

THE  
NANSEN  
INITIATIVE

DISASTER-INDUCED CROSS-BORDER DISPLACEMENT



# PROTECTION AND DISASTERS IN THE HORN OF AFRICA: NORMS AND PRACTICE FOR ADDRESSING CROSS-BORDER DISPLACEMENT IN DISASTER CONTEXTS

## TECHNICAL PAPER

Tamara Wood, University of New South Wales

DISASTERS  
CLIMATE CHANGE AND  
DISPLACEMENT

EVIDENCE  
FOR ACTION

PARTNERS





## ACKNOWLEDGEMENTS

This report was prepared for the Nansen Initiative.  
The author may be contacted at: [tamara.wood@unsw.edu.au](mailto:tamara.wood@unsw.edu.au)  
January 2013

---

The project is funded  
by the European Union  
with the support of  
Norway and Switzerland



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

**Federal Department of Foreign Affairs FDFA**



# TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b> .....	7
<b>SUMMARY OF RECOMMENDATIONS</b> .....	8
<b>ACRONYMS</b> .....	9
<b>INTRODUCTION</b> .....	10
<b>1. PREVENTING CROSS-BORDER DISPLACEMENT</b> .....	12
<b>1.1 MIGRATION AND FREE MOVEMENT OF PERSONS</b> .....	13
1.1.1 Legal Frameworks.....	14
1.1.2 Role in preventing cross-border displacement .....	16
<b>1.2 PROTECTION OF INTERNALLY DISPLACED PERSONS</b> .....	17
1.2.1 Legal framework .....	17
1.2.2 Role in preventing displacement.....	18
<b>1.3 PROTECTING PASTORAL LIVELIHOODS</b> .....	19
<b>2. PROTECTION DURING DISPLACEMENT</b> .....	21
<b>2.1 MIGRATION AND FREEDOM OF MOVEMENT</b> .....	22
2.1.1 Applicability .....	22
2.1.2 Protection during displacement .....	22
<b>2.2 REFUGEE PROTECTION</b> .....	23
2.2.1 Applicability.....	24
2.2.2 Protection .....	29
<b>2.3 REGIONAL HUMAN RIGHTS LAW</b> .....	31
2.3.1 Applicability.....	31
2.3.2 Protection .....	32
<b>2.4 TEMPORARY PROTECTION ARRANGEMENTS</b> .....	36
2.4.1 Applicability.....	36
2.4.2 Protection .....	38
<b>2.5 MANAGING ‘MIXED MIGRATION’</b> .....	38
<b>3. DURABLE SOLUTIONS</b> .....	41
<b>3.1 DURABLE SOLUTIONS – GENERAL</b> .....	41
<b>3.2 FACILITATING RETURN</b> .....	43
3.2.1 The Kenya-Somalia Tripartite Agreement .....	45
<b>CONCLUSION</b> .....	47
<b>BIBLIOGRAPHY</b> .....	48





# EXECUTIVE SUMMARY

- 1 This report analyses the scope of regional and sub-regional law and policy frameworks relevant to addressing disasters and displacement in the Greater Horn of Africa. Taking the 2011 Horn of Africa drought and famine as a case study, it assesses the capacity of these frameworks to address the needs of persons displaced across borders in the context of a disaster. This report has been prepared for the Nansen Initiative, 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 in the context of disasters. In particular, the research contained in this report contributed to and is informed by the Nansen Initiative's Regional Consultation for the Horn of Africa.
- 2 Cross-border displacement in the context of disasters is the combined result of natural hazards, existing vulnerabilities, local government response capacities and broader social, political and economic conditions. In the Horn of Africa, the impact of natural hazards has frequently been exacerbated by widespread insecurity, conflict and weak governance. Law and policy in all of these areas will therefore assist in preventing disaster-related cross-border displacement. Due to space restrictions, however, they are not dealt with in detail in this report. Rather, this report addresses three areas of regulation which have a more direct effect on the need for disaster-affected persons to cross an international border in search of safety. These are: migration and freedom of movement arrangements, the protection of internally displaced persons, and protection of pastoral livelihoods. Law and policy frameworks in these three areas have the capacity to prevent disaster-related cross-border displacement by allowing populations affected (or likely to be affected) by disaster to adapt to changing climatic conditions, including through mobility, secure their livelihoods, and obtain protection and assistance within their own borders.
- 3 Once persons affected by disasters have been displaced across an international border, the key question relating to their protection is whether, and under what circumstances, they qualify for refugee status under the 1969 African Refugee Convention's Article I(2) expanded refugee definition. This report suggests that such persons may qualify for refugee status under this instrument, in situations where the disaster amounts to an 'event seriously disturbing public order'. The precise scope of this phrase warrants further attention – suggestions for how to approach its interpretation are offered in section 2.2.1 of this report.
- 4 Regional human rights law, including the principle of *non-refoulement* and the general human rights obligations conferred on states with respect to all persons (including non-nationals) within their territory, also offers important protections to persons displaced across borders in the context of disaster. This could be used as a basis for the development of a temporary protection regime for disaster-related displaced persons within the region. Migration and freedom of movement arrangements, such as are being developed within the sub-regional economic communities, may assist in preventing or reducing displacement in the context of disasters. However, they are not protection-oriented and should not be relied upon to provide adequate protection *during* displacement.
- 5 The achievement of durable solutions is the ultimate goal of addressing all forms of displacement, including that which occurs in the context of disasters. Repatriation to one's country of origin will frequently (though not always) be the best option for a durable solution, but it must remain consistent with states' international obligations with respect to *non-refoulement*, the cessation of refugee status and general human rights law. Specific agreements between states in relation to return may be useful for addressing particular situations of displacement, provided they conform to international law and address both the immediate and longer term needs of returnees.
- 6 In all cases, the effectiveness of law and policy as a means of preventing displacement, protecting displaced persons and achieving durable solutions will depend on its full and effective implementation, which to date has frequently not occurred. Implementation includes ratification of relevant legal instruments and incorporation into domestic law, as well as practical implementation.

## SUMMARY OF RECOMMENDATIONS

### Recommendation 1:

---

The full implementation of migration and free movement of persons frameworks in the Horn of Africa region could play a partial role in preventing disaster-related displacement, particularly in the context of slow-onset disasters such as drought. These frameworks should be fully implemented and accompanied by strategies for improving access to international travel documents, transportation and livelihood opportunities.

### Recommendation 2:

---

States should ratify regional frameworks for preventing and responding to internal displacement and implement their provisions at the domestic level.

### Recommendation 3:

---

African states' recognition of the nexus between disasters and displacement and the protection needs of disaster-displaced persons in the Kampala Convention and the Great Lakes Protocol provides a political and legal platform for developing a rights-based approach to disaster-related cross-border displacement in the region.

### Recommendation 4:

---

Pastoral displacement does not fit readily into conventional notions of displacement. It is therefore best addressed within policies and frameworks directed specifically at the needs of pastoral communities.

### Recommendation 5:

---

Preserving the ability of pastoral communities to access water and grazing lands will protect livelihoods and prevent displacement. Regulation of cross-border movement by pastoral communities could be addressed by regional economic communities such as the EAC and COMESA. The ECOWAS Transhumance Certificate provides a useful example in this regard.

### Recommendation 6:

---

Migration and free movement of persons frameworks are not protection-oriented and should not be relied upon to provide adequate protection to persons displaced across borders in the context of a disaster.

### Recommendation 7:

---

The capacity of the expanded refugee definition contained in Article I(2) of the 1969 African Refugee Convention to extend protection to some persons displaced in the context of disaster should be explicitly recognised.

### Recommendation 8:

---

The precise scope of the 1969 Convention's expanded refugee definition – in particular, the phrase 'events seriously disturbing public order' – should be further explored. This could include requesting interpretative guidance from appropriate regional institutions, such as the African Commission on Human and Peoples'

Rights, however an approach that focuses on building consensus among states party to the Convention is likely to be more effective. In either case, interpretation of the expanded refugee definition must be consistent with the international law on treaty interpretation.

### Recommendation 9:

---

The scope of the principle of *non-refoulement* under African regional human rights instruments provides a potential avenue for ensuring access to territory and temporary refuge for persons displaced in the context of disasters, particularly in the case of severe and sudden-onset disasters.

### Recommendation 10:

---

It would be helpful for the African Commission to clarify its Guidelines in relation to the principle of *non-refoulement* under the Article 5 of the African Charter (prohibition on torture, cruel, inhuman or degrading punishment and treatment). In any case, this provision must be read in conjunction with African states' *non-refoulement* obligations under international human rights law, including customary international law.

### Recommendation 11:

---

The development of a formal temporary protection regime could provide a useful mechanism for affording short-term refuge to persons displaced by disaster in Africa and would reflect the good will of African states in providing refuge to neighbours in distress. In order for such a framework to provide meaningful protection, however, it must respect the principle of *non-refoulement*, provide some form of legal status, and uphold the rights to which all displaced persons are entitled under international and regional human rights instruments.

### Recommendation 12:

---

The challenges associated with mixed migration flows do not detract from the protection obligations owed by states to displaced persons, in particular under human rights and refugee law. State should ensure that admission and reception arrangements are capable of identifying persons with protection needs and referring them, where necessary, for assistance or for further status determination. The development of any new protection framework for disaster-displaced persons must include a clear definition of its intended beneficiaries to facilitate their identification within mixed migration flows.

### Recommendation 13:

---

Frameworks for the return of displaced persons following disaster must address both the immediate and on-going needs of returnees. In the short term, being able to travel back and forth between the home state and host state will enable informed decision-making by those considering return and may facilitate returnees' re-establishment of livelihoods. In the longer term, protection of human rights, promotion of sustainable development and maintenance of security will reduce the risk of re-displacement in the future.



## ACRONYMS

<b>AU</b>	African Union
<b>CAT</b>	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>EAC</b>	East African Community
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>DRC</b>	The Democratic Republic of the Congo
<b>ECOWAS</b>	Economic Community of West African States
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IGAD</b>	Intergovernmental Authority on Development
<b>IDP</b>	Internally Displaced Person
<b>ILO</b>	International Labour Office
<b>IOM</b>	International Organization for Migration
<b>NGO</b>	Non Government Organisation
<b>OAU</b>	Organisation of African Unity
<b>PRSD</b>	<i>Prima Facie</i> Refugee Status Determination
<b>RCP</b>	Regional Consultative Process on Migration
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>VCLT</b>	Vienna Convention on the Law of Treaties



# INTRODUCTION

**The Horn of Africa provides a sharp illustration of some of the challenges associated with addressing the needs of persons displaced across borders in the context of disaster. Experience in the region, in particular during the 2011 Horn of Africa drought and famine, demonstrates the complexities of the relationship between natural hazards and existing social, economic and political vulnerabilities, as well as their effects on populations, including on displacement. It also provides useful case study through which to analyse the capacity of existing law and policy frameworks in the African region to respond to disaster-related cross-border displacement.**

In some respects, the 2011 Horn of Africa crisis was unique – while slow-onset disasters such as drought pose the most common environmental challenge in the Horn of Africa,<sup>1</sup> the situation in 2011 has been described as ‘the most severe [the region] has experienced in more than half a century’.<sup>2</sup> Coming on top of weak governance and instability, which has long characterised the region – particularly Somalia – it is perhaps unsurprising that the drought, and resulting famine, led to the displacement of more than a million people, both within and beyond the region.<sup>3</sup> In addition to drought, the Horn of Africa has also had to deal with displacement caused by sudden-onset disasters. In 2002, for example, the eruption of Mount Nyiragongo in nearby Democratic Republic of Congo (DRC) led to an influx of

Congolese into neighbouring states such as Rwanda and Uganda.<sup>4</sup>

The link between disasters and population movement, including displacement, has been recognised by African states. For example, the African Union (AU) Migration Policy Framework calls on states to:

draw up reliable policies for the protection of the environment in order to avoid natural disasters, the encroachment of the desert and soil degradation which are *major sources of displacement* of people from their natural environment.<sup>5</sup>

---

<sup>1</sup> Nansen Initiative, ‘Background Paper: Natural Hazards, Climate Change, and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move’, Nansen Initiative Greater Horn of Africa Regional Consultation, 21-23 May 2014, Boma Hotel, Nairobi, Kenya (Horn of Africa Background Paper) 1.

<sup>2</sup> Girmachew Adugna Zewdu and Graeme Hugo, ‘Cross-Border Migration and Displacement in the Context of the 2011-12 Drought in the Horn of Africa’, First Draft of a Report to the Nansen Initiative, July 2014, 5.

<sup>3</sup> Well over a million people were displaced during the 2011 drought, to neighbouring Horn of Africa States and further afield, to countries including such as Saudi Arabia, Yemen and Europe. See generally, Horn of Africa Background Paper, above n 1, esp 7.

<sup>4</sup> Though as noted in the Nansen Initiative’s Desk Review for the Horn of Africa, the distinction between slow and sudden-onset disasters can be difficult to pinpoint in practice – for example, lack of rain and the resulting crop failure can very quickly take a situation of drought to emergency levels. Nansen Initiative Secretariat, ‘Desk Review on Cross-Border Displacement in the Context of Disasters in the Horn of Africa: A discussion paper drafted in preparation for the Nansen Initiative Regional Consultation in the Horn of Africa’, Draft Version 1, 20 January 2014 (Horn of Africa Desk Review), 13.

<sup>5</sup> African Union Executive Council, Migration Policy Framework for Africa (2006) EX.CL/276 (IX) (Migration Policy Framework), 35, emphasis added. See also, African Union Council of Ministers, Decision on Natural Disasters in Africa CV/Dex. 577 (LXXIII), which took note ‘of the declarations made by the delegations of Malawi, Zambia and Mozambique on the natural calamities (torrential rains followed by floodings) which recently affected these countries, destroying infrastructure and resulting in mass movement of the people within and outside these countries.’

As scholars have pointed out, however, environmental harms, such as disasters and the negative effects of climate change, are rarely the sole cause of displacement.<sup>6</sup> Rather, they have ‘an incremental impact, adding to existing problems and compounding existing threats’.<sup>7</sup> This is particularly true in the Horn of Africa, where environmental challenges sit on top of numerous other pressures, including prolonged conflict, weak governance and widespread poverty.<sup>8</sup> In this context, the willingness and capacity (or lack thereof) of governments to respond when disaster occurs will have a significant impact on displacement, determining not only whether persons affected by the disaster are displaced, but also whether the displacement that occurs is predominantly internal or cross-border, as persons forced to flee their homes go in search of a more protective environment.

This report analyses existing regional and sub-regional law and policy frameworks relevant to disasters and displacement in the Horn of Africa. In particular, it assesses the capacity of these frameworks to address the needs of persons displaced across borders in the context of a disaster. It is important to note that these regional and sub-regional frameworks exist alongside similar frameworks at the international level, many (or most) of which will also be applicable in the Horn of Africa. A full understanding of the legal obligations of states in the region must therefore also take these into account. However, international laws and policies are outside the scope of this report, which focuses only on regional and sub-regional frameworks applicable to Horn of Africa states.

For the purposes of this report the Horn of Africa is defined to include all Member States of the Intergovernmental Authority Development (IGAD).<sup>9</sup> These are:

- Republic of Djibouti
- Federal Democratic Republic of Ethiopia
- Republic of Kenya
- Somali Republic<sup>10</sup>
- Republic of The Sudan
- Republic of South Sudan
- Republic of Uganda
- State of Eritrea

The types of law and policy mechanisms that will be analysed in this report include binding treaties – that is, ‘international agreement[s] concluded between States in written form and governed by international law’<sup>11</sup> – as well as non-binding guidelines and policy frameworks. In most cases, these mechanisms have been concluded under the auspices of African regional and sub-regional institutions, such as the AU (formerly the Organisation of African Unity/OAU), IGAD, and relevant regional economic communities – the East African Community (EAC) and the Community of Eastern and Southern African States (COMESA). Where relevant and possible, this report will provide some (limited) examples of legislation, policy and practice at the domestic level. Such examples will be drawn primarily from states within the Horn of Africa, though examples from other African states may also be referred to where they are illustrative of possible approaches or reflect the implementation of regional instruments which also apply in the Horn of Africa.

Taking the 2011 Horn of Africa drought and famine as a case study, this report will assess the capacity of regional and sub-regional law and policy frameworks to address the protection needs of disaster-affected persons during all phases of displacement –before, during and after displacement. As such, the report is divided into the following three sections:

- ① Preventing cross-border displacement
- ② Protection during displacement
- ③ Durable solutions

Each of these three sections will provide a description of the relevant laws and policies applicable in the region, as well as an assessment of the role (potential or actual) of these laws and policies in addressing cross-border disaster-related displacement. Finally, this report will provide brief recommendations about how the laws and policies discussed could be further utilised or developed to address the needs of displaced persons in the disaster context.

<sup>6</sup> See, eg, Roger Zetter, ‘Protecting environmentally displaced people: Developing the capacity of legal and normative frameworks’ University of Oxford Refugee Studies Centre Research Report (2011); Vikram Kolmannskog, ‘Climate Change, Human Mobility, and Protection: Initial Evidence from Africa’ (2010) 29(3) *Refugee Survey Quarterly* 103.

<sup>7</sup> Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP, 2012), 16-17, citations omitted.

<sup>8</sup> In 2014, the Fund for Peace’s Fragile States Index listed Somalia, South Sudan and Sudan as three of the top five states most at risk on a range of social, economic and political indicators, including disaster, disease, poverty, mortality rates, conflict, corruption and displacement. See Fund for Peace, ‘2014 Fragile States Index’ available at: <http://ffp.statesindex.org/rankings-2014>. The other two of the top five countries are also nearby neighbours to the Horn of Africa. They are the Central African Republic (CAR) and Democratic Republic of Congo (DRC).

<sup>9</sup> This is consistent with the scope of the Nansen Initiative’s Horn of Africa Regional Consultation. See Horn of Africa Background Paper, above n 1.

<sup>10</sup> This report analyses relevant legal and policy frameworks in the Somali Republic as a whole, though the substantial differences between Somaliland and the rest of Somalia may mean that the implementation of such frameworks in each of these sub-regions gives rise to different issues and considerations in practice,

<sup>11</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (VCLT), Art 2(1)(a).



# 1. PREVENTING CROSS-BORDER DISPLACEMENT

It is well recognised that cross-border displacement in the context of disasters is the combined result of natural hazards, existing vulnerabilities and the response capacities of governments. This is especially true of slow-onset disasters, such as drought, which are common in the Horn of Africa. As noted by the Nansen Initiative's Desk Review for the Horn of Africa:

Determining when a deficiency of precipitation constitutes a disaster is contextually determined, and dependent on a range of political, social and economic factors.<sup>12</sup>

The relationship between these factors was emphasised during the Nansen Initiative's Horn of Africa Regional Consultation Civil Society Pre-Meeting, where participants repeatedly noted the importance of poverty, capacity and resilience in determining whether and when a natural hazard becomes a disaster.<sup>13</sup> It is also illustrated by the draft report to the Nansen Initiative of Zewdu and Hugo, who found that patterns of mobility during the 2011 Horn of Africa drought were influenced by the '[a]vailability of humanitarian assistance, households' resource possession, security and restrictions imposed by Al Shabaab and local militia'.<sup>14</sup> Legal and

policy initiatives in a wide range of areas will therefore have a potential impact on disaster-related cross-border displacement.

For example, the safeguarding of human security and fundamental rights could go a considerable way to reducing the need for those affected by disasters to cross international borders. The chief instrument for human rights protection in Africa is the African Charter on Human and Peoples' Rights (African Charter).<sup>15</sup> Though the African Charter does not contain any specific rights relating to protection from natural hazards or the provision of humanitarian assistance, it does grant all peoples the right to a 'general satisfactory environment favourable to their development'<sup>16</sup> and provides a wide range of socio-economic, civil and political rights, the full realisation of which would reduce the existing vulnerabilities that contribute to the need for movement in response to natural hazards.<sup>17</sup>

Initiatives aimed at disaster preparedness, risk management, development and natural resource management also contribute significantly to the effect of disasters on populations, including on displacement. In the Horn of Africa region, these initiatives have been developed

---

<sup>12</sup> Horn of Africa Desk Review, above n 5, 10, citing Jamie Linton, *What is water? The history of a modern abstraction* (UBC Press 2010).

<sup>13</sup> See Nansen Initiative 'Natural Hazards, Climate Change and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move', Report of the Nansen Initiative Civil Society Pre-Meeting, (Horn of Africa Civil Society Pre-Meeting Report) 3-4 March 2014, Nairobi, Kenya.

<sup>14</sup> Zewdu and Hugo, above n 2, viii.

<sup>15</sup> African Charter on Human and Peoples' Rights 27 June 1981 (entered into force 21 October 1986) (African Charter), sometimes referred to as the 'Banjul Charter'.

<sup>16</sup> African Charter, Art 24. It is worth noting that this is not an individual right, rather it is the right of 'all peoples'.

<sup>17</sup> For example, the African Commission on Human and Peoples' Rights has held that the right to health in Article 16 of the African Charter entails an obligation on states to provide for clean drinking water and ensure access to basic medicines. See African Commission on Human and Peoples' Rights, Communications No. 25/89, 47/90, 56/91, 100/93: Free Legal Assistance Group and Others / Zaire (1995). In this case the Commission found that Zaire's failure to provide basic services, such as safe drinking water and electricity, and a shortage of basic medicines was in violation of Article 16 of the African Charter. It is worth noting, however, that the complaint to the Commission in this case also involved allegations of torture, detention, restriction on freedom of association and mismanagement of public funds. It is not clear whether failure to provide access to such services in a disaster context would also violate Article 16.

under the auspices of the AU, IGAD, and regional economic communities (EAC, COMESA).<sup>18</sup> While most such initiatives have not dealt explicitly with issues of cross-border displacement,<sup>19</sup> they have emphasised the link between disaster response and other areas of governance, including peace building and development,<sup>20</sup> and the need for regional cooperation in disaster preparation and response mechanisms.<sup>21</sup>

For a general overview of disaster risk reduction and resilience building measures in the Horn of Africa region, all of which may play a role in preventing disaster-related displacement, see the Nansen Initiative Desk Review on Cross-Border Displacement in the Context of Disasters in the Horn of Africa<sup>22</sup> and the Background Paper to the Nansen Initiative Horn of Africa Region Consultation.<sup>23</sup> Sections 1.1 to 1.3 below will provide a more detailed analysis three further areas of regulation, which it is argued may have a more direct impact on preventing of cross-border displacement in the context of disaster. These are: migration and free movement of persons, protection of internally displaced persons, and protection of pastoral livelihoods.

## 1.1 MIGRATION AND FREE MOVEMENT OF PERSONS

In general, migration laws in East Africa have been described as ‘fragmented and at times contradictory’.<sup>24</sup> While migration is a common phenomenon in the region, for the most part it is irregular (unlawful). For example, most of the Somalis fleeing to Kenya during the 2011 Horn of Africa drought ‘took hazardous back roads and used smugglers to avoid the Kenya police and the official border post’.<sup>25</sup> Historically, opportunities for formal migration in the region have been limited, with national migration frameworks tending to restrict, rather than encourage, migration.<sup>26</sup>

Despite this, there are reportedly a growing number of skilled labour migrants from the Horn of Africa moving both within the region, as well as to more politically stable countries of southern Africa, including Botswana, Namibia and South Africa.<sup>27</sup> In addition, the establishment of various sub-regional economic communities – including the EAC and COMESA and associated freedom of movement frameworks provides an increasing range of options for intra-regional migration. These opportunities may assist in preventing disaster-related displacement, by allowing some of those affected (or likely to be affected) by disasters to adapt to changing climatic conditions, and to access safety and alternative livelihood opportunities before displacement occurs.

---

<sup>18</sup> For example, IGAD’s Drought Disaster Resilience and Sustainability Initiative (IDDRSI) brings together IGAD Member States with a range of other institutions and organisation to address ‘the effects of drought and related shocks in the IGAD region in a sustainable and holistic manner’. Development in Africa is guided by the New Partnership for Africa’s Development (NEPAD), a strategic policy framework formed in 2001 to eradicate poverty and promote sustainable development. NEPAD has a six programme areas. These are: Agriculture and Food Security, Climate Change and Natural Resource Management, Regional Integration and Infrastructure, Human Development, Economic and Corporate Governance, and Cross-Cutting Issues (Gender and Capacity Development). See <http://www.nepad.org/nepad-programmes>.

<sup>19</sup> The domestic Constitutions of some Horn of Africa states have dealt with this more explicitly. For example, the Ugandan Constitution provides: ‘The State shall institute an effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in general displacement of people or serious disruption of their normal life.’ Constitution of the Republic of the Uganda 1995, Art XXIII. The Ethiopian Constitution provides: ‘Government shall take measures to avert any natural and man-made disasters, and, in the event of disasters, to provide timely assistance to the victims.’ Constitution of The Federal Democratic Republic of Ethiopia 1994, Art 89(3).

<sup>20</sup> See, eg, IGAD Drought Disaster Resilience and Sustainability Initiative, Communique of the Second General Assembly Meeting, Kampala, 26 March 2014.

<sup>21</sup> See, eg, the African Regional Platform on Disaster Risk Reduction, IGAD’s sub-regional program for disaster risk management, and the East African Community’s Disaster Risk Reduction and Management Bill. African Union and UNISDR, ‘Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction calls on state to ‘strengthen long-term capacities at regional and sub-regional levels’.

<sup>22</sup> Horn of African Desk Review, above n 5.

<sup>23</sup> Horn of Africa Background Paper, above n 1.

<sup>24</sup> Flora Mndeme Musonda, ‘Migration Legislation in East Africa’ (2006) International Labour Organisation, International Migration Paper No. 82, 13.

<sup>25</sup> Zewdu and Hugo, above n 2, 41.

<sup>26</sup> See generally, Feleke Tadele, ‘An Overview of the State of International Migration in Horn and East Africa’ (2007) International Migration Institute, University of Oxford, 12.

<sup>27</sup> Ibid.

## 1.1.1 Legal Frameworks

### Migration

At the regional level, the Migration Policy Framework for Africa, adopted by Member States of the AU in 2006,<sup>28</sup> provides non-binding guidelines for the development of national migration policies by Member States.<sup>29</sup> Forced Migration is one of the thematic issues identified by the Framework, however policy recommendations in this area focus specifically on refugees, asylum seekers, IDPs and others displaced by conflict.<sup>30</sup> The Framework does not specifically address disaster-related displacement,<sup>31</sup> though it does recognise the increasing role of environmental considerations in migration and forced displacement and recommends that States '[i]ncorporate environmental considerations in the formulation of national and regional migration management policies to better address environment related causes of migratory movements'.<sup>32</sup>

In the Horn of Africa, a 2008 IGAD workshop on 'Inter-State and Intra-Regional Cooperation on Migration Management in the IGAD Region' acknowledged 'conflicts, natural disasters and resource scarcity' as the main drivers of displacement in the region<sup>33</sup> and emphasised the need to address irregular migration in the region 'with due regard to humanitarian obligations

for refugees and others eligible for international protection'.<sup>34</sup> In 2009 IGAD's Council of Ministers established the Regional Consultative Process on Migration (RCP) – a formal, non-binding process designed to 'facilitate regional dialogue and cooperation on migration policy issues amongst the IGAD states'.<sup>35</sup> The RCP hosts intergovernmental dialogue sessions once or twice per year to discuss migration-related issues identified as important by member states – its Secretariat intends to recommend that the RCP host a dialogue on disaster-related displacement prior to the Nansen Initiative's global consultation.<sup>36</sup> In addition, a number of bilateral and multilateral agreements on migration have been signed in the region<sup>37</sup> – for example, in February 2014 the governments of Kenya, Uganda and Rwanda signed an agreement to allow citizens to travel between the three countries using national identity cards.<sup>38</sup>

At the national level, as noted above, migration policies and legislation in the Horn of Africa have tended to restrict, rather than encourage, migration.<sup>39</sup> For example, the Uganda Citizenship and Immigration Control Act 1999 provides for a range of entry permits – including for those intending to engage in agriculture,<sup>40</sup> mining,<sup>41</sup> business and trade,<sup>42</sup> or a number of prescribed professions<sup>43</sup> – however the Act declares any destitute person, or any person without a valid identity document, to be

---

<sup>28</sup> Migration Policy Framework, above n 6. The Framework was adopted by the AU Executive Council, which is the primary policy organ of the AU, comprising Ministers or other delegates of the Governments of Member States.

<sup>29</sup> The introduction to the Migration Policy Framework states: 'The policy framework serves to provide the necessary guidelines and principals to assist governments and their RECs in the formulation of their own national and regional migration policies as well as, their implementation in accordance with their own priorities and resources. The policy framework is therefore a comprehensive and integrated reference document and hence non-binding in nature, scope and content.' Migration Policy Framework, above n 6, 2.

<sup>30</sup> See Migration Policy Framework, above n 6, section 3.

<sup>31</sup> Section 4 of the Migration Policy Framework is entitled 'Forced Displacement' and is divided into the following sub-sections: Refugees and Asylum-Seekers; Internally Displaced Persons; Protracted Displacement Situations; Crisis Prevention, Management and Conflict Resolution; Principles of Non-Discrimination; Integration and Re-integration; Stateless Persons.

<sup>32</sup> Migration Policy Framework, above n 6, section 6.3.

<sup>33</sup> 'Inter-State and Intra-Regional Cooperation on Migration Management in the IGAD Region' IGAD Workshop Report, 12-14 May 2008, 5.

<sup>34</sup> *Ibid.*, 8.

<sup>35</sup> 'Concept Note', 2nd IGAD Regional Consultative Process on Migration; Migration and Development, 7-8 February 2012, Addis Ababa.

<sup>36</sup> As indicated by the Project Manager for IGAD Regional Political Integration and Human Security Support Program during the Nansen Initiative Horn of Africa Regional Consultation, Nairobi, Kenya, 21-23 May 2014.

<sup>37</sup> UNHCR and IOM, 'Summary Report of the Regional Conference on Refugee Protection and International Migration: Mixed Movements and Irregular Migration from the East and Horn of Africa and Great Lakes Region to Southern Africa', Dar es Salaam, Tanzania, 6-7 September 2010, 7.

<sup>38</sup> John Mbanda and Eric Kabeera, 'EAC Presidents launch us of National IDs to cross borders' (All Africa, 20 February 2014). This agreement has since been joined by South Sudan.

<sup>39</sup> Musonda, above n 25, ix. The possible exceptions to this are migration for the purposes of foreign investment or to address specific skill shortages in the receiving country. See ACP Observatory on Migration, 'Overview on South-South Migration and Development in East Africa: Trends and Research Needs. Regional Overview: East Africa', 16. Some governments in the region have also reportedly taken steps to implement policy measures aimed at increasing remittances from the diaspora, including duty free imports of certain items, liberalising trade in foreign exchange and providing investment incentives. See Feleke Tadele, above n 27, 10. For example, in Kenya mobile banking units allow access for remittances in rural areas. See ILO, 'Multilateral Framework on Labour Migration: Examples of Good Practice', International Labour Office 2006, 80.

<sup>40</sup> Uganda Citizenship and Immigration Control Act 1999, Fourth Schedule, Part A, section 3.

<sup>41</sup> Uganda Citizenship and Immigration Control Act 1999, Fourth Schedule, Part A, section 4.

<sup>42</sup> Uganda Citizenship and Immigration Control Act 1999, Fourth Schedule, Part A, section 5.

<sup>43</sup> Uganda Citizenship and Immigration Control Act 1999, Fourth Schedule, Part A, section 7.



a Prohibited Immigrant<sup>44</sup> and prevents them, or their dependants, from applying for an entry permit.<sup>45</sup>

Even where legal migration pathways exist, many migrants do not access them due to lack of awareness, lengthy bureaucratic processes and high application costs.<sup>46</sup> Those who do access formal migration pathways benefit from labour rights protections in national constitutions<sup>47</sup> or labour-related legislation,<sup>48</sup> though a 2002 report on migration in Africa by the International Labour Organization (ILO) found that, in practice, ‘conditions encountered by migrant workers all too frequently compromise their basic rights and dignity’.<sup>49</sup> Child labour has been identified as one pressing issue in the management of labour migration in the region, in particular in Ethiopia, Kenya and Uganda.<sup>50</sup> Furthermore, as noted at the outset, most migrants in the region travel irregularly, leaving them vulnerable to exploitation and abuse by people smugglers and employers.<sup>51</sup>

### Free movement of persons

The Greater Horn of Africa includes Member States of two sub-regional economic communities – the EAC<sup>52</sup> and COMESA,<sup>53</sup> – both of which have adopted agreements for the free movement of persons between Member States.<sup>54</sup>

Under the Treaty for the Establishment of the East African Community (EAC Treaty), Partner States agree to adopt ‘measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community.’<sup>55</sup> To this end, the 2009 Protocol on the Establishment of the East African Community Common Market (EAC Protocol) provides broad guarantees on free movement of persons<sup>56</sup> and workers,<sup>57</sup> including entry without visa, freedom of movement within the territory, permission to remain and permission to exit without restrictions.<sup>58</sup> Similarly, the COMESA Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence (COMESA Protocol) provides for the gradual removal of ‘all restrictions to the free movement of persons, labour, and services and the right of establishment and residence’,<sup>59</sup> including the relaxation and eventual elimination of visa requirements within the Common Market.<sup>60</sup> The COMESA Protocol was adopted in 2001 but has not yet entered into force due to the lack of requisite ratifications. IGAD has emphasised the important role that freedom of movement plays in increasing regional economic cooperation and development<sup>61</sup> and is currently debating a Draft Protocol on the Free Movement of Persons in the IGAD Region, which is similar to the EAC Protocol.<sup>62</sup>

---

<sup>44</sup> Uganda Citizenship and Immigration Control Act 1999, section 52.

<sup>45</sup> Uganda Citizenship and Immigration Control Act 1999, section 54(2).

<sup>46</sup> UNHCR and IOM, above n 38, 7.

<sup>47</sup> For example, the Constitution of Kenya 2010 provides protection from slavery and forced labour (Article 73) and discrimination (Art 82), and allows freedom of association (Art 80).

<sup>48</sup> For example, the Ugandan Employment Act 2006 regulates employment conditions, including payment of wages, leave entitlements, weekly rest and terminations.

<sup>49</sup> International Labour Office Social Protection Sector, ‘ILO Africa Labour Migration Policy Initiative: A Contribution to the NEPAD Agenda’ (Ouagadougou, April 2002).

<sup>50</sup> ACP Observatory on Migration, above n 40, 16. The Migration Policy Framework for Africa also identifies child trafficking as a particular challenge for Africa. See Migration Policy Framework for Africa, above n 6.

<sup>51</sup> See Zewdu and Hugo, above n 2, 41.

<sup>52</sup> Kenya and Uganda.

<sup>53</sup> All IGAD countries except Somalia.

<sup>54</sup> These agreements reflect the principle set out in the Treaty Establishing the African Economic Community (Abuja Treaty) for the establishment of an African Common Market through ‘[t]he application of the principle of free movement of persons as well as the provisions herein regarding the rights of residence and establishment’ See Treaty Establishing the African Economic Community 3 June 1991 (entered into force 1994) Art 6(e)(iii).

<sup>55</sup> Treaty for the Establishment of the East African Community, 30 November 1991 (entered into force 7 July 2000) (EAC Treaty), Art 104

<sup>56</sup> Protocol on the Establishment of the East African Community Common Market, 20 November 2009 (entered into force 1 July 2010) (EAC Protocol), Art 7.

<sup>57</sup> EAC Protocol, Art 8

<sup>58</sup> EAC Protocol, Art 7(2).

<sup>59</sup> COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, 29 June 1998 (not yet in force) (COMESA Protocol), Art 2.

<sup>60</sup> Including the right to obtain a visa on arrival. See COMESA Protocol, Art 3. See COMESA, ‘Fresh commitment towards free movement of persons in the region’, available at <http://goo.gl/NGp2bb>.

<sup>61</sup> See Draft Terms of Reference (TORs) for Consultancy to Develop the Protocol on Free Movement of Persons in the IGAD Region (copy on file with the author).

<sup>62</sup> The Protocol is still under negotiation but will be similar to the EAC Protocol.

To date, the EAC Protocol is the only free movement protocol to have entered into force (in 2010) and implementation by Partner States has so far been limited.<sup>63</sup> In practice, therefore, Horn of Africa states are not accorded the full right of free movement to citizens of other states. A number of challenges have been identified in the implementation of freedom of movement protocols in the region, including 'poor linkages between migration and development processes; inadequate administrative and institutional capacity for effective migration policies and migration management; and lack of protection of migrant workers'.<sup>64</sup>

### 1.1.2 Role in preventing cross-border displacement

Migration frameworks, including free movement of persons protocols, have the potential to assist in preventing forced displacement, particularly in the case of slow-onset disasters such as drought, by providing opportunities for mobility to persons exposed to natural hazards prior to displacement occurring. Allowing people to access livelihood opportunities elsewhere facilitates adaptation by populations impacted by slow-onset disasters and the gradual effects of climate change,<sup>65</sup> who are typically not well served by international refugee or other protection mechanisms.<sup>66</sup> Opportunities for migration (whether temporary or permanent) for some family or community members in areas affected by slow-onset disasters may allow others to remain in their homes for longer – for example, remittances from family members who travel elsewhere for work already provide a major source of support to drought-affected communities in the Horn of Africa.<sup>67</sup> Migration and freedom of movement arrangements may also provide opportunities for pre-emptive movement for persons residing in areas that are particularly vulnerable to sudden-onset disasters and/or are likely to face an increase in sudden-onset disasters as a result of the effects of climate change.

The role of migration and freedom of movement frameworks in preventing cross-border displacement will depend, however, on their full implementation and on meaningful access for those who could benefit from

them. As noted above, of the three freedom of movement protocols potentially applicable in the Horn of Africa, only the EAC Protocol has actually come into force, and even then practical implementation has been very limited. There are thus very few people at present who could access such arrangements in practice. Even with full implementation, however, migration and freedom of movement frameworks are not protection-oriented – rather, they are designed to advance the interests of the migrant's host state, by addressing particular skills shortages and/or promoting greater inter-state economic cooperation and development. For example, though the EAC Protocol provides that 'Partner States shall... guarantee the protection of the citizens of the other Partner States while in their territories',<sup>68</sup> the primary objective of the EAC Common Market Area is not protection – rather, it is to 'accelerate economic growth and development of the Partner States'.<sup>69</sup> Its freedom of movement arrangements do not, therefore, address the particular needs or vulnerabilities of persons who are vulnerable to displacement. For example, accessing freedom of movement arrangements depends on possession of an international travel document – the cost and logistics of obtaining such a document may themselves constitute a barrier to access. As Zewdu and Hugo note, it is generally '[b]etter off families [who are] most able to use migration as an early response, while the poor [are] likely not to move until they are forced to'.<sup>70</sup>

Thus, while formal migration and freedom of movement avenues arrangements in the Horn of Africa could prevent displacement by facilitating pre-emptive movement and adaptation for populations vulnerable to disaster, particularly in the context of slow-onset disaster such as drought, their capacity to do so will depend on their full implementation and on ensuring access to information and travel documents for persons vulnerable to such displacement. In addition, such mechanisms will never provide an adequate solution on their own, as the poorest families may never have the means to access either documentation or transportation necessary to move. Finally, the capacity of those who do move under such arrangements to successfully 'adapt' will depend on their having transferrable skills and access to opportunities for work and other livelihoods.

<sup>63</sup> For example, Kenya's Citizenship and Immigration Act 2011 provides for the issue of East African passports and Temporary Permits for Kenyan citizens to travel to other EAC Partner States. See sections 25 and 26.

<sup>64</sup> Musonda, above n 25, 31.

<sup>65</sup> See Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches', UNHCR Legal and Protection Policy Research Series, February 2012, 60-61; McAdam, above n 8, 201 ff.

<sup>66</sup> As McAdam notes, the forward-looking assessment of risk required by international refugee law requires turn in part on the imminence of potential harm to the refugee applicant and this 'poses particular difficulties for pre-emptive movement away from the slow-onset impacts of climate change.' McAdam, above n 8, 50; see also 84-87.

<sup>67</sup> A representative from the Somali delegation at the Nansen Initiative Horn of African Regional Consultation identified such remittances as one of the major sources of income for drought-affected regions of Somalia.

<sup>68</sup> EAC Protocol, above n 57, Art 7(3).

<sup>69</sup> For example, one of the stated aims of the EAC Protocol is to 'accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital' See EAC Protocol, above n 57, Art 4(2)(a).

<sup>70</sup> Zewdu and Hugo, above n 2, viii.



## Recommendation 1:

The full implementation of migration and free movement of persons frameworks in the Horn of Africa region could play a partial role in preventing disaster-related displacement, particularly in the context of slow-onset disasters such as drought. These frameworks should be fully implemented and accompanied by strategies for improving access to international travel documents, transportation and livelihood opportunities.

## 1.2 PROTECTION OF INTERNALLY DISPLACED PERSONS

Effective mechanisms for preventing and responding to internal displacement have the potential to prevent cross-border displacement by reducing the need for persons affected by natural hazards to cross borders in search of safety and/or livelihoods. This was discussed by participants in the Horn of Africa civil society pre-consultation, who noted that failure to address internal displacement will result in cross-border displacement and recommended the implementation of existing internal displacement frameworks as one means of addressing cross-border displacement in the disaster context.<sup>71</sup> Internal displacement frameworks may also help to ensure that returnees – previously displaced persons returning home – are protected and do not merely become displaced again within the borders of their home state.<sup>72</sup> This will be particularly important in the context of disaster-related displacement, where returnees' former place/s of residence may have been rendered uninhabitable by the disaster itself.<sup>73</sup>

### 1.2.1 Legal framework

The Horn of Africa benefits from a binding regional framework for addressing internal displacement – the Kampala Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention).<sup>74</sup> The Kampala Convention's preamble declares states' commitment to addressing displacement, including that which is caused by natural disasters, which it notes 'have a devastating impact on human life, peace, stability, security, and development'.<sup>75</sup> Its definition of internally displaced persons (IDPs) – which replicates the definition of the United Nations Guiding Principles on Internal Displacement (Guiding Principles) – includes persons displaced in the context of disaster. It provides:

“Internally Displaced Persons” means 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 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>76</sup>

Preventing displacement from occurring is one of the stated objectives of the Kampala Convention<sup>77</sup> – States are obliged to 'refrain from, prohibit and prevent arbitrary displacement of populations',<sup>78</sup> including through the development of early warning systems and disasters risk management strategies in areas of potential displacement.<sup>79</sup> When displacement occurs, the Convention provides for a wide range of protection and assistance obligations to those displaced, including meeting their basic needs,<sup>80</sup> ensuring respect for human rights<sup>81</sup> and issuing identity documents 'necessary for the enjoyment and exercise of their rights'.<sup>82</sup> In the longer term, the Kampala Convention protects those who have been displaced against 'forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk'.<sup>83</sup>

<sup>71</sup> See Horn of Africa Civil Society Pre-Meeting Report, above n 14.

<sup>72</sup> For example, the Somali delegation to the Horn of Africa Regional Consultation identified addressing the needs of returnees, particularly those whose livelihoods have been destroyed by drought, as one of the key displacement-related challenges facing Somalia at present.

<sup>73</sup> For further discussion, see below, section 3.2, on Facilitating Return.

<sup>74</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 22 October 2009 (entered into force 6 December 2012) (Kampala Convention).

<sup>75</sup> Kampala Convention, preambular para 5.

<sup>76</sup> Kampala Convention, Art 1(k), emphasis added. This definition is the same as that provided by the UN Guiding Principles on Internal Displacement, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement, 11 February 1998 (Guiding Principles).

<sup>77</sup> See Kampala Convention, Arts 2, 3.

<sup>78</sup> Kampala Convention, Art 3(1)(a). Prohibited forms of displacement include 'forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the health and safety of those affected'. Art 4(4)(f).

<sup>79</sup> Kampala Convention, Art 4(2).

<sup>80</sup> Kampala Convention, Art 3(1)(j).

<sup>81</sup> Kampala Convention, Art 3(1)(d).

<sup>82</sup> Kampala Convention Art 13(2).

<sup>83</sup> Kampala Convention Art 9(2)(e).

While the Kampala Convention provides a comprehensive framework for preventing and responding to internal displacement, ratification and implementation by states has been slow. Of the IGAD states, only Uganda has ratified the Kampala Convention. Djibouti, Eritrea, Ethiopia, Somalia and South Sudan have signed but not ratified,<sup>84</sup> and Kenya and Sudan have neither signed nor ratified. A 2014 review of the Kampala Convention by the UN Special Rapporteur on the human rights of internally displaced persons concluded that '[m]uch work... remains to be done to translate this important instrument into practice'.<sup>85</sup>

In addition to the Kampala Convention, Member States of the Great Lakes region – including Kenya, Sudan, South Sudan and Uganda – are also subject to the 2006 Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons (Great Lakes Protocol). The Great Lakes Protocol was developed primarily to provide a legal basis for the implementation of the UN Guiding Principles on Internal Displacement.<sup>86</sup> Importantly, the Great Lakes Protocol repeats the definition of an IDP from the Guiding Principles<sup>87</sup> (which, as noted above, is the same as that of the Kampala Convention and includes persons displaced by natural disasters). In addition, it provides that Member States 'shall, to the extent possible, mitigate the consequences of displacement caused by natural disasters and natural causes'.<sup>88</sup>

Despite the currently low levels of ratification of the Kampala Convention, some Horn of Africa states have developed their own national IDP policies and/or legislation.<sup>89</sup> Uganda and Sudan adopted national policies for IDPs in 2004 and 2009 respectively, while Somalia is currently in the process of developing a national policy.<sup>90</sup> In 2012, Kenya endorsed a national policy on IDPs and passed the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Commu-

nities Act,<sup>91</sup> though as of June 2014, 'there has been no progress in implementing the Act or moving the national policy beyond the draft stage'.<sup>92</sup> In practice, assistance to IDPs in the Horn of Africa is frequently provided on an informal basis by local communities – for example, populations displaced by flooding in South Sudan in 2012 took shelter with local host families, in schools and in other makeshift camps.<sup>93</sup>

## 1.2.2 Role in preventing displacement

The Kampala Convention could play a role in preventing (or at least reducing) cross-border disaster-related displacement, through the binding obligations it imposes on States to implement appropriate disaster risk management strategies and prevent arbitrary displacement. The assistance obligations of States towards internally displaced persons may also reduce the need for those displaced by disasters to cross international borders in search of protection. Its capacity to do so, however, will depend on its effective implementation, which, as noted above, has not occurred.

Nevertheless, while full implementation of internal displacement mechanisms in the Horn of Africa is still a long way away, the Kampala Convention and Great Lakes Protocol are symbolically significant in addressing disaster-related displacement, due to their explicit recognition by African states that natural disasters are both a cause of displacement, and that they give rise to protection needs equally significant to those faced by persons displaced by conflict, violence and other human rights abuses.<sup>94</sup> It is also notable that existing national legislation and policies in several Horn of Africa states incorporate the IDP definition from the Kampala Convention, which includes persons displaced by natural disasters.<sup>95</sup>

---

<sup>84</sup> Somalia has ratified the Kampala Convention internally but is yet to register its ratification with the African Union. IDMC, 'Somalia: Internal displacement in brief' (December 2013).

<sup>85</sup> Chaloka Beyani, 'Report of the Special Rapporteur on the human rights of internally displaced persons' Report to the UN General Assembly Human Rights Council (4 April 2014), 19.

<sup>86</sup> See Protocol on the Protection and Assistance to Internally Displaced Persons, 30th November 2006 (entered into force 2008) (Great Lakes Protocol), Art 2. Under Article 4(1)(a) States agree to 'Adhere to the principles of International Humanitarian Law and Human Rights applicable to the protection of internally displaced persons in general and as reflected in the Guiding Principles in particular.'

<sup>87</sup> Great Lakes Protocol, Art 1(4).

<sup>88</sup> Great Lakes Protocol, Art 3(2).

<sup>89</sup> This includes, such as Kenya, who have not ratified the Kampala Convention.

<sup>90</sup> See Uganda, National Policy for Internally Displaced Persons 2004 (Uganda); The National Policy for Internally Displaced Persons (IDPs) 2009 (Sudan).

<sup>91</sup> The Act replicates the definition of an internally displaced person from the Kampala Convention and Guiding Principles (see above section 1.2), which includes persons displaced by natural disasters. Notably, the Act states its intention to give effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons and the United Nations Guiding Principles on Internal Displacement (see long title and section 3 of the Protocol), however it makes no mention of the Kampala Convention.

<sup>92</sup> IDMC, 'Kenya: Too early to turn the page on IDPs, more work is needed' (3 June 2014)

<sup>93</sup> See IDMC, 'Global Estimates 2012: People displaced by disasters'(May 2013).

<sup>94</sup> This recognition can also be found in the National Adaptation Programmes of Action (NAPAs) of some states, including Uganda and Ethiopia. See NRC, 'The Kampala Convention: One year on: Progress and prospects' (2013).

<sup>95</sup> See, eg, The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 (Kenya), section 2; National Policy for IDPs 2004 (Uganda); National Policy for Internally Displaced Persons 2009 (Sudan), section 2(d).

It must be remembered, however, that even the best implementation of internal displacement frameworks will not prevent all instances of cross-border displacement – in some disaster situations the safest, or only, course of action for affected persons will still be to cross an international border. Indeed, this fact is explicitly recognised within both the Kampala Convention and the Great Lakes Protocol, both of which preserve the right of displaced persons to cross borders in order to seek asylum.<sup>96</sup>

### Recommendation 2:

States should ratify regional frameworks for preventing and responding to internal displacement and implement their provisions at the domestic level.

### Recommendation 3:

African states' recognition of the nexus between disasters and displacement and the protection needs of disaster-displaced persons in the Kampala Convention and the Great Lakes Protocol provides a political and legal platform for developing a rights-based approach to disaster-related cross-border displacement in the region.

## 1.3 PROTECTING PASTORAL LIVELIHOODS

Pastoral livestock production systems are a common form of livelihood in Africa, in particular in the arid and semi-arid regions of the Horn of Africa. One of the key features of pastoralism is the reliance on mobility, including at times across borders, to access water and grazing lands for livestock. This is described by Schrepfer and Caterina in their study of pastoralists in northern Kenya:

Pastoralists rely heavily on strategic mobility to ensure access to grazing land and water in areas where seasonal weather patterns mean such resources are not available all year round, and as such their livelihoods have a regional dimension. They migrate across borders, access regional and international markets, and

are affected by impacts such as conflict or drought, which often spread across national boundaries.<sup>97</sup>

The twin reliance on mobility and natural resources, including water, makes pastoralist communities especially vulnerable to displacement in the context of disaster, particularly drought. Drought has been identified as a key cause of displacement of pastoralists, though in most cases pastoral displacement will be multi-causal, affected by a range of factors, including both slow and sudden-onset disasters, conflict, violence and epidemics.<sup>98</sup>

Drought is seldom the only cause of displacement. It often comes on top of cattle rustling and conflicts over resources in which pastoralists have already lost livestock and mobility. The loss of traditional grazing land as a result of privatisation and land concessions can also increase the risk of conflict when drought hits, given that they can make dwindling resources scarcer still and interfere with migration routes. Isolating an individual or primary cause of displacement in such slow-onset contexts is difficult if not impossible, because the different factors are so inextricably intertwined.<sup>99</sup>

While cross-border movement is a common feature of pastoralism in the Horn of Africa,<sup>100</sup> it will not always be characterised as 'displacement'. Because of the regular nature of movement among pastoralist communities, determining when a pastoralist has become displaced can be difficult.

Schrepfer and Caterina propose a framework which defines pastoral displacement according to a process of impoverishment and relative deprivation, caused by external factors, leading to the decision to abandon pastoral production system.<sup>101</sup> This approach to defining pastoral displacement recognises the failure of more conventional displacement frameworks – which largely proceed on the presumption that individuals (and populations) have a fixed place of residence<sup>102</sup> – to accommodate the distinctive circumstances of pastoralists. Furthermore, as Schrepfer and Caterina assert, '[u]nderstanding internal displacement as a process of impoverishment and decreasing resilience speaks to humanitarian and development agencies alike.'<sup>103</sup> However, the use of such

<sup>96</sup> See Kampala Convention, Art 20(1), which states: 'No provision in this Convention shall be interpreted as affecting or undermining the right of internally displaced persons to seek and be granted asylum within the framework of the African Charter on Human and Peoples' Rights, and to seek protection, as a refugee, within the purview of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa or the 1951 U.N Convention Relating to the Status of Refugees as well as the 1967 Protocol Relating to the Status of Refugees.' See also Great Lakes Protocol, Art 4(1)(k).

<sup>97</sup> Nina Schrepfer and Martina Caterina, 'On the Margin: Kenya's Pastoralists. From displacement to solutions, a conceptual study on internal displacement of pastoralists.' (IDMC, March 2014), 10, citations omitted.

<sup>98</sup> Ibid, 22.

<sup>99</sup> Ibid, 24.

<sup>100</sup> See Horn of African Desk Review, above n 5, 29.

<sup>101</sup> Cited ibid, 29.

<sup>102</sup> See, eg, 1969 African Refugee Convention, Art I(2), which defines a 'refugee' as person compelled to leave their 'place of habitual residence' See full discussion in section 2.2.1.

<sup>103</sup> Schrepfer and Caterina, above n 98, 8.

an approach as a means of determining the threshold at which pastoralists are (our should be) entitled to international protection is difficult to square with existing international and regional protection frameworks, which generally do not recognise impoverishment and deprivation alone as a criteria for protection.<sup>104</sup>

Despite these conceptual difficulties, African states have shown considerable commitment to protecting the pastoralist way of life, including acceptance of the movement of pastoralist communities back and forward across borders. Recognising both the necessity of pastoralism – many pastoralist communities live in parts of the Horn of Africa where alternative livelihoods make alternative livelihoods unviable<sup>105</sup> – as well as its contribution to the economy,<sup>106</sup> in 2010 the AU Department of Rural Economy and Agriculture adopted a ‘Policy Framework for Pastoralism in Africa’ (Policy Framework for Pastoralism). The Policy Framework for Pastoralism is intended to achieve the following stated objectives:

#### Objective 1

Secure and protect the lives, livelihoods and rights of pastoral peoples and ensure continent-wide commitment to political, social and economic development of pastoral communities and pastoral areas.

#### Objective 2

Reinforce the contribution of pastoral livestock to national, regional and continent-wide economies.

The Policy Framework for Pastoralism recognises that ‘mobility is the basis for efficient use and protection of rangelands’ and ‘key to appropriate adaptation to climatic and other trends’.<sup>107</sup> It emphasises the ‘cross-border nature of many pastoralist communities’ and thus the importance of a regional approach to protecting pastoral livelihoods.<sup>108</sup>

Protecting access to traditional rangelands is a key focus of the Policy Framework for Pastoralism, which notes that ‘pastoral mobility also often requires movements through settled farming areas, movements across internal administrative borders within states, and movements across national borders’<sup>109</sup> One of the enumerated strategies adopted by the Frameworks is thus ‘to support policy reform or development which enables these kinds of mobility’.<sup>110</sup> The Policy Framework for Pastoralism advocates for the regulation of pastoral movement within regional economic communities<sup>111</sup> and identifies the ECOWAS International Transhumance Certificate as an example of such a development.<sup>112</sup> This Certificate was introduced as part of a Decision taken by ECOWAS Members States relating to transhumance in the West African region, which permits day-time border crossings of pastoral livestock in accordance with trails and itineraries defined by states.<sup>113</sup> In the Horn of Africa region, COMESA is reportedly considering a similar regional livestock certification system.<sup>114</sup>

#### Recommendation 4:

Pastoral displacement does not fit readily into conventional notions of displacement. It is therefore best addressed within policies and frameworks directed specifically at the needs of pastoral communities.

#### Recommendation 5:

Preserving the ability of pastoral communities to access water and grazing lands will protect livelihoods and prevent displacement. Regulation of cross-border movement by pastoral communities could be addressed by regional economic communities such as the EAC and COMESA. The ECOWAS Transhumance Certificate provides a useful example in this regard.

<sup>104</sup> Though it is recognised that, as for other communities, the ability of pastoralists to adapt to natural hazards will also be affected by other factors such as conflict and violence.

<sup>105</sup> See Schrepfer and Caterina, above n 98, 10.

<sup>106</sup> See African Union, Department of Rural Economy and Agriculture, Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving Lives, Livelihoods and Rights of Pastoralist Communities (October 2010) (Policy Framework for Pastoralism in Africa), i, which notes: ‘Pastoralists supply very substantial numbers of livestock to domestic, regional and international markets and therefore, make crucial – but often undervalued – contributions to national and regional economies in Africa’.

<sup>107</sup> Policy Framework for Pastoralism in Africa, above n 107, section 4.1.4

<sup>108</sup> Policy Framework for Pastoralism in Africa, above n 107, section 4.1.5. For example, a study by Pavanello and Levine on natural resource management in the Kenya–Ethiopia border area notes that border communities, such as pastoral communities, ‘engage in a wide range of cross-border activities and sharing arrangements around natural resources, as well as the trading of livestock, livestock products and other commodities, sharing of information (on livestock prices and water and pasture availability) and sharing of basic services.’ Sara Pavanello and Simon Levine, ‘Rules of the Range: Natural resources management in Kenya–Ethiopia border areas’ (HPG Working Paper, September 2011).

<sup>109</sup> Policy Framework for Pastoralism in Africa, above n 107, strategy 2.2.

<sup>110</sup> Policy Framework for Pastoralism in Africa, above n 107, strategy 2.2.

<sup>111</sup> Policy Framework for Pastoralism in Africa, above n 107, section 4.1.5.

<sup>112</sup> See Policy Framework for Pastoralism in Africa, above n 107, strategy 2.2.

<sup>113</sup> Economic Community of West African States (ECOWAS) Decision A/DEC.5/10/98 regulating transhumance between the Member States of ECOWAS, Art 7.

<sup>114</sup> Horn of African Background Paper, above n 1, 13.



## 2. PROTECTION DURING DISPLACEMENT

**The protection needs of persons once they have been displaced across borders in the context of a disaster may be broadly divided into two categories – the first relates to access to territory in another state, and the second to treatment received during stay in that territory. For protection during cross-border displacement to be meaningful it must address both of these areas of need.**

Access to territory includes safe admission to the territory and protection against forcible return to the disaster-affected area. Zewdu and Hugo's account of the 2011 Horn of Africa drought illustrates the enormous personal and security risks faced by disaster-affected persons who are forced to cross borders in an irregular manner and in the context of widespread insecurity.

The story of Somali refugees fleeing into neighbouring countries is devastating. Mothers were frequently forced to abandon their children literally by the side of the road. Those who were en-route to the sprawling complex of refugee camps and Dadaab, Kenya, took hazardous back roads and use smugglers to avoid the Kenyan police and the official border post, that until recently remained closed. This undoubtedly increased their vulnerability... Reports of rape and attack when approaching Dadaab camps and chronic insecurity in the camps indicate significant unmet protection needs.<sup>115</sup>

Here, the risks posed by general border insecurity were exacerbated by Kenya's closing of the official border crossing, removing the possibility of lawful access to Kenyan territory and increasing the risk that disaster-affected persons on the Somali side of the border would be unable to flee to relative safety.

While admission to territory may be a necessary first step in enabling persons displaced by disaster to access safety, the legal status, and associated rights, afforded

to such persons during their stay in that territory will be essential to ensuring their adequate protection there. Without some form of legal status, and without access to adequate livelihoods and/or other assistance, persons displaced across international borders remain vulnerable to abuse, harassment, exploitation and deportation.<sup>116</sup>

This section will assess the capacity of existing regional and sub-regional frameworks to facilitate access to territory and protection during stay for disaster-displaced persons in the Horn of Africa region. Central to this inquiry is whether, and to what extent, are entitled to protection under Africa's chief refugee protection instrument, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 African Refugee Convention/1969 Convention). However, given that even on the most expansive reading of the 1969 Convention, not all persons displaced in the context of disaster will qualify for its protection, this section will also consider the scope of protection offered to displaced persons by other legal and policy mechanisms – including those governing migration, free of movement of persons and human rights – as well as less formal arrangements for temporary admission and stay. Each of these frameworks will be discussed in turn to assess, first, whether the framework applies to persons displaced in the context of disasters, and second, to the extent that it *does* apply, whether it meets the particular protection *needs* of such persons during displacement.

---

<sup>115</sup> Zewdu and Hugo, above n 2, 41.

<sup>116</sup> *Ibid*, 41-2.



## 2.1 MIGRATION AND FREEDOM OF MOVEMENT

### 2.1.1 Applicability

As noted above in Section 1.1, formal migration pathways in the Horn of Africa are limited and costly, making them accessible to only very few of those who might wish to move across borders. Freedom of movement arrangements within the two sub-regional economic communities that include Horn of Africa states – the EAC and COMESA – are increasing opportunities for movement within the region, though access still depends on being able to fulfil certain bureaucratic requirements, such as possession of a valid travel document.

In addition to the practical barriers to accessing migration and freedom of movement pathways in the Horn of Africa, persons displaced in the context of disasters may fall within specific exclusions from such regimes, at either the regional or domestic level. Both the EAC and COMESA freedom of movement protocols give states broad powers to limit free movement ‘on grounds of public policy, public security or public health’<sup>117</sup> – precisely the kinds of concerns that are likely to arise in the context of disasters (particularly sudden-onset disasters), which frequently involve large-scale population movements. Where disaster-displaced persons qualify for refugee status<sup>118</sup> they may even be excluded from freedom of movement arrangements entirely. The EAC Protocol provides that ‘movement of refugees within the Community shall be governed by the relevant international conventions’<sup>119</sup> suggesting that international ref-

ugee law could effectively override the Protocol.<sup>120</sup> States involved in the negotiation of the IGAD Draft Protocol have also been clear that refugees and pastoralists will be excluded from its provisions.<sup>121</sup>

As noted earlier, states may also impose additional restrictions on access to the migration and freedom of movement pathways set out in sub-regional arrangements. For example, the Uganda Citizenship and Immigration Control Act 1999 declares a destitute person to be a Prohibited Immigrant<sup>122</sup> and prevents them, or their dependants, from applying for an entry permit.<sup>123</sup>

### 2.1.2 Protection during displacement

Even where persons displaced in the context of disasters are not formally excluded from migration or freedom of movement pathways, the potential for such pathways to provide adequate access and protection during displacement is limited. As noted above in section 1.1.2, migration and freedom of movement frameworks are not protection-oriented and do not take into account the particular needs and circumstances of persons who have been forcibly displaced – for example, they presuppose access to travel documents,<sup>124</sup> do not address access to basic assistance, such as healthcare or education, and contain no guarantees against return to one’s home country.<sup>125</sup>

These limitations will be particularly acute in relation to persons displaced in the context of a sudden-onset disaster, such as flood or earthquake, who do not have time to gather relevant documentation and generally require significant emergency assistance. For people

---

<sup>117</sup> EAC Protocol, above n 57, Art 7(5). Article 7(1) of the COMESA Protocol also allows for temporary suspension ‘on the grounds of public security or influx of persons as refugees arising from disturbances in the territory of another member State’.

<sup>118</sup> For discussion see section 2.2 below.

<sup>119</sup> EAC Protocol, above n 57, Art 7(8).

<sup>120</sup> Though this arguably sets up a somewhat circular relationship with the 1951 Convention, which stipulates: ‘Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.’ See 1951 Convention Relating to the Status of Refugees 28 July 1951 (entered into force 22 April 1954) (1951 Refugee Convention), Art 5.

<sup>121</sup> Article 1(8) of the Draft Protocol on the Free Movement of Persons in the IGAD Region provides that ‘movement of refugees within the Community shall be governed by the relevant international conventions’ and Art 15 provides that the ‘management of refugees in the Region shall be regulated by a specific Memorandum of Understanding (MOU) between State Parties’. This is in contrast to freedom of movement arrangements in the Economic Community of West African States (ECOWAS), which are widely perceived to be compatible with refugee protection instruments. See Aderanti Adepoju, Alistair Boulton and Mariah Levin, ‘Promoting Integration through Mobility: Free Movement and the ECOWAS Protocol’ UNHCR New Issues in Refugee Research, December 2007, 16. Though the authors note that this position is not universally accepted. See also Alistair Boulton, ‘Local Integration in West Africa’ (2009) 33 *Forced Migration Review* 32, 33, who notes that ‘ECOWAS has issued a statement that refugees are to be guaranteed equal treatment under the free movement protocols with other Community citizens’.

<sup>122</sup> Citizenship and Immigration Control Act 1999 (Uganda), section 52.

<sup>123</sup> Citizenship and Immigration Control Act 1999 (Uganda), section 54(2).

<sup>124</sup> The COMESA Protocol applies to ‘citizens of member States holding valid travel documents’ (Article 3) while the EAC Protocol provides that ‘A citizen of a Partner State who wishes to travel to another Partner State shall use a valid common standard travel document.’ (Article 9). The Draft Protocol on the Free Movement of Persons in the IGAD Region requires citizens of Member States to use an international travel passport (Article 2).

<sup>125</sup> See Migration Policy Framework for Africa 18, which notes: ‘The right of individuals to free movement does not imply a right of entry or stay.’ See also, COMESA Protocol, Art 6, which gives Member States the right to refuse permission to enter or remain where it considers a person ‘to be detrimental to its national security or public health’.

displaced in the context of slow-onset disasters, such as drought, who are more likely to have time to plan their departure, freedom of movement arrangements have the potential to provide access to the territory of another state, though only for those who have the means to obtain relevant travel documentation and the financial resources to support travel. Beyond access to territory, however, the lack of rights protection, including the lack of guarantee against forcible return, mean that they still do not address the significant protection needs of disaster-displaced persons.

### Recommendation 6:

Migration and free movement of persons frameworks are not protection-oriented and should not be relied upon to provide protection to persons displaced across borders in the context of a disaster.

## 2.2 REFUGEE PROTECTION

At the international level, the capacity of refugee protection regimes to encompass persons displaced in the context of natural hazards and the effects of climate change has received considerable attention in recent years. In large part, scholars and practitioners generally agree that, while some persons displaced in the context of disasters and other environmental hazards will qualify for refugee status under the 1951 *Convention relating to the Status of Refugees* (1951 Refugee Convention/1951 Convention) – in particular, where environmental factors combine with other socio-political factors to cause

displacement<sup>126</sup> – the 1951 Convention’s definition of a refugee does not encompass the impacts of disasters or effects of climate change per se.<sup>127</sup> In contrast, the capacity of regional refugee protection instruments, including the 1969 African Refugee Convention, to address disaster-related displacement has received remarkably little attention.<sup>128</sup> This question is central to determining the extent of the existing ‘protection gap’ in Africa.

As the below will demonstrate, the definition of the term ‘refugee’ in the 1969 African Refugee Convention, which is significantly expanded from that of the 1951 Refugee Convention, has the potential to extend protection to persons displaced in the context of disaster, at least in situations where the disaster is accompanied by conflict, widespread violence and/or a breakdown of national government systems. This is significant for the Horn of Africa, which has been marred by considerable violence in recent decades,<sup>129</sup> and where conflict and lack of effective governance have been significant determinants, first, of whether the effects of a natural hazard amount to a disaster, and second, whether persons affected by disaster are compelled to cross an international border in search of safety.<sup>130</sup> The capacity of the 1969 Convention to encompass disaster-related displacement in the absence of these additional factors is less clear, though as the below analysis will demonstrate, this question warrants further attention.

<sup>126</sup> As noted in AF (Kiribati) [2013] NZIPT, though in general the effects of natural disasters do not discriminate between persons of different race, religion, political opinion etc, ‘broad generalisations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes, including [1951 Refugee] Convention-based recognition.’ Para 57.

<sup>127</sup> Article 1A(2) of the 1951 Refugee Convention defines a refugee as ‘every person who, owing to 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’. Persons displaced in the context of disasters generally fail to satisfy these criteria owing to the absence of ‘persecution’ and the lack of nexus to a Convention ground (race, religion, nationality, membership of a particular social group or political opinion).

<sup>128</sup> Unlike the 1951 Convention, which has been the subject of significant analysis by scholars, national courts and UNHCR, only two articles to date purport to provide any systematic interpretation of the definition’s terms. See Micah Rankin, ‘Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) UNHCR New Issues in Refugee Research, Working Paper No 13; Alice Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 African Journal of International and Comparative Law 204.

<sup>129</sup> According to one study, the eight IGAD states alone have been involved in over 200 conflicts in the years since 1990. See Paul D Williams, ‘Webs of Conflict and Pathways to Peace in the Horn of Africa: Towards a Regional Strategy’ (2011), cited Horn of Africa Desk Review, above n 5, 33.

<sup>130</sup> E.g. Zewdu and Hugo note that, during the 2011 Horn of Africa drought, effective safety nets and disaster response mechanisms, including the delivery of humanitarian assistance, helped to avert a large-scale crisis in Ethiopia, Kenya and even parts of Somalia, while armed conflict and the lack of humanitarian access contributed to conditions in southern Somalia quickly reaching the level of famine. See Zewdu and Hugo, above n 2, 38-9.

## 2.2.1 Applicability

As a multilateral treaty, the 1969 African Refugee Convention imposes obligations on states that have consented to be bound by its terms.<sup>131</sup> Some 45 African states have now ratified or acceded to the Convention, making it one of the most widely endorsed treaties on the continent.<sup>132</sup> In the Horn of Africa, all of the IGAD countries except Eritrea and South Sudan have signed the Convention, though only Ethiopia, Kenya, Sudan and Uganda have also ratified it (Djibouti and Somalia have signed but not ratified). In addition to defining the term ‘refugee’, the terms of the 1969 Convention also govern to the provision of asylum,<sup>133</sup> non-discrimination,<sup>134</sup> issue of travel documents,<sup>135</sup> burden sharing among states<sup>136</sup> and voluntary repatriation.<sup>137</sup> Signatories to the 1969 Convention undertake to cooperate with the OAU (now AU) and UNHCR in the management of refugee affairs.<sup>138</sup> Many of the Convention’s terms, including its definition of a refugee, have been incorporated into the domestic legislation of states.<sup>139</sup>

The 1969 Convention’s definition of the term ‘refugee’ is provided in Article I. It begins by repeating the international definition from the 1951 Convention then extends the term further. In full, it provides:

### Article 1

#### Definition of the term “Refugee”

1. For the purposes of this Convention, the term “refugee” shall mean every person who, owing to 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.
2. The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events 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.<sup>140</sup>

Article I(2) thus provides Africa’s ‘expanded refugee definition’ – persons satisfying its criteria are entitled to protection in African states party to the 1969 Convention. Scholarly analysis of the expanded refugee definition’s applicability to persons displaced in the context of disasters has been limited, and divided. The key issue is whether natural hazards or disasters fall within the phrase ‘events seriously disturbing public order’.<sup>141</sup> While some assert that the phrase is broad and flexible enough to encompass situations involving natural disasters,<sup>142</sup> others argue that it ought to be read

<sup>131</sup> See Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2000), 60-61.

<sup>132</sup> In the Horn of Africa, all IGAD states except Eritrea and South Sudan have signed the 1969 African Refugee Convention. Ethiopia, Kenya, Sudan and Uganda have also ratified it, while Djibouti and Somalia have signed but not ratified. For a full list of signature and ratifications, see <http://www.achpr.org/instruments/refugee-convention/ratification>

<sup>133</sup> Organisation of African Union (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 (entered into force 20 June 1974) (1969 African Refugee Convention), Art II.

<sup>134</sup> 1969 African Refugee Convention, Art IV.

<sup>135</sup> 1969 African Refugee Convention, Art VI.

<sup>136</sup> 1969 African Refugee Convention, Art II(4).

<sup>137</sup> 1969 African Refugee Convention, Art V.

<sup>138</sup> 1969 African Refugee Convention, Art VIII(1).

<sup>139</sup> See, eg, The Refugee Act 2006 (Kenya), The Refugee Act 2006 (Uganda), Refugee Act 2012 (South Sudan).

<sup>140</sup> 1969 African Refugee Convention, Art I(2).

<sup>141</sup> The others three enumerated events – external aggression, occupation and foreign domination – are not relevant to natural disasters.

<sup>142</sup> See Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP, 2004) 188, citing Gino Naldi, *The Organization of African Unity. An Analysis of its Role* (2nd ed, Mansell 1999) 83; Medard Rwelamira, ‘Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (1989) 1(4) *International Journal of Refugee Law* 557, 558; Vikram Kolmannskog, ‘“We Are in Between”: Case Studies on the Protection of Somalis Displaced to Kenya and Egypt during the 2011 and 2012 Drought’ (2013) 2 *International Journal of Social Science Studies*. Gino J. Naldi claims that the very purpose of the expanded refugee definition was to ‘take account of the particular difficulties facing Africa, such as wars of national liberation and environmental catastrophes such as drought and famine which had given rise to flight en masse and displaced whole populations.’ Cited George Okoth-Obbo, ‘Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20(1) *Refugee Survey Quarterly* 79, 87.



in a more limited way, for example as encompassing only 'man-made' disturbances.<sup>143</sup> The UNHCR's 2011 Roundtable on Climate Change and Displacement noted the potential for the expanded refugee definition to extend to persons fleeing sudden-onset disasters, though acknowledged that 'this position has yet to be fully tested'.<sup>144</sup>

State practice in this area has also been ambiguous. There have been instances of refugee status being awarded under the 1969 Convention to persons fleeing disasters – notably, in the Horn of Africa, Somalis fleeing the 2011 drought were awarded *prima facie* status under the expanded refugee definition in Kenya.<sup>145</sup> Interviews with government, UNHCR and NGO representatives in the region also reveal some support for inclusion of natural disasters within the scope of the phrase 'events seriously disturbing public order', though many emphasised that there would need to be a link between the effect of the natural hazards and government action or inaction.<sup>146</sup>

In contrast, some states have expressed the view that the expanded refugee definition is more limited than this and does not include disaster-related displacement. For example, the 1998 South African Refugee White Paper, prepared during the drafting of the current South African Refugees Act, states: 'The government... does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin solely for reasons

of poverty or other social, economic or environmental hardships'.<sup>147</sup>

Edwards notes the practice of many African states in affording temporary refuge to persons fleeing environmental catastrophe, but further contends that 'receiving States rarely declare that they are acting pursuant to their OAU Convention obligations'.<sup>148</sup> For example, in 2002, the government of Uganda took the view that people fleeing the eruption of Mount Nyiragongo in nearby Goma, DRC, were not refugees, even under the expanded refugee definition, though it still afforded them temporary refuge within its borders.<sup>149</sup>

While these examples of state practice provide useful illustrations of current approaches to refugee protection in practice, it is important to note that, under international law, they are not determinative of the scope of the expanded refugee definition itself. This is governed by international principles of treaty interpretation, found primarily in Article 31-33 of the Vienna Convention on the Law of Treaties (VCLT).<sup>150</sup> While these principles provide that subsequent practice by states in the application of a treaty may be a relevant source of interpretative guidance,<sup>151</sup> this is only the case where such practice 'establishes the agreement of the parties regarding its interpretation'.<sup>152</sup> State practice that is confined to individual, or even groups of, states will not suffice, unless it is accompanied by the 'manifested or imputable agreement' of *all* the parties to the treaty.<sup>153</sup>

---

<sup>143</sup> Rankin, above n 129, 20. Rankin states that 'the technical meaning of "public order" suggests a reference to social and political unrest caused by human activities and not by nature.' characterises a natural disaster as a force majeure, 'an event or effect that can be neither anticipated nor controlled' and argues that, as the force majeure is generally outside the responsibility of the state it does not give rise to a duty to grant asylum. He notes, however, that this would not licence a state to use the disaster to pursue its own ends, nor would it capture e.g. a famine caused by state action. See Rankin, 20-21. Sharpe describes the exclusion of so-called 'environmental refugees' as a rare area of possible consensus in the meaning of the phrase 'events seriously disturbing public order. Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 McGill Law Journal 95, 19. See also James Hathaway, *Law of Refugee Status* (Butterworths, 1991) 16-17.

<sup>144</sup> UNHCR 'Summary of Deliberation on Climate Change and Displacement', Bellagio, Italy, from 22 to 25 February 2011.

<sup>145</sup> Representatives from government, UNHCR and refugee-related NGOs working in Kenya reported that the grant of *prima facie* status to Somalis in Kenya is based on the 1969 Convention, although it is difficult to identify exactly when or by whom the decision to grant status in this way was made. During field research by the author in 2012, some interviewees reported that the decision was made unilaterally by the Kenyan Government, others reported it was made by UNHCR, pursuant to the 2010 Eligibility Guidelines for Somalia. Yet others described the arrangement as the result of an agreement between the two. Somalis fleeing during the 2011 drought were also awarded *prima facie* refugee status in Yemen, though Yemen is not a party to the 1969 African Refugee Convention.

<sup>146</sup> Interviews conducted by the author in Kenya and South Africa during 2012 (notes on file with the author). Interviewees suggested that events such as famine and economic disaster might be included where there is some link between the situation and government action or inaction.

<sup>147</sup> 'Draft Refugee White Paper', Republic of South Africa Government Gazette General Notice 1122 of 1998, 7, emphasis added.

<sup>148</sup> Edwards, above n 129, 227

<sup>149</sup> This was reported by representatives of the Government of Uganda during the Nansen Initiative Horn of Africa Regional Consultation.

<sup>150</sup> These are generally accepted to reflect international customary law on treaty interpretation, meaning that they apply to all states, not only those party to the VCLT itself.

<sup>151</sup> VCLT, Art 31(3)(b), provides: 'There shall be taken into account, together with the context... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

<sup>152</sup> VCLT, Art 31(3)(b).

<sup>153</sup> Richard Gardiner, 'Treaty Interpretation' (OUP, 2008), 236. Gardiner further notes that 'It is sufficient if there is practice of one or more parties and good evidence that the other parties have endorsed the practice.' At 239.

This report argues that the wholesale exclusion of natural hazards and disasters from the African Refugee Convention's expanded refugee definition would be erroneous, for three reasons. First, there is nothing on the face of the phrase 'events seriously disturbing public order' to indicate that such events are excluded – the language itself emphasises the effect of the event (i.e. on public order); it is neutral as to its cause. Second, neat distinctions between 'natural' and 'man-made' disturbances or disasters are rarely, if ever, borne out in practice.<sup>154</sup> Experience of the 2011 Horn of Africa drought and famine clearly illustrates the interrelationship between environmental hazards and socio-political factors, including conflict, insecurity and government capacity. As has been argued elsewhere, whether a natural hazard amounts to a disaster will depend on a range of contextual factors, including social, economic and political factors.<sup>155</sup> Third, and perhaps most importantly, the application of international principles of treaty interpretation to the phrase 'events seriously disturbing public order' does not support a distinction between natural and human-caused events.

The general rule of treaty interpretation is found in Art 31(1) of the VCLT. It provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>156</sup>

The exclusion of natural hazards and/or disasters from the phrase 'events seriously disturbing public order' would go against this general rule, both because of the context in which the phrase is used – in particular its relationship to the other three enumerated events – and the object and purpose of the 1969 Convention as a whole, which is the protection of refugees. While some have suggested that it the 'man-made' character of the first three enumerated events in the expanded refugee definition – external aggression, occupation and foreign domination – means that events seriously disturbing public order ought also be limited to disturbances with a human cause,<sup>157</sup> others point to the *other* shared characteristics of these events – for example, all three also denote events where 'there is a serious disruption to society that threatens the lives and freedoms of human beings'.<sup>158</sup> The humanitarian and protection-oriented object and purpose of the 1969 Convention favour the latter of these two approaches. As is the case under

international protection mechanisms elsewhere, it is the *effect* of the risk, not its origins or internal characteristics, which is paramount in determining protection needs.<sup>159</sup> The interpretation of 'events seriously disturbing public order' should focus on effect of the event (on public order) rather than its origins (natural or human). The key question, therefore, is not whether a particular disturbance has natural or human causes; but whether it has a sufficiently adverse effect on public order.

While the interpretation of the phrase 'events seriously disturbing public order' must be undertaken in accordance with the principles of the VCLT, this paper suggests four possible approaches, or frameworks, for assisting decision-makers in the application of the phrase to particular situations involving natural hazards or disaster. These approaches could be used individually, or in conjunction with each other.

The first approach is to leave the phrase open to be interpreted and applied on a case-by-case basis within individuals state's refugee status determination procedures. Provided that such determinations are made by reference to the effect, not the cause, of events, determining whether a particular situation amounts to a serious disturbance of public order could be left to decision-makers considering individual (or group) claims for refugee status. This approach would maintain maximum flexibility, allowing the expanded refugee definition to adapt over time to different causes of displacement. The associated risk, however, is of significant inconsistencies between states parties to the 1969 Convention, or even between different decision-makers, as to the scope and application of the phrase. This would make protection in the region somewhat of a lottery, especially for persons fleeing natural hazard-related disasters. Such decision-making would also be significantly lacking in transparency – without some sort of guidance for assessing whether an event seriously disturbs public order, decision-makers, advocates and applicants alike will lack any kind of framework for both preparing and assessing individual claims for refugee status.

A second approach to interpreting 'events seriously disturbing public order' is with reference to the 1969 Convention's prohibition on *refoulement*, which prohibits states from compelling a person to return or remain in a territory 'where his life, physical integrity or liberty would be threatened for reasons set out in Article I, paragraphs 1 and 2'.<sup>160</sup> According to this approach, a sit-

<sup>154</sup> See above, n 127.

<sup>155</sup> Jamie Linton, *What is water? the history of a modern abstraction* (UBC Press, 2010), cited 'Horn of Africa Desk Review, above n 5.

<sup>156</sup> VCLT, Art 31(1).

<sup>157</sup> See Rankin, above n 129, 20. This is known as the *ejusdem generis* rule, according to which 'when a general word or phrase follows a list of specific person or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.'

<sup>158</sup> Edwards, above n 129, 217.

<sup>159</sup> This has been important in the interpretation of the 1951 Convention's refugee definition, for example, which requires an analysis of the effect (potential harm) of persecution on the victim, not the mindset of the persecutor.

<sup>160</sup> 1969 African Refugee Convention, Art II(3).

uation amounts to an event seriously disturbing public order where it puts the life, physical integrity or liberty of the population at risk. This contextual approach draws directly on the text of the Convention itself – it seems clear that the Convention is intended to encompass *at least* those persons facing such risks. However it leads to a somewhat circular analysis, whereby a person is a refugee if they fall within the *non-refoulement* clause and a person falls within the *non-refoulement* clause if they are a refugee. This may have the effect of making the refugee definition itself redundant, a result which seems inappropriate and at odds with the *non-refoulement* provision's stipulation that the risk arise 'for reasons set out' in the definition itself. Furthermore, and even if this circularity could be overcome, it would still be necessary to decide on the requisite level of risk to life, physical integrity or liberty. Would even a remote risk be sufficient, or would it be necessary to show a certain degree of probability of the risk eventuating?

A third approach is to interpret events seriously disturbing public order as relating to events which disturb the level of 'law and order' in a country.<sup>161</sup> This approach has some support in practice. A 2009 decision of the South African Refugee Appeal Board obtained by the author states:

Where law and order has broken down and the government is unwilling or unable to protect its citizens it can be said that there are events seriously disturbing public order.<sup>162</sup>

It also has some resonance with uses of the phrase 'public order' elsewhere in both the 1969 and 1951 Conventions, which are generally in conjunction with concepts such as national security and compliance with the law. Finally, this approach captures the more general idea that the cause of refugee flight must have some connection to government action or inaction – as the maintenance of law and order is unequivocally the role of government, its failure is a clear indication of the need for international (or surrogate) protection. Therefore, as was the case with the second approach outlined immediately above, it might be safe to presume that events seriously disturbing public order encompass *at least*

those situations where there is a breakdown in law and order. However, the exclusion of events that do not entail such a breakdown – for example, those characterised by disruption to food security, economic activity or more general human rights, which might equally threaten the lives and liberty of a population – may risk unduly limiting the scope of the phrase.

The fourth and final approach suggested by this paper is to interpret events seriously disturbing public order using a human rights framework – that is, an event will amount to a serious disturbance of public order when it has a sufficiently adverse impact on the enjoyment of human rights, as defined by relevant international human rights instruments. Rankin, for example, has suggested using 'fundamental principles of humanity: the core set of human rights from which no derogation is permitted' to assist in assessing events seriously disturbing public order.<sup>163</sup> Edwards proposes consideration of a broader range of human rights, which she argues may give rise to events seriously disturbing public order depending on the circumstances.<sup>164</sup> Under a human rights framework, whether or not an event amounts to a serious disturbance of public order would be determined by the effect it has on the affected population's human rights – i.e. the more rights that are affected and the more fundamental those rights are, the more likely it amounts to a serious disturbance of public order – and the scale of the impact – i.e. whether it is sufficiently widespread to constitute a disturbance of *public* order.

This approach is similar to that which is often taken in the interpretation of 1951 Convention's refugee definition, under which the infringement of certain human rights will amount to 'persecution'.<sup>165</sup> It is also the one which is arguably most consistent with the application of the interpretative principles set out in the VCLT. It is supported by the expanded refugee definition's context – the preamble of the 1969 Convention acknowledges the Universal Declaration of Human Rights and the 'principle that all human beings shall enjoy fundamental rights and freedoms without discrimination'<sup>166</sup> – and the 1969 Convention's object and purpose, which is the protection of refugees and their human rights.<sup>167</sup>

<sup>161</sup> Edwards notes the potential correlation here, when she states: 'As looting and general crimes often follow [natural disasters], including in some cases the complete collapse of the system of law and order, it is arguable that persons fleeing these correlative events could seek protection under the OAU Convention.' Edwards, above n 129, 226.

<sup>162</sup> Refugee Appeal Board, Appeal No 1708-07 (2009) (copy on file with the author). The decision relates to ongoing violence in the DRC's North and South Kivu provinces.

<sup>163</sup> Rankin, above n 129, 19-20. Rankin draws this list from the Human Rights Committee's General Comment on States of Emergency, which in turn draws on the non-derogable rights in the International Covenant on Civil and Political Rights (ICCPR).

<sup>164</sup> Edwards, above n 129, 222-3.

<sup>165</sup> According to this approach, sufficiently serious infringement of an individual's human rights will amount to persecution under Art 1A(2) of the 1951 Refugee Convention. See generally James Hathaway, *The Rights of Refugees under International Law* (CUP, 2005), Michelle Foster, *Refugee from Deprivation: International Refugee Law and Socio-Economic Rights* (CUP, 2007).

<sup>166</sup> 1969 African Refugee Convention, preambular para 6

<sup>167</sup> Though the list of enumerated rights in the 1969 Convention is limited – it includes rights relating to asylum, non-discrimination, voluntary repatriation and travel documents – its role as the 'regional complement' to the 1951 Convention confirms its central concern with securing the rights of refugees. See further below, section 2.2.2.

It is important to note that, even under a human rights approach to interpreting ‘events seriously disturbing public order’, not all natural hazards or disasters would amount to such an event. For example, short-term flooding followed by an effective government response, in which personal security, access to justice and basic socio-economic rights are maintained, would be unlikely to be included. However, disasters which have sufficiently serious and widespread adverse effects on the human rights of the affected population would constitute an event seriously disturbing public order, irrespective of whether their cause is natural or human-made.<sup>168</sup>

### Other criteria for refugee status

The phrase ‘events seriously disturbing public order’ does not provide a stand-alone criterion for refugee status. Even if disasters arising from natural hazards do amount to events seriously disturbing public order, it does not follow that every person affected by such an event will qualify for refugee status – such persons will also need to satisfy the definition’s other criteria, including those concerning the relationship between the event and flight, the compulsion to leave and place of habitual residence.

For example, the expanded refugee definition requires that a refugee ‘is compelled to leave his [or her] place of habitual residence’. This part of the definition concerns the nature and location of flight – that is, the refugee must be ‘compelled’ to leave, rather than choose to leave voluntarily, and must have left his or her place of habitual residence, not some other place. Though the use of the term ‘compelled’ clearly indicates an intention to exclude voluntary migrants from the scope of the expanded refugee definition, it is unclear whether the term imposes any additional evidentiary hurdle in a claim for refugee status under the expanded refugee definition. The fact that the definition recognises four specific types of events as causes of refugee flight, combined

with the nexus of the event to a person’s place of habitual residence, seems adequate to ensure that only those compelled to leave will be captured by the definition.<sup>169</sup> Alternatively, if the term does impose an additional requirement on the refugee to demonstrate the compulsion to leave, further analysis will be required regarding how the line between forced and voluntary movement is to be determined. In particular, this raises issues regarding the timing of a person’s departure from their place of habitual residence – for example, is a person who flees in anticipation of a *future* disaster ‘compelled’ to flee?<sup>170</sup>

When read with the definition as a whole, the refugee must be compelled to leave ‘owing to’ one of the four enumerated events. The expanded refugee definition thus requires a causal relationship between the relevant event and the refugee’s flight. Establishing these other requirements for refugee status will be largely a question of fact, to be determined on a case-by-case basis and in light of the evidence. However it is clear that, under these criteria, not all persons affected by natural hazard or disaster will qualify for refugee status. For example, persons visiting, but not habitually residing in, the area in which the event seriously disturbing public order occurs will not qualify. Such persons, it will be presumed, may safely return to their place of habitual residence (provided that place is not also affected by one of the definition’s enumerated events).<sup>171</sup>

In addition, while it has often been argued that the phrase ‘in either part or the whole of his country of origin or nationality’ obviates the need to consider the availability of an internal flight (or relocation or protection) alternative – that is, whether or not a refugee applicant could find safety elsewhere within his or her own country of origin<sup>172</sup> – this paper contends that this question remains relevant to refugee status under the expanded refugee definition. Like the 1951 Refugee Convention, the 1969 African Refugee Convention establishes a system of international protection for

---

<sup>168</sup> This approach also avoids the complex and often artificial analysis regarding whether particular ‘natural’ disasters – e.g. famine – are natural or human-caused.

<sup>169</sup> This fits with the more general view that the expanded refugee definition provides a purely ‘objective’ set of criteria, concerned only with the conditions in the refugee’s country of origin. While some scholars have suggested that the definition also includes a ‘subjective’ component, what is generally meant by this is merely that the assessment of a refugee claim must consider the individual circumstances of the refugee applicant, not his or her (subjective) state of mind.

<sup>170</sup> These issues have been considered in the application of the 1951 Refugee Convention and complementary protection mechanisms elsewhere, particularly in the context of slow-onset disasters. For a discussion of the distinction between forced and voluntary movement in the context of the 1951 Refugee Convention see AF (Kiribati) [2013] NZIPT, esp para 49.

<sup>171</sup> A remaining issue concerns persons compelled to leave a place other than his or her habitual residence, but who is unable, for geographical or other practical reasons, to return to his or her place of habitual residence.

<sup>172</sup> This question – commonly referred to as the internal flight/relocation/protection alternative requirement – is commonly applied to applicants for refugee status under Article 1A(2) of the 1951 Refugee Convention, where it is generally held that persons who can seek effective protection by relocating elsewhere within their country of origin are not entitled to refugee status outside of it. See ‘Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees’ HCR/GIP/03/04, July 2003 (UNHCR Internal Flight Alternative Guidelines), para 5. Sharpe also notes practice by two states – Benin and Burkina Faso – of not considering whether an applicant for refugee status under the 1969 Convention could access protection elsewhere in his or her country of origin. See Marina Sharpe, ‘The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination’, UNHCR Legal and Protection Policy Series, January 2013.



persons who unable to secure the protection of their home state.<sup>173</sup> In light of this purpose, it would makes sense that persons who *can* access meaningful and effective state protection in their country of origin are not entitled to it elsewhere. This is supported by the text of the expanded refugee definition itself – in particular, by the phrase ‘compelled to leave his place of habitual residence *in order to seek refuge in another place outside his country of origin or nationality*’.<sup>174</sup> It is also supported by the context of the expanded refugee definition – in particular by the 1969 Convention’s central concern with not returning a person to ‘a territory where his life, physical integrity or liberty would be threatened’.<sup>175</sup>

As is the case under the 1951 Convention definition, determining whether an internal flight alternative is available to a refugee applicant must involve a holistic consideration, not only of the absence of a refugee claim pertaining to other parts of the home country, but also the accessibility of that region and the *reasonableness* in all the circumstances of requiring the applicant to relocate there.<sup>176</sup> Where such relocation is not reasonable – for example, due to geography, tribal difference, lack of services, or lack of family/community supports – the applicant will be entitled to protection as a refugee.

The above analysis highlights the potential of the 1969 African Refugee Convention, to date largely unexplored, in addressing the perceived protection gap that arises in the context of cross-border displacement and disasters. The extent to which it does so will depend on the interpretation of the phrase ‘events seriously disturbing public order’. This issue has not been resolved by this paper, however four possible approaches to interpretation have been outlined above. Some participants in the Nansen Initiative’s Horn of Africa Regional Consultation in May 2014 suggested that guidance on such questions could be requested from appropriate regional institutions, for example the African Commission on Human and Peoples’ Rights. Others, however, advocated for a more ‘bottom-up’ approach to interpretation, designed to building consensus on the scope of the definition among states party to the 1969 Convention.

Regardless of the approach taken, however, not all persons displaced by natural hazards will be refugees – only where the effects of the hazard amount to an event seriously disturbing public order, *and* where the persons satisfies the several other criteria of the definition, should refugee protection be extended. This has the effect of excluding some, perhaps many, persons displaced by natural hazards. The loss of livelihood due to drought, for example, will not give rise to a refugee claim where the associated disruption is not sufficiently widespread, despite the fact that the effect on the individual may be equally, if not more, severe.

## 2.2.2 Protection

Satisfaction of the 1969 African Refugee Convention’s criteria for refugeehood is a precondition to the acquisition of other protections under the Convention, the most important of which is the right of *non-refoulement* – that is, the right to not to be returned to face harm. This is provided in Art II(3) of the 1969 Convention:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.<sup>177</sup>

The 1969 Convention’s *non-refoulement* provision is couched in similar terms to its international counterpart in the 1951 Refugee Convention, though it is arguably broader than the latter in two respects.<sup>178</sup> First, it is absolute. While the 1951 Convention excludes from protection ‘a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’,<sup>179</sup> the 1969 Convention’s *non-refoulement* provision admits of no exceptions.<sup>180</sup> Second, it includes an explicit prohibition on rejection at the frontier.<sup>181</sup> This is important in a re-

<sup>173</sup> This has sometimes been called ‘surrogate protection’. This is evidenced in the text of the 1969 Convention itself – for example, Art I(4) provides for the cessation of refugee status where a refugee has either voluntarily re-availed himself of the protection of the country of his nationality (Art I(4)(a)), can no longer refuse to avail himself of the protection of his country of nationality (Art I(4)(e)) or enjoys the protection of a new country of nationality (Art I(4)(c)).

<sup>174</sup> 1969 African Refugee Convention, Art I(2), emphasis added.

<sup>175</sup> 1969 African Refugee Convention, Art II(3). Art II(1) also requires signatories to provide asylum to persons who ‘are unable or unwilling to their country of origin or nationality’.

<sup>176</sup> See UNHCR Internal Flight Alternative Guidelines, above n 173.

<sup>177</sup> 1969 African Refugee Convention, Art II(3)

<sup>178</sup> See generally, Okoth-Obbo, above n 143, 88-9.

<sup>179</sup> 1951 Refugee Convention, Art 33(2).

<sup>180</sup> Though it is important to note that refugee status under the 1969 Convention is still subject to the general exclusion clauses provided under Article I(5), which relate to war crimes, crimes against humanity and other serious non-political crimes.

<sup>181</sup> See Murray, above n 143, 220.

gion such as the Horn of Africa, where most cross-border movement is via land and where rejection at the frontier would almost always prevent a person from fleeing danger.<sup>182</sup>

Beyond protection from *refoulement*, it has sometimes been said that the 1969 Convention does not take a particularly rights-based approach to refugee protection.<sup>183</sup> It is true that the Convention does not contain an equivalent list of protections to those listed in the 1951 Convention.<sup>184</sup> It does, however, contain several key protections, including the right to travel documents,<sup>185</sup> protection from discrimination,<sup>186</sup> assistance in securing settlement<sup>187</sup> and voluntary repatriation.<sup>188</sup> While some of these obligations are couched in aspirational, rather than mandatory, terms – states shall use their ‘best endeavours’, for example, to secure the resettlement of refugees<sup>189</sup> – states parties to the Convention nevertheless undertake to perform them in good faith.<sup>190</sup>

In addition to the rights enumerated in the 1969 Convention itself, the Convention’s status as the ‘regional complement’ of the 1951 Convention<sup>191</sup> is said to imply that refugees within the meaning of the Article I(2) expanded refugee definition also acquire the rights conferred on refugees by the 1951 Convention.<sup>192</sup> These include freedom of religion,<sup>193</sup> access to domestic courts,<sup>194</sup> and rights to employment,<sup>195</sup> housing<sup>196</sup> and public education.<sup>197</sup> Against this position, it has also been argued that the provision of the full range of refugee rights to refugees under the 1969 Convention’s expanded refugee definition would impose an unfair burden on poor

countries hosting large numbers of refugees.<sup>198</sup> However, the extension of equivalent rights to refugees under both definitions is strongly supported by the 1969 Convention’s preambular references to the 1951 Convention as the ‘basic and universal instrument relating to the status of refugees’ and the explicit concern of States ‘to establish common standards for their treatment’.<sup>199</sup>

The distinct advantage of a protection regime based on refugee status for persons displaced in the disaster context is that the rights conferred by refugee protection instruments have been designed with the particular needs of displaced persons in mind. The emphasis on socio-economic rights such as employment and housing, and access to documentation, for example, is directed towards promoting self-sufficiency and integration into the host community by refugees. In practice, however, the treatment that refugees under the 1969 Convention receive during their stay in the host territory will depend less on states’ interpretation of their international refugee protection obligations and more on their capacity and willingness to respond. For example, Okoth-Obbo has noted that:

the reality that for refugees, as indeed for several other matters otherwise regulated by law, the main theatre in most of Africa for the day to day mediation of rights and obligations is not that of law and judicature. In the particular case of refugees, politics and resource considerations have had, and continue to have, a far more telling effect.<sup>200</sup>

---

<sup>182</sup> Though the explicit prohibition on rejection at the frontier is indeed a unique feature of the 1969 Convention’s *non-refoulement* provision, this requirement has also commonly been read in to the Article 33 of the 1951 Convention.

<sup>183</sup> See Joe Oloka-Onyango, ‘The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa.’ (1996) 24(3) *Denver Journal of International Law and Policy* 349, 375; Murray, above n 143, 189.

<sup>184</sup> One of the earlier drafts of the Convention contained a list of rights, including e.g. to employment, but these were removed, reportedly as the result of the ‘the concern to ensure full harmony with the principles of the 1951 Convention’. Ivor Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999), 182, cited Okoth-Obbo, above n 143, 103.

<sup>185</sup> 1969 African Refugee Convention, Art VI.

<sup>186</sup> 1969 African Refugee Convention, Art IV.

<sup>187</sup> 1969 African Refugee Convention, Art II(1).

<sup>188</sup> 1969 African Refugee Convention, Art V.

<sup>189</sup> 1969 African Refugee Convention, Art II(1).

<sup>190</sup> VCLT, Art 26.

<sup>191</sup> See 1969 African Refugee Convention Art VIII(2).

<sup>192</sup> See Sharpe, above n 144; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) Ch 6.

<sup>193</sup> 1951 Refugee Convention, Art 4.

<sup>194</sup> 1951 Refugee Convention, Art 16.

<sup>195</sup> 1951 Refugee Convention, Art 17 and 18.

<sup>196</sup> 1951 Refugee Convention, Art 21.

<sup>197</sup> 1951 Refugee Convention, Art 22.

<sup>198</sup> See Toby Mendel, ‘Refugee Law and Practice in Tanzania’ (1997) 9(1) *International Journal of Refugee Law*, 35-59.

<sup>199</sup> 1969 Refugee Convention, preambular para 9. It is also supported by the fact that the enumerated rights in earlier version of the Convention were removed report to ‘ensure full harmony with the principles of the 1951 Convention’; Jackson, above n 185, 182.

<sup>200</sup> Okoth-Obbo, above n 143, 106.

As the 2011 Horn of Africa drought clearly illustrated, large scale influxes such as are likely to occur in a disaster context frequently overwhelm the response capacities of neighbouring states. In response to these challenges, some states in the region have instituted restrictions on the movement of refugees within their territory, including for example policies of encampment.<sup>201</sup>

Despite these challenges, clarity in the scope of the 1969 African Refugee Convention's expanded refugee definition, and in the scope of rights afforded to persons who qualify for refugee status under the definition, would provide a sound framework for both planning and assessing state responses to disaster-related cross-border movement. It would also provide a basis upon which affected states could seek the assistance of the international community in responding to the challenges identified above.

### Recommendation 7:

The capacity of the expanded refugee definition contained in Article I(2) of the 1969 African Refugee Convention to extend protection to some persons displaced in the context of disaster should be explicitly recognised.

### Recommendation 8:

The precise scope of the 1969 Convention's expanded refugee definition – in particular, the phrase 'events seriously disturbing public order' – should be further explored. This could include requesting interpretative guidance from appropriate regional institutions, such as the African Commission on Human and Peoples' Rights, however an approach that focuses on building consensus among states party to the Convention is likely to be more effective. In either case, interpretation of the expanded refugee definition must be consistent with the international law on treaty interpretation.

## 2.3 REGIONAL HUMAN RIGHTS LAW

### 2.3.1 Applicability

The protection of human rights in the Horn of Africa is governed chiefly by the African Charter on Human and Peoples' Rights (African Charter). The African Charter has been ratified by 53 of the 54 Member States of the AU, making it one of the most widely ratified instruments on the continent,<sup>202</sup> and is supported by the Protocol on the Rights of Women, and the African Charter on the Rights and Welfare of the Child. Human rights in Africa are also widely endorsed at the domestic level, through inclusion in domestic laws and constitutions of most African states.<sup>203</sup> For example, the Kenyan Constitution provides that '[t]he State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'<sup>204</sup>

While the African Charter does not explicitly address issues of displacement, most of the rights contained therein are conferred on 'every individual', including displaced persons. In a case concerning the mass expulsion of 517 West African from Zambia, the African Commission on Human and Peoples' Rights, which has the power to provide authoritative interpretations of the Charter,<sup>205</sup> confirmed that the Charter imposes obligations on contracting states 'to secure the rights protected in the Charter to all persons within their jurisdiction, nationals or *non-nationals*'.<sup>206</sup> This includes the right to enjoy all the rights and freedoms contained in the Charter 'without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.<sup>207</sup>

The rights in the African Charter also apply to persons awarded refugee status, in addition to the rights that refugees receive under refugee-specific instruments. A meeting between UNHCR and the African Commission on Human and Peoples' Rights in 2003 concluded that

<sup>201</sup> For example, in January 2013 directive that all Somali refugees and asylum seekers living in Nairobi be forced to relocate to the country's already overcrowded refugee camps near the Somali and South Sudanese borders. The directive was quashed by Kenya's High Court in July 2013. See Simon Ndonga, 'Court Overturns Order to Register Refugees in Camps' All Africa (26 July 2013) <http://allafrica.com/stories/201307270038.html> accessed 29 July 2013.

<sup>202</sup> Only the Constitutive Act of the African Union has the same level of ratification.

<sup>203</sup> Most African states have some form of Bill of Rights. See, eg, The Federal Republic of Somalia, Provisional Constitution August 2012, Ch 2; Djibouti Constitution 1992, Title II.

<sup>204</sup> Constitution of Kenya 2010, Art 21(4). Limited human rights protections may also be found within African sub-regional economic communities. For example, Art 6(d) of the EAC Treaty enforces principles of good governance and the rule of law among Member States. The East African Court of Justice has held that, while it may consider matters involving alleged human rights violations, it does not yet have the direct authority to interpret human rights under the African Charter. See *Attorney General of Rwanda v. Plaxeda Rugumba*, June 2012, EACJ Appellate Division, Appeal No. 1 of 2012.

<sup>205</sup> See African Charter, Art 45(3), which provides: 'The functions of the Commission shall be... [to] Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.'

<sup>206</sup> African Commission Communication No. 71/92: Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) / Zambia (1996), para 22, emphasis added.

<sup>207</sup> African Charter, Art 2.

‘refugees are endowed with the same rights and responsibilities as all other human beings. The specific rights of refugees are an integral part of human rights and are universal indivisible, inter-dependent and inter-related. Where national laws on refugees are inadequate or non-existent, general human rights law should therefore be invoked to protect refugees.’<sup>208</sup>

Africa’s other regional human rights instruments – the Protocol to the Charter on the Rights of Women, and the African Charter on the Rights and Welfare of the Child – provide more targeted rights to women and children respectively. This is important in the disaster context, where marginalised and vulnerable groups, including women, children, the elderly, persons with disabilities and minority groups, often sustain the greatest impact.<sup>209</sup> This is due to the fact that often the most marginalised groups live in the areas most vulnerable to natural hazards,<sup>210</sup> as well as the lack of resources and coping capacities faced by such groups. Children and youth make up approximately half of the population of the Horn of Africa region<sup>211</sup> – according to Zewdu and Hugo, ‘[i]n Somalia, children aged five or less accounted for more than half of the total population that died from famine.’<sup>212</sup> Women (and sometimes children) are most vulnerable to trafficking, including across borders to Africa, Middle East and Europe.<sup>213</sup> Children are also vulnerable to recruitment into armed conflict by groups such as Al-Shabaab.<sup>214</sup> Despite the increased impact of disasters on marginalised groups, such groups may be less likely to be displaced across borders as a result – for example, the poor, who have less access to assistance, information and networks, are in fact more likely to either *not* move, or to move later.<sup>215</sup>

The protection needs of marginalised and vulnerable groups may therefore differ. The Nansen Initiative’s Horn of Africa Desk Review describes the different risks and assistance needs of these different groups, including in areas of mobility, health, caregiving and dietary needs.<sup>216</sup> Unlike international human rights law, the African human rights regime includes a notable absence of specific instrument for other marginalised groups

– including the poor, elderly and disabled. The particular needs of some of these groups are addressed (albeit briefly) in the substantive provisions of the African Charter (see below).

Lastly, the African Charter provides important protections to African peoples, including the right to existence and the ‘unquestionable and inalienable right to self-determination’.<sup>217</sup> As McAdam has emphasised, rights frameworks for protection during displacement should ‘respect the cultural and self-determination right of communities, especially indigenous groups, which may need to be fostered in the place of relocation.’<sup>218</sup> In this respect, African regional human rights law provides a progressive basis for the protection of whole communities, including indigenous and minority groups.

## 2.3.2 Protection

### *Non-refoulement and right to asylum*

As is the case elsewhere in international human rights law, the obligations imposed by African regional human rights instruments may prohibit states from returning, or *refouling*, an individual (non-national) to a territory in which he or she is at risk of certain harms. The application of the *non-refoulement* principle under general human rights law is often described as ‘complementary protection’ – as it provides a form of international protection that is ‘complementary’ to the protection afforded to refugees<sup>219</sup> – though the term is rarely used in the African context.

Under international human rights law, this broader principle of *non-refoulement* is based primarily on obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>220</sup> – in particular on those instruments’ prohibitions on arbitrary deprivation of life, torture and cruel, inhuman and degrading treatment, all of which are replicated in the African Char-

---

<sup>208</sup> See Murray, above n 143, 194.

<sup>209</sup> See Zewdu and Hugo 11, above n 2, 17, who note that children, women and the poor were the most vulnerable and most affected by the Somali famine

<sup>210</sup> See Horn of Africa Desk Review, above n 5, 37.

<sup>211</sup> Zewdu and Hugo, above n 2.

<sup>212</sup> Ibid, 11.

<sup>213</sup> See Ibid, 28.

<sup>214</sup> For example, 1,789 children were reportedly recruited by Al Shabaab in 2012. Ibid, 29.

<sup>215</sup> Ibid, 55, 57.

<sup>216</sup> Horn of Africa Desk Review, above n 5, 37.

<sup>217</sup> African Charter, Art 20(1).

<sup>218</sup> McAdam, above n 8, 260.

<sup>219</sup> See generally, McAdam, above n 193.

<sup>220</sup> As well as similar provisions in the Convention on the Rights of the Child. See Convention on the Rights of the Child, 20 November 1989 (entered into force 2 September 1990), Arts 6 and 37.



ter.<sup>221</sup> In general, the prohibition on return is not explicit – rather, the obligation on states to prevent persons within its jurisdiction and control from being subject to these harms is said to include an obligation not to return persons to any other territory where they would be at risk of those harms.<sup>222</sup> Of most relevance to persons displaced in the context of disaster is the prohibition on return to ‘inhuman or degrading treatment’, which it has been argued may be invoked to prevent return to environment-related harms where such harms, or their effect on the individual, are particularly serious.<sup>223</sup>

At the international level, the high threshold required to establish ‘inhuman or degrading treatment’ has been said to make this provision of limited use in the context of climate change,<sup>224</sup> where the effects are more gradual, though it could be more suited to providing protection in case of particularly severe, sudden onset disasters, such as earthquake or volcano. However, guidelines put forward by the African Commission in relation to inhuman and degrading treatment suggest that the scope of the *non-refoulement* principle may in fact be more limited in Africa. In 2002, the African Commission on Human and Peoples’ Rights adopted a Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Guidelines, also referred to as The Robben Island Guidelines) which provides guidance to African states on the interpretation and implementation of their relevant international obligations. The Guidelines deal explicitly with *non-refoulement*, providing:

States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture.<sup>225</sup>

The omission of ‘inhuman and degrading treatment’ from the Guidelines’ *non-refoulement* provision is conspicuous, particularly as numerous of the Guidelines’ other provisions extend explicitly to ‘torture, cruel, inhuman or degrading treatment or punishment’.<sup>226</sup> The Guidelines thus suggest that the principle of *non-refoulement* under African human rights law extends only to the most severe form of ill-treatment (i.e. torture). This is concerning as such an approach would be inconsistent with the accepted reading of the equivalent principle under international human rights law instruments.

Other rights within the African human rights regime may also give rise to a prohibition on forcible return to ones country of origin. For example, the African Charter provides that ‘[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral’.<sup>227</sup> This is supported by the African Charter on the Rights and Welfare of the Child, which provides that the family unit ‘shall enjoy the protection and support of the State for its establishment and development’<sup>228</sup> and that a child ‘shall, whenever possible, have the right to reside with his or her parents’.<sup>229</sup> The African Commission on Human and Peoples’ Rights has held that protection of the family ‘requires that States refrain from any action that will affect the family unit, including arbitrary separation of family members and involuntary displacement

---

<sup>221</sup> Art 4 of the Charter provides: ‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.’ Art 5 provides: ‘All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.’

<sup>222</sup> See, eg, UN Human Rights Committee, General Comment No. 31, 29 March 2004, which states that ‘the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.’ The exception is Article 3(1) of the Convention Against Torture, which provides: ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’

<sup>223</sup> See McAdam, above n 8, esp Chapter 2.

<sup>224</sup> Ibid. McAdam states that: ‘The very high threshold set in the jurisprudence means that it will likely take some decades before the negative impacts of climate change, interacting with underlying socio-economic vulnerabilities, could, in and of themselves, be regarded as constituting a violation of [the prohibition on inhuman and degrading treatment].’ At 76.

<sup>225</sup> African Commission on Human and Peoples’ Rights, ‘Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa’, 32nd Session, 17 - 23 October 2002: Banjul, The Gambia (African Commission Guidelines), Art 15.

<sup>226</sup> For example, Art 9 of the African Commission Guidelines provides: ‘Circumstances such as state of war, threat of war, internal political instability or any other public emergency, shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.’ This distinction in the Guidelines is also in contrast to the approach taken by UN Human Rights Committee, which rarely distinguishes between torture and other forms of ill-treatment under the equivalent provision in Art 7 of the ICCPR. See McAdam, above n 8, 63-4.

<sup>227</sup> African Charter, Art 18(1).

<sup>228</sup> African Charter on the Rights and Welfare of the Child, 1990, (entered into force 29 November 1999) (African Charter on Children’s Rights), Art 18(1)

<sup>229</sup> African Charter on Children’s Rights, Art 19(1)

of families<sup>230</sup> and that the mass deportation of West Africans by Angola, which resulted in some deportees being separated from their families, violated Article 18 of the Charter.<sup>231</sup>

To the extent that the principle of *non-refoulement* applies to persons displaced across borders in the disaster context, it will be particularly important in providing access to safety in the territory of another state. As is the case at the international level, the principle of *non-refoulement* under African regional human rights instruments includes an indirect right to admission to a state's territory, in situations where refusal to admit would result in a person being returned to a country where he or she was at risk of torture, inhuman or degrading treatment or arbitrary deprivation of life.<sup>232</sup>

In the African context, the principle of *non-refoulement* is further supported by the right to asylum, which is provided by Article 12(3) of the African Charter. It states that:

every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.<sup>233</sup>

The African Charter's right to asylum is often cited as one of its most progressive features, as it includes the right to seek *and obtain* asylum, which is broader than the equivalent right to seek *and enjoy* asylum under the Universal Declaration of Human Rights (UDHR). However it will have little relevance for persons displaced by disaster, as the language of the provision limits the

right to those fleeing persecution, such that it would be appear to be limited to refugees as defined in the 1951 Refugee Convention, and not to cover other displaced persons, including refugees under the 1969 Convention's expanded refugee definition.<sup>234</sup> Furthermore, the provision confers a right 'to seek and obtain asylum in other countries *in accordance with laws of those countries and international conventions*'.<sup>235</sup> The wording here suggests that the right is subject to, and limited by, the domestic laws of the receiving state.<sup>236</sup>

### Rights during stay

In addition to protection from return, a number of the rights contained in African regional human rights instruments will be particularly applicable to displaced persons during their displacement. Under the African Charter, these include the right to life and integrity of the person,<sup>237</sup> freedom of movement within the state,<sup>238</sup> right to leave and return to his country,<sup>239</sup> rights to property,<sup>240</sup> physical and mental health,<sup>241</sup> and family unity.<sup>242</sup> As Murray notes, rights such as freedom of movement, work and education help refugees (and other displaced persons) to become self-sufficient in their host state.<sup>243</sup> General human rights law may also be a more appropriate mechanism for addressing the term needs of displaced persons who qualify for refugee status. According to Hyndman and Nylund, '[r]ecognition must... be given to the fact that there may be circumstances under which refugees are not contemplating returning to their country of origin, and therefore must be able to enjoy their human rights in the place that they have taken refuge.'<sup>244</sup>

<sup>230</sup> African Commission on Human and Peoples' Rights, Communication No. 279/03-296/05 : Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan (2009), para 214.

<sup>231</sup> African Commission and Human and Peoples' Rights, Union inter africaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme and others v. Angola, 38. See also African Commission on Human and Peoples' Rights, Communication No. 97/93\_14AR: John K. Modise / Botswana (2000), where the deportation of a man from Botswana to South Africa, which denied him his family and his family his support, also constituted a violation of Article 18(1) of the Charter.

<sup>232</sup> See also, Kälin and Schrepfer, above n 66, 35.

<sup>233</sup> African Charter, Art 12(4). The right to asylum was also emphasised in the OAU's 1995 Plan of Action, developed in conjunction with UNHCR at a regional conference on refugees and displaced persons in the Great Lakes Region of Africa, emphasised that 'the granting of asylum... should be seen as a responsibility and an obligation under international law.' Plan of Action of the OAU/UNHCR Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, adopted by the OAU/UNHCR Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, 12-17 February 1995, Bujumbura, para 25.

<sup>234</sup> The right to asylum has not been explicitly considered by the African Commission on Human and Peoples' Rights. In the 2009 case of Curtis Francis Doebller / Sudan, concerning the forced repatriation of Ethiopian refugees in Sudan in 1999, the Commission stated that 'the *refoulement* of refugees to their country of origin where they feared persecution would constitute a violation of the Charter' but does not say of which article.

<sup>235</sup> African Charter, Art 12(4), emphasis added.

<sup>236</sup> See generally Okoth-Obbo, above n 143, 89.

<sup>237</sup> African Charter, Art 4.

<sup>238</sup> African Charter, Art 12(1).

<sup>239</sup> African Charter, Art 12(2).

<sup>240</sup> African Charter, Art 14.

<sup>241</sup> African Charter Art 16.

<sup>242</sup> African Charter, Art 18.

<sup>243</sup> Murray, above n 143, 210.

<sup>244</sup> Cited Murray, above n 143, 209.

Specific rights for vulnerable and marginalised groups provide important recognition of the different risks and needs faced by such groups. Some of these rights are found within the African Charter itself, which obliges States to ensure the elimination of discrimination against women and guarantee the protection of rights of women and children.<sup>245</sup> In addition, Article 18 of the Charter provides that:

The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.<sup>246</sup>

The African Charter on the Rights and Welfare of the Child replicates many of the rights enumerated in the African Charter, as well as providing some additional child-specific rights. These include the right to the nationality of the State that the child is born in, if not entitled to nationality elsewhere,<sup>247</sup> special protection for children separated from parents,<sup>248</sup> as well as appropriate protection and assistance to children who are refugees or internally displaced persons. Significantly, the last of these includes children displaced ‘through natural disaster’.<sup>249</sup> This reflects the definition of an internally displaced persons in the Kampala Convention for IDPs.<sup>250</sup>

The rights of peoples will also be relevant in the context of disaster-related displacement, in particular where whole communities have been displaced and in situations where return to the place of origin is not possible. Most importantly, Article 22 of the Charter provides:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.<sup>251</sup>

Though many of the rights provided by human rights instruments in the Horn of Africa will be relevant to persons displaced across borders in the context of disaster, the status of such persons during displacement is an important omission from international and regional human rights law.<sup>252</sup> Arguably, it is incumbent upon states to provide an appropriate legal status to individuals which would facilitate the provision of the other rights that the state is obliged to uphold, including movement within and between states and access to relevant health and education facilities. However, such an approach would still depend on displaced persons being able to access the territory of the state. As noted above, this will in turn depend on the scope and application of the right to asylum and states’ *non-refoulement* obligations, and thus may not extend to all disaster-displaced persons. In any event, using human rights law to regularise status of the persons displaced across border remains along way away from the current practice of African (and other) states.

### Recommendation 9:

The scope of the principle of *non-refoulement* under African regional human rights instruments provides a potential avenue for ensuring access to territory and temporary refuge for persons displaced in the context of disasters, particularly in the case of severe and sudden-onset disasters.

### Recommendation 10:

It would be helpful for the African Commission to clarify its Guidelines in relation to the principle of *non-refoulement* under the Article 5 of the African Charter (prohibition on torture, cruel, inhuman or degrading punishment and treatment). In any case, this provision must be read in conjunction with African states’ *non-refoulement* obligations under international human rights law, including customary international law.

<sup>245</sup> African Charter, Art 18(3).

<sup>246</sup> African Charter, Art 18(4).

<sup>247</sup> African Charter of Children’s Rights, Art 6(4).

<sup>248</sup> African Charter of Children’s Rights, Art 25.

<sup>249</sup> African Charter of Children’s Rights, Art 23(4).

<sup>250</sup> See section 1.2 of this report.

<sup>251</sup> African Charter, Art 22(1).

<sup>252</sup> See, eg, Kälin and Schrepfer, above n 66, 25.

## 2.4 TEMPORARY PROTECTION ARRANGEMENTS

Temporary protection is a broad concept that describes a range of legal and non-legal arrangements for temporary admission and stay to a territory, usually during situations of mass influx. On the one hand temporary protection has been described as a ‘pragmatic tool’ for ‘offering sanctuary to those fleeing humanitarian crises’.<sup>253</sup> A 2011 UNHCR Roundtable on Climate Change and Displacement recommended:

In some situations of external displacement following natural disasters or other sudden-onset events, a practical response would be for states to grant admission and some form of provisional, interim or temporary stay, either on an individual or group basis.<sup>254</sup>

On the other hand, states have been criticised for using ‘temporary protection’ as a means of avoiding the fulfilment of their full protection obligations under human rights and refugee protection instruments,<sup>255</sup> and as ‘a strategy to shift refugee protection from the realm of law to that of politics and voluntary humanitarian assistance’.<sup>256</sup> Temporary protection mechanisms are frequently discretionary – even where they have been set down in law, as is the case for example in the United States and the European Union, the activation of temporary protection still requires an executive decision to be taken.<sup>257</sup>

This section will analyse the provision of temporary protection under existing African laws and state practice. It will consider, first, whether regional African human rights and refugee protection instruments support an obligation on African states to provide temporary protection to persons displaced in the context of disasters. Second, it will provide some examples of

state allowing for the temporary admission and stay of populations displaced by disaster outside of formal legal arrangements, on an ad hoc or discretionary basis. As the below will demonstrate, while temporary protection mechanisms may provide a useful tool for admission and temporary stay following a disaster, their capacity to provide meaningful protection to disaster-affected persons is limited.

### 2.4.1 Applicability

There are several examples of African states providing temporary refuge to displaced persons on an ad hoc basis, including in the context of natural disaster. For example, Edwards notes the common practice among African states of giving sanctuary to persons fleeing environmental catastrophes, citing the example of Rwanda’s hosting Congolese fleeing the eruption of Mount Nyiragongo in January 2002.<sup>258</sup> Uganda also provided temporary refuge to Congolese fleeing the eruption, permitting them to stay within Uganda’s borders and allowing access by international aid agencies to provide relief.<sup>259</sup> Botswana and Tanzania have admitted people from neighbouring states fleeing disasters such as floods on a humanitarian basis.<sup>260</sup> Temporary protection has even been offered by African states to nationals from outside Africa itself. In 2010, for example, the Senegalese government extended an invitation to displaced Haitians for resettlement in their original lands.<sup>261</sup>

These ‘temporary protection’ arrangements have usually been group-based – i.e. extended to a particular population – and informal – that is, they have been based on principles of humanitarianism and African solidarity, rather than on legal protection obligations.<sup>262</sup> Unlike some other regions, temporary protection has not received specific attention within African refugee and/or human rights regimes, at either the regional or domestic

---

<sup>253</sup> UNHCR, ‘Guidelines on Temporary Protection or Stay Arrangements’, para 3.

<sup>254</sup> UNHCR ‘Summary of Deliberations on Climate change and Displacement’ Bellagio, Italy, from 22 to 25 February 2011., para 17

<sup>255</sup> Michael Kagan, ‘UNHCR Issues New Guidelines on Temporary Protection. They Need a Rewrite.’ (RSD Watch, 20 March 2014).

<sup>256</sup> Fitzpatrick, ‘Temporary Protection’ at 4, cited Murray, above n 143, 209.

<sup>257</sup> See McAdam, above n 8, 100. The US’s Temporary Protected Status, and the EU’s temporary protection regime require decisions by the Attorney General and Council of the European Union respectively in order for temporary protection to be accessed.

<sup>258</sup> Edwards, above n 129, 227.

<sup>259</sup> Discussion during Horn of Africa’s Regional Consultation.

<sup>260</sup> See McAdam, above n 8, 107, citing Kälin and Schrepfer’s original study, 37. ‘During a visit in Mozambique and South Africa in 2008 we heard anecdotal evidence that people from Mozambique and Malawi look for temporary refuge in neighboring countries quite regularly when displaced by flooding.’ Kälin and Schrepfer, above n 66, 14.

<sup>261</sup> Cited McAdam, above n 8.

<sup>262</sup> For example, Kälin and Schrepfer, above n 66, note: ‘Although regional practice has been to permit people who cross an international border to flee a natural disaster to remain temporarily (e.g. Congolese fleeing eruption of Mount Nyiragongo in 2002 and crossing into Rwanda), African governments have never characterized this as an obligation arising under the OAU Convention.’ Kälin and Schrepfer, above n 66, 14. Edwards also notes ‘Temporary protection schemes are frequently justified by states as extra-treaty measures and falling therefore within their sovereign discretion.’ Alice Edwards, ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13 Melbourne Journal of International Law 595, 3.

levels.<sup>263</sup> This has been identified as a shortcoming of existing legal frameworks, as states perceive a lack of formal mechanisms available for offering sanctuary during humanitarian crises, including in the disaster context.<sup>264</sup> To the extent that persons displaced by disaster qualify for refugee status under the 1969 Convention, the protection it provides may be characterised as ‘temporary’. Furthermore, the broader concept of *non-refoulement* in African regional human rights law will support temporary admission and stay for disaster-affected persons who are at risk of certain harms if returned. Beyond this, however, there is little support in African regional frameworks for an obligation on states to provide temporary safe haven to persons displaced in the context of disaster.

Where displaced populations qualify for refugee status under either the 1951 Refugee Convention or the 1969 African Refugee Convention, their protection will be governed by those instruments. As a matter of law, such protection is temporary – in the sense that it does not give a right to permanent residence or settlement and is limited by the instruments’ respective cessation clauses.<sup>265</sup> Refugee protection in Africa has also been linked with the concept of ‘temporary protection’ for two additional reasons.

First, Article II(5) of the 1969 Convention deals explicitly with the concept of ‘temporary residence’. It provides:

Where a refugee has not received the right to reside in any country of asylum, he may be granted *temporary residence* in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.<sup>266</sup>

While this provision has sometimes been said to support the provision of ‘temporary protection’ to African refugees,<sup>267</sup> such a reading is incorrect. In fact, it is concerned more with responsibility sharing among African states than it is with limiting protection. As Rutinwa has pointed out, ‘where a person is resettled from one African country to another on account of the

first country not being able to continue to provide him or her asylum, the function of resettlement in this case is not to terminate but to continue the refugee status of that person but in a different country’.<sup>268</sup> Thus it is the ‘sojourn in the first country of asylum, not the protection, that is temporary’.<sup>269</sup>

Second, the widespread use of *prima facie* refugee status determination (PFRSD) on the continent, in particular under the 1969 Convention’s expanded refugee definition, has also been said to make African refugee protection a form of ‘temporary protection’.<sup>270</sup> The relationship between PFRSD and temporary protection has been noted elsewhere. UNHCR’s Note on International Protection describes temporary protection as ‘a variation of the admission and temporary refuge based on *prima facie* or group determinations of the need for international protection that have been used frequently to deal with mass flows of refugees in other parts of the world’;<sup>271</sup> while its more recent Guidelines on Temporary Protection advocate the use of temporary protection where ‘individual status determination is either not applicable or feasible, or both’.<sup>272</sup> However, while the expanded refugee definition’s recognition of widespread and indiscriminate forms of harm – such as events seriously disturbing public order – might support the use of PFRSD,<sup>273</sup> refugee status conferred under such procedures is usually no more ‘temporary’ than that awarded via individual status determinations. Numerous refugee law scholars have noted that the presumption of refugeehood applied during PFRSD constitutes conclusive evidence of refugee status and those recognised as refugees on a *prima facie* basis must be afforded the same treatment under refugee protection instruments as those subjected to other forms of status determination.<sup>274</sup> In state practice, refugees are generally afforded the same status and rights, regardless of the method of status determination used to confer status. For example, Somalis fleeing to Kenya during the 2011 Horn of Africa crisis were awarded refugee status under PFRSD procedures, but were awarded the same status and rights as other refugees in Kenya, whose status was awarded under individual RSD procedures.

<sup>263</sup> This is in contrast to, e.g., the EU Temporary Protection Directive. 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 Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof.

<sup>264</sup> This was identified and discussed at length during the Horn of African Regional Consultation.

<sup>265</sup> Cessation is dealt with by Art I(4) of the 1969 African Refugee Convention.

<sup>266</sup> 1969 African Refugee Convention, Art II(5), emphasis added.

<sup>267</sup> See generally, Edwards, above n 129, 15-6.

<sup>268</sup> Bonaventure Rutinwa, ‘*Prima Facie* Status and Refugee Protection’ UNHCR New Issues in Refugee Research, October 2002, 16.

<sup>269</sup> *Ibid.*

<sup>270</sup> See generally, Sharpe, above n 144, 27-8.

<sup>271</sup> UNHCR, Note on International Protection, 7 September 1994, para 46.

<sup>272</sup> UNHCR, Guidelines on Temporary Protection or Stay Arrangements, February 2014, para 10.

<sup>273</sup> Though numerous scholars have noted that *prima facie* refugee status determination could equally be used to determine refugee status under the 1951 Refugee Convention. For a detailed discussion see Sharpe, above n 144, 27-30.

<sup>274</sup> See generally, Sharpe, above n 144.



The broader principle of *non-refoulement* in African regional human rights law – in particular, under the African Charter on Human and Peoples’ Rights – also provides a form of temporary protection, as it prohibits return to a territory for as long as such return would put a person at risk of certain harms. As discussed above in section 2.3, however, this may include some, but not all, persons displaced in the context of disaster.

## 2.4.2 Protection

As noted above, temporary protection arrangements can be both tools of protection and used to limit the rights of displaced persons. According to UNHCR’s International Note on Protection, at a minimum temporary protection should include the following basic elements: admission to territory, respect for basic human rights, protection against *refoulement*, and repatriation when conditions allow.<sup>275</sup> The satisfaction of these basic elements will rest on certain other conditions being met – for example, states must provide a means for documentation to allow identification of persons with particular vulnerabilities.<sup>276</sup>

In general, however, temporary protection is often viewed as an exceptional measure and associated with a lower standard of rights protection than that afforded to refugees. As noted by UNHCR,

‘since [temporary protection] is conceived as an emergency protection measure of hopefully short duration, a more limited range of rights and benefits offered in the initial stage than would customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol.’<sup>277</sup>

As noted above, the main instruments governing ‘temporary protection’ in Africa are those relating to refugee protection and human rights. For those qualifying for refugee status, minimum standards of treatment will be governed by international and regional refugee law (see section 2.2.2 above), while other persons displaced across borders will benefit from the general human rights protections afforded under the African Charter and related instruments, which are owed by states to all persons within their territory and jurisdiction.<sup>278</sup>

In 2013, UNHCR’s Global Roundtable on Temporary Protection took the view that formalising temporary

protection obligations, for example through the drafting of a protocol to an existing treaty, would be premature.<sup>279</sup> However, where temporary protection is offered on an informal, or ad hoc, basis, displaced persons may remain without legal status in the territory of the country of refuge and as a result without access to meaningful protection during their stay.

### Recommendation 11:

The development of a formal temporary protection regime could provide a useful mechanism for affording short-term refuge to persons displaced by disaster in Africa and would reflect the good will of African states in providing refuge to neighbours in distress. In order for such a framework to provide meaningful protection, however, it must respect the principle of *non-refoulement*, provide some form of legal status, and uphold the rights to which all displaced persons are entitled under international and regional human rights instruments.

## 2.5 MANAGING ‘MIXED MIGRATION’

One of the key challenges faced by states in responding to the protection needs of persons displaced across borders in the context of disasters is the mixed nature of people movement across borders. This issue is particularly relevant in the Horn of Africa, where displaced persons, including refugees and those fleeing disasters and the effects of climate change, frequently travel alongside other (economic) migrants and in search of similar work and livelihood opportunities. Zewdu and Hugo stress that the need to recognise and deal with mixed migration is one of the key lessons to be learned from the 2011 Horn of African drought and famine.<sup>280</sup> According to their research,

much of the mobility in the Horn of Africa is a ‘mix’ of economic and environment migration, as well as conflict. The concept of mixed migration is important in the region, more than any other region in the world. In the Horn of Africa mixed migration includes irregular migrants, refugees and asylum seekers, victims of trafficking, stateless persons and unaccompanied minors and separated children. These migrants move in different directions within and beyond the region for multiple interrelated reasons.<sup>281</sup>

<sup>275</sup> UNHCR Note on International Protection, 7 September 1994, para 48.

<sup>276</sup> UNHCR, Guidelines on Temporary Protection or Stay Arrangements, February 2014, para 8

<sup>277</sup> UNHCR Note on International Protection, 7 September 1994, para 46. See, eg, Executive Committee of the High Commissioner’s Programme, ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx: No 22 (XXXII)’, which sets out minimum standards of treatment for even non-refugees.

<sup>278</sup> See section 2.3 above.

<sup>279</sup> See UNHCR, ‘Concept Note: Global Roundtable on Temporary Protection’ 15 – 16 July 2013, San Remo, Italy, para 1.

<sup>280</sup> Zewdu and Hugo, above n 2, 56.

<sup>281</sup> Zewdu and Hugo, above n 2, 24, citations omitted.

Differentiating between those who have legitimate protection needs and those who travel for economic reasons is made difficult by the fact that the various groups frequently travel by the same routes, using the same transport and, in some cases, the same services of smugglers.<sup>282</sup> The complex motivations of people travelling such routes compounds the problem. While legal and policy frameworks generally distinguish between ‘voluntary’ migrants and those whose movement is ‘forced’, the decision to leave is usually more complex than this. According to the University of Oxford’s Migration Observatory,

Often poverty, inequality and conflict co-exist: those who flee a country where conflict, persecution, discrimination and human rights abuse are rife, for example, may also be trying to escape dire economic circumstances -- which may themselves feed into such conflict, persecution, discrimination and human rights abuse.<sup>283</sup>

This is certainly true of disaster-related displacement in the Horn of Africa. The region is one of the poorest in the world and, indeed, the poor and very poor were among those most affected by the 2011 drought.<sup>284</sup> Conflict also interacts with environmental factors in the decision to leave for many. This was particularly the case in Somalia, where, as Zewdu and Hugo note, ‘although the 2011-12 drought did not occur during a period of armed struggle, the policies of Al-Shabaab and the global war on terror escalated the calamities in many ways.’<sup>285</sup>

The first thing to note in relation to existing frameworks for the protection of displaced persons in Africa is that the standards sets out in such frameworks are not affected by states’ need or desire to manage mixed migration. For example, as noted above in section 2.3, the rights set out in the African Charter and other regional human rights instruments apply to all persons within a state’s jurisdiction, including non-nationals and without reference to the reason for travel there. The rights set out for refugees in both the 1951 Refugee Convention and the 1969 African Refugee Convention apply to all persons who satisfy those instruments’ respective definitions of a refugee, irrespective of their mode of travel and whether or not they travel together with non-refugees.

Furthermore, refugees are entitled to protection as such even if their motivations for movement include non-protection related reasons. The definitions of a refugee in both instruments do not require that the relevant refugee criteria provide the *only* motivation for leaving ones country of origin, and indeed many persons fleeing persecution or one of the 1969 Convention’s enumerated events – including events seriously disturbing public order – may be additionally motivated by the need or desire to improve their economic opportunities and access to services such as health and education. Lastly, it is important to remember that those who are strictly (economic) migrants have rights and may be vulnerable too.<sup>286</sup> For example, one of IOM’s main areas of work in relation to mixed migration is the provision of assistance to migrants ‘through operational support, medical referrals, and distribution of non-food items’.<sup>287</sup>

Nevertheless, the phenomenon of mixed migration does have implications, particularly procedural, for the protection of persons displaced across borders. These implications and possible approaches for addressing them have been helpfully outlined in the refugee context, in UNHCR’s 10-point Plan of Action for Refugee Protection and Mixed Migration.<sup>288</sup> In particular, UNHCR exhorts states dealing with mixed migration to ensure they develop and implement protection-sensitive entry systems and reception arrangements, aimed to documenting all new arrivals, identifying those with protection needs and making referrals where necessary for assistance or further determinations (e.g. formal refugee status determination procedures).<sup>289</sup> Implementation of mechanisms such as these will be particularly important in ensuring that African states adhere to their *non-refoulement* obligations under international and regional human rights law (see section 2.3) and that they identify and provide adequate protection to those fleeing disasters who qualify for refugee status – e.g. because the disaster amounts to an event seriously disturbing public order (see section 2.2). They could also be used by states and/or regional organisations in the development of new protection frameworks for disaster-displaced persons, such as temporary protection (see section 2.4).

In the reception and management of mixed migration flows, conceptual clarity and the use of language is particularly important, in order to distinguish between

<sup>282</sup> Johannes van der Klaauw, ‘Refugee Rights in Times of Mixed Migration: Evolving Status and Protection Issues’ (2020) 28(4) *Refugee Survey Quarterly* 59, 60.

<sup>283</sup> Nicholas van Hear, ‘Policy Primer – Mixed Migration: Policy Challenges’ The Migration Observatory, 2011.

<sup>284</sup> Zewdu and Hugo report that ‘Almost all famine affected rural residents are either classified as in the ‘poor’ or ‘very poor’ category.’ Above n 2, 8.

<sup>285</sup> *Ibid*, 11.

<sup>286</sup> See, eg, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990 (entered into force 1 July 2003).

<sup>287</sup> International Organization for Migration, ‘Mixed Migration in the Horn of Africa’ brochure available at: <http://www.iom.int/files/live/sites/iom/files/Country/docs/Mixed-Migration-HOA.pdf>.

<sup>288</sup> UNHCR, ‘Refugee Protection and Mixed Migration: A 10-Point Plan of Action’ 1 January 2007.

<sup>289</sup> *Ibid*, see especially points 3, 4, 5 and 6.

those who have a valid claim to protection and those who do not. For example, while IOM has tended to include refugees and other displaced persons within the broad definition of ‘international migrant’,<sup>290</sup> others, particularly refugee advocates, emphasise the need to maintain a clear distinction between protection imperatives on the one hand, and migration control strategies on the other.<sup>291</sup> UNHCR has argued strongly against subsuming refugees and other forcibly displaced persons within the broad category of ‘migrant’.<sup>292</sup> The development of any new protection frameworks for those displaced in the context of disasters will need to ensure that the beneficiaries of such frameworks are adequately defined – in particular, any such definition must address the nature or degree of ‘force’ required in the decision to move, and the relationship between disaster and other motivating factors, including conflict and poverty.

### Recommendation 12:

The challenges associated with mixed migration flows do not detract from the protection obligations owed by states to displaced persons, in particular under human rights and refugee law. States should ensure that admission and reception arrangements are capable of identifying persons with protection needs and referring them, where necessary, for assistance or for further status determination. The development of any new protection framework for disaster-displaced persons must include a clear definition of its intended beneficiaries to facilitate their identification within mixed migration flows.

---

<sup>290</sup> See, eg, International Organization for Migration, Constitution, 19 October 1953 (entered into force 30 November 1954) preambular para 3.

<sup>291</sup> See van der Klaauw, above n 282, 60.

<sup>292</sup> See Erika Feller, ‘Refugees are Not Migrants’ (2005) 24(4) *Refugee Survey Quarterly* 27.





## 3. DURABLE SOLUTIONS

**UNHCR has identified three main durable solutions for refugees and other displaced persons. These are: voluntary repatriation, local integration and resettlement to a third country.<sup>293</sup> These have also been recognised by the African state community as the three options for bringing an end to displacement.**

The Migration Policy Framework for Africa urges states to:

Use voluntary repatriation (through repatriation, reintegration, rehabilitation, reconstruction mechanisms), local integration (through development by local integration mechanisms) and resettlement, as applicable, to address protracted displacement situations through a comprehensive and integrated approach based on international solidarity and burden sharing.<sup>294</sup>

Durable solutions are described as the ‘ultimate goal’ of protection, designed to end displacement and allow displaced persons ‘to rebuild their lives in dignity and peace’.<sup>295</sup> Failure to secure durable solutions leads to situations of protracted displacement, in which refugees and other displaced persons live in limbo, unable to either establish themselves in their host community or to return home. This is particularly important in the Horn of Africa, where displacement has often been protracted.<sup>296</sup> For example, Somali displacement during the 2011 Horn of Africa drought only added to the population of long-term displaced Somalis in Kenya, some of whom have been living in Kenya for more than twenty years.

Durable solutions are equally important for persons displaced in the disaster context, whose ability to become self-sufficient will depend on their being able to re-establish their lives and livelihoods as soon as

possible after displacement. This section will analyse the potential for all three durable solutions to be achieved under existing frameworks in the Horn of Africa. It will then provide a more detailed analysis of the legal frameworks governing the voluntary repatriation of persons displaced by disaster in the Horn of Africa. It will assess the obligations placed on both sending and receiving states in relation to the timing of return, the voluntary nature of repatriation and appropriate assistance for returnees both during and after return. It will then consider the potential of specific agreements – such as the tripartite agreement recently concluded between the governments of Kenya and Somalia and UNHCR – to facilitate return following a disaster.

### 3.1 DURABLE SOLUTIONS – GENERAL

In the Horn of Africa, as elsewhere in Africa, return has been the preferred solution to displacement of host governments. As noted by Jeff Crisp,

from the mid-1980s onwards, a consensus was forged around the notion that repatriation – normally but not necessarily on a voluntary basis – was the only viable solution to refugee problems in Africa and other low-income regions.<sup>297</sup>

<sup>293</sup> UNHCR, Framework for Durable Solutions and Persons of Concern, May 2003, para 12.

<sup>294</sup> Migration Policy Framework, 23.

<sup>295</sup> UNHCR, ‘Durable Solutions’, available at: <http://www.unhcr.org/pages/49c3646cf8.html>.

<sup>296</sup> As noted by Jeff Crisp, in many part of Africa, “‘temporary’ refugee camps have become semi-permanent settlements’. Cited Katy Long, ‘Permanent crises? Unlocking the protracted displacement of refugees and internally displaced persons’ University of Oxford, Refugee Studies Centre, October 2011, 2.

<sup>297</sup> Jeff Crisp, ‘No Solution in Sight: The Problem of Protracted Refugee Situations in Africa’, UNHCR New Issues in Refugee Research, January 2003, 3.

The 1994 Addis Ababa Document on Refugees and Forced Population Displacements in Africa describes voluntary repatriation as the ‘best solution’ to displacement<sup>298</sup> and calls on states to ‘actively promote voluntary repatriation’.<sup>299</sup> Few African states have established resettlement programs for refugees or other displaced persons, and restrictive asylum policies, including restrictions on movement and access to labour markets,<sup>300</sup> reduce the possibility of even *de facto* local integration.<sup>301</sup> In many cases, return home following disaster will be the most readily available and appropriate solution. As noted by Kalin and Schrepfer, particularly in the context of sudden-onset disasters, ‘displacement need not be long-term, provided recovery efforts are effective and return in principle remains possible as a durable solution in many cases.’<sup>302</sup>

Despite the preference by states for return as a durable solution, in practice such return will not always be possible.<sup>303</sup> In the disaster context, the long-term devastation caused by disaster, lack of access to livelihoods or assistance, and general insecurity in the country of origin may also make return unviable. This was recognised at the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa in 1994, which noted:

The main constraint to voluntary repatriation is continuing insecurity, violence or strife in the countries of origin. Moreover, many areas of potential repatriation have suffered years of destruction, stagnation and decay.<sup>304</sup>

Under existing regional frameworks the prospects for durable solutions other than return are limited. For example, persons displaced in the context of disaster

will generally not be able to access the well-developed resettlement programs managed by UNHCR, even where they qualify for refugee status under the 1969 Convention, as such programs generally facilitate resettlement in Western, industrialised nations who recognise refugees only under the more limited definition of the 1951 Refugee Convention.<sup>305</sup>

There appears to be little appetite among African states for local integration. Several countries in the region have tolerated the ‘self-settlement’ of displaced persons, without official assistance, in host communities.<sup>306</sup> However, instances of formal integration, defined as ‘the granting of full and permanent asylum, membership and residency status, by the host government’,<sup>307</sup> are rare. For example, Uganda’s Self Reliance Strategy for refugees, whereby refugees are able to access education, income generation programmes and land to grow their own food,<sup>308</sup> is uniquely progressive in comparison to most neighbouring states. Even so, the policy does not envisage permanent integration and has been criticised for imposing continued limitations on refugees’ freedom of movement, leading to economic and social isolation.<sup>309</sup> One of the complexities associated with local integration as a permanent solution is the effect it might have on local communities. The need to address the needs of host communities when addressing both the short- and long-term needs of displaced persons is often emphasised.<sup>310</sup> For states in the Horn of Africa region, who are generally poor and face significant internal challenges, this adds to the perceived burden of long-term integration.

As discussed above, in section 2.3, the jurisprudence of the African Commission on Human and Peoples’ Rights suggests that the right to family unity under the African

<sup>298</sup> Organization of African Unity, ‘Addis Ababa Document on Refugees and Forced Population Displacements in Africa’, 10 September 1994 (Addis Ababa Document), para 19.

<sup>299</sup> Addis Ababa Document, para 11.

<sup>300</sup> For example, through a policy of encampment, such as in Kenya.

<sup>301</sup> See Long, above n 297, 8, referring to A Lindley A Haslie, ‘Unlocking Protracted Displacement: Somali Case Study’ (2011) RSC Working Paper No. 79.

<sup>302</sup> Kälin and Schrepfer, above n 66, 40.

<sup>303</sup> Kälin and Schrepfer, above n 66, who note that where an area becomes too dangerous for human habitation, return will not be an option and more durable solutions will need to be found. At 42.

<sup>304</sup> Addis Ababa Document, para 20.

<sup>305</sup> However field research undertaken by the author in Kenya in 2012 suggested that, in practice, the legal basis for refugee status was often not a significant factor on decision regarding resettlement as the majority of refugees awarded status under the 1969 Convention – mainly Somalis and Darfuri Sudanese – would also qualify for refugee status under the 1951 definition. For full discussion of these definitions see above section 2.2.

<sup>306</sup> Karen Jacobsen, ‘Local Integration: The Forgotten Solution’ Migration Policy Institute October 1, 2003.

<sup>307</sup> Karen Jacobsen, ‘The forgotten solution: local integration for refugees in developing countries’, UNHCR New Issues in Refugee Research, July 2001.

<sup>308</sup> See UNHCR, ‘Refugees in Uganda move towards self-reliance’, 13 October 2003, available at: <http://www.unhcr.org/3f8aa81e4.html>.

<sup>309</sup> See Sarah Dryden-Peterson and Lucy Hovil, ‘A Remaining Hope for Durable Solutions: Local Integration of Refugees and Their Hosts in the Case of Uganda’ (2004) 22(1) *Refugee* 29. Its implementation has also been undermined by ongoing civil conflict in refugee settlement areas. See UNHCR, above n 309. On Uganda’s refugee rights protection, see generally Marina Sharpe and Salima Namusobya, ‘Refugee Status Determination and the Rights of Recognized Refugees under Uganda’s Refugees Act 2006’ 24(3) *International Journal of Refugee Law* 561.

<sup>310</sup> See, eg, Zewdu and Hugo, above n 2, 56.

Charter might provide a basis for local integration for those displaced persons who have close family members in the host state,<sup>311</sup> however this has not been fully explored and, in any event, would likely provide solutions for only very few displaced persons. There are also some hopes that the development of ‘regional citizenships’ in conjunction with regional economic communities, such as within the EAC, could improve the prospects of integration – for example, in West Africa, ECOWAS citizenship has been credited with helping to resolve the protracted displacement of Liberian and Sierra Leonean refugees<sup>312</sup> – though as noted above, in sections 1.1 and 2.1, progress in this area has been more limited in the Horn of Africa region and many disaster-displaced persons may be excluded from sub-regional freedom of movement arrangements.<sup>313</sup>

Thus, as noted above, repatriation may be the most appropriate, or indeed the only, option for many persons displaced in the disaster context. However, as the Horn of Africa drought demonstrates, even once the critical phased of a disaster has passed, return may be complicated by more general conditions in the country of origin – including insecurity, lack of effective governance and access to livelihoods. As noted by Zewdu and Hugo in relation to Somalis who fled during the 2011 Horn of Africa drought,

the return or repatriation of migrants and displaced people where the circumstances at the place of origin were unchanged made them more vulnerable.<sup>314</sup>

This leads to a risk of further displacement.<sup>315</sup> Indeed some states in the region have been criticised for focusing on permanent return as a solution, while ignoring ‘the precarious conditions and lack of sustainable reintegration prospects’ in countries of origin.<sup>316</sup>

## 3.2 FACILITATING RETURN

The obligations of host states towards persons displaced by disaster do not end with the end of the disaster itself. For all displaced persons, return to the country of origin must respect the principle of *non-refoulement* found in regional and international human rights law, which prohibits states from returning a person to a situation where they would be at risk of specific harms, including inhuman and degrading treatment or arbitrary deprivation of life.<sup>317</sup> In addition, the African Charter prohibits the mass expulsion of non-nationals<sup>318</sup> and provides that:

A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.<sup>319</sup>

For those who qualify for refugee status, the end of protection will be governed by Article I(4) of the 1969 African Refugee Convention, which provides for the cessation of refugee status in certain circumstances. Of particular relevance to the disaster context is the ‘ceased circumstances’ clause, which provides that:

This Convention shall cease to apply to any refugee if... he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.<sup>320</sup>

UNHCR has emphasised, in relation to the equivalent provision in the 1951 Refugee Convention, that for this clause to be applicable, ‘there must have been a change in the refugee’s country of origin which is fundamental, durable, and effective’.<sup>321</sup> In particular, they state that ‘[a] situation which has changed, but which also continues to change or shows signs of volatility is not by definition

---

<sup>311</sup> See discussion above, section 2.3

<sup>312</sup> Long, above n 297, 35.

<sup>313</sup> This may be *de facto* exclusion – where displaced persons are unable to access necessary documentation for cross-border movement – or *de jure* exclusion – for example, for persons qualifying for refugee status. See discussion above in section 2.1.

<sup>314</sup> Zewdu and Hugo, above n 2, 43.

<sup>315</sup> See, eg, P Charles Gasarasi, ‘Durable Solutions to the Refugee Problem in Africa: An Elusive Subject’ RSP Documentation Centre (1991), 6. ‘Countries like Uganda, Mozambique, Angola, the Sudan, etc., have produced two-time or even three-time refugees, because of the persistence of the root causes of the refugee phenomenon in those countries. Thus, although enactment of amnesty laws and repatriation operations are very commendable activities, they may merely amount to temporary victories that might be shattered by the recurrence of new and sometimes worse refugee situations.’

<sup>316</sup> Long, above n 297, 27. Long makes this criticism of Kenya’s concern with the return of Somali refugees. ‘Kenya’s interest in promoting ‘Jubaland’ as a buffer zone area to which Somali refugees could be returned also echoes this fixation on physical return rather than addressing the crises of citizenship underlying displacement.

<sup>317</sup> See full analysis in section 2.3.

<sup>318</sup> African Charter, Art 12(5).

<sup>319</sup> African Charter, Art 12(4).

<sup>320</sup> 1969 African Refugee Convention, Art I(4)(e).

<sup>321</sup> UNHCR, ‘Note on Cessation Clauses’, 30 May 1997, para 19.

stable, and cannot be described as durable.<sup>322</sup> By requiring a *durable* change in circumstances, not merely the absence of risk, the threshold for the return of refugees is arguably higher than the threshold for return under the principle of *non-refoulement*.

This has particular implications for displacement in the context of drought, which is a recurrent phenomenon in the Horn of Africa. As noted above in section 2.2.1, persons fleeing disasters such as drought will only qualify for refugee status in circumstances where the disaster amounts to an 'event seriously disturbing public order' (under the 1969 Convention's Article I(2) definition of a refugee). While the end of the critical disaster phase of the 2011 drought may mean that it no longer amounts to such an event, the continued potential for severe fluctuations in rainfall make it at least doubtful that the change in conditions could be described as 'durable'. In the Somali context any assessment of country conditions will be additionally complicated by the country's security situation.

In this context, preserving the voluntary nature of repatriation is particularly important. This is emphasised in the 1969 Convention itself, which provides:

The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.<sup>323</sup>

African regional instruments also impose obligations on receiving states to facilitate the reception of refugees and other returnees to their country of origin. Article 12(2) of the African Charter gives every person the right 'to leave any country including his own, and to return to his country'<sup>324</sup> and of course returnees benefit from the rights in the Charter as a whole.<sup>325</sup> In addition, the obligation on states signatory to the Kampala Convention on IDPs, including the obligation to 'prevent and avoid conditions that might lead to the arbitrary displacement of persons',<sup>326</sup> will be particularly relevant to returnees, who are often vulnerable to becoming displaced again.

For refugees, the 1969 Convention calls upon receiving states to collaborate with countries of asylum to 'make adequate arrangements for the safe return of refugees who request repatriation'.<sup>327</sup> In addition, it provides:

The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.<sup>328</sup>

While the impact of financial constraints on the capacity of home states to receive back returnees is well recognised,<sup>329</sup> attempts by states to limit the return of displaced nationals have largely been rejected by the African community. For example, in 1986, the Rwandese Government reportedly issued a document entitled 'Position of the Central Committee on the Problems of the Refugees of Rwanda' stating that, due to a shortage of land and unemployment, only a refugee who could demonstrate his or her ability to be self-sufficient would be allowed to return home.<sup>330</sup> This prompted a response from the OAU Commission of Fifteen, which recommended:

Rwanda 's first step with regard to her nationals living in exile should be for the Government of Rwanda to admit in no uncertain terms that this problem is first and foremost Rwanda 's problem whose solution primarily rests with the government of Rwanda.<sup>331</sup>

The return of displaced persons following a period of crisis involves a complex interplay of legal, practical and social issues, relating to the status of returnees, transportation and the availability of resettlement assistance. For this reason, some have suggested that 'regular repatriation programmes based upon a Tripartite Agreement concluded between the country of origin, the country of asylum and UNHCR offer a good possibility'.<sup>332</sup> Such agreements have also been endorsed by the African Community – an expert report to the first AU Ministerial Conference on Human Rights in 2003 recommended that host countries and countries of origin 'cooperate with the UNHCR in the establishment of tripartite commissions to facilitate the repatriation of refugees'.<sup>333</sup>

---

<sup>322</sup> Ibid, para 21.

<sup>323</sup> 1969 African Refugee Convention, Art V.

<sup>324</sup> African Charter, Art 12(2). Though this right may be subject to 'restrictions, provided for by law for the protection of national security, law and order, public health or morality'.

<sup>325</sup> See further, section 2.3 above.

<sup>326</sup> Kampala Convention, Art 4(1).

<sup>327</sup> 1969 African Refugee Convention, Art V(2).

<sup>328</sup> 1969 African Refugee Convention, Art V(3).

<sup>329</sup> See, eg, Barbara Harrell-Bond 'Repatriation', cited Murray, above n 143, 213.

<sup>330</sup> See Gasarasi, above n 316, 4.

<sup>331</sup> Cited Gasarasi, above n 316, 4.

<sup>332</sup> Rainer Hofmann, 'Refugee Law in the African Context' (1992) 52 Heidelberg Journal of International Law 318, 326.

<sup>333</sup> 'Report of the Meeting of Experts of the First AU Ministerial Conference on Human Rights in Africa', Kigali, 5-6 May 2003, para 40(9), cited Murray, above n 143.

### 3.2.1 The Kenya-Somalia Tripartite Agreement

One such example is the Tripartite Agreement signed between UNHCR and the governments of Kenya and Somalia in November 2013 to facilitate the voluntary repatriation of Somali refugees living in Kenya.<sup>334</sup> The Agreement was made possible by the formation of the Federal Government of the Republic of Somalia in August 2012, improving security situation in parts of Somalia and the growing number Somalis returning spontaneously to their homeland. Many of the refugees targeted by the Agreement were displaced to Kenya during the 2011 Horn of Africa drought.

The Kenya-Somalia Tripartite Agreement emphasises the principle of voluntariness<sup>335</sup> – UNHCR has been clear that it does not support forced returns under the agreement<sup>336</sup> – and sits squarely within the parties' existing international law obligations. The preamble to the Agreement recalls Kenya and Somalia's obligations under international refugee and human rights law<sup>337</sup> and notes 'the desire of the two Governments and UNHCR to cooperate and establish this legal framework in order to facilitate the voluntary repatriation in safety and dignity of refugees as well as their sustainable reintegration in Somalia'.<sup>338</sup> NGOs welcomed the agreement as 'a first and important step towards finding durable solutions for Somali refugees in the region' though emphasised the importance of preserving protection for Somalis in Kenya and the principle of voluntary return.<sup>339</sup>

One of the clear advantages of Tripartite Agreements such as this is that they are able to take account of the entire process of return, including preparation, transportation and resettlement. The Kenya-Somalia Tripartite Agreement obliges parties to provide Somali refugees 'with objective, accurate and timely information on current conditions in Somalia',<sup>340</sup> to facilitate 'go and see' visits by Somali refugees wishing to assess conditions in the home country prior to return<sup>341</sup> and to mobilise international resources for the 'voluntary and organized repatriation of Somali refugees and the reintegration of Somali returnees'.<sup>342</sup> While the Government of Somalia bears the primary responsibility for creating conditions 'conducive to sustainable return and reintegration of returnees'<sup>343</sup> – including restitution of land and property,<sup>344</sup> recognition of skills and qualifications obtained in Kenya,<sup>345</sup> and access to documentation necessary for the exercise and enjoyment of their respective legal rights<sup>346</sup> – all parties to the Agreement undertake to 'assist Somali refugees under this Agreement to return to their final destination in safety and dignity'.<sup>347</sup>

One problem with the Kenya-Somalia Tripartite Agreement is the potential effect of return on the status of Somali refugees. While the agreement does not specifically entail the cessation of refugee status for Somali refugees, those who return would lose such status by virtue of the fact that they are no longer outside their country of origin.<sup>348</sup> In addition, voluntary repatriation is defined by the agreement to mean 'the voluntary return of a refugee to the country of origin with the specific intention to re-avail him or herself of the national protection of the country of origin',<sup>349</sup> suggesting invocation of

---

<sup>334</sup> Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 10 November 2013 (Kenya-Somalia Tripartite Agreement).

<sup>335</sup> Kenya-Somalia Tripartite Agreement, Art 10(2), entitled 'Voluntary Character of Repatriation', provides: 'The Parties hereby agree that the decision of the refugees to repatriate shall be based on their freely expressed wish and their relevant knowledge of the conditions within the country of origin and the areas of return.'

<sup>336</sup> UNHCR 'Kenya: Repatriation process to Somalia starting, must be voluntary' Briefing Notes, 26 Nov 2013.

<sup>337</sup> Kenya-Somalia Tripartite Agreement, preambular para (a) recalls the 1951 Refugee Convention and its 1967 Protocol, and the 1969 African Refugee Convention, while para (b) notes in particular the right of all persons to leave and return to their country under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

<sup>338</sup> Kenya-Somalia Tripartite Agreement, preambular para (m).

<sup>339</sup> Danish Refugee Council, 'Tripartite Agreement for Repatriation of Somali Refugees in Kenya: NGOs welcome an agreement with potential to enhance opportunities for Durable Solutions for Somali Refugees', 11 November 2013, available at: <http://goo.gl/LCiiZV>.

<sup>340</sup> Kenya-Somalia Tripartite Agreement, Article 15(1).

<sup>341</sup> Kenya-Somalia Tripartite Agreement, Articles 15(2), 24(v), 25(xix).

<sup>342</sup> Kenya-Somalia Tripartite Agreement, Article 8(II).

<sup>343</sup> Kenya-Somalia Tripartite Agreement, Article 25(iii).

<sup>344</sup> Kenya-Somalia Tripartite Agreement, Article 25(viii).

<sup>345</sup> Kenya-Somalia Tripartite Agreement, Article 25(xi).

<sup>346</sup> Kenya-Somalia Tripartite Agreement, Article 25(xii).

<sup>347</sup> Kenya-Somalia Tripartite Agreement, Article 12(1).

<sup>348</sup> This is a criteria for refugee status under all international agreements.

<sup>349</sup> Kenya-Somalia Tripartite Agreement, Art 1(5).



the cessation clauses.<sup>350</sup> This could create problems for refugees who choose to return to Somalia but later wish to return to Kenya. Such persons would presumably have to re-apply for refugee status upon entry and their claims may be subject to negative inferences on the basis of their previous return to Somalia.<sup>351</sup> This is significant given that both UNHCR and NGOs have emphasises ‘the need for continued protection of Somali refugees in Kenya’,<sup>352</sup> noting that ‘the current context in Somalia is not conducive for the mass return of refugees’<sup>353</sup> and ‘only few pockets of Somalia are safe for return’.<sup>354</sup>

In addition, as is the case with other legal and policy frameworks in the region, the success of the Tripartite Agreement is subject to its implementation, which to date has been fraught. In April 2014, the Kenyan Government’s security crackdown on Somali refugees<sup>355</sup> led to the Somali government declining attendance at a scheduled tripartite meeting for late May<sup>356</sup> and the suspension of the launch of the 12-member Tripartite Commission.<sup>357</sup> Furthermore, the number of refugees electing to take up the option of return has been smaller than hoped – only 3,000 of the target 10,000 refugees had registered for repatriation by August 2014.<sup>358</sup>

### Recommendation 13:

Frameworks for the return of displaced persons following disaster must address both the immediate and ongoing needs of returnees. In the short term, being able to travel back and forth between the home state and host state will enable informed decision-making by those considering return and may facilitate returnees’ re-establishment of livelihoods. In the longer term, protection of human rights, promotion of sustainable development and maintenance of security will reduce the risk of re-displacement in the future.

<sup>350</sup> Under both the 1951 Refugee Convention and 1969 African Refugee Conventions, voluntarily re-availing oneself of the protection of ones country of origin leads to cessation of refugee status. See 1951 Refugee Convention, Art 1C(1); 1969 African Refugee Convention, Art 1(4) (a).

<sup>351</sup> Having returned voluntarily to ones country of origin is often viewed negatively within refugee status determination procedures, as evidence that one does not hold a genuine fear for his or her safety.

<sup>352</sup> Quote by UNHCR’s Kenya Representative, Raouf Maxou. See UNHCR ‘New procedures set for Somali refugees to return home voluntarily from Kenya’, 11 Nov 2013, available at: <http://www.unhcr.org/528102b49.html>.

<sup>353</sup> Danish Refugee Council, above n 340.

<sup>354</sup> Danish Refugee Council, above n 340.

<sup>355</sup> Initial reports suggested that the crackdown included the forced deportation of some 359 Refugees. See ‘Somalia Boycotts Tripartite Conference On Refugee Repatriation’, AllAfrica, 27 May 2014. However UNHCR’s Kenya country representative, Raouf Mazoe, later indicated that these had been an error and that ‘[o]ut of the 300 Somali nationals who were deported only six had refugee status’. See Fred Oluoch, ‘Only 3,000 out of 10,000 Somali refugees going home’ Reliefweb, 2 August 2014.

<sup>356</sup> ‘Somalia Boycotts Tripartite Conference On Refugee Repatriation’ AllAfrica, 27 May 2014.

<sup>357</sup> Brid Ni Ghrainne, ‘Implementation of Tripartite Agreement on Hold’, Oxford Human Rights Hub, 1 June 2014. <http://ohrh.law.ox.ac.uk/implementation-of-tripartite-agreement-on-hold/>.

<sup>358</sup> As UNHCR has previously noted, ‘The great majority of refugees who return to their home do so on their own initiative, rather than by agreeing to join a formal repatriation plan devised under international auspices after a fundamental change of the circumstances’ had made possible a return ‘in safety and dignity.’ UNHCR, ‘The State of the World’s Refugees: The Challenges of Protection’, cited Okoth-Obbo, above n 143, 125.





## CONCLUSION

**This report has detailed the scope of existing regional and sub-regional law and policy frameworks relevant to addressing cross-border displacement in the context of disasters in the Horn of Africa. As noted at the outset, a full understanding of the international legal obligations of states in this region requires these frameworks to be considered along with similar (and often overlapping) frameworks at the international level.**

At all phases of disaster-related cross-border displacement – prior to, during, and after displacement – African regional and sub-regional law and policy instruments have the capacity to assist in addressing the needs of displaced persons. In all cases, however, their capacity to do so depends on clarity in the scope of obligations they impose on states, and on their full implementation by states at the domestic level. Key issues that need to be addressed include: full implementation of sub-regional freedom of movement arrangements and improved access to movement for individuals, particularly the poor; full ratification and implementation of the Kamapala Convention for IDPs by states; and clarity in the scope of the 1969 African Refugee Convention's expanded refugee definition. Further engagement by states and relevant international organisations, including the AU, IGAD, EAC, COMESA and UNHCR, with the instruments discussed in this report could assist in addressing these issues. Indeed, the active involvement of all of these bodies in the Nansen Initiative's Horn of Africa Regional Consultation provides a positive first step in this regard.

While clarity in existing frameworks is a necessary first step in addressing the protection gap for persons displaced in the disaster context, in practice effective protection for such persons depends on the implementation of those frameworks. This report has not provided

a detailed discussion of the implementation in the Horn of Africa, which is impacted by numerous factors, including capacity, resources, political will and the general rule of law. In some parts of the region, existing political and legal conditions all but undo the protections provided by law and policy. This is particularly the case in Somalia, for example, given the lack of a competent central authority.<sup>359</sup> Implementation of regional protection frameworks at all stages of displacement must also take into account the needs of host communities. This is particularly the case for communities in border areas or near the site of a disaster, or in situations of mass influx, where the capacity of local communities, many of whom are already struggling with poverty, conflict or other challenges, to respond is overwhelmed.

Even with the full implementation of existing regional and sub-regional frameworks, however, there still remains a protection gap for persons displaced across borders in the context of disaster – in particular, for those persons who do not qualify for refugee status under the 1969 African Refugee Convention's expanded refugee definition. For such persons, a regional temporary protection framework, which provides legal status to displaced persons and includes full respect for human rights, could provide a useful mechanism for states who are willing to host their neighbours in distress but lack a legal framework for doing so.

---

<sup>359</sup> See Zewdu and Hugo, above n 2, 42-3.



# BIBLIOGRAPHY

## LEGAL INSTRUMENTS, DECISIONS AND POLICY DOCUMENTS

### International/Regional/Sub-regional

1951 Convention Relating to the Status of Refugees 28 July 1951 (entered into force 22 April 1954)

African Charter on Human and Peoples' Rights 27 June 1981 (entered into force 21 October 1986)

African Charter on the Rights and Welfare of the Child, 1990, (entered into force 29 November 1999)

African Commission on Human and Peoples' Rights, Communication No. 279/03-296/05 : Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan (2009)

African Commission Communication No. 71/92: Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) / Zambia (1996)

African Commission and Human and Peoples' Rights, Communication No. 159/96: Union inter africaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme and others v. Angola (2007)

African Commission on Human and Peoples' Rights, Communication No. 97/93\_14AR: John K. Modise / Botswana (2000)

African Commission on Human and Peoples' Rights, Communications No. 25/89, 47/90, 56/91, 100/93: Free Legal Assistance Group and Others / Zaire (1995)

African Commission on Human and Peoples' Rights, 'Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa', 32nd Session, 17 - 23 October 2002: Banjul, The Gambia

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 22 October 2009 (entered into force 6 December 2012) (Kampala Convention)

African Union Council of Ministers, Decision on Natural Disasters in Africa CV/Dex. 577 (LXXIII)

African Union Department of Rural Economy and Agriculture, Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving Lives, Livelihoods and Rights of Pastoralist Communities (October 2010)

African Union Executive Council, Migration Policy Framework for Africa (2006) EX.CL/276 (IX)

African Union and UNISDR, 'Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction calls on state to 'strengthen long-term capacities at regional and sub-regional levels'.

Attorney General of Rwanda v. Plaxeda Rugumba, June 2012, EACJ Appellate Division, Appeal No. 1 of 2012

COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, 29 June 1998 (not yet in force)

Constitutive Act of the African Union

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (entered into force 26 June 1987)

Convention on the Rights of the Child, 20 November 1989 (entered into force 2 September 1990)

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 Promoting a Balance of Efforts Between Member States in

Receiving such Persons and Bearing the Consequences Thereof.

Draft Protocol on the Free Movement of Persons in the IGAD Region

Draft Terms of Reference (TORs) for Consultancy to Develop the Protocol on Free Movement of Persons in the IGAD Region

Economic Community of West African States (ECOWAS) Decision A/DEC.5/10/98 regulating transhumance between the Member States of ECOWAS

Executive Committee of the High Commissioner's Programme, 'Protection of Asylum-Seekers in Situations of Large-Scale Influx: No 22 (XXXII)'

IGAD Drought Disaster Resilience and Sustainability Initiative, Communique of the Second General Assembly Meeting, Kampala, 26 March 2014

International Covenant on Civil and Political Rights, 15 December 1966 (entered into force 23 March 1976)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990 (entered into force 1 July 2003)

International Organization for Migration, Constitution, 19 October 1953 (entered into force 30 November 1954)

Organization of African Unity, 'Addis Ababa Document on Refugees and Forced Population Displacements in Africa', 10 September 1994

Organisation of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 (entered into force 20 June 1974)

Plan of Action of the OAU/UNHCR Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, adopted by the OAU/UNHCR Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, 12-17 February 1995, Bujumbura

Protocol on the Protection and Assistance to Internally Displaced Persons, 30th November 2006 (entered into force 2008)

Protocol on the Establishment of the East African Community Common Market, 20 November 2009 (entered into force 1 July 2010)

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003 (entered into force 25 November 2005)

Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement, 11 February 1998

Treaty Establishing the African Economic Community 3 June 1991 (entered into force 1994) Art 6(e)(iii)

Treaty for the Establishment of the East African Community, 30 November 1991 (entered into force 7 July 2000)

Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 10 November 2013

UNHCR, Framework for Durable Solutions and Persons of Concern, May 2003

UNHCR, 'Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees' HCR/GIP /03/04, July 2003

UNHCR, Guidelines on Temporary Protection or Stay Arrangements, February 2014

UNHCR, Note on International Protection, 7 September 1994

UNHCR, Note on Cessation Clauses, 30 May 1997

UNHCR 'Summary of Deliberations on Climate Change and Displacement' Bellagio, Italy, from 22 to 25 February 2011

UN Human Rights Committee, General Comment No. 31, 29 March 2004

Universal Declaration of Human Rights, 10 December 1948

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

## DOMESTIC

### Djibouti

Djibouti Constitution 1992

### Ethiopia

Constitution of The Federal Democratic Republic of Ethiopia 1994

### Kenya

Citizenship and Immigration Act 2011

Constitution of Kenya 2010

The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012

The Refugee Act 2006 (Kenya)

### Somalia

Provisional Constitution August 2012

### South Sudan

Refugee Act 2012

### Sudan

The National Policy for Internally Displaced Persons (IDPs) 2009.

### Uganda

Constitution of the Republic of the Uganda 1995

Citizenship and Immigration Control Act 1999

Employment Act 2006

National Policy for Internally Displaced Persons 2004

The Refugee Act 2006

### Other

AF ( Kiribati) [2013] NZIPT (New Zealand)

Refugee Appeal Board, Appeal No 1708-07 (2009) (South Africa)

Draft Refugee White Paper, Republic of South Africa Government Gazette General Notice 1122 of 1998 (South Africa)

## ARTICLES AND REPORTS

ACP Observatory on Migration, 'Overview on South-South Migration and Development in East Africa: Trends and Research Needs. Regional Overview: East Africa'

Adepoju, Aderanti; Boulton, Alistair and Levin, Mariah, 'Promoting Integration through Mobility: Free Movement and the ECOWAS Protocol' UNHCR New Issues in Refugee Research, December 2007

Aust, Anthony, *Modern Treaty Law and Practice* (CUP, 2000)

Beyani, Chaloka, 'Report of the Special Rapporteur on the human rights of internally displaced persons' Report to the UN General Assembly Human Rights Council (4 April 2014)

Boulton, Alistair, 'Local Integration in West Africa' (2009) 33 *Forced Migration Review* 32

COMESA, 'Fresh commitment towards free movement of persons in the region', available at <http://goo.gl/NGp2bb>

'Concept Note', 2<sup>nd</sup> IGAD Regional Consultative Process on Migration; Migration and Development, 7-8 February 2012, Addis Ababa.

Crisp, Jeff, 'No Solution in Sight: The Problem of Protracted Refugee Situations in Africa', UNHCR New Issues in Refugee Research, January 2003

Danish Refugee Council, 'Tripartite Agreement for Repatriation of Somali Refugees in Kenya: NGOs welcome an agreement with potential to enhance opportunities for Durable Solutions for Somali Refugees', 11 November 2013

Dryden-Peterson, Sarah, and Hovil, Lucy, 'A Remaining Hope for Durable Solutions: Local Integration of Refugees and Their Hosts in the Case of Uganda' (2004) 22(1) *Refugee* 29

Edwards, Alice, 'Refugee Status Determination in Africa' (2006) 14 *African Journal of International and Comparative Law* 204

Edwards, Alice, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 *Melbourne Journal of International Law* 595

Feller, Erika, 'Refugees are Not Migrants' (2005) 24(4) *Refugee Survey Quarterly* 27

Foster, Michelle, *Refuge from Deprivation: International Refugee Law and Socio-Economic Rights* (CUP, 2007)

- Fund for Peace, '2014 Fragile States Index' available at: <http://ffp.statesindex.org/rankings-2014>
- Gardiner, Richard, 'Treaty Interpretation' (OUP, 2008)
- Gasarasi, P Charles, 'Durable Solutions to the Refugee Problem in Africa: An Elusive Subject' RSP Documentation Centre (1991)
- Hathaway, James, *Law of Refugee Status* (Butterworths, 1991)
- Hathaway, James, *The Rights of Refugees under International Law* (CUP, 2005)
- Hofmann, Rainer, 'Refugee Law in the African Context' (1992) 52 Heidelberg Journal of International Law 318
- IDMC, 'Global Estimates 2012: People displaced by disasters'(May 2013)
- IDMC, 'Kenya: Too early to turn the page on IDPs, more work is needed' (3 June 2014)
- IDMC, 'Somalia: Internal displacement in brief' (December 2013).
- International Labour Office, 'Multilateral Framework on Labour Migration: Examples of Good Practice', International Labour Office 2006
- International Labour Office Social Protection Sector, 'ILO Africa Labour Migration Policy Initiative: A Contribution to the NEPAD Agenda' (Ouagadougou, April 2002)
- International Organisation for Migration, 'Mixed Migration in the Horn of Africa' brochure available at: <http://goo.gl/xSkGhM>
- 'Inter-State and Intra-Regional Cooperation on Migration Management in the IGAD Region' IGAD Workshop Report, 12-14 May 2008, 5.
- Jackson, Ivor, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999)
- Jacobsen, Karen, 'Local Integration: The Forgotten Solution' Migration Policy Institute October 1, 2003
- Jacobsen, Karen, 'The forgotten solution: local integration for refugees in developing countries', UNHCR New Issues in Refugee Research, July 2001
- Kagan, Michael, 'UNHCR Issues New Guidelines on Temporary Protection. They Need a Rewrite.' (RSD Watch, 20 March 2014)
- Kälin, Walter and Schrepfer, Nina, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches', UNHCR Legal and Protection Policy Research Series, February 2012
- Kolmannskog, Vikram, 'Climate Change, Human Mobility, and Protection: Initial Evidence from Africa' (2010) 29(3) Refugee Survey Quarterly 103
- Kolmannskog, Vikram, "'We Are in Between": Case Studies on the Protection of Somalis Displaced to Kenya and Egypt during the 2011 and 2012 Drought' (2013) 2 *International Journal of Social Science Studies*
- Long, Katy, 'Permanent crises? Unlocking the protracted displacement of refugees and internally displaced persons' University of Oxford, Refugee Studies Centre, October 2011
- Mbanda, John and Kabeera, Eric, 'EAC Presidents launch us of National IDs to cross borders' (All Africa, 20 February 2014)
- McAdam, Jane, *Climate Change, Forced Migration and International Law* (OUP, 2012)
- McAdam, Jane, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007)
- Mendel, Toby, 'Refugee Law and Practice in Tanzania' (1997) 9(1) International Journal of Refugee Law 35
- Murray, Rachel, *Human Rights in Africa: From the OAU to the African Union* (CUP, 2004) 188
- Musonda, Flora Mndeme, 'Migration Legislation in East Africa' (2006) International Labour Organisation, International Migration Paper No. 82
- Nansen Initiative, 'Background Paper: Natural Hazards, Climate Change, and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move', Nansen Initiative Greater Horn of Africa Regional Consultation, 21-23 May 2014, Boma Hotel, Nairobi, Kenya (Horn of Africa Background Paper)
- Nansen Initiative Secretariat, 'Desk Review on Cross-Border Displacement in the Context of Disasters in the Horn of Africa: A discussion paper drafted in preparation for the Nansen Initiative Regional Consultation in the Horn of Africa', Draft Version 1, 20 January 2014
- Nansen Initiative, 'Natural Hazards, Climate Change and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move', Report of the Nansen Initiative Civil Society Pre-Meeting
- Ndonga, Simon, 'Court Overturns Order to Register Refugees in Camps' All Africa (26 July 2013) <<http://allafrica.com/stories/201307270038.html>>



- Ni Ghrainne, Brid, 'Implementation of Tripartite Agreement on Hold', Oxford Human Rights Hub, 1 June 2014. <http://goo.gl/MS7D8M>
- Norwegian Refugee Council, 'The Kampala Convention: One year on: Progress and prospects' (2013).
- Okoth-Obbo, George, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) Refugee Survey Quarterly 79
- Oloka-Onyango, Joe, 'The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa.' (1996) 24(3) Denver Journal of International Law and Policy 349
- Oluoch, Fred, 'Only 3,000 out of 10,000 Somali refugees going home' Reliefweb, 2 August 2014
- Pavanello, Sara and Levine, Simon, 'Rules of the Range: Natural resources management in Kenya–Ethiopia border areas' (HPG Working Paper, September 2011)
- Rankin, Micah, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On' (2005) UNHCR New Issues in Refugee Research, Working Paper No 13
- 'Report of the Meeting of Experts of the First AU Ministerial Conference on Human Rights in Africa', Kigali, 5-6 May 2003
- Rutinwa, Bonaventure, 'Prima Facie Status and Refugee Protection' UNHCR New Issues in Refugee Research, October 2002
- Rwelamira, Medard, 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (1989) 1(4) International Journal of Refugee Law 557
- Schrepfer, Nina and Caterina, Martina, 'On the Margin: Kenya's Pastoralists. From displacement to solutions, a conceptual study on internal displacement of pastoralists.' (IDMC, March 2014)
- Sharpe, Marina, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and. Omissions' (2012) 58 McGill Law Journal 95
- Sharpe, Marina, 'The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination', UNHCR Legal and Protection Policy Series, January 2013
- Sharpe, Marina and Namusobya, Salima, 'Refugee Status Determination and the Rights of Recognized Refugees under Uganda's Refugees Act 2006' 24(3) International Journal of Refugee Law 561
- 'Somalia Boycotts Tripartite Conference On Refugee Repatriation', AllAfrica, 27 May 2014
- Tadele, Feleke, 'An Overview of the State of International Migration in Horn and East Africa' (2007) International Migration Institute, University of Oxford
- UNHCR, 'Concept Note: Global Roundtable on Temporary Protection' 15 – 16 July 2013
- San Remo, Italy
- UNHCR, 'Durable Solutions', available at: <http://www.unhcr.org/pages/49c3646cf8.html>
- UNHCR, 'Kenya: Repatriation process to Somalia starting, must be voluntary' Briefing Notes, 26 Nov 2013
- UNHCR, 'New procedures set for Somali refugees to return home voluntarily from Kenya', 11 Nov 2013, available at: <http://www.unhcr.org/528102b49.html>
- UNHCR, 'Refugees in Uganda move towards self-reliance', 13 October 2003, available at: <http://www.unhcr.org/3f8aa81e4.html>
- UNHCR, UNHCR, 'Refugee Protection and Mixed Migration: A 10-Point Plan of Action' 1 January 2007
- UNHCR and IOM, 'Summary Report of the Regional Conference on Refugee Protection and International Migration: Mixed Movements and Irregular Migration from the East and Horn of Africa and Great Lakes Region to Southern Africa', Dar es Salaam, Tanzania, 6-7 September 2010
- van der Klaauw, Johannes, 'Refugee Rights in Times of Mixed Migration: Evolving Status and Protection Issues' (2020) 28(4) Refugee Survey Quarterly 59
- van Hear, Nicholas, 'Policy Primer – Mixed Migration: Policy Challenges' The Migration Observatory, 2011
- Williams, Paul D, 'Webs of Conflict and Pathways to Peace in the Horn of Africa: Towards a Regional Strategy' (2011)
- Zewdu, Girmachew Adugna and Hugo, Graeme, 'Cross-Border Migration and Displacement in the Context of the 2011-12 Drought in the Horn of Africa', First Draft of a Report to the Nansen Initiative, July 2014
- Zetter, Roger, 'Protecting environmentally displaced people: Developing the capacity of legal and normative frameworks' University of Oxford Refugee Studies Centre Research Report (2011)





DISASTERS  
CLIMATE CHANGE AND  
DISPLACEMENT



## EVIDENCE FOR ACTION

This is a multi-partner project funded by the European Commission (EC) whose overall aim is to address a legal gap regarding cross-border displacement in the context of disasters. The project brings together the expertise of three distinct partners (UNHCR, NRC/IDMC and the Nansen Initiative) seeking to:

- 1 › **increase the understanding** of States and relevant actors in the international community about displacement related to disasters and climate change;
- 2 › **equip them to plan for and manage** internal relocations of populations in a protection sensitive manner; and
- 3 › **provide States and other relevant actors tools and guidance** to protect persons who cross international borders owing to disasters, including those linked to climate change.

THE  
NANSEN  
INITIATIVE

DISASTER-INDUCED CROSS-BORDER DISPLACEMENT

### Nansen Initiative Secretariat

International Environment House 2,  
7-9, Chemin de Balexert, 1219 Chatelaine, Geneva, Switzerland  
Phone: +41 22 917 8205  
[info@nanseninitiative.org](mailto:info@nanseninitiative.org)  
[www.nanseninitiative.org](http://www.nanseninitiative.org)