration categories, for instance i) by allowing individuals from disaster-affected countries to request that the receiving State prioritize or expedite the processing of their existing or new immigration applications; ii) by waiving certain requirements or application fees; iii) by using criteria on “humanitarian and compassionate” grounds; iv) by granting a visa waiver for non-national residents to sponsor relatives from disaster-affected countries; or v) by expanding the use of pre-existing temporary work quotas to target people from disaster-affected areas.<sup>45</sup>

### *b) Free movement of persons*

[49] In some regions of the world, cross-border disaster-displaced persons may benefit from pre-existing (sub-) regional or bilateral agreements on the free movement of persons that were adopted for other purposes, but which may allow disaster displaced persons to freely travel to another country. However, even where they exist, free movement agreements do not always guarantee the entry of disaster displaced persons, particularly if they have documentation requirements that such persons may not be able to meet. Free movement agreements may also have suspension clauses, such as for mass influx situations.

### *c. Exceptional migration measures*

[50] A third tool identified from State practice is to admit cross-border disaster-displaced persons by granting temporary entry and stay on the basis of a variety exceptional migration measures.

[51] A small number of States have developed specific legal measures to temporarily admit individuals who cannot safely return to their home country or country of habitual residence because of the effects of an “environmental catastrophe,” “natural disaster” or “natural or man-made environmental disasters.” Some of these laws grant national immigration authorities the discretionary authority to determine whether what they call a “humanitarian visa,” “temporary protection” or similar measure will be activated, and are limited to certain categories of individuals. Other countries have used “humanitarian” grounds to grant temporary entry and stay on an *ad hoc* basis for individuals who are personally and seriously affected by a disaster.

[52] While exceptional migration measures are often granted on an individual basis, some States have developed exceptional measures, including forms of “temporary protection,” to respond to a group or “mass influx” of people who have been displaced for a variety of reasons and cannot return to their country of origin. In other disaster situations, the entry of groups of displaced persons fleeing disasters has been allowed or tolerated without taking a formal decision, or has been permitted on an *ad hoc* basis relying upon humanitarian and solidarity principles.

[53] In limited cases, people have been evacuated across international borders in the context of sudden-onset disasters, a measure largely used for people who needed urgent medical assistance and their accompanying caregivers.

*d. Pastoralist transhumance arrangements*

[54] Recognizing the need for pastoralists to move in times of drought and environmental stress to access water and grazing lands for the survival of their livestock, some African States have developed bilateral, multilateral or (sub-) regional agreements that permit or facilitate movement along traditional routes across international borders (ECOWAS, CEMAC<sup>46</sup>). Such arrangements may include the provision of certificates or other supplemental documentation to ensure that those crossing a border are able to bring property, such as vehicles and animals. Pastoralists in Africa also often rely on traditional informal arrangements that facilitate cross-border movement.

*e. Refugee protection and similar protection under human rights law*

[55] In general, disaster situations do not as such fall within the scope of application of international or regional refugee protection instruments. However, in some cases, refugee law or similar protection under human rights law will be applicable. For instance, the effects of a disaster may create international protection concerns by generating violence and persecution, such as when a collapse of governmental authority triggered by the disaster leads to violence and unrest<sup>47</sup> or when a government uses a disaster as pretext to persecute its opponents.<sup>48</sup> Thus, it is still necessary for competent authorities to carefully scrutinize cases from a disaster-affected country with a view to assessing if refugee status, or similar protection from return under applicable human rights law, is required due to any such negative consequences of the disaster.

[56] Wider notions of who is a refugee as enshrined in regional instruments may also justify the application of refugee law. In the case of the 2011-2012 droughts in the Horn of Africa, States in the region applied the 1969 AU Refugee Convention’s expanded definition of a refugee for people fleeing Somalia. This determination was based upon the *prima facie* recognition of refugee status for people from particular parts of Somalia. Arguably, the facts that the famine threatened their lives, domestic authorities able to help them did not exist, and the ongoing conflict and violence greatly hindered international organizations’ capacity to protect and assist Somalis during the famine, justified considering them as victims of an event “seriously disturbing public order in either part or the whole” of the country that “compelled” them to seek refuge abroad.<sup>49</sup>

[57] In some countries, measures under regional or domestic frameworks of “complementary protection” such as the EU Temporary Protection Directive<sup>50</sup> adopted to address “refugee-like” situations of people fleeing violence or civil unrest that did not fall within the 1951 Refugee Convention,<sup>51</sup> could also be relevant. However, while it is not excluded that such measures could apply in other, unforeseen scenarios, including disaster situations, to date they have not been used for this purpose.

### **3. Challenges and Gaps**

[58] Existing mechanisms at the national level are largely unpredictable, because they generally rely upon the discretionary power of relevant authorities as opposed to a legal obligation to admit or permit the stay of disaster displaced persons. There is also little, if any, coordination or harmonization of such humanitarian protection measures at (sub-) regional levels. It also remains unclear to what extent regional instruments such as the 1969 African Union Refugee Convention or the 2001 EU Temporary Protection Directive are applicable for cross-border disaster-displacement. Consequently, the unpredictable nature of existing measures results in uncertainty about when cross-border disaster-displaced persons will be admitted.

[59] States may have an interest in considering the harmonization of humanitarian protection measures at the (sub-)regional level. Such harmonization may facilitate international cooperation and solidarity in situations when national authorities cannot find solutions on their own. Furthermore, harmonization may help to ensure that all their citizens benefit from humanitarian protection measures in case of cross-border disaster-displacement. However, to date, such harmonization processes are largely absent.

#### **D. Rights and Responsibilities during Stay**

[60] When cross-border disaster-displaced persons are admitted to a country, it is important to clarify their rights and responsibilities for the duration of their stay, taking into account the capacity of receiving States and host communities and the likely duration of stay. Such clarification not only ensures respect for the rights and basic needs of those admitted, but also helps avert the risk of secondary movements to another country.

##### **1. Effective Practices**

[61] Effective practices States could consider with regard to the rights and responsibilities of admitted cross-border disaster-displaced persons during their stay include the following:

- *Clarifying and ensuring that those admitted enjoy full respect of their human rights, and, if needed, have access to assistance that meets their basic needs, including: shelter, food, medical care, education, livelihoods, security, family unity, and respect for social and cultural identity.*
- *Ensuring that information about their rights and responsibilities is provided to admitted persons in a language and manner they are likely to understand.*
- *Issuing personal documentation, when relevant, indicating the status under domestic law and the right to stay of the admitted person.*

##### **2. Background**

[62] Under international human rights law, States have assumed obligations to ensure respect for the human rights of persons who have been permitted entry to, or who are otherwise present in, their territory. In addition, States should consider the key protection concerns for cross-border disaster-displaced persons. These include: safeguarding personal integrity; family unity; provision of and access to food, health, shelter, adequate housing and education; access to livelihood opportunities; freedom of movement; respect for culture and language; and access to personal documentation. Women and children in particular may face a heightened risk of trafficking and exploitation, and in some situations, cross-border disaster-displaced persons may face potential *de facto* statelessness. Some States' humanitarian protection measures account for the fact that people's needs may change over time, particularly when displacement lasts an extended period of

time. Finally, host communities may also have specific concerns that need to be recognized and addressed.

### **3. Challenges and Gaps**

[63] Unless cross-border disaster-displaced persons are admitted under a regular migration category, few States have outlined the specific rights of such persons during their stay. In particular, temporary admission measures that rely on *ad hoc* discretionary powers may lack details regarding the rights and responsibilities that accompany the status. At the bilateral or (sub-)regional level, State cooperation to delineate and agree upon such rights and responsibilities in advance of a cross-border movement is rare.

## **II. Non-Return of Foreigners Abroad at the Time of a Disaster**

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[64] Citizens and permanent residents of a disaster-affected country may be abroad when a disaster hits. In particular, if they were required to leave the country or face deportation under applicable migration law, such persons may face a real risk to their life and safety or very serious hardship linked to the disaster upon return to their country of origin or habitual residence. In this and other situations, some States have refrained from sending such persons back to their country of origin or former habitual residence during and in the aftermath of a disaster, or allowed them to extend their stay, for reasons of international solidarity and grounded in humanitarian considerations.

### **A. Effective Practices**

[65] Effective practices States could consider with regard to the non-return of foreigners abroad at the time of a disaster in their country of origin include:

- ***Providing such persons with humanitarian protection measures such as suspending their deportation or extending or changing their existing migration status on humanitarian grounds if:***
  - ***They would experience extreme hardship as a consequence of the disaster in case of return to the country of origin; or***
  - ***Their country of origin has declared a disaster and is temporarily unable to manage the return of its citizens for reasons related to the disaster.***
- ***Providing persons eligible for humanitarian protection measures with adequate information on the possibility to benefit from such protection, and their rights and responsibilities once such protection has been granted.***

### **B. Background**

[66] Returning foreigners who were abroad when a disaster hit their country of origin in the post-disaster phase could be problematic for a number of reasons. Government authorities in the disaster-affected country may temporarily lack the capacity to receive their own citizens due to the impacts of the disaster. Return may place their lives and health at risk or expose them to serious hardship because of lack of access to adequate assistance and protection. Under such circumstances such persons may be considered cross-border disaster-displaced persons *sur place*.<sup>52</sup> To identify such persons, States often use the same or similar criteria as described above (para.33).

[67] Furthermore, States may refrain from return to allow migrants to send back remittances in support of their family members in disaster-affected areas.

[68] Thus, humanitarian protection measures for foreigners already abroad not only protect affected persons from the conditions in their country of origin, but may also be a measure of solidarity with a disaster-affected country. Non-return measures may be provided for by law setting out the conditions for applying them or be based on *ad hoc* decisions. States have a wide measure of discretion, subject however to the limitations set out above (paras. 38-40), when granting protection from return.

### **C. Challenges and Gaps**

[69] While many countries refrain from returning foreigners to their countries of origin when their country has been gravely affected by a disaster, such measures are often neither foreseen in law nor used in a consistent manner. It may be difficult to identify persons eligible for protection against return, particularly if they are in the country on an irregular basis. Foreigners may also lack sufficient information about their rights and responsibilities in the event that temporary relief from return is granted (see paras. 60-63 above).

## **III. Finding Lasting Solutions for Cross-Border Disaster-Displaced Persons**

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[70] Admission, stay and non-return of cross-border disaster-displaced persons usually is granted on a temporary basis. When such temporary measures come to end, displaced persons will need to find a solution that allows them to rebuild their lives in a sustainable way either in their country of origin, or in some cases, in the country that received them or in exceptional cases in a third country.

### **A. Effective Practices**

[71] Effective practices States could consider with regard to finding lasting solutions for cross-border disaster-displaced persons include the following:

- *Developing criteria and mechanisms, preferably at a bilateral or (sub-)regional level, to determine when return from abroad in disaster contexts may take place and how to facilitate the return, including necessary exit procedures and travel.*
- *Ensuring cooperation between countries of origin and receiving countries and, where relevant, with international organizations, to ensure that returnees are received with respect for their safety, dignity, and human rights, and under conditions that allow them to find lasting solutions to their displacement.*
- *Alternatively, allowing cross-border disaster-displaced persons to apply for renewed or permanent residency, or resettlement to a third country when conditions causing the displacement persist for an extended period of time or become permanent.*
- *Developing measures to support sustained cultural and familial ties when return to the country of origin is not possible.*
- *Ensuring information of, consultation with and participation by affected persons or groups of persons, including host communities, in finding lasting solutions.*
- *Integrating interventions aimed at finding lasting solutions for cross-border disaster-displaced persons into general development plans through resilience building measures and recovery/reconstruction support at all relevant levels.*

### **B. Background**

[72] States and disaster displaced persons may prefer to end cross-border disaster-displacement through voluntary return with sustainable re-integration at the place where displaced persons lived before the disaster. When return to their former homes is not possible or desired, in particular when

the area concerned is no longer habitable or too exposed to the risk of recurrent disasters, an alternative way to end cross-border disaster-displacement includes settlement in a new place of residence after return to the country of origin. Particularly when the conditions causing the displacement persist for an extended period of time or become permanent, in exceptional circumstances finding a lasting solution also may mean facilitating permanent admission in the country that admitted them or in a third country.

[73] A comprehensive approach to finding solutions to cross-border disaster-displacement that allows displaced persons to rebuild their lives in sustainable ways requires accurate information about their needs and capacities, and mechanisms to ensure effective consultation and participation by the displaced. Lasting solutions must also include measures that ensure, among others, access to adequate housing, basic services and education, and the restoration of livelihoods.<sup>53</sup>

[74] It is important to recognize that although disaster displacement primarily constitutes a humanitarian and human rights challenge, it also carries with it significant development challenges as well as opportunities. The ability of affected persons to keep or regain their self-sufficiency is an essential component of finding lasting solutions to displacement. Particularly important are resilience building measures that seek to build and strengthen the ability of those groups, communities and institutions most affected by disaster displacement to recover from such disruption in a timely and efficient manner, and to enable affected people to help themselves. Responding to disaster displacement through sustainable development interventions thus has the potential to benefit not only the disaster displaced populations but also their host communities.

### **C. Challenges and Gaps**

[75] In the absence of improved resilience to future disasters and environmental stress, returnees may continue to be at a high risk of repeated crises and recurrent displacement. Slow or inefficient recovery and reconstruction efforts, often hindered by the challenge of finding alternative relocation sites, resolving land tenure issues, or financing construction with higher building standards to withstand future disasters, can delay return for months or years. It is also often difficult to successfully restart and provide support for the development of diversified livelihood opportunities as quickly as possible to support self-reliance. Local governance models generally face challenges to ensure the inclusion of disaster displaced persons in community service delivery schemes, which could replace often problematic, parallel humanitarian delivery systems. International support for recovery and reconstruction allowing disaster displaced persons to find lasting solutions is often insufficient or ineffective due to significant conceptual, operational and institutional differences in the respective approaches between humanitarian and development actors and their respective funding mechanisms and modalities.

## **PART TWO: MANAGING DISASTER DISPLACEMENT RISK IN THE COUNTRY OF ORIGIN**

[76] There are a number of measures States can take to manage disaster displacement risk in the country of origin to help people stay, move out of areas at risk, and address the specific needs of those that have been internally displaced. Available policy options to reduce vulnerability and build the resilience of people at risk of disaster displacement include disaster risk reduction, climate change adaptation and overall development measures. Second, when movement is unavoidable, policy options include facilitating migration and planned relocation to move people away from hazardous areas to safer areas before a disaster occurs and to help them to cope with the impacts of

natural hazards and the adverse effects of climate change. Finally, integrated humanitarian action, disaster risk management and development interventions are essential for protecting those who have been internally displaced and finding durable solutions for them. Whereas most of these tools would be used within the country of origin, facilitating migration with dignity requires cooperation with destination countries.

## **I. Reducing Vulnerability and Building Resilience to Displacement Risk**

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[77] State responsibility includes preparing for foreseeable disasters and take reasonable measures to prevent threats to the lives and property of people, including preventing displacement.<sup>54</sup> To some extent, disaster displacement is predictable insofar as it is possible to identify particularly disaster prone areas and assess the expected impact of a natural hazard on affected populations, including displacement risks, in order to focus measures aimed at reducing exposure and vulnerability, and enhancing resilience.

### **A. Effective Practices**

[78] Effective practices States could consider with regard to taking measures to reduce vulnerability and build resilience to displacement risk include the following:

- *Elaborating new or reviewing separate or joint climate change adaptation and disaster risk management strategies, plans or laws at all levels, in close cooperation with local governments and affected communities, to specifically incorporate disaster displacement risks and protection needs.*
- *Taking measures to identify people at risk of displacement in the immediate and long term, and develop appropriate responses, in particular by:*
  - *Encouraging local communities to develop and institutionalize community-based and traditional disaster risk mapping tools and methodologies to establish preparedness and response plans with the support of local and national authorities, civil society and the private sector, in particular to identify potential areas suitable for evacuation and, if necessary, planned relocation.*
  - *Establishing preparedness and early warning systems that clearly describe the hazards, identify populations most at risk of displacement, determine evacuation corridors and sites, and ensure that information reaches affected communities and can be easily understood by them.*
  - *Prioritizing infrastructure improvements, such as sea-walls, dams, dykes, and earthquake resistant buildings, in areas where people are most at risk of displacement.*
  - *Investing in measures, such as improving housing, livelihood diversification, education, food security, and health care, that increase the resilience and adaptive capacity of persons and groups of persons at risk of displacement, those that have to move or are already displaced, as well as host communities.*
- *Enhancing the disaster risk reduction and climate change adaptation capacity of local authorities and communities.*
- *Ensuring that, where needed, countries have adequate access to climate change adaptation and other relevant funding for human mobility related programs and activities.*
- *Developing bilateral and regional contingency plans that identify transboundary risk scenarios and formulate comprehensive disaster risk management measures to reduce vulnerability and strengthen capacity to respond to cross-border disaster-displacement.*

## B. Background

[79] Resilience is a key factor in determining whether and how individuals, families, communities and countries can withstand the impacts of sudden-onset and slow-onset natural hazards and impacts of climate change. The potential for a natural hazard to develop into a disaster that leads to displacement is highly dependent upon a country's level of development. Low levels of development or uneven development that exacerbate, rather than reduce, inequality also contribute to heightened vulnerability to disaster risk.<sup>55</sup> In general, not only are poorer people more likely to be displaced in disasters, poorer communities as a whole are less likely to benefit from sufficient levels of governance, infrastructure, livelihood opportunities, urban planning, building codes, and disaster preparedness and response to withstand the impact of natural hazards.

[80] This underscores the importance of ensuring strong, sustainable and inclusive development in order to better manage displacement risks of all kinds, before, during and following disasters. States currently use a wide range of policy options to build people's resilience to natural hazards. Development spans economic measures, such as job opportunity creation; social measures, such as education, health and housing; governance priorities, such as social inclusion and the rule of law; and spatial planning, including urbanization and rural and urban development policies. Implementation of such development activities is critically important to help people remain safely in their homes when faced with natural hazards and reduce displacement risk. Such activities may also help to strengthening host communities' capacity to receive displaced persons, and facilitate finding lasting solutions to end displacement by reducing exposure and building resilience to future hazards.

[81] The Sendai Framework on Disaster Risk Reduction 2015 – 2030 acknowledges the large number of disaster displaced persons identified in recent years as one of the devastating effects of disasters. The Framework underlines, *inter alia*, the need to prepare for “ensuring rapid and effective response to disasters and related displacement, including access to safe shelter, essential food and non-food relief supplies” and encourages States to adopt, at national and local levels “policies and programmes addressing disaster-induced human mobility to strengthen the resilience of affected people and that of host communities as per national laws and circumstances.” It also calls for trans-boundary cooperation to address displacement risks in areas with common eco-systems such as river basins or coastlines. Incorporating these principles in regional and national disaster risk reduction strategies will be an important step to use the potential of DRR to prevent displacement when possible, and mitigate it when it occurs.

[82] In some parts of the world the adverse effects of climate change already contribute to displacement, migration and planned relocation. Therefore, both climate change mitigation and adaptation measures can also play an important role in reducing disaster displacement. The 2010 UNFCCC Cancun Adaptation Framework calls for many activities to help build the resilience of communities in the face of climate change impacts, such as impact and vulnerability assessments, strengthening institutional capacities, and strengthening data, information and knowledge systems.<sup>56</sup> The Warsaw International Mechanism for Loss and Damage associated with climate change impacts also identifies displacement as a potential consequence of climate change. The Mechanism's initial two year work plan, approved at the twentieth session of the Conference of the Parties to the UNFCCC, will seek to enhance understanding and expertise- and their application- of how impact of climate change are affecting patterns of migration, displacement and human mobility.

[83] The 2030 Agenda for Sustainable Development contains a commitment “to cooperate internationally to ensure [...] the humane treatment”, *inter alia*, of “displaced persons,”<sup>57</sup> and to

build the resilience, *inter alia*, of those in vulnerable situations to climate-related extreme events and other disasters.<sup>58</sup> In this regard, Goal 13 – Take Urgent Action to Combat Climate Change and Its Impacts breaks new ground. The intention to “leave no one behind” when the goals are implemented to ensure equality, non-discrimination, equity and inclusion, as well as the reference to displaced persons and migrants among vulnerable groups establish a clear link between displacement, climate change, natural hazards, and development.

### **C. Challenges and Gaps**

[84] Existing disaster risk reduction and climate change adaptation strategies normally neither acknowledge nor reflect the reality that very high numbers of people are displaced every year by disasters and thus do not adequately address human mobility issues.<sup>59</sup> Where bilateral or regional disaster risk management mechanisms exist, the potential for cross-border disaster-displacement is generally not recognized within contingency planning and response plans.

[85] Some States have requested specific guidance on how to appropriately include displacement, migration and planned relocation within national and regional DRR and climate change adaptation policies and strategies. Furthermore, the implementation of human mobility issues included within national and regional climate change adaptation plans, policies and strategies may require adaptation funding, including from the operating entities of the financial mechanism of the UNFCCC and other funding mechanisms.

[86] Disaster displacement is not only a fundamental humanitarian concern but also a development issue. Another persistent challenge in disaster risk reduction and resilience building measures is closing the gap between humanitarian and development action. At the national level, this challenge illustrates the need for coordination between government departments, and increased integration of elements of disaster risk management and climate change adaptation plans into development policies. At the local level, building the capacity and empowering local authorities and communities is needed.

## **II. Facilitation of Migration with Dignity in the Context of Natural Hazards and Climate Change**

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[87] Natural hazards, such as seasonal flooding, sea level rise and drought or saltwater intrusion, can negatively impact livelihoods, health and physical security. When living conditions deteriorate, individuals and families often use migration as a way to seek alternative opportunities within their country or abroad to avoid situations that otherwise may result in a humanitarian crisis and displacement in the future. Pastoralists use migration as a traditional coping method to access water and grazing land in times of environmental stress.

### **A. Effective Practices**

[88] Effective practices States could consider with regard to facilitating migration with dignity as a potentially positive way to cope with the effects of natural hazards, environmental degradation and climate change include the following:

- *Reviewing existing bilateral and (sub-) regional migration agreements to determine how they could facilitate migration as an adaptation measure, including issues such as simplified travel and customs documents. In the absence of such agreements, negotiating and implementing new agreements to facilitate migration with dignity.*

- *Developing or adapting national policies providing for residency permit quotas or seasonal worker programs in accordance with international labour standards to prioritize people from countries or areas facing natural hazard or climate change impacts.*
- *Providing training and education, including through qualification and accreditation alignment, to enable people from countries facing natural hazard or climate change impacts to compete for skilled employment opportunities in a regional or global labour market, and in this regard to cooperate closely with employers.*
- *Providing cultural orientation and other pre-departure training for documented migrants to help them move in safety and dignity.*
- *Reducing the costs of sending remittances from diaspora communities used to support and build the resilience of families remaining at home.*
- *Facilitating pastoralists' traditional practice of moving internally and across international borders to access water, pasture and regional markets during times of drought, such as through the development of transhumance agreements or special travel permits to facilitate the cross-border movement of livestock.*

## **B. Background**

[89] Managed properly, migration has the potential to be an adequate measure to cope with the adverse effects of climate change, other environmental degradation and natural hazards. Circular or temporary migration can create new livelihood opportunities, support economic development, and build resilience to future hazards by allowing migrants to send back remittances and return home with newly acquired knowledge, technology and skills. Diaspora remittances and investments in disaster-prone countries of origin can also play an important role in early recovery and provide a foundation for long-term development solutions. Migration not only provides individuals and families with opportunities for the future, but can also help to ease population pressure on highly fragile areas, such as small low-lying islands, eroding coastlines, high mountain areas or areas exposed to desertification.

[90] The possibility for permanent migration is particularly important for low-lying small island States and other countries confronting substantial loss of territory or other adverse effects of climate change that increasingly make large tracts of land uninhabitable.

[91] While migration can be highly beneficial, it also carries specific risks, especially for women and children. Migrants might be economically exploited, exposed to dangerous conditions at their place of work or home, face discrimination or become victims of violence or being trafficked. This is particularly true for those using irregular means for migration, but also for regular migrants. Research indicates that migration can also exacerbate the negative circumstances of impoverished, unskilled, or otherwise vulnerable individuals and families by placing them in a more precarious situation than if they had stayed in their place of origin.<sup>60</sup> The migration of a substantial number of members of a community or family may undermine their resilience. This is why it is important that people can migrate with dignity and with respect of their human rights.

[92] In certain situations, people in the most desperate circumstances may lack the resources to move at all, forcing them to remain in unsafe areas.<sup>61</sup>

## **C. Challenges and Gaps**

[93] With very few exceptions, planned and coherent approaches to recognizing, facilitating, managing and harnessing the benefits of migration as a means of coping with the adverse effects of

climate change, environmental degradation and natural hazards are absent in most regions and countries. Similarly, where human mobility is included in national or regional climate change adaptation strategies, migration is generally viewed as something to be avoided, rather than recognized as a potentially positive adaptation strategy. There is a lack of regional or bilateral agreements specifically addressing and regulating migration as a response to the negative effects of climate change and other natural hazards.

### **III. Planned Relocation with Respect for People's Rights**

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[94] The risks and impacts of natural hazards, climate change, and environmental degradation have led many governments around the world to move and settle persons or groups of persons to safer areas, both before and after disaster displacement occurs.<sup>62</sup> However, because of the many negative effects associated with past relocation processes (e.g. challenges related to sustaining livelihoods, cultural ties, identity and connection to land), planned relocation is generally considered a last resort after other options have been reasonably exhausted.

#### **A. Effective Practices**

[95] Effective practices States could consider with regard to planned relocation include, in particular, the following:

- *Developing international and regional guidance, as well as national and local level laws and public policies, to support effective and sustainable planned relocation processes adapted to the local context and with full respect for the rights of affected persons or groups of persons, including members of host communities.*
- *Identifying and setting aside suitable land and living space for planned relocation as a disaster preparedness and climate change adaptation measure.*
- *Ensuring that planned relocation sites do not expose relocated people to greater disaster risk and provide for disaster risk management measures in the event of future disasters.*
- *Implementing planned relocation in a manner that*
  - *takes into account all relevant social, economic, cultural and demographic factors, including in particular the specific needs of women and children, particularly vulnerable persons and, where relevant, indigenous peoples;*
  - *engages both relocated persons or groups of persons and host communities in consultation, planning, implementation and evaluation of planned relocation programmes and projects;*
  - *takes into account community ties, cultural values, traditions, and psychological attachments to their original place of residence;*
  - *ensures adequate livelihood opportunities, basic services, and housing in the new location;*
  - *provides for adequate mechanisms and safeguards to prevent and solve conflicts, such as over land, other resources, and access to services and livelihoods; and*
  - *uses planned relocation in ways that help to achieve development goals.*

#### **B. Background**

[96] Planned relocation in the context of disasters and the effects of climate change may be relevant, each with its own challenges:

- 1) As a preventative measure within the country of origin to reduce the risk of displacement in the future by moving people out of areas particularly at risk of sudden-onset disasters (such as flooding or landslides) or when areas become unfit for habitation due to environmental degradation or the impacts of climate change (sea level rise, drought, or melting permafrost).
- 2) As a lasting solution within the country of origin to allow disaster displaced people to rebuild their lives if the impacts of the disaster or the risk of future disasters rendered their place of origin as no longer fit for habitation.
- 3) As a lasting solution in a receiving country in the extreme event that impacts of climate change and other natural hazards render large parts of or an entire country unfit for habitation (e.g., low-lying island States).

[97] Experience shows that planned relocation meets resistance or is not sustainable if it is undertaken without consultation and the participation of affected people, including host communities, and if livelihood, community cohesion and cultural traditions issues are neglected.<sup>63</sup> Systematic engagement with women, in particular, often contributes to a successful outcome of the relocation process.

### **C. Challenges and Gaps**

[98] While planned relocation has the potential to increase vulnerable persons or groups of persons' overall security and resilience to natural hazards, ensuring adequate livelihood opportunities, infrastructure and social support is a common challenge in relocation processes. Relocation processes often lack transparent, inclusive and participatory approaches that include consultation and engagement with affected communities throughout the planning and implementation process. Furthermore, no clear criteria or guidance exist to determine when planned relocation is an adequate or necessary policy option in disaster and climate change related contexts and how such relocation should be implemented.<sup>64</sup>

## **IV. Addressing the Needs of Internally Displaced Persons in Disaster Contexts**

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[99] Since most disaster displacement takes place within countries, the protection of internally displaced persons (IDPs) is particularly important. To be effective, approaches to risk mapping, disaster risk reduction measures, contingency planning, the humanitarian response, as well as efforts to find lasting solutions to disaster displacement often require addressing both internal and cross-border displacement at the same time. Furthermore, although more knowledge and data is required to better understand the relationship, it has been observed that cross-border disaster-displacement could potentially be avoided or reduced if IDPs received adequate protection and assistance following disasters. In particular, a lack of durable solutions is one reason why internally displaced persons may subsequently move abroad.

### **A. Effective Practices**

[100] Effective practices States could consider with regard to protecting and assisting IDPs in disaster contexts include the following:

- *Reviewing domestic legislation or policies on internal displacement to identify whether the notion of IDPs includes those displaced in disaster contexts, and if not consider expanding that notion in line with the UN Guiding Principles on Internal Displacement and relevant (sub-)regional instruments.*

- *Reviewing domestic legislation and policies on disaster risk management to identify whether they contain specific and adequate provisions addressing all stages of disaster related internal displacement and, if not, revise such laws and policies in line with the UN Guiding Principles on Internal Displacement and relevant (sub-)regional instruments.*
- *Specifically incorporating IDP protection considerations, and clarifying roles and responsibilities of relevant actors within disaster risk reduction and humanitarian response plans, as well as relevant development plans, in accordance with respect for the human rights of IDPs.*
- *Strengthening the institutional capacity and resources of national and local authorities to enhance protection and support for IDPs in disaster contexts.*
- *Ensuring that projects and programs regarding humanitarian assistance, early recovery and durable solutions in disaster contexts provide meaningful information and opportunities for consultation with and participation by displacement-affected persons or groups of person, those at risk of displacement and host communities.*

[101] Effective practices States could consider with regard to finding durable solutions for IDPs in disaster contexts include the following:

- *Consistently establishing links between humanitarian and development activities to ensure that IDPs find durable solutions, such as by specifically addressing internal displacement within recovery, reconstruction and post-disaster development plans.*
- *Using thematic clusters or sectoral working groups in the rehabilitation, recovery and reconstruction response to disasters that build upon those used during the humanitarian response to ensure an effective transition.*
- *Ensuring information of, consultation with and participation by affected individuals, in particular women, youth, and where relevant members of indigenous peoples, and host communities.*
- *Emphasizing the re-establishment of livelihoods and basic services, in addition to housing and infrastructure reconstruction, within durable solutions strategies.*
- *Incorporating within long-term development planning measures that support durable solutions, particularly in return areas, and enable IDPs to better withstand future natural hazards, environmental degradation, and the adverse effects of climate change.*

## **B. Background**

[102] States have the primary duty and responsibility to protect and assist IDPs in accordance with their obligations under international human rights law as well as, where applicable, international humanitarian law. The UN Guiding Principles on Internal Displacement, which have been recognized by the international community as an “important international framework for the protection of internally displaced persons,”<sup>65</sup> address this responsibility.<sup>66</sup> They describe IDPs as “persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence” for reasons including “natural or human-made disasters” and who have not crossed an international border.<sup>67</sup> States are also responsible for finding durable solutions for IDPs. Durable solutions include (a) voluntary return with sustainable re-integration at the place where displaced persons lived before the disaster; (b) local integration at the location where people were displaced, or (c) settlement elsewhere within their country. Importantly, finding durable solutions for IDPs creates particular challenges that, unresolved, can leave people in protracted displacement situations.

[103] A small number of States have developed national laws and policies on internal displacement that specifically apply to disaster contexts. At the (sub-)regional level, disasters and climate change are explicitly covered by the 2009 African Union Convention on the Assistance and Protection of Internally Displaced Persons in Africa (AU Kampala Convention), and the 2006 Great Lakes IDP Protocol.<sup>68</sup>

### C. Challenges and Gaps

[104] Despite widespread recognition of the principles outlined in the UN Guiding Principles on Internal Displacement, most States neither have laws and policies specifically addressing internal displacement in disaster contexts, nor do they address such displacement in their legal frameworks on disaster management and response. Where States have adopted IDP specific instruments, the challenge lies in implementing them in operational terms. Institutional accountability for IDP protection at the international level in disaster situations also may not be clear. For example, international leadership to support national authorities with protection activities during a disaster response is not predictable, if such support is even activated at all.<sup>69</sup>

[105] Slow or inefficient recovery and reconstruction efforts, often hindered by the challenge of finding alternative relocation sites, resolving land tenure issues, or financing construction with higher building standards to withstand future disasters, can delay return for months or years, potentially leaving IDPs in temporary or transitional shelter for years at a time. Leadership for finding durable solutions is also not always clear or predictable amongst government institutions or international organizations, particularly regarding the respective roles and responsibilities of humanitarian and development actors, and their funding mechanisms.

## PART THREE: PRIORITY AREAS FOR FUTURE ACTION

[106] Cross-border disaster-displacement requires enhanced action at the national, (sub-) regional and international level. A number of effective practices have been identified that contribute to a comprehensive approach to cross-border disaster-displacement, including through the management of disaster displacement risk in the country of origin. These effective practices can provide inspiration to States and other relevant actors seeking more coherent and effective approaches to cross-border disaster-displacement in the future. They also provide a starting point to bring together the many existing policy and action areas discussed in this agenda that have been relatively uncoordinated to date.

[107] The consultative process leading to this agenda was intended to build consensus on key principles and elements addressing the protection and assistance needs of cross-border disaster-displaced persons at a policy level, rather than focus on implementation. As a contribution to future efforts to address cross-border disaster-displacement, this agenda identifies *three priority areas* for action to support the implementation of identified effective practices:

- 1) **Collecting data and enhancing knowledge** on cross-border disaster-displacement;
- 2) **Enhancing the use of humanitarian protection measures** for cross-border disaster-displaced persons, including mechanisms for lasting solutions, for instance by harmonizing approaches at (sub-)regional levels;

- 3) **Strengthening the management of disaster displacement risk in the country of origin** by:
- a. Integrating human mobility within disaster risk reduction and climate change adaptation strategies, and other relevant development processes;
  - b. Facilitating migration with dignity as a potentially positive way to cope with the effects of natural hazards and climate change;
  - c. Improving the use of planned relocation as a preventative or responsive measure to disaster risk and displacement;
  - d. Ensuring that the needs of IDPs displaced in disaster situations are specifically addressed by relevant laws and policies on disaster risk management or internal displacement.

[108] Concerted action in these areas will be important for generating wider and more systematic application of the numerous effective practices currently used by States and other actors. In particular, such action requires a shared understanding of and coordinated approaches to cross-border disaster-displacement that bring together and link humanitarian action, human rights protection, migration management, refugee protection, disaster risk reduction, climate change adaptation, and development interventions.

[109] Action in the three priority areas requires concerted efforts at all levels. It is necessary that States at the national level establish clearly designated institutional leadership to bring together different branches of government to coordinate national planning and response efforts for cross-border disaster-displacement. At the same time, effective implementation of activities requires strong involvement and participation of local authorities; affected communities including, where relevant, indigenous peoples; women; youth; as well as civil society organizations and academia.

[110] Recognizing that most cross-border disaster-displacement takes place within regions and therefore appropriate responses vary from region to region, the roles of regional and sub-regional organizations, for example the African Union and the African regional economic communities or the Pacific Islands Forum, are of primary importance for developing integrated responses, including policies and strategies and, where appropriate, normative frameworks to address the three priority areas. More specialized (sub-)regional mechanisms include Regional Consultative Processes (on migration), human rights mechanisms, disaster risk management centres, climate change adaptation strategies, as well as common markets and free movement of persons arrangements, among others.

[111] At the global level, international organizations and agencies dealing with issues as diverse as humanitarian action, human rights protection, migration management, refugee protection, disaster risk reduction, climate change adaptation, and development may also contribute. In particular, they can provide technical advice as well as capacity building and operational support to (sub-)regional bodies as well as national and local authorities, particularly in the most vulnerable countries, to support implementation of the three priority areas, according to their respective mandates and areas of expertise.

#### **I. Collecting Data and Enhancing Knowledge on Cross-Border Disaster-Displacement**

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[112] Knowledge and data on cross-border disaster-displacement is growing, particularly regarding concepts, numbers and regional dynamics. At the same time, despite efforts by academic

institutions, and non-governmental and international governmental organizations and agencies, comprehensive, reliable and timely global data on cross-border disaster-displacement are still not available. Similarly, additional knowledge is also needed on disaster-related migration and planned relocation processes.

[113] In order to address these challenges and gaps, and to promote and facilitate the collection of data and enhanced knowledge, the following *key actions* are suggested:

- [i] Setting up new or building upon existing systems to<sup>70</sup>
  - a. Collect, consolidate and analyze gender- and age-disaggregated data regarding the overall number of people displaced in disaster contexts, both internally and across international borders, based on clear criteria and effective methods;
  - b. Develop methodologies to identify those at risk of being displaced in disaster contexts, including across international borders;
  - c. Determine to what extent men and women already rely on migration as a strategy to cope with the effects of natural hazards and the effects of climate change, and what lessons can be learned for improving the benefits of migration and addressing related protection risks;
  - d. Collect, analyze and evaluate effective practices for planned relocation processes in the context of disasters and effects of climate change.
- [ii] Establishing an inter-agency mechanism for improved data collection on disaster displacement that enhances synergies between actors, addresses gaps, and improves clarity on roles and responsibilities.
- [iii] Analyzing the effectiveness of existing humanitarian protection mechanisms in responding to the protection needs of cross-border disaster-displaced persons.

## **II. Enhancing the Use of Humanitarian Protection Measures for Cross-Border Disaster-Displaced Persons**

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[114] Some States possess legal provisions explicitly providing for humanitarian protection measures for cross-border disaster-displaced persons. However, most States lack laws and policies that would offer guidance and a predictable response if such persons arrived at their borders or were on their territory. Even in regions where relevant legal provisions exist, such approaches could benefit from further harmonization to better facilitate regional cooperation in addressing cross-border disaster-displacement. Improved accountability for protection and assistance for cross-border disaster-displaced persons, including finding lasting solutions, are also needed.

[115] In order to address these challenges and gaps, and to promote and facilitate the implementation of identified effective practices for promoting protection and assistance for cross-border disaster-displaced persons (see paras. 33-34; 43; 47; 66; 65; 71), the following *key actions* are suggested:

- [i] Reviewing existing domestic laws, policies and strategies to determine to what extent they allow for the temporary admission, stay or non-return, as well as lasting solutions for cross-border disaster-displaced persons, and revising them where appropriate, taking into account the specific needs of women and children, particularly vulnerable persons and, where relevant, members of indigenous peoples;

- [ii] Exploring the need to harmonize approaches to admission, stay and non-return of cross-border disaster-displaced persons at (sub-)regional levels;
- [iii] Exploring the need to develop new, or revise and harmonize existing national, bilateral or (sub-)regional cross-border disaster risk management and humanitarian response mechanisms to ensure that such mechanisms integrate cross-border disaster-displacement risk;
- [iv] Exploring the need to develop bilateral or (sub-) regional cooperation mechanisms facilitating the return and sustainable reintegration of cross-border disaster-displaced persons to find lasting solutions;
- [v] Establishing mechanisms in support of governments at the UN Country Team or Humanitarian Country Team level to determine the respective roles and responsibilities of international organizations and agencies to address the protection and assistance needs of cross-border disaster-displaced persons in the receiving country.

### **III. Strengthening the Management of Disaster Displacement Risk in the Country of Origin**

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[116] There are a number of measures States can take to manage disaster displacement risk in the country of origin to help people stay, move out of areas at risk, and address the specific needs of those that have been internally displaced.

#### **A. Integrating Human Mobility within Disaster Risk Reduction and Climate Change Adaptation Strategies, and Other Relevant Development Processes**

[117] While climate change adaptation, disaster risk reduction and other development strategies can also help avoid displacement by building up the resilience of people living in areas facing natural hazards, environmental degradation and the adverse effects of climate change, existing disaster risk reduction and climate change adaptation related laws, policies, strategies, and operational activities, with very few exceptions, do not address disaster displacement, migration and planned relocation. Furthermore, the current and projected impacts of natural hazards and the adverse effects of climate change suggest that efforts to address disaster and displacement risk and build resilience need to be scaled up to meet present and future challenges.

[118] In order to address these challenges and gaps, and to promote and facilitate the implementation of identified effective practices on reducing vulnerability and building resilience to displacement risk (see para. 78), the following *key actions* are suggested:

- [i] Developing guidance, and providing technical and capacity building support to national and local authorities and (sub-)regional organizations to implement the Sendai Framework on Disaster Risk Reduction's relevant priorities for action related to displacement, migration and planned relocation.
- [ii] Developing guidance, and providing technical and capacity building to national and local authorities, and (sub-)regional organizations to support the inclusion of human mobility considerations within climate change adaptation strategies and policies, including through collaboration, as appropriate, with UNFCCC bodies and processes.<sup>71</sup>
- [iii] Continuing to consider the issues of displacement, migration and planned relocation within on-going activities of the Conferences of Parties to the UNFCCC.
- [iv] Revising laws, policies, strategies and plans on disaster risk reduction, climate change adaptation, and overall resilience building with a view to integrate human mobility aspects.

- [v] Ensuring that access to funding is secured and facilitated to finance human mobility related measures within local, national and regional climate change adaptation, disaster risk reduction, and resilience building plans and activities.

## **B. Facilitating Migration with Dignity as a Potentially Positive Way to Cope with the Effects of Natural Hazards and Climate Change**

[119] If well supported and managed, migration has the potential to help people living in areas exposed to natural hazards, environmental deterioration and the adverse impacts of climate change to avoid situations that otherwise may result in a humanitarian crisis and displacement in the future. However, in many parts of the world regular channels for such migration are few or do not exist. Due to a lack of opportunities for regular migration, some persons impacted by natural hazards may resort to irregular migration with all its negative consequences, particularly for women and children.

[120] In order to address these challenges and gaps, and to promote and facilitate the implementation of identified effective practices on facilitating migration with dignity as a potentially positive way to cope with the effects of natural hazards, environmental degradation and climate change (see para. 88), the following *key actions* are suggested:

- [i] Reviewing, adapting or developing national legislation, as well as bilateral or (sub-)regional agreements, to facilitate temporary, circular or, where appropriate, permanent migration as means to cope with the effects of natural hazards, environmental degradation and climate change.
- [ii] Preparing persons who envisage migration as a positive coping strategy to build their capacity to compete in the labour market.
- [iii] Reviewing existing regional, sub-regional and bilateral free movement of persons agreements to determine to what extent such agreements already, or could better, facilitate international migration.

## **C. Improving the Use of Planned Relocation as a Preventative or Responsive Measure to Disaster Risk and Displacement**

[121] The planned relocation of persons or group of persons is recognized as a preventative or responsive measure to disaster risk and displacement, including the adverse effects of climate change. In some cases, planned relocation has been identified as necessary, but cannot be carried out due to policy, institutional, financial and other limitations. In other situations, planned relocation processes are undertaken without sufficient guidance and capacity to ensure the process is sustainable and fully respects the rights of the relocated persons or groups of persons, and host communities.

[122] In order to address these challenges and gaps, and to promote and facilitate the implementation of identified effective practices on planned relocation as preventive or responsive measures to disaster risk and displacement (see para. 95) the following *key actions* are suggested:

- [i] Developing international and (sub-)regional operational guidance to support effective and sustainable disaster risk and climate change related planned relocation processes.<sup>72</sup>
- [ii] Reviewing or developing relevant instruments and institutional capacity, particularly in the areas of disaster risk management, climate change adaptation and development, to integrate planned relocation as a potential tool to address the effects of natural hazards, environmental degradation and climate change, and ensure that planned relocation, when carried out, respects the rights of relocated persons and members of host communities.

- [iii] Providing technical support and strengthen the capacity and leadership of relevant national and local authorities, and communities to carry out, when appropriate, planned relocation that takes into account the specific needs of women and children, particularly vulnerable persons and, where relevant, members of indigenous peoples.

#### **D. Ensuring that the Needs of IDPs Displaced in Disaster Situations Are Addressed by Relevant Laws and Policies**

[123] Since most disaster displacement takes place within countries, the protection of IDPs is an important part of managing displacement risk, but relevant domestic laws, policies and strategies often do not address the specific needs of such persons. At the same time, international institutional accountability in support of governments for IDP protection within a specific disaster response is often not predictable.

[124] In order to address these challenges and gaps, and to ensure that IDPs displaced in disaster situations are addressed by relevant laws and policies (see paras. 100-101), the following *key actions* are suggested:

- [i] Reviewing or developing relevant instruments and institutional capacity in order to ensure that internal displacement in disaster contexts is integrated within domestic disaster risk management or IDP laws, policies and strategies.
- [ii] Reviewing the mandates and potential roles of international organizations and agencies, in anticipation of future disasters, to ensure predictable, timely and accountable international leadership in supporting governments to protect IDPs and find durable solutions.
- [iii] Ensuring that funding mechanisms for finding durable solutions to internal disaster displacement can be activated already during the humanitarian response.

#### **IV. Possible Next Steps**

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[125] To facilitate follow up on this agenda and implementation of activities identified in the three priority areas for action addressing cross-border disaster-displacement, it will be important to continue to:

- [i] Provide a forum for dialogue among interested States to further discuss how best to protect cross-border disaster-displaced persons, and prevent disaster displacement, where possible.
- [ii] Enhance cooperation and coordination between international organizations and agencies, and other relevant actors, in order to ensure a comprehensive approach to cross-border disaster-displacement.

## **ANNEXES**

ANNEX I: Countries That Received and/or Did Not Return Disaster-Affected Foreigners

ANNEX II: Examples of Cross-Border Disaster-Displacement

## **CONTENT OF VOLUME II**

ANNEX I: Regional Dynamics of Disaster-Related Human Mobility

ANNEX II: Effective Practices for Cross-Border Disaster-Displacement

ANNEX III: Disaster Displacement References in International, (Sub-)Regional and National Agreements, Declarations, and Policies

## Endnotes

<sup>1</sup> Internal Displacement Monitoring Centre (IDMC), “Global Estimates 2015: People displaced by disasters,” July 2015, p.8. Note, IDMC’s estimates do not include drought and other incidents of environmental degradation.

<sup>2</sup> *Ibid*, p. 17.

<sup>3</sup> The IPCC also highlights that “populations that lack the resources for planned migration experience higher exposure to extreme weather events.” IPCC, “Summary for Policymakers: Climate Change 2014: Impacts, Adaptation and Vulnerability.” Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press: 2014, p. 20.

<sup>4</sup> For example, the NASA Earth Science Division director Michael Freilich stated, based upon computer simulation of sea level rise, “More than 150 million people, most of them in Asia, live within one meter of present sea level.” <http://www.abc.net.au/news/2015-08-27/sea-levels-set-to-rise-nasa-says/6728008>. See also <https://www.nasa.gov/press-release/nasa-science-zeros-in-on-ocean-rise-how-much-how-soon>.

<sup>5</sup> IPCC *supra* note 3, p. 20.

<sup>6</sup> See Annex for more detailed description and examples.

<sup>7</sup> During a Ministerial Meeting of UN Member States facilitated by UNHCR in December 2011, Norway and Switzerland made the following statement: “A more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters, including where climate change plays a role. We therefore pledge to cooperate with interested states, UNHCR and other relevant actors with the aim of obtaining a better understanding of such cross border movements at relevant regional and sub-regional levels, identifying best practices and developing consensus on how best to assist and protect the affected people.”

<sup>8</sup> The Nansen Initiative is led by the Governments of Norway and Switzerland. Its Steering Group is comprised of nine Member States: Australia, Bangladesh, Costa Rica, Germany, Kenya, Mexico, Norway, the Philippines, and Switzerland, and complemented by IOM and UNHCR as standing invitees. The Steering Group is joined by the European Union and Morocco in their capacity as co-chairs of the Group of Friends. The Consultative Committee informs the process through expertise.

<sup>9</sup> Paragraph 14(f) invites States to enhance their action on adaptation including by “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.” United Nations Framework Convention on Climate Change Decision 1/CP.16, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, FCCC/CP/2010/7/Add.1 (15 March 2011), available from <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

<sup>10</sup> Nansen Conference on Climate Change and Displacement in the 21st Century held in Oslo on 5-7 June 2011. Nansen Principle IX calls for a “more coherent and consistent approach at the international level [...] to meet the protection needs of people displaced externally owing to sudden-onset disasters.”

<sup>11</sup> Over the course of 2013-2015, intergovernmental Regional Consultations were held in the Pacific (the Cook Islands), Central America (Costa Rica), the Greater Horn of Africa (Kenya), Southeast Asia (the Philippines) and South Asia (Bangladesh). Civil Society meetings took place in the Pacific (Fiji), Central America (Guatemala), the Greater Horn of Africa (Kenya), Southeast Asia (Thailand), and South Asia (Nepal). Additional consultations were held on West Africa (Germany), Southern Africa (South Africa), and South America (Ecuador). Reports and conclusions from these meetings can be found at [www.nanseninitiative.org](http://www.nanseninitiative.org).

<sup>12</sup> While this Protection Agenda is limited to human mobility in the context of disasters as a consequence of natural hazards and the effects of climate change, the identified effective practices may also apply *mutatis mutandis* to disasters triggered by human-made factors such as large-scale industrial accidents. It is, however, not applicable to disasters caused by violence and armed conflict.

<sup>13</sup> See <https://www.iom.int/micic>.

<sup>14</sup> Please see Volume II that includes the Summary of Conclusions from the Nansen Initiative Regional Consultations, which include conclusions on migrants caught up in a disaster situation while abroad.

<sup>15</sup> The IASC, established in 1991 in GA Resolution 46/182, adopted this definition as used and agreed upon during ICRC workshops. Such protection may include activities aimed at preventing or stopping violations and ending harm, providing remedies when such rights have been violated, and promoting an overall environment conducive for the respect of such rights and thus may be responsive, remedial and environmental building. See IASC, *Protection of Internally Displaced Persons*, Policy Paper Series, New York, December 1999.

<sup>16</sup> According to UNISDR, “Disasters are often described as a result of the combination of: the exposure to a hazard; the conditions of vulnerability that are present; and insufficient capacity or measures to reduce or cope with the potential negative consequences. Disaster impacts may include loss of life, injury, disease and other negative effects on human physical, mental and social well-being, together with damage to property, destruction of assets, loss of services, social and economic disruption and environmental degradation.” “Terminology,” UN Office for Disaster Risk Reduction (UNISDR), <http://www.unisdr.org/we/inform/terminology#letter-d>

<sup>17</sup> According to the Guiding Principles on Internal Displacement, “internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a

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result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

<sup>18</sup> Humanitarian protection measures should not be equated with subsidiary and complementary protection as generally used in refugee and similar contexts, although in some circumstances the later forms of protection might also be relevant in disaster contexts. See paras. 55-57 in the text.

<sup>19</sup> IOM defines migration as, “The movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.” International Organisation for Migration, *Glossary on Migration* (2011).

<sup>20</sup> IOM’s working definition states: “Environmental migrants are persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.” International Organization for Migration (ed), ‘Discussion Note: Migration and the Environment MC/INF/288-1’ (2007).

<sup>21</sup> See paras. 22 and 24 in the text.

<sup>22</sup> Barnett, Jon and Webber, Michael, “Migration as Adaptation: Opportunities and Limits” in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary perspectives* (Hart, Oxford: 2010).

<sup>23</sup> Brookings, Georgetown University and UNHCR, “Guidance on Planned Relocation within National Borders: To Protect People from Impacts of Disasters and Environmental Change, Including Climate Change,” Draft, 5 June 2015. See also: IASC, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*. The Brookings-Bern Project on Internal Displacement (2011). “The act of moving people to another location in the country and settling them there when they no longer can return to their homes or place of habitual residence.”

<sup>24</sup> UNISDR, Terminology, <<http://www.unisdr.org/we/inform/terminology#letter-r>>

<sup>25</sup> UNISDR, Terminology, <<http://www.unisdr.org/we/inform/terminology#letter-e>>

<sup>26</sup> UNISDR, Terminology, <<http://www.unisdr.org/we/inform/terminology#letter-r>>

<sup>27</sup> IPCC, 2014: Annex II: Glossary [Mach, K.J., S. Planton and C. von Stechow (eds.)] in *Climate Change 2014: Synthesis Report*. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, p. 118.

<sup>28</sup> Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012, Decision 3/CP.18, *Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity*, FCCC/CP/2012/8/Add.1.

<sup>29</sup> *Framework on Disaster Risk Reduction 2015 – 2030*, adopted by the Third World Conference on Disaster Risk Reduction in Sendai/Japan on 18 March 2015 (UN Doc. A/CONF.224/CRP.1).

<sup>30</sup> UNDP, *Transforming Our World: The 2030 Agenda for Sustainable Development*, (advance unedited version) para. 14 <https://sustainabledevelopment.un.org/content/documents/7891Transforming%20Our%20World.pdf>.

<sup>31</sup> World Humanitarian Summit Synthesis Report, *forthcoming*, 2015. See also the WHS, Final Report, Regional Consultation for the Pacific, Auckland, 30 June -2 July 2015, p. 24-27.

<sup>32</sup> African Union, *The Migration Policy Framework for Africa* p.1. See also the 2014 Fifth African Regional Platform on Disaster Risk Reduction, which states, “Disasters are not constrained by administrative boundaries and require trans-boundary policies and programmes. Population movements induced by disasters (fast- and slow-onset) and long-term violent conflicts call for cross-border cooperation.”

<sup>33</sup> 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,” Brasilia, 3 December 2014.

<sup>34</sup> Pacific Islands Development Forum Secretariat, *Suva Declaration on Climate Change*, 4 September 2015, p.2 at <http://pacificidf.org/wp-content/uploads/2013/06/PACIFIC-ISLAND-DEVELOPMENT-FORUM-SUVA-DECLARATION-ON-CLIMATE-CHANGE.v2.pdf>

<sup>35</sup> The Nansen Initiative has, in particular, provided input to the Sendai Framework for Disaster Risk Reduction, the World Humanitarian Summit Process, the UNFCCC negotiations, the Brazil Declaration and Plan of Action, and the Strategy for Climate and Disaster Resilient Development in the Pacific. The Nansen Initiative also participated in the elaboration of the OSCE Self-Assessment Tool for Nations to Increase Preparedness for Cross-Border Implications of Crises (OSCE Secretariat, Transnational Threats Department, Borders Unit, 2013) which, *inter alia*, covers disaster-related cross.

<sup>36</sup> For the purposes of this agenda, “security” refers to the physical security of disaster-affected people.

<sup>37</sup> See for instance Article 6, paragraph 1 of the International Covenant on Civil and Political Rights obliging States Parties not only to respect the right to life but also protect life, an obligation that the Human Rights Committee has interpreted as preventing States Parties that have abolished the death penalty from extraditing a person to a State where he or she would face capital punishment (see *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993)) or return rejected asylum seekers to countries where they would face a real risk of being killed. To date, States have not relied explicitly upon international human rights law obligations or complementary protection mechanisms as the legal basis for

admitting disaster displaced persons but rather relied upon their discretionary authority, often on “humanitarian grounds.” See Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press: Oxford, 2012) p. 49.

<sup>38</sup> See, e.g., *M.S.S. v Belgium and Greece*, ECtHR, no. 30696/10 (2011), and *Sufi and Elmi v United Kingdom*, ECtHR, nos. 8319/07 and 11449/07 (2011).

<sup>39</sup> Inter-American Court of Human Rights, *Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (2014) Series A, No 21. See paras. 222, 231-232.

<sup>40</sup> The relevant rule in relation to refugees is Article 33 of the Refugee Convention. Complementary protection provisions concerning *refoulement* are derived usually from the provisions of international human rights law treaties.

<sup>41</sup> See, for example, the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children states in Article 7 on the Status of victims of trafficking in persons in receiving States, that “each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases” and “give appropriate consideration to humanitarian and compassionate factors.”

<sup>42</sup> See the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Doc. A/RES/45/158, 18 December 1990.

<sup>43</sup> Nansen Initiative, South American Regional Consultation Outcome Report, September 2015. Other countries have incorporated into their legislation the right to not to have to migrate due to a lack of development.

<sup>44</sup> The examples in this section are mainly drawn from research commissioned by the Nansen Initiative, and the consultative process. See David J. Cantor, “Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters: States of the Regional Conference on Migration and Others in the Americas,” Nansen Initiative, December 2014; Robert Freeman, “Southern Africa Background Paper,” Nansen Initiative, June 2015; François Gemenne, Julia Blocher, Florence de Longueville, Nathalie Perrin, Sara Vigil, Caroline Zickgraf, Dalila Gharbaoui & Pierre Ozer, “Catastrophes, Changement Climatique et Déplacements forcés Dynamiques régionales de mobilité en Afrique de l’Ouest,” Nansen Initiative, 2014; Nicolás Rodríguez Serna, “South American Background Paper,” Nansen Initiative, June 2015. Patricia Weiss Fagan, “Receiving Haitian Migrants,” Nansen Initiative, December 2013; Tamara Wood, “Protection and Disasters in the Horn of Africa: Norms and practice for addressing cross-border displacement in disaster contexts,” Nansen Initiative, 2014.

<sup>45</sup> Nansen Initiative, “Discussion Paper: Draft Elements of a Guide to Effective Practices on Admission and Stay for Persons Moving across Borders in the Context of Disasters,” Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disaster, February 2015.

<sup>46</sup> For more about the Economic Community of West Africa (ECOWAS) and the Economic Community of Central African States (CEMAC) transhumance arrangements see F.A. Abiola, A. Teko-Agbo, C. Biao and M. Niang. “Socio-Economic and Animal Health Impact of Transhumance,” Conf. OIE 2005, 105-119. <http://www.oie.int/doc/ged/d3248.pdf>.

<sup>47</sup> For example, a few States (Panama, Peru) found that asylum seekers from Haiti had a “well-founded fear of persecution by non-State actors that arose from the vacuum of governmental authority after the earthquake in Haiti,” thus applying the 1951 Refugee Convention.

<sup>48</sup> In New Zealand, the Refugee Status Appeals Authority found that a female activist from Myanmar had a well-founded fear of arrest and sentencing because in the aftermath of Cyclone Nargis she had distributed humanitarian aid purchased by foreigners who supported an opposition party. Refugee Appeal No 76374, Decision of 28 October 2009 (B.L. Burson [member]), available online at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20091028\\_76374.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20091028_76374.pdf) (last accessed 4 March 2015).

<sup>49</sup> See Tamara Wood, “Protection and Disasters in the Horn of Africa: Norms and practice for addressing cross-border displacement in disaster contexts,” Nansen Initiative, 2014, p. 32-33.

<sup>50</sup> See Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures for promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

<sup>51</sup> See also UNHCR, “Guidance Note on Temporary Protection or Stay Arrangements,” Division of International Protection, January 2014.

<sup>52</sup> Such circumstances could arise, if applied by analogy to the circumstances under which a person becomes a refugee *sur place*. “A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee ‘sur place.’ A person becomes a refugee ‘sur place’ due to circumstances arising in his country of origin during his absence.” UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,” HCR/IP/4/Eng/REV.1, Reedited, Geneva January 1992, UNHCR, 1979, paras. 94-96.

<sup>53</sup> *IASC Framework on Durable Solutions for Internally Displaced Persons*, The Brookings Institution- University of Bern Project on Internal Displacement, April 2010.

<sup>54</sup> See Draft Article 16 Duty to reduce the risk of disasters, International Law Commission, Protection of Persons in Situations of Disaster, Draft Articles 16-17, UN Doc. A/CN.4/L.815, 23 July 2013. See also the Nansen Conference Principle II: “States have a primary duty to protect their populations and give particular attention to the special needs of the people most vulnerable to and most affected by climate change and other environmental hazards, including the displaced, hosting

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communities and those at risk of displacement.” UNHCR, “Summary of Deliberations on Climate Change and Displacement,” April 2011.

<sup>55</sup> UNISDR, *Global Assessment Report on Disaster Risk Reduction 2015*, <http://www.unisdr.org/we/inform/publications/42809>.

<sup>56</sup> UNFCCC, *supra* note 9, paras.14 (b)(c)(h).

<sup>57</sup> UNDP, *supra* note 27, para. 35.

<sup>58</sup> *Ibid*, Goal 1.5.

<sup>59</sup> See, for example, Daniel Petz, “Strengthening Regional and National Capacity for Disaster Risk Management: The Case of ASEAN,” (November 2014) The Brookings-LSE Project on Internal Displacement; IDMC, “Neglected Displacement: Human Mobility in Pacific Disaster Risk Management and Climate Change Adaptation Mechanisms,” September 2013; and IOM, “No 18, International Dialogue on Migration: Climate Change, Environmental Degradation and Migration” (2012) p. 34-36.

<sup>60</sup> Koko Warner, Tamer Afifi, Kevin Henry, Tonya Rawe, Christopher Smith, and Alex de Sherbinin, *Where the Rain Falls: Climate Change, Food and Livelihood Security and Migration*, Global Policy Report, UNU-EHS, November 2012, p.17

<sup>61</sup> Foresight, *Migration and Global Environmental Change* (Final Project Report, The Government Office for Science, Foresight, 2011).

<sup>62</sup> See examples in Annex, and Daniel Petz, “Planned Relocations in the Context of Natural Disasters and Climate Change: A Review of the Literature,” Brookings Institution, 2015.

<http://www.brookings.edu/~media/research/files/papers/2015/06/planned-relocations-climate-change/brookings-planned-relocations-annotated-bibliography-june-2015.pdf>

<sup>63</sup> Brookings, Georgetown University and UNHCR, “Planned Relocations, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future,” Sanremo Consultation Report, 12-14 March 2014.

<<http://www.unhcr.org/53c4d6f99.pdf>>

<sup>64</sup> Presently, the Planned Relocation, Disasters and Climate Change Project, led by the Brookings Institution, Georgetown University and UNHCR, is in the process of developing such guidance. See *supra* note 20.

<sup>65</sup> See General Assembly resolutions: A/RES/62/153, para. 10; A/RES/64/162, para. 10; A/RES/66/165, para. 12.

[A/RES/68/180](#) para. 16; Human Rights Council: Res. 6/32 para. 5; 2005 World Summit Outcome, A/RES/60/1, 24 October 2005, para. 132; Human Rights Council resolutions: A/HRC/RES/6/32, para. 5; A/HRC/RES/14/6, para. 9; A/HRC/RES/20/9, para. 1; A/HRC/RES/23/8, para. 12.

<sup>66</sup> See General Assembly Resolutions: A/RES/62/153, para. 10; A/RES/64/162, para. 10; A/RES/66/165, para. 12.

[A/RES/68/180](#) para. 16; Human Rights Council: Res. 6/32 para. 5; 2005 World Summit Outcome, A/RES/60/1, 24 October 2005, para. 132; Human Rights Council resolutions: A/HRC/RES/6/32, para. 5; A/HRC/RES/14/6, para. 9; A/HRC/RES/20/9, para. 1; A/HRC/RES/23/8, para. 12.

<sup>67</sup> Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998).

<sup>68</sup> International Conference on the Great Lakes, Protocol on the Protection and Assistance to Internally Displaced Persons, 2006.

<sup>69</sup> Under the Inter-Agency Standing Committee’s Cluster Approach to coordinate international humanitarian action, UNHCR is the global protection cluster lead. However, in the event of a disaster at the country level, leadership of the protection cluster is determined on a case by case basis between UNHCR, OHCHR and UNICEF, under the leadership of the UN Humanitarian Coordinator. Other activities to provide protection and assistance to IDPs in disaster situations are also included within all the sectoral clusters, notably the Camp Coordination and Camp Management Cluster led by IOM (disasters) and the Emergency Shelter Cluster convened by IFRC (disasters). See the Global Protection Cluster: <http://www.globalprotectioncluster.org/en/areas-of-responsibility/protection-in-natural-disasters.html>.

<sup>70</sup> Since 2008, IDMC has been collecting global data on disaster displacement, and has also developed models to project future disaster displacement. IOM’s Displacement Tracking Matrix collects data on displacement in disaster situations where the organization has field operations.

<sup>71</sup> IOM is currently developing guidance on integrating human mobility within National Adaptation Plans. See <http://environmentalmigration.iom.int/integrating-human-mobility-issues-within-national-adaptation-plans>.

<sup>72</sup> See *supra* notes 20 and 59.

## **Interview Questions and Respondents**

### **Research Project - The Nansen Initiative and the Development of International Legal Norms for Cross-Border Disaster-Displaced Persons**

#### **Interview Topics To Be Covered**

Participants' Views and Experiences of:

- Motive(s) for joining the steering committee of the Nansen Initiative
- Work on the steering committee
- Mandate of the Nansen Initiative
- Issues and challenges facing the Nansen Initiative
- The protection agenda
- The Nansen Initiative post 2015

#### **A. Envoy of the Chairmanship/Steering Committee Members**

1. Beyond the written material available online, how would you describe the mandate of the Nansen Initiative? Has this mandate evolved or changed during the Initiative's lifetime?
2. In your view, what were the most important factors leading to the formation of the Nansen Initiative?
3. Apart from members of the steering committee, how have other states been responding to the work and activities of the initiative?
4. What would you say are the challenges confronting the initiative and what are their implications on the general goal or outcome of the initiative?
5. It is stated on the Nansen Initiative's website that the Initiative does not aim to create a new legal standard but its outcome may. Could you explain this?
6. Do you see the outcome of the initiative translating into a soft or hard international legal instrument for the recognition and protection of cross-border environmentally displaced persons?

7. The Nansen Initiative comes to an end in December 2015, what happens to the Initiative post 2015?
8. Why did you/your state decide to join the Nansen Initiative/steering committee of the initiative?
9. Essentially, what do you do as a member of the steering committee/envoy of the chairmanship?
10. Do you see other major immigrant-destination countries such as USA, Canada, UK, France and New Zealand supporting both the initiative and its protection agenda?
11. What is the protection agenda and how do you classify it? Is it a soft legal document or a policy document?
12. Would you say the initiative has accomplished its set goals? If yes, how? If not, why not?
13. Do you think states will be willing to support an institutional framework for the Nansen Initiative post 2015?

## **B. Representatives of States**

1. What is your state's disposition to the work and activities of the Nansen Initiative?
2. Why didn't your state join the steering committee of the Nansen Initiative?
3. Is your state in support of the protection agenda? If yes, how do your state intend to implement it? If no, why not?
4. Would your state prefer the protection agenda in a soft or hard legal framework in the future?  
What would inform your state's decision to this question?
5. Would your state support a proposal for the institutionalization of the Nansen Initiative post 2015?

6. Would you say the initiative has accomplished its set goals? If yes, how? If not, why not?
7. What is the effect of the support of your state to the protection agenda within your region?
8. Is the Nansen Initiative necessary?

### **Interview Respondents**

Representatives whose names are not disclosed below requested that the data gathered from the interview that I conducted with them be published in a form that does not identify them in any way.

1. Representative of Australia
2. Representative of Bangladesh
3. Mr. Axel Kuechle, Representative of Germany
4. Mr. Haron Komen, and Mr. Tom Anyim, Representatives of Kenya
5. Representative of Norway
6. Mr. Jesus R.S. Domingo, Representative of the Philippines
7. Representative of Switzerland
8. Professor Walter Kalin, Envoy of the Chairmanship of the Nansen Initiative
9. Professor Jane McAdam, Subject-Matter Expert