Climate Change Law (2018)

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In this section, the efforts of the international community to deal with climate change and climate-induced disasters are discussed and analysed through the lens of the 1992 United Nations Framework on Climate Change (UNFCCC).¹ The multilateral climate change negotiations under the UNFCCC have been underway now for twenty-seven years. The ultimate objective of the UNFCCC is to achieve ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner’.² Whether or not this goal will be achieved is a moot question. However, the most recent commitments of the Parties culminated in the 2015 Paris Agreement³ and the accompanying Decision 1/CP.21⁴ to implement the Agreement. The Agreement came into force on 4 November 2016⁵ and a work program has been established to deliver the key outcomes of the Agreement progressively.⁶ The most recent negotiations under the UNFCCC took place in Katowice, Poland at the Twenty Fourth Conference of the Parties to the UNFCCC (COP 24) from 2 to 14 December 2018.

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1 UN, United Nations Framework Convention On Climate Change, available at <http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveg.pdf>, last accessed (as any subsequent URL) on 15 May 2019.

2 *Ibid.*, art. 2.

3 UNFCCC, Adoption of the Paris Agreement, available at <<https://unfccc.int/resource/docs/2015/cop21/eng/10g01.pdf>>.

4 UNFCCC, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015. Addendum. Part two: Action taken by the Conference of the Parties at its twenty-first session, available at <<http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>>.

5 See <<http://newsroom.unfccc.int/unfccc-newsroom/landmark-climate-change-agreement-to-enter-into-force/>>.

6 See Progress tracker Work programme resulting from the relevant requests contained in decision 1/CP.21 available at <https://unfccc.int/sites/default/files/resource/pa_progress_tracker_200617.pdf>.

1 Climate Disasters and the Lead-up to the Paris Agreement

Previous agreements under the UNFCCC, such as the Kyoto Protocol,⁷ focused primarily on mitigating greenhouse gas emissions. However, in 2010, at the Sixteenth Conference of the Parties (COP 16),⁸ the Parties established the 'Cancun Adaptation Framework'⁹ acknowledging the need to adapt to the impacts of global climate change, while stating that adaptation must be addressed with the same priority as mitigation.¹⁰ The COP invited all Parties to: make climate change impact assessments; plan adaptation actions; strengthen institutional capacities; build resilience; and enhance climate change related disaster risk reduction strategies.¹¹ The COP decided further to establish an Adaptation Committee to promote the implementation of enhanced action on adaptation.¹² In addition, the COP determined that a work program would be established to consider approaches to address loss and damage associated with climate change impacts in vulnerable developing countries.¹³

Subsequently, at the Eighteenth Conference of the Parties (COP 18) in Doha, the Parties decided to incorporate within UNFCCC's jurisdiction the loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change. In December 2013 at COP 19, the Parties then established the 'Warsaw international mechanism for loss and damage associated with climate change impacts' (WIM).¹⁴ The WIM, established under the Adaptation Framework, acknowledged that adaptation and risk management strategies contribute towards addressing loss and damage associated with climate change impacts but – crucially – that adaptation cannot reduce all of these losses.¹⁵ The Framework

7 UN, Kyoto Protocol to the United Nations Framework Convention on Climate Change, available at <<https://unfccc.int/resource/docs/convkp/kpeng.pdf>>.

8 See 2010 Outcome of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, art. 1, available at <http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf>.

9 *Ibid.*, art. 13.

10 *Ibid.*, art. 2(b).

11 *Ibid.*, art. 14.

12 *Ibid.*, art. 17.

13 *Ibid.*, art. 26.

14 Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013 Addendum. Part two: Action taken by the Conference of the Parties at its nineteenth session, available at <<http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>>.

15 *Ibid.*, Preamble.

calls for: the undertaking of impact, vulnerability and adaptation assessments;¹⁶ climate-resilient development and vulnerability reduction;¹⁷ the enhancement of climate change disaster risk reduction;¹⁸ and an understanding of Climate Displaced Persons, migration and planned relocation at the national, regional and international levels.¹⁹ An Executive Committee was established and has developed a five-year rolling work plan²⁰ to address the loss and damage associated with extreme weather events and slow onset events.²¹ Four thematic expert groups²² play a major role in carrying out the activities of the work plan focusing on slow onset events,²³ non-economic losses,²⁴ displacement related to the adverse impacts of climate change,²⁵ and comprehensive risk management approaches.²⁶

2 The Paris Agreement and Averting Climate Disasters

Under the Paris Agreement, the Parties agreed to hold the increase in the global average temperature to well below 2° C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, to significantly reduce the risks and impacts of climate change.²⁷ Most of the details for implementing the Paris Agreement – known as ‘the Paris

16 *Ibid.*, art. 14(b).

17 *Ibid.*, art. 14(c).

18 *Ibid.*, art. 14(e).

19 *Ibid.*, art. 14(f).

20 Five year rolling workplan. The Executive Committee of the Warsaw International Mechanism, available at <<https://unfccc.int/sites/default/files/resource/Detailed%20workplan%20by%20strategic%20workstreams.pdf>>.

21 *Ibid.*, art. 25.

22 See Executive Committee of the Warsaw International Mechanism for Loss and Damage, available at <<https://unfccc.int/7543>>.

23 This expert group released a scoping paper in 2018, available at <https://unfccc.int/sites/default/files/resource/activity_b_soe_assesment_feb_2018.pdf>.

24 This expert group released a technical paper in 2013, available at <<https://unfccc.int/sites/default/files/resource/docs/2013/tp/02.pdf>>.

25 The report of this expert group is discussed in the context of the Katowice climate change negotiations.

26 This expert group released a Draft Compendium on Comprehensive Risk Management Approaches in 2017, available at <https://unfccc.int/sites/default/files/compendium_march_2017.pdf>.

27 UNFCCC (n. 3) art. 2(a).

Rulebook' – are encompassed in the COP 24 'Katowice climate package'²⁸ but are too extensive to be reproduced here.

2.1 *Emissions Reduction Targets*

The Paris Agreement required developed and developing country Parties to prepare, communicate and implement successive voluntary nationally determined contributions (NDCs), to be pursued through domestic mitigation measures. Each successive NDC must represent a progression beyond the Party's current NDC and reflect its highest possible ambition, in accordance with its common but differentiated responsibilities and respective capabilities, and in the light of different national circumstances. NDCs must be communicated every 5 years and will be informed by a Global Stocktake. The first Global Stocktake will be undertaken in 2023 and every five years thereafter,²⁹ with developed countries urged to continue to take the lead by undertaking economy wide absolute emission reduction targets.

2.2 *Transparency Framework*

The Transparency Framework builds on existing reporting and review requirements under the 2010 Cancun Agreements. The information provided by each Party in its reports will be subject to a technical expert review, which will identify any areas for improvement in reporting and capacity building, in consultation with the Party concerned. The expert review report will identify any compliance issues. A multilateral and facilitative examination will also consider the expert review's report.³⁰ The transparency framework 'shall be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on the Parties'.³¹

2.3 *The Global Adaptation Goal*

The Paris Agreement establishes a global adaptation goal to: enhance adaptive capacity; strengthen resilience; and reduce vulnerability to climate change.³² The Parties recognise that adaptation is a key component of protecting people, livelihoods and ecosystems and that the needs of people in developing countries, particularly vulnerable to the adverse effects of climate change, are

28 Katowice climate package, available at <<https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package>>.

29 UNFCCC (n. 3) art. 14(2).

30 *Ibid.*, art. 13.

31 *Ibid.*

32 *Ibid.*, art. 7(1).

urgent and immediate.³³ All Parties are required to engage in adaptation planning and to implement the agreed upon adaptation actions. These actions should be country-driven, gender-responsive, participatory and fully transparent, considering: vulnerable groups; communities; ecosystems; the best available science; and indigenous and local knowledge. Adaptation should be integrated into all relevant socioeconomic and environment policies and actions.³⁴ Parties are also encouraged to submit periodically and update an adaptation communication as a component of, or in conjunction with, a national adaptation plan.³⁵ The communication will be recorded in a public registry and a review of the overall progress made in achieving the global goal on adaptation is part of the Global Stocktake,³⁶ mentioned above.

2.4 *The Warsaw International Mechanism for Loss and Damage*

The Paris Agreement requires Parties to enhance understanding, action and support on loss and damage on aspects such as early warning systems, risk insurance facilities, climate risk pooling and other insurance solutions. However, and very significantly, the Parties have decided³⁷ that the Agreement does not involve or provide a basis for any liability or compensation for the impacts of climate change.

3 COP 24 and the 2018 Report of the Executive Committee of the Warsaw International Mechanism

The most recent developments with regard to climate disasters occurred at COP 24. There, the COP adopted decision 10/CP.24, entitled 'Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts'.³⁸ Decision 10/CP.24³⁹ took note of the Intergovernmental Panel on Climate Change (IPCC) 'Special Report on Global Warming of 1.5° C'⁴⁰ and welcomed the annual report and progress

33 *Ibid.*, art. 7(2).

34 *Ibid.*, art. 7(5).

35 *Ibid.*, art. 7(9).

36 *Ibid.*, art 7(14).

37 See UNFCCC (n. 4) art. 51.

38 UNFCCC Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. Draft conclusions proposed by the Chairs, para. 84, available at <<https://unfccc.int/event/cop-24>>.

39 *Ibid.*

40 IPCC Special Report, Global warming of 1.5°C, available at <https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf>.

made by the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. It also welcomed the report of the Task Force on Displacement.⁴¹

The Executive Committee was especially encouraged to:

- enhance its responsiveness, effectiveness and performance with regard to action and support on finance, technology and capacity-building for addressing the loss and damage associated with climate change,⁴²
- work with the IPCC and other scientific organizations to address the scientific information needs and knowledge gaps when undertaking its work,⁴³
- increase its consideration of groups vulnerable to the adverse effects of climate change, and
- continue its work on human mobility as discussed in the report of the Task Force on Displacement.⁴⁴

The COP also invited relevant organizations, such as associated expert groups, subcommittees, panels, thematic advisory groups, and task-focused ad hoc working groups to make sufficient resources available to the Executive Committee to implement its five-year rolling work plan in a successful and timely manner.⁴⁵ They were also invited to collaborate with the Executive Committee to develop and disseminate products that will support national focal points and loss and damage contact points to raise awareness of averting, minimizing and addressing loss and damage.⁴⁶ The Parties to the UNFCCC were invited to consider developing policies, plans and strategies and to facilitate coordinated action and monitor progress with averting, minimizing and addressing loss and damage.⁴⁷ They were also invited to consider future climate risks when developing and implementing their relevant national loss and damage plans and strategies.⁴⁸

3.1 *The Task Force on Displacement*

The Task Force on Displacement has made significant progress on its work plan. At COP 24, the COP welcomed the decision of the Executive Committee to extend the mandate of the Task Force on Displacement in accordance with

41 Report of the Task Force on Displacement, available at <https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf>.

42 UNFCCC (n. 38) para. 5 (a).

43 *Ibid.*, para. 5(d).

44 *Ibid.*, para. 5(e).

45 *Ibid.*, para. 6.

46 *Ibid.*, para. 8.

47 *Ibid.*, para. 10.

48 *Ibid.*

terms of reference yet to be elaborated by the Executive Committee at its ninth meeting being held from 9–11 April 2019.⁴⁹

- Recommendations made by the Executive Committee on averting, minimizing and addressing displacement related to the adverse impacts of climate change.

These recommendations are based on the extensive work undertaken by the Task Force on Displacement and represented in its report⁵⁰ comprising eighty two pages which cannot be dealt with comprehensively here. Suffice it to say that, in addition to containing a list of recommendations, it includes detailed summary reports on the activities of the Task Force on Displacement's work plan, making it essential reading for those working in this area. These reports include:

- Mapping Human Mobility and Climate Change in Relevant National Policies and Institutions frameworks at the national level, while excluding disaster reduction frameworks,⁵¹
- Synthesizing the state of knowledge to better understand displacement related to slow onset events,⁵²
- Mapping the workplans of bodies/work programmes under the UNFCCC on displacement including: the Adaptation Committee, the Consultative Group of experts on National Communications not include in Annex I of the Convention, the Least Developed Countries Expert group, the Lima Work Plan on Gender, the Nairobi work programme on impacts, vulnerability and adaptation to climate change, and the Research and Systematic Observation workstream,⁵³
- Mapping Human Mobility (Migration, Displacement and Planned Relocation) and Climate Change in the International Processes, Policies and Legal Frameworks, including migration governance, labour, humanitarian assistance, human rights, climate change action, disaster risk reduction, sustainable development and environmental protection.⁵⁴ This part acknowledges the United Nations 'Global Compact for Safe, Orderly and Regular Migration'⁵⁵

49 *Ibid.*, para. 4. The agenda for this meeting is available at <<https://unfccc.int/sites/default/files/resource/Provisional%20agenda%20and%20annotations%20Excom%209.pdf>>.

50 Report of the Task Force on Displacement. available at <https://environmentalmigration.iom.int/sites/default/files/2018_TFD_report_16_Sep_FINAL-unedited.pdf>.

51 *Ibid.*, Part IV(A), para. 40.

52 *Ibid.*, Part IV(B).

53 *Ibid.*, Part IV(C), para. 65.

54 *Ibid.*, Part IV(D), para. 70.

55 Global Compact for Safe, Orderly and Regular Migration. Intergovernmentally Negotiated and Agreed Outcome, available at <https://refugeemigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf>.

(the UN Global Compact) and that the Green Climate Fund does not make explicit reference to climate-induced human mobility in terms of its objectives, which might hinder the possibility of finance on a large scale,⁵⁶

- Mapping of institutional frameworks and mandates within the United Nations system to avert, minimize and address displacement and outline options for facilitating coordination of key systems,⁵⁷
- Mapping of existing international and regional guidance and tools on averting, minimizing, addressing and facilitating durable solutions to climate-induced displacement,⁵⁸ a non-exhaustive exercise that found over two hundred relevant guidance and tools intended to enhance resilience and reduce displacement through climate change adaptation, disaster risk reduction and sustainable development,⁵⁹
- Systematic data collection and monitoring of displacement and its impacts at local, national, regional and international levels to inform comprehensive needs and risk assessments for formulating policies and plans.⁶⁰ One of the findings here is the unequal reporting on large events in a small number of countries compared with under-reporting of small-scale events, even though these are more common. Also disasters which occur in isolated, insecure or marginalised areas tend to be under-reported because of limited access and communications.⁶¹ Between 2008–2016, eighty six per cent of internal displacements were as a result of weather events accounting for a total 195 million displacements. Of these hydrometeorological events, floods accounted for fifty two per cent of displacements followed by storms at thirty two per cent.⁶²
- The recommendations.

The Executive Committee's recommendations are based on the report of the Task Force on Displacement. It calls for better coordination between the relevant bodies under the UNFCCC and the Paris Agreement to better understand human mobility (including migration, displacement and planned relocation).⁶³ It also asks these bodies to help countries develop climate change risk assessments and improve their standards for collecting data on internal and cross-border displacement, in consultation with affected and

⁵⁶ Task Force on Displacement report (n. 50) para.81(c)(b).

⁵⁷ *Ibid.*, Part IV(E).

⁵⁸ *Ibid.*, Part IV(F).

⁵⁹ *Ibid.*, para. 99.

⁶⁰ *Ibid.*, Part IV(G).

⁶¹ *Ibid.*, para. 108(b).

⁶² *Ibid.*, para. 123.

⁶³ Annex para. 1(c).

at-risk communities.⁶⁴ The Adaptation Committee and Least Developed Countries Expert Group is invited to collaborate with the Executive Committee to integrate climate-induced displacement and its causes into relevant national planning processes including in formulating and implementing national adaptation plans.⁶⁵ In formulating laws, policies and strategies on displacement, Parties are invited to take into account their human rights obligations, other relevant international standards and legal considerations.⁶⁶

Parties are also invited to enhance their research, data collection and risk analysis and share that information so that human mobility can be better mapped, understood and managed, with the participation of affected communities.⁶⁷ They are asked to strengthen: preparedness including early warning systems; contingency and evacuation planning; resilience building; and develop innovative approaches to avert, minimize and address climate-induced displacement. One such approach could be 'forecast-based financing'.⁶⁸ Forecast-based Financing (FbF) releases humanitarian funding based on forecast information for planned activities which reduce risks, enhance preparedness and response, and make disaster risk management overall more effective. The idea is to trigger and fund preparedness actions before the disaster strikes when a credible warning arrives.⁶⁹

The Parties are asked to act consistently with the 'Guiding Principles for Internally Displaced People',⁷⁰ which set out thirty principles for protecting the human rights of IDPs in all phases of displacement, and the UN Global Compact. Consistently with the Compact, Parties should consider the needs of migrants and displaced persons, their origin, transit and destination and enhance opportunities for regular migration pathways, such as through labour migration consistent with international standards.⁷¹ Parties are further invited to support efforts on finance, technology and capacity-building at community, national, regional and international levels and also enhance cooperation especially on risk and vulnerability assessments, mapping, data analysis,

64 *Ibid.*, para. 1(d).

65 *Ibid.*, para. 1(e).

66 *Ibid.*, para. 1(i).

67 *Ibid.*, para. 1(ii).

68 *Ibid.*, para 1(iii).

69 See 'Forecast based financing for preparedness: developing an operational protocol' (Climate Centre), available at <https://www.climatecentre.org/downloads/files/programs/RCCC_FbF%20of%20preparedness%202pager%20V1%20web.pdf>.

70 OCHA, Guiding Principles on Internal Displacement, available at <<http://www.internal-displacement.org/sites/default/files/publications/documents/1998o8-training-OCHA-guiding-principles-Eng2.pdf>>.

71 Decision 10/CP.24 (n. 38) annex para. 1(vi).

preparedness and early warning systems, while developing and sharing good practices.⁷² There is a timely invitation to relevant UN agencies that are facilitating the efforts of States to address climate-induced displacement, such as under the Global Compact, and to engage with the Executive Committee so as to avoid duplication.⁷³ The UN Secretary-General is also invited to consider steps, including a system-wide strategic review, to establish greater coherence across the UN system to address climate-induced human mobility and displacement.⁷⁴

4 The Emissions Gap Report

Over the past twenty seven years, the UNFCCC has made significant progress on dealing with the challenges of climate change. However, the United Nations Environment Programme's 2018 *Emissions Gap Report*⁷⁵ issues a salutary warning that '[p]athways reflecting current NDCs imply global warming of about 3°C by 2100, with warming continuing afterwards. If the emissions gap is not closed by 2030, it is very plausible that the goal of a well-below 2°C temperature increase is also out of reach'.⁷⁶ There is a great deal more work to be done by all countries to deal with and avert the prospect of even more catastrophic climate disasters than those which the world has already witnessed in recent times.

72 Annex para. 1(h)(i),(ii),(iii).

73 Annex para. 1(i).

74 Annex para. 9(k).

75 UNEP, *Emissions Gap Report 2018*, available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/26895/EGR2018_FullReport_EN.pdf?sequence=1&isAllowed=y>.

76 *Ibid.*, xiv.