

African Legal Tools for Facilitating Climate Justice in Cross-Border Displacement in Eastern Africa: Surpassing the Bleak Legal Ideal in International Refugee Law

Dalia Malek

Introduction

‘... I’m the same as people who are fleeing war. Those who are afraid of dying, it’s the same as me. The sea level is coming up, and I will die, like them’, Ioane Teitiota (McDonald, 2015).

International refugee law has aptly received criticism for its inability to protect those displaced by climate change. Terminologies such as ‘environmental migrants’ or ‘climate refugees’ are contested across scholarship, while there is no universal term or definition in international law. A few scholars have suggested that international legal instruments can be amended or interpreted more flexibly, but many others have argued that international refugee law cannot appropriately offer protection to those displaced by climate change (Marcs, 2008; Borges, 2019; McAdam, 2022). The international human rights legal regime has similarly illustrated narrowness when considering the prohibition of *refoulement* as it pertains to climate-change displacement. In *Teitiota v New Zealand* (2020), the Human Rights Committee (HRC) found that New Zealand did not violate the right to life of Ioane Teitiota, quoted at the start of the chapter, when it refused his asylum claim and deported him back to Kiribati from which he had escaped the harmful effects of rising sea levels.

With these scholarly and jurisprudential commentaries in the backdrop, receiving States have had to overcome the limitations of the legal tools available and react rapidly to displacements, particularly in situations of sudden-onset disasters and mass influx. The United Nations High Commissioner for Refugees (UNHCR) refers to the ‘cross-border movement in the context of conflict and/or violence *and* disaster and/or the adverse effects of climate change’ (Weerasinghe, 2018, emphasis in original) as ‘nexus dynamics’. When international refugee law is analyzed in light of nexus dynamics, the provision of international protection for persons displaced by climate change is contingent on a link to the legal criterion of persecution. This results in a bleak legal ideal where the observed dynamic of climate change acting as a ‘threat multiplier’ (UNSC, 2019) of existing marginalization becomes an eligibility requirement.

International refugee law situates the circumstances of forced migrants within the criteria of having ‘a well-founded fear of being persecuted’ as elaborated in Article 1(A)(2) in the 1951 Convention Relating to the Status of Refugees (1951 Convention). Persecution must be linked to at least one of the 1951 Convention’s five grounds of race, religion, nationality, membership of a particular social group or political opinion. If harm caused by climate change can be integrated into a claim of persecution for reasons related to one or more of these grounds, the claim is more likely to be successful according to these standards. In Eastern Africa, the circumstances of climate change in conjunction with persecution can theoretically qualify some displaced persons to meet the rigid legal criteria.

Multiple overlapping factors can drive migration in Eastern Africa, a characterization of migration that contrasts with the standards of international refugee law where persecution is ordinarily considered the sole motivator. Migrants in Eastern Africa can fulfil the ‘legal ideal’ where their displacement is attributed to government authorities and non-State actors who perpetuate wars, prevent access to humanitarian aid, and oppress minoritized populations as climate change simultaneously inflicts drought, flooding, heatwaves and anomalous rainfall. Subsequent food insecurity or famine can be caused or exacerbated by climate change, or it can be directly human-induced, while also compounding existing vulnerabilities and amplifying discrimination to an extent that it rises to the level of persecution. While this ‘legal ideal’ is framed as bolstering refugee claims, it also reinforces the narrow standard that must be reached in order to acquire international protection. Achieving this standard should be considered beneficial for some, but its exclusionary rigidity contradicts the calls for flexibility and resourcefulness that are necessary and practical for addressing climate-change displacement. Although the African regional system does not necessarily offer a straightforward or comprehensive answer to these calls, its hallmark flexibility can facilitate innovation. The legal tools it provides, alongside other regional efforts, can

help circumvent the restrictiveness of international refugee law when applied in the climate-change context.

In this chapter I use ‘climate-change displacement’ to generally refer to movement that occurs both within and across borders while assuming a human-induced element causing climate change and resulting in environmental events and disasters. I use ‘regional’ as it is used in international law when referring to the respective international human rights laws, courts, procedures and other mechanisms that are only applicable to regions such as Africa, the Americas and Europe, in contrast with the ‘universal’ or United Nations (UN) system and its treaty-monitoring bodies and mechanisms. While any country can adopt global instruments, such as the UN treaties, regional and subregional instruments also form a part of international law, but their acceptance is restricted to countries in those regions. To avoid confusion with this use of ‘regional’, for the purposes of this chapter the Regional Economic Communities (REC), as well as their groupings of States such as the Inter-Governmental Authority on Development (IGAD), are referred to in this chapter as ‘subregional’.

This chapter begins with a reflection on migrants from Somalia to Ethiopia, a microcosm of nexus dynamics. After signposting recent developments, I examine the unique acknowledgements of climate-change displacement in the subregional IGAD Transhumance and Free Movement Agreements. On the regional level, I consider tools available to those in all contracting States in Africa: the African Charter on Human and Peoples’ Rights (African Charter) and their potential for strategic litigation before the African Commission and African Court, as well as the regional 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) and its expanded refugee definition. I return to the context of Ethiopia as a receiving State of forced migrants from Somalia, putting forward that its domestic application of the 1969 OAU Convention should be encouraged and that climate-change events should be interpreted as ‘events seriously disturbing public order’. In turn, I conclude that, through its characteristic flexibility, the African regional framework is equipped to bring about justice and provide international protection for those displaced by climate change.

Somali forced migrants meeting the standards of the ‘bleak legal ideal’

The peoples of Eastern Africa have engaged in travel and trade for millennia and, in spite of colonial boundaries and border disputes, movements across the borders of what are now the modern States of Ethiopia, Kenya and Somalia have continued for a variety of reasons that are separate from but sometimes intermingled with repression, conflict and climate change.

These include healthcare, education, seeking favourable markets for trade, as well as continued traditions of pastoralism and transhumance. Pastoralist and agropastoralist livelihoods have integrated adaptability with mobility and for generations have passed down traditions of land management, communications between elders and communities, and localized migration governance. In the border area, pastoralists were the main group to cross international borders as a result of climate change according to research by [UNHCR \(2023a\)](#). For some, crossing international borders had been a form of seasonal migration. Over time, they have increasingly integrated strategies of adaptability to weather variability and now, their traditional livelihoods have become disrupted or altogether lost as they come to face drought, flooding and other harmful impacts of climate change.

Those who *flee* Somalia may be escaping targeted harm, for example due to belonging to a minority ethnicity or clan, or they may be seeking safety from the ongoing armed conflict where the violence may be indiscriminate. They may also be fleeing the continually deteriorating human rights situation in areas that are under the effective control of State agents and government-affiliated forces, or of non-State actors such as Al-Shabaab or clan militias ([UNHCR, 2022](#)). In previous decades, Somalia has also been subject to environmental degradation and climate change. More recently, the severe ongoing drought that began in 2021 led to an increased scarcity of water resources, food insecurity, livestock deaths, outbreaks of disease and lack of access to livelihoods, also causing many to flee. According to Frantz Celestin, the International Organisation for Migration (IOM) Somalia Chief of Mission: ‘It’s becoming clear that climate change is exacerbating conflict and displacement in Somalia as farmers compete over natural resources to survive. The short-term consequences are violent clashes, but the long-term outlook is a threat to peace in a country which has already suffered three decades of protracted conflict’ ([IOM, 2022](#)). The crossing of an international border is a requirement of fulfilling the refugee criteria, but the majority of climate-change displacement occurs internally. By the end of 2023, there were 3.5 million internally displaced persons (IDPs) in Somalia, and 64 per cent of them cited ‘natural disaster’ as the primary reason for their displacement ([IOM, 2024](#)). From late 2023 onward, heavy rains leading to severe flooding have led to outbreaks of disease and death, leading to more displacement.

These multiple drivers of migration in Eastern Africa can operate simultaneously, and decisions to migrate are often considered, strategic and characterized by a significant level of agency subject to variables that may be unique to an individual or household, and thus difficult to generalize and link directly. Although refugees and their reasons for leaving their countries of origin do not necessarily lack these characteristics, international refugee law narrows their displacement to a usually singular motive of

having a ‘well-founded fear of being persecuted’ as elaborated in the 1951 Convention. UNHCR has interpreted this to mean that it ‘automatically makes all other reasons for escape irrelevant to the definition’, and that it also ‘rules out such persons as victims of famine or natural disaster, unless they have a well-founded fear of the reasons stated’ (UNHCR, 2019a). The legal perspective that narrowly focuses on a well-founded fear of being persecuted for reasons related to one of the five grounds in the 1951 Convention definition does not fully capture these dynamics without further contextualization. Similarly, while climate change may also affect or motivate some of these movements, a slow or rapid onset disaster does not tell the whole story behind the drivers that may compel individuals and families to move across borders, alter their movements across borders, or leave their countries of origin permanently. Although aspects of these movements may be irrelevant to the consideration of a refugee claim, the factors and motivations contributing to cross-border mobility in Eastern Africa are multifaceted, as is exemplified by the migrations of Somalis to Ethiopia.

Those of the myriad identities fleeing persecution in Somalia may also suffer harm as a result of climate-change-induced disasters and, correspondingly, those who flee the effects of climate-change disasters on their livelihoods, health or safety, may also be exposed to conflict and violence due to resource scarcity. These disasters may also cause an augmentation of existing vulnerabilities and discrimination, further contributing to their reasons for migrating. As a matter of law, many of those fleeing such circumstances in Somalia would likely fit the 1951 Convention definition of ‘refugee’. As mentioned above, while this is positive for the claims of refugees seeking international protection, it is because the circumstances in Somalia are uniquely protracted and because Eastern Africa is especially vulnerable to climate change that individuals may be likely to fulfil the 1951 Convention criteria on the basis of nexus dynamics. Still, those who have left Somalia solely because of harm induced by climate change would find difficulty in fulfilling the 1951 Convention refugee definition. A slow onset disaster like drought may raise legal questions about the extent to which cross-border movement of this kind would be considered involuntary, whether the loss of livelihood and other harms caused by climate change constitute persecution, and if so, who the agent of persecution might be. These questions should not lead to a presumption that such claims are ineligible for international protection. Rather, they should be explored further in legal research; beyond the law, social, economic and political inequities should also be analyzed together with an eye toward achieving justice for those affected. As reflected by Ethiopia’s approach to receiving these populations, analyzed later, this difficulty can be circumvented by creatively utilizing regional tools at the domestic level.

Appetite for change: the development of subregional and regional tools

Since the AU Assembly established the Committee of African Heads of State and Government on Climate Change (CAHOSCC) in 2009 (AU Assembly, 2009), African subregional and regional institutions have increasingly made efforts to address climate-change displacement. In 2022, Ministers of the subregional IGAD and East African Community (EAC) Member States gathered key messages and commitments in the Kampala Ministerial Declaration on Migration, Environment and Climate Change; it recognizes that ‘[T]he East and Horn of Africa Region is severely affected by environmental degradation, floods, landslides, sand storms, tropical cyclones, drought, water level rise, and rainfall variability. Notably, in 2016 alone, 2.6 million new disaster displacements occurred in sub-Saharan Africa creating climate mobility crisis’ (Kampala Ministerial Declaration, 2022).¹ It includes the commitment to ‘apply and integrate gender and human rights-based approaches in the design and implementation of policies relating to the climate change-migration nexus’ (Kampala Ministerial Declaration, Article 10).

At the regional level, Article 5(4) of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), a binding instrument, obligates contracting States to ‘take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change’. The African Commission, in its Resolution on Climate Change and Forced Displacement in Africa, among other things, reminds African States of their 1969 OAU Convention obligations and calls on them to ‘add climate change and its impact on populations on their agenda and to take the necessary measures to prevent forced displacement as a result of climate change’ (AfComm, 2021: 2). The AU Migration Policy Framework for Africa (2018–2030) (MPFA) provides migration policy guidelines to AU Member States on issues that include climate change and environmental degradation. The AU Agenda 2063’s flagship project Free Movement of All Persons and African Passport, through its progress, has already begun to impact those displaced by climate change (AU Agenda 2063). The African Youth Declaration for Climate Mobility (2022) introduced urgent demands and recommendations to establish initiatives and actions, including those that address the human mobility nexus and integrate the participation of migrants. The AU and IOM signed an agreement in 2022 that articulates an alignment with the UN’s 2030 Agenda for Sustainable Development, the AU’s Agenda 2063, and the MPFA; the AU Commission and IOM also met in 2024 to renew their commitment to solidarity, reinforce partnership with Regional Economic Communities (REC)s, and address governance

areas including climate-induced migration. These growing subregional and regional efforts, along with existing regional international tools, can be better suited to address displacement caused by climate change in Eastern Africa than ordinary approaches to international refugee law.

Subregional recognition of climate change displacement in unlikely places: the IGAD transhumance and free-movement protocols

In the Eastern African subregion, the eight Member States of the Intergovernmental Authority on Development (IGAD) are Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda. The primary purpose of subregional transhumance and free-movement agreements is not to provide international protection or asylum, but rather to improve labour mobility in favour of economic growth and development. As mentioned above, pastoralists were among the populations observed to be crossing borders between Ethiopia, Kenya and Somalia, among other reasons, as a result of climate change. The ability of pastoralists to cross borders in Eastern Africa for purposes such as transhumance has decreased as climate change has impacted many of their activities including finding water for their herds and altering grazing patterns (IOM, 2022). Ahmed Mohamud, a Somali herder who lost 50 of his 70 camels, has said ‘There’s no food. The ground is dry. This country is known for its refugees. If you lose your animals, you sign up as a refugee, that’s what we say. So, there are many people who lost their animals and signed up as refugees’ (ICRC, 2021). In a study conducted in Somaliland, an informant said that the impact of drought was more severe than ‘any other tragedy I’ve experienced, even conflicts and the war’ (Ahmed et al, 2022).

The 2020 IGAD Protocol on Transhumance (IGAD Transhumance Protocol) addresses the livelihoods of pastoralists and agropastoralists in the IGAD subregion, in part as a response to climate change as is mentioned in its Preamble. According to Article 2(a), its aims include ‘allowing free, safe, and orderly cross-border mobility of transhumant livestock and herders in search of pasture and water as an adaptation mechanism to climate change and weather variability within the IGAD region’ (2020 IGAD Transhumance Protocol). Although this acknowledgement of cross-border movement due to climate change is positive, given the nature of the cross-border mobility of transhumant livestock and herds, for it to be ‘orderly’ in the sense of the text would seem antithetical to the instrument’s need for flexibility toward varying movements. For example, the IGAD Transhumance Protocol calls for an identification document called the IGAD Transhumance Certificate (ITC). However, in Ethiopia some pastoralists have seen the ITC as undermining traditional governance; others, including those in Somalia,

have chosen not to obtain an ITC because they see themselves as owners of the land and distrust the central government, while still others are not aware of the ITC (ICPALD, 2020). Member States should thus consider collaborative border governance methods that realistically refrain from inhibiting pastoralist movements across borders and respect the traditional local methods of governance that have been in place.

The AU's endeavours to establish integration through the free movement of persons, one of the flagship projects of the AU Agenda 2063, can complement the IGAD Transhumance Protocol. The 2020 Protocol on Free Movement of Persons in the IGAD Region (IGAD Free Movement Protocol) is a tool for implementing IGAD's aims of sustainable development and harmonization of economic policies through an integrated subregion. It is not overtly a legal instrument for conferring international protection, but it promotes an abolition of visa requirements and rights of entry, stay, exit, free movement, establishment and residence in the territories of IGAD Member States. Despite its economic focus, its Preamble recognizes 'the positive contribution that free movement of persons can have in mitigating the impact of conflict, poverty, unemployment, and underemployment, drought and disasters, as well as the adverse effects of climate change and environmental degradation as important drivers of displacement and migration in the IGAD region' (2020 IGAD Free Movement Protocol). This crucially identifies the economic and social loss of livelihood caused by climate change as a driver of cross-border displacement. Unlike international refugee law instruments, the IGAD Free Movement Protocol also specifically addresses climate-change displacement. Article 16(1) provides that Member States should allow individuals from other Member States entry into their territories when they are 'moving in anticipation of, during, or in the aftermath of disaster'.²

For individuals who are affected by disaster, Article 16(2) indicates that Member States should 'take measures to facilitate the extension of stay or the exercise of other rights'. Article 19 prohibits the mass expulsion of noncitizens with reference to the same obligation in Article 12(5) of the African Charter. Within its principles for governing expulsion, Article 21(5) elaborates that 'No Member State shall expel or return (*'refouler'*) a citizen of another Member State where there are substantial grounds for believing that he or she may be in danger of death, torture, inhuman or degrading treatment or punishment, or other irreparable harm' (2020 IGAD Free Movement Protocol). The inclusion of a provision on *nonrefoulement*, the cornerstone of international refugee law, implies that individuals from Member States who are protected from return may be in need of asylum, even if it does not obligate Member States to confer it. An obligation of *nonrefoulement* necessarily entails a right to seek asylum, which debatably may be interpreted into this provision, but is also found explicitly in other binding instruments, such as the African Charter. Article 16 of the IGAD

Free Movement Protocol could on its own protect those who have been displaced by climate change, or it could be considered in conjunction with Article 21(5) if the ‘danger’ is of a threshold that can result in death or irreparable harm, both of which could be inflicted by a climate-change-induced disaster. A broader interpretation could also include ‘torture’ and ‘inhuman or degrading treatment or punishment’ as consequences of return; it can also be considered in situations where there has also been harm, conflict or persecution along with a climate-change-induced disaster.

It is promising that the Preamble of the IGAD Free Movement Protocol suggests a progressive interpretation of climate-change displacement and of *nonrefoulement* and that it, along with the IGAD Transhumance Protocol, incorporates human rights and expressly recognizes climate-change displacement. Significantly, these instruments consider that economic and social matters do not exist in a vacuum. Challenges may exist in this context, such as the logistical problems of identification and documentation that arise when displacement occurs. If those displaced by climate change will also be considered ‘refugees’ with consideration to Article 16, the 1969 OAU Convention, or a separate national asylum procedure, then it would be apt to recall the obligations on States not to penalize the ‘illegal entry or presence’ of refugees. This obligation is found in Article 31 of the 1951 Convention, which is binding on all IGAD Member States except for Eritrea and Somalia, which are not Parties to the Convention. The IGAD mechanisms lay the first stone for addressing the livelihoods and needs of increasingly displaced pastoralists, presenting Member States with the opportunity to play a supportive role, particularly in their approaches to documentation and legal status in the context of climate change displacement.

Flexibility in African regional law: working towards justice through climate-change displacement litigation

Beyond regional refugee law, Africa’s regional international human rights framework is also equipped to protect the rights of those displaced by climate change. Its implementation of human rights standards differs from conferring legal status, such as asylum or international protection; beyond decisions on whether States have violated human rights, no implementing body can compel States to accept individuals into their territories or to grant asylum or international protection. Treaty-monitoring bodies hold a separate role from the State, which has discretion to grant refugee status or international protection based on its own laws and policies. Bearing this distinction in mind, the African Commission and the African Court can be empowered to make decisions on cases concerning the rights of those displaced by climate change.

The African Commission can make influential recommendations to States Parties to the African Charter to States and the African Court can issue

binding decisions to Member States which have accepted its jurisdiction. As examples in the climate-change context, the African Commission and Court can implement the right to life in Article 4, the prohibition of torture in Article 5, the right to seek and obtain asylum when persecuted in Article 12(3) of the African Charter, and the prohibition of mass expulsion of non-nationals in Article 12(5). According to the so-called flexibility clause in Article 60 of the African Charter, the African Commission and Court can utilize the 1969 OAU Convention,³ its expanded refugee definition and other provisions and international instruments relevant to climate-change displacement.

Activists' recent efforts to advance strategic climate-change litigation should extend to displacement and the African regional system, including the African Commission and African Court. Strategic litigation should also occur at the domestic level, but so far only a small number of cases have emerged across a few jurisdictions in Africa, and only a few in Eastern Africa. In Kenya, *Legal Advice Centre T/A Kituo cha Sheria & Anor v Attorney General and 7 Others* includes, among others, the allegation of displacement due to climate-change-induced flooding. At the time of writing the petition is pending, and the Environment and Land Court of Iten must consider the question of whether the Kenyan government failed to mitigate the impacts of climate change. This is one of the first cases of its kind in Africa, and despite some potential challenges, strategic litigation will continue to play an important role in addressing climate-change displacement through the African regional human rights framework.

There is an impossibility of drawing causal links between specific migration events and climate-change-related events that result from State conduct that is prohibited by international law. Since it is not typically African States that are responsible for emissions contributing to climate change, this may raise questions about considering an African State as a Respondent in a case. Despite not being directly responsible for climate change, African States may still fail to protect individuals or groups from harms caused by climate change within their jurisdictions. African States may violate the human rights of those entering their borders as a result of climate change or, through inaction, fail to implement the planned relocation of a population that is susceptible to climate-change displacement. However, at the international level, the African regional system's complaints mechanism is flexible when it comes to victimhood (*Suedi and Fall, 2023*), and the admissibility criteria in Article 56 of the African Charter does not require that the author of a communication be the victim of the alleged human rights violation. The African Charter also allows NGOs with observer status to author communications.

Flexibility around victimhood and authorship can lend itself to strategic litigation and climate-change displacement cases, but there may be additional challenges for Complainants themselves. Individuals displaced by climate change – or climate change *and* conflict or persecution – may face unique

hurdles when fulfilling the admissibility requirements laid out in Article 56 of the African Charter. I have written elsewhere that when accessing individual complaints and fulfilling the admissibility requirements,

refugees may be particularly disadvantaged due to a lack of familiarity with how to approach the legal system in a foreign country when attempting to exhaust local remedies, lack of freedom of movement when being held in detention or refugee camps, challenges with uncertain or pending legal status, unavailability or unaffordability of legal aid, serious and massive violations of human rights, and deportations. (Malek, 2023: 3–4)

Displaced persons may face difficulty with access to the African system's individual complaints mechanism and admissibility before a communication can even be submitted. Because of this, the African Commission and Court should strengthen their approaches to cases where the Complainants have been displaced, and they should provide commentary on the interpretation of the application of the African Charter and the 1969 OAU Convention to climate-change displacement.

Of the few cases that the African Commission and African Court have considered where the Complainant was forcibly displaced, even fewer have included decisions on *nonrefoulement*. While the African Commission has occasionally exempted refugees from the African Charter's Article 56(5) requirement to exhaust local remedies, its approach has been inconsistent. So far, the African Commission and Court have not provided significant commentary on *nonrefoulement*, the 1969 OAU Convention, or how or the extent to which exemptions from exhausting local remedies should consider the vulnerabilities of those who have been forcibly displaced. In addition to human rights that are related to a determination of legal status or international protection, such as the right to seek and enjoy asylum and the prohibition of *refoulement*, the African Commission and Court can consider other substantive rights found in the African Charter that pertain to climate-change displacement. For example, those displaced by climate change, such as Somalis who flee to Ethiopia, may be inhibited from the right to enjoy one's culture, the right to a healthy environment, the right to life, or the prohibition of torture or cruel, inhuman or degrading punishment and treatment.

Application of the regional standards of the 1969 OAU Convention at the domestic level: Ethiopia's reception of Somali forced migrants

At the regional level, the 1969 OAU Convention definition of 'refugee' in part contains language similar to that in the 1951 Convention definition. Additionally, it indicates that a refugee is also

every person who, owing to external aggression, occupation, foreign domination, or event seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. (1951 Convention, Article 1(2))

UNHCR and legal scholars agree that this expanded 1969 OAU Convention definition of ‘refugee’ may be suited for offering protection to some of those fleeing climate-change-related events and disasters, but there have been diverging understandings of which circumstances should qualify for the granting of international protection according to this definition.

UNHCR (2023c: 3) has advised that ‘Refugees within wider regional definitions encompass persons who are compelled to leave their country in the context of events or circumstances related to climate change events or disasters “seriously disturbing public order”’. Despite this commentary focusing on climate change and disasters, all of the examples that UNHCR provides to illustrate this additionally refer to elements of violence and persecution, including ‘Somalis fleeing violence and conflict exacerbated by drought and famine in 2011–2012 who were granted refugee status in Kenya and Ethiopia’ (UNHCR, 2023c: 3). Through these examples, UNHCR seems to maintain that refugee protection in the climate-change context entails nexus dynamics even when a more flexible refugee definition may not demand this. Elsewhere, in UNHCR’s Climate Action Plan for East and Horn of Africa and Great Lakes Region 2023–2028, its first Regional Objective entails that States: ‘provid[e] protection to people fleeing from and living in climate crises’, in part by granting refugee status according to the 1969 OAU Convention. It observes that the expanded definition may offer international protection ‘including notably those compelled to leave their countries in the contexts of events or circumstances seriously disturbing public order related to climate change or disaster’ (UNHCR, 2023b: 8).

Scholarly debates over whether ‘events seriously disturbing public order’ include environmental events have been divided, particularly over the question of whether or not the events must be human induced in order to produce refugees (Sharpe, 2018: 50). These debates, however, should consider migration due to ‘natural disasters’ and other environmental and climate-related events separately from the climate *change* context. Climate *change* is undoubtedly human induced, even if it is difficult to attribute to a particular State. State failure to mitigate climate change or to undertake actions that result in damages in other States or violations of the human rights of their citizens contravenes the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto Protocol) and the 2015 Paris Agreement. Although it is impossible to attribute a singular

climate-change-induced event to an individual State, human activities – predominantly through the burning of fossil fuels, greenhouse gas emissions and other forms of pollution – have ‘unequivocally’ caused the warming of global surface temperature and led to climate extremes globally (IPCC, 2023: 6). The international community has what Sciaccaluga (2020: 86) calls a ‘collective responsibility’ to mitigate emissions that particularly falls on the heavy polluting countries, and their obligation to the no-harm principle in international law should be included in the analysis of displacement.

Although the circumstances of nexus dynamics in Eastern Africa can give relevance to the 1951 Convention refugee definition, the practices of Ethiopia as a receiving State of forced migrants from Somalia reflect that attempting to apply stringent legal criteria – even when it is possible to do so – may not be necessary or practical. UNHCR (2019b) has lauded Ethiopia’s domestic asylum law, Refugee Proclamation No. 1110/2019 (Refugee Proclamation), which incorporates both the 1951 Convention and 1969 refugee definitions, as ‘one of the most progressive in Africa’. An Ethiopian representative at the Nansen Initiative Global Consultation declared in his plenary statement that Ethiopia takes regional and international conventions to include ‘those who are forced to leave their countries due to natural disasters, mainly climate related calamities such as droughts’. He further stated that Ethiopia is of the view that for the 1969 OAU Convention refugee definition ‘to include persons who are compelled, due to natural disasters, to leave their place of habitual residence in order to seek refuge in another place outside their country of origin or nationality, has enabled African countries, including Ethiopia to open their borders’ (The Nansen Initiative, 2015: 107). At the IOM Council’s 100th Session in 2011, the Ethiopian delegation announced that Ethiopia ‘maintains an open door policy towards people seeking assistance and refuge from violence and natural disasters’ (IOM Council, 2011).

Ethiopia’s stated position on its interpretation of the 1969 OAU Convention is a reflection of its practice; this has been documented in UNHCR’s 2018 (Weerasinghe, 2018) research, which UNHCR also alluded to in its abovementioned 2023 note on climate-change impacts and cross-border displacement. This study captured a snapshot of the responses of some receiving States, including Ethiopia, to populations including Somalis who fled across international borders to escape environmental disasters and degradation, along with conflict, violence, and persecution, in 2011–12. Informants in the study indicated that multiple drivers led them to flee from Somalia to Ethiopia, which was comprised of the interconnected circumstances of drought and the violence and conflict predominantly caused by Al-Shabaab, as well as other social, political and economic dynamics. An illuminating aspect of this study is its exposition of the fact that those who indicated in their refugee status determination (RSD) interviews that they

only fled Somalia due to drought and the resulting famine also indicated that when they sought humanitarian assistance within Somalia, Al-Shabaab blocked or restricted the access of the population to humanitarian assistance, or it prevented those attempting to provide humanitarian assistance from affected populations. This interweaving of environmental factors and harm inflicted by non-State actors contributing to the conflict and violence, and potentially persecution, exemplifies the ways in which the 1951 Convention criteria could have been applied.

In practice, however, during the time period studied, Ethiopia recognized cases like this by applying the expanded 1969 OAU Convention refugee definition.⁴ According to UNHCR's data, in the Dollo Ado Camps in 2011, only 17 Somalis were recognized according to the 1951 Convention, while in contrast, 98,650 were recognized according to the broader refugee criteria. In 2012, none received 1951 Convention recognition, and 34,816 were recognized under the broader refugee criteria (Weerasinghe, 2018). This received further comment from an informant in the study who represented the Administration for Refugee and Returnee Affairs (ARRA), the government department that at the time received asylum seekers and refugees in cooperation with UNHCR; the informant observed that the expanded definition moves away from placing 'too much emphasis on the human-made causes, noting that "natural" events can also result in disturbances of public order' (Weerasinghe, 2018: 56). While the data collected does not reflect whether this was necessarily the prevalent view held by the ARRA at the time, nor is there data about the interpretation of the current administrative body – the Refugees and Returnees Service (RRS) – it coheres with Ethiopia's public statements about its interpretation of the 1969 OAU Convention and its open-door policy. It also aligns with its practice, at least with reference to the time period of 2011–12 upon which the UNHCR study focused.

The African Commission has stated that 'the notion of public order in a State implies conditions that ensure the normal and harmonious functioning of institutions on the basis of an agreed system of values and principles' (*Scanlen and Holderness v Zimbabwe*, 2009, para. 109). The ARRA informant's understanding of 'events seriously disturbing public order' also has support from those in academic scholarship who do not believe that a human-induced element is required for the clause to apply to environmental events. However, as mentioned above, this debate about 'natural events' should be considered separately from human-induced climate-change disasters. Ethiopia's interpretation of 'events seriously disturbing public order' referenced in the UNHCR study could make a case for applying African regional refugee law when offering international protection to those displaced by climate change.

From an international law perspective, as Wood (2019) has observed, the isolated practices of States should only be considered as a supplemental means

of interpreting the 1969 OAU Convention. Interpretations also should not undermine the treaty's object and purpose which in part is humanitarian in approach, per the Preamble. Scholars have interpreted the object and purpose of the 1969 OAU Convention differently in that, in addition to its stated humanitarian approach, it also focuses on security. In light of the drafters' preoccupation with subversive activities, the 1969 OAU Convention distinguishes between 'a refugee who seeks a peaceful and normal life' and 'a person fleeing his country for the sole purpose of fomenting subversion from the outside' (Preamble, para 4). Since it is an instrument that confers rights and status to refugees, it would be apt to apply an humanitarian interpretation that follows the Preamble's stated aims which repeat the notion of seeking a better future, outlining its desire for 'finding ways and means of alleviating ... misery and suffering as well as providing ... a better life and future' (1969 OAU Convention, Preamble, para 1). Beyond the limits of this chapter's scope, further research should be conducted in Eastern African States and throughout the continent to observe their approaches to 'events seriously disturbing public order', while encouraging acceptance of its inclusion of those displaced by climate-change disasters.

Conclusion

The AU has demonstrated a continued receptiveness toward initiatives that concern climate-change displacement. Through the AU Agenda 2063's flagship project on the free movement of persons, further protections of those displaced by climate change can be extended on the subregional level. Regional Economic Communities (RECs) can tailor their approaches to implementing the AU Agenda 2063's aspirations in their respective subregions with consideration to cultural and geographic requirements, such as IGAD's approach to delivering services to clusters. Although the primarily economy and trade-centred IGAD Transhumance and Free Movement Protocols were not intended to confer legal status or human rights protection to displaced persons, their inclusion of provisions that address climate-change displacement and *nonrefoulement* can bring about promising solutions. Alongside the potential for these instruments to help protect those such as pastoralists and agropastoralists who are affected by climate change in the IGAD subregion, Member States should continue to respect local governance structures and apply minimal approaches to documentation requirements when implementing the Transhumance and Free Movement Protocols.

The African Commission and African Court can bring about justice by protecting and implementing the human rights of those displaced by climate change. Despite challenges and limitations of the individual complaints mechanism, strategic climate-change litigation is possible. The

African Commission and Court should provide further commentary on exemptions from the exhaustion of local remedies rule when Complainants have been displaced and are seeking justice in another country; by doing so, their approaches to displaced Complainants can be made more consistent than in previous case law. The African Commission and Court are also empowered to provide more in-depth commentary on climate-change displacement and *nonrefoulement*, and they should use the flexibility clause to make further pronouncements on the 1969 OAU Convention and on climate-change displacement.

More research is needed to identify and evaluate the practices of African States and their interpretations of the 1969 OAU Convention when receiving those displaced across borders by climate change. Although approaches such as that of Ethiopia cannot be said to represent State practice in the African region, interpreting climate-change disasters as creating refugees in the sense of Article 1(2) is within the scope of ‘events seriously disturbing public order’. Parties to the 1969 OAU Convention should be encouraged to adapt this interpretation, particularly in Eastern Africa where the harmful events of climate change are acute.

Overall, the African regional framework is uniquely equipped to address climate-change displacement, but in Eastern Africa, successfully protecting those most affected by the harms of climate change will require collaborative efforts by the AU, the African Commission and African Court, and individual Member States to promote justice for persons displaced by climate change.

Notes

- ¹ Member States of the Intergovernmental Authority on Development (IGAD), the East African Community (EAC), and States of East and Horn of Africa. *Kampala Ministerial Declaration on Migration, Environment, and Climate Change*. Interministerial Conference on Migration, Environment, and Climate Change (29 July 2022).
- ² The IGAD Free Movement Protocol defines ‘disaster’ as ‘a calamitous event or series of events not governed by the rules of international humanitarian law and resulting in widespread loss of life, great suffering or distress, or large-scale material or environmental damage, thereby disrupting the functioning of society’.
- ³ Article 60 of the African Charter allows the African Commission and African Court to ‘draw inspiration from international law on human and peoples rights’.
- ⁴ The time period covered by the UNHCR study ‘In Harm’s Way’ predates the current version of Ethiopia’s Refugee Proclamation, which continues to define refugees with language similar to the 1969 OAU Convention definition, but the revised 2019 Refugee Proclamation has removed the phrase ‘in case of refugees in Africa’.

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