

# The protection of climate refugees under the African human rights system: proposing a value-driven approach

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**ABSTRACT:** The predicament of climate refugees has gained international attention. However, there is no explicit legal protection for them under international law, including African regional law. Their legal protection is not clear. Some scholars and practitioners argue that the existing international framework on refugees does not cover climate refugees. At the African regional level, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa refers to climate-induced displacement but it does not govern migration beyond borders. This article examines international human rights and refugee law instruments, particularly the 1951 UN Convention Relating to the Status of Refugees and 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, to identify the challenges and prospects in the legal recognition and protection of climate refugees in Africa. It finds that the gaps existing in the refugee protection regime for climate refugees is historical and continues up to the present. The article consequently argues that the best way to ensure protection for climate refugees in Africa is the operationalising by the AU of its solidarity and humanistic approach as a demonstration of its commitment to the ideals of Pan-African cooperation for addressing common continental problems.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### La protection des « réfugiés du climat » dans le système africain des droits de l'homme: la proposition d'une approche fondée sur les valeurs

**RÉSUMÉ:** La situation précaire des réfugiés climatiques a attiré l'attention de la communauté internationale. Cependant, le droit international, y compris le droit régional africain, ne les protègent pas. Leur protection légale n'est pas claire. Praticiens et doctrinaires sont d'avis que le cadre international existant sur les réfugiés ne couvre pas les réfugiés climatiques. Au niveau régional africain, la Convention de l'Union africaine de 2009 sur la protection et l'assistance aux personnes déplacées en Afrique fait référence au déplacement induit par le climat, mais ne régit pas la

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migration au-delà des frontières. Cette contribution examine les instruments internationaux relatifs aux droits de l'homme et au droit des réfugiés, en particulier la Convention des Nations Unies de 1951 relative au statut des réfugiés et la Convention de l'OUA de 1969 régissant les aspects spécifiques des problèmes des réfugiés en Afrique, afin d'identifier les défis et les perspectives de la reconnaissance et de la protection juridiques des réfugiés climatiques en Afrique. La contribution constate que les lacunes existant dans le régime de protection des réfugiés climatiques sont historiques et se perpétuent jusqu'à présent. Par conséquent, cette contribution estime que le meilleur moyen d'assurer la protection des réfugiés climatiques en Afrique est la mise en œuvre par l'Union africaine de son approche solidaire et humaniste, démontrant ainsi son attachement aux idéaux de la coopération panafricaine visant à résoudre les problèmes continentaux communs.

**KEY WORDS:** climate change, climate refugees, international human rights law, refugee protection, refugee law, solidarity

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## 1 INTRODUCTION

Climate change as a potential trigger of flight or voluntary international migration has gained significant attention.<sup>1</sup> Developing countries are particularly vulnerable to climate change due to the limited resources to cope with its consequences.<sup>2</sup> Due to the continent's weak adaptive capacity, Africa is particularly vulnerable as evidenced by the fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC).<sup>3</sup> The IPCC unequivocally posits that the threat of climate change to Africa may potentially reverse current development gains.<sup>4</sup> Complicating matters further is the rapid expansion of the Sahara Desert in terms of growth and spatial extent, often spilling into

1 See, generally, B Mayer & F Crépeau (eds) *Research handbook on climate change, migration and the law* (2017); B Mayer *The concept of climate migration* (2016); W Kälin & N Schrepfer *Protecting people crossing borders in the context of climate change: normative gaps and possible approaches* (2012); F Biermann & I Boas 'Climate change and human migration: towards a global governance system to protect climate refugees' in J Scheffran, M Brzoska, HG Brauch, PM Link & J Schilling (eds) *Climate change, human security and violent conflict* (2012).

2 See, generally, S Behrman & A Kent (eds) *Climate refugees: beyond the legal impasse?* (2018); Intergovernmental Panel on Climate Change (IPCC). *Climate change 2014: impacts, adaptation, and vulnerability. Summary for policymakers*. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014).

3 IPCC, *Managing the risks of extreme events and disasters to advance climate change adaptation* (2012).

4 IPCC. *An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development and Efforts to Eradicate Poverty: Summary for Policymakers* (2018), <http://ipcc.ch/report/sr15/> (accessed 10 August 2019).

precarious zones, placing communities at risk. The Food and Agriculture Organization (FAO) observes that an estimated 319 million hectares of Africa's land is vulnerable to desertification-related hazards due to sand movement.<sup>5</sup> The intense rate of desertification could make most parts of the African continent uninhabitable. For example, the United Nations (UN) reports that desertification could send about 50 million Sub-Saharan migrants elsewhere by 2020, with 700 million Africans being forcefully displaced across the continent due to land degradation by 2050.<sup>6</sup> Already, the FAO has revealed that about 26.4 million people were displaced annually in Africa due to climate-related disasters between 2008 and 2015.<sup>7</sup> UN reports and resolutions have also drawn the link of climate change to human rights of vulnerable populations and thus, adaptation to the adverse effects of climate change will require measures that address the multi-dimensional impacts of climate change such as cross border climate-induced migration.<sup>8</sup>

Although the plight of climate refugees has gained prominence in international discourses, their legal protection under international and regional law in Africa is not clear. Some scholars have argued that the existing international framework on refugees, particularly the 1951 Convention Relating to the Status of Refugees (UN Refugee Convention) and 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), do not cover climate-induced asylum seekers. The only instrument to have mentioned climate-induced displacement at the African regional level, the 2009 African Union (AU) Convention for the Protection and

5 Food and Agriculture Organization (FAO), 'The magnitude of the problem', <http://www.fao.org/docrep/x5318e/x5318e02.htm> (accessed 10 August 2019).

6 'Desertification: The people whose land is turning to dust' *BBC News*, 2 November 2015, <https://www.bbc.com/news/world-africa-34790661> (accessed 10 August 2019); IPBES Secretariat, 'Media Release: Worsening Worldwide Land Degradation Now 'Critical', Undermining Well-Being of 3.2 Billion People', 23 March 2018, <https://www.ipbes.net/news/media-release-worsening-world-wide-land-degradation-now-%E2%80%98critical%E2%80%99-undermining-well-being-32> (accessed 10 August 2019).

7 FAO (n 5).

8 See, UNHCR res. 10/4 (25 March 2009), OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights* (A/HRC/10/61) (15 January 2009); UNFCCC COP, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention* (15 March 2011), Decision 1/CP.16, referred in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1, at preamble; OHCHR, *A New Climate Change Agreement Must Include Human Rights Protections for All: An Open Letter From Special Procedures Mandate-Holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the Occasion of the Meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn* (20-25 October 2014) (17 October 2014).

Assistance of Internally Displaced Persons in Africa (Kampala Convention) appears not to govern migration beyond borders.<sup>9</sup> The article investigates whether the gap in the existing refugee protection regime for climate refugees is historical, and if so, how existing values within key instruments under the African human rights system can ensure sufficient protection to those who, due to changing climate conditions, are forced to leave their countries of origin. The article is divided into four parts. Part one is this introduction; followed by part two which assesses the gaps and challenges in the existing legal regime in relation to the protection of climate refugees in Africa. Part three analyses how the AU can recognise and offer protection for climate refugees under the African human rights system through the African values of humanity and pan-African solidarity. Part four summarises the argument and concludes the discussion.

## 2 CLIMATE REFUGEES: LEGAL GAPS AND PROTECTION CHALLENGES

The legal gaps and protection challenges in the existing refugee protection regime for climate refugees is historical. The reasons for this position are not farfetched. The structure and normative content of the international refugee protection system was strongly influenced by the system for protecting aliens and national minorities by the League of Nations. For instance, the Aliens' Law recognises the distinctive vulnerability of individuals who were without the effective protection of their country of habitual resident.<sup>10</sup> Hathaway underscores the specific vulnerabilities of individuals who leave their home states when he asserted that

the individual, when he leaves his home State, abandons certain rights and privileges, which he possessed according to the municipal law of his State and which, to a certain limited extent, especially in a modern democracy, gave him control over the organization of the State ... In a foreign State, he is at the mercy of the State and its institutions, at the mercy of the inhabitants of the territory, who in the last resort accord him those rights and privileges which they deem desirable.<sup>11</sup>

This implies that the national law of a foreign country, without international law, might not offer sufficient protection to foreign nationals facing harm or the violation of their human rights. The Aliens'

9 AO Jegede 'Indigenous peoples, climate migration and international human rights law in Africa, with reflections on the relevance of the Kampala Convention' in B Mayer & F Crépeau (eds) *Research handbook on climate change, migration and the law* (2017) 169-189; B Glahn, 'Climate refugees? Addressing the international legal gaps', International Bar Association, 11 June 2009, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EBoF442> (accessed 15 July 2019).

10 The Alien Friends Act of 1798 and the Alien Enemy Act of 1798. The two Acts allowed the president to imprison and deport non-citizens who were deemed dangerous. See, generally, R Lillich *The human rights of aliens in contemporary international law* (1984) 5-40; C Amerasinghe *State responsibility for injuries to aliens* (1967) 23; A Roth *The minimum standard of international law applied to aliens* (1949) 113.

11 JC Hathaway *The rights of refugees under international law* (2005) 75.

law thus merely accommodated the fundamental concerns of foreign nationals in a minimal manner in order to ensure sustained international relations between states. The evolution of the Aliens' Law led to the validation of some exclusive harms in the sphere of international law. States that fail to meet the minimum standards of protection that aliens are entitled to can thus be compelled to account for such violation through the applicable recognised international mechanisms.<sup>12</sup> No doubt, the Aliens' Law was therefore the first international legal mechanism to deny the absolute right of states to treat persons within their jurisdiction in whatever manner they deemed appropriate. The law does this through the recognition of the distinctive defenselessness of individuals outside the effective protection of their home state and thus, provided a mixture of unreserved and conditional responsibilities owed to aliens. These responsibilities were enforced by an interstate accountability mechanism that was operationalised at the multilateral and bilateral level. However, while this development laid the groundwork for the successive evolution of the existing international refugee protection system, the Aliens' Law neither requires any state to accommodate foreigners fleeing home country by law nor confer any clear set of rights on foreigners accommodated in a host state. What is clear is that the Aliens' Law still affords states a great degree of discretion to deal with aliens in certain manner as they wish and hardly reflects the modern day of justice required by migrants.

The Minorities Treaties, similar to the Aliens' Law, were adopted shortly after the World War I to promote the interests of states through demanding that the countries defeated respect the human rights and dignity of ethnic and religious minorities residing within their territories.<sup>13</sup> The underlining rationale was to avoid the possibility of another world war. The Minorities Treaties are, a major development over the normative and procedural framework of the Aliens' Law,<sup>14</sup> however, certain gaps are glaring in terms of protection. For instance, apart from the fact that it is not clear whether refugees can constitute a minority in terms of the provisions of the treaties, there is no official standing that citizenship can be conferred on populations belonging to minority groups. It may be argued that Minorities Treaties were not an international regime for the protection of the human rights of minorities because it applied only to states that were forced to accept

12 As above.

13 These were unilateral declarations made before the League of Nations. The treaties containing provisions relating to minorities included the Treaty of 28 June 1919 between the Principal Allied and Associated Powers and Poland, placed under the guarantee of the League of Nations, 13 February 1920; the Treaty of 10 September 1919 between the Principal Allied and Associated Powers and Czechoslovakia, placed under the guarantee of the League of Nations, 29 November 1920; the Treaty of 10 September 1919 between the Principal Allied and Associated Powers and Serb-Croat-Slovene State, placed under the guarantee of the League of Nations, 29 November 1920; and Articles 62 to 69 of the Treaty of Peace with Austria (signed at St. Germain-en-Laye on 10 September 1919), placed under the guarantee of the League of Nations, 22 October 1920. See H Rosting 'Protection of minorities by the League of Nations' (1923) 17 *American Journal of International Law* 647-8.

14 As above.

the provisions on minority rights as part of the broad terms of peace. Nonetheless, the provisions in the Minorities Treaties were also applicable in states that voluntarily made general declarations to respect the rights of minorities as a requirement to be admitted into the League of Nations.

The emergence of the contemporary international refugee protection mechanism closely aligns with the development of the international human rights system and humanitarian action<sup>15</sup> as they are both products of the 20th century.<sup>16</sup> The codification of the international refugee protection regime happened shortly after the Universal Declaration of Human Rights (Universal Declaration) and its normative content and structure were largely influenced by the Universal Declaration. The system for protecting refugees at the international level is therefore human rights-based and places the rights and dignity of vulnerable groups and individuals at the centre of protection. Hathaway argues that the international refugee protection system is to be understood as system that responds to situation-specific vulnerabilities without which refugees may be denied of meaningful benefits required for living dignified lives under the international human rights system.<sup>17</sup> Hence it does not surprise that the rights of refugees are recognised and guaranteed in the International Bill of Rights which emphasise dignity as a human rights norm.<sup>18</sup> Yet, such provisions are not without inherent weaknesses in terms of the protection of climate refugees. For instance, the Universal Declaration recognises the right to seek refuge as a basic human right and guarantees in article 14(1) that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'.<sup>19</sup> However, article 14(2) fails to provide for an exhaustive regulation on the scope of neither the right nor the type of protection that asylum seekers and refugees may enjoy. No doubt, climate refugees may be covered by article 13(2) of the Universal Declaration which provides that everyone has the right to leave any country including his or her own,<sup>20</sup> a provision which is reaffirmed by the International Covenant on Civil and Political Rights (ICCPR) in its article 12(2).<sup>21</sup> However there are weaknesses in this regime. There are acceptable limitations on the right

15 As above.

16 M Addaney 'A step forward in the protection of urban refugees: the legal protection of the rights of urban refugees in Uganda' (2017) 17 *African Human Rights Law Journal* 218-243.

17 Hathaway (n 11) 26.

18 WA Schabas *The Universal Declaration of Human Rights: The travaux préparatoires, volume 1, October 1946 to November 1947* (2013) 37. Human rights provisions of the UN Charter including the Universal Declaration (1948), ICCPR (1966), and ICESCR (1966) form the international Bill of Rights.

19 Universal Declaration, art 14(1) & (2).

20 Universal Declaration, art 13(2).

21 The International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 UNTS 14668, art (12)(2).

to leave one's country,<sup>22</sup> practically, it is commonly the lack of the right to a third country which constrains the right to leave one's country.<sup>23</sup>

There have been arguments to address the weaknesses in the human rights regime, but these are not without objections. For instance, some scholars argue that international human rights law should oblige states to consider the extraterritorial impacts of their contributions to the climate crises.<sup>24</sup> This implies that people from developing states fleeing the adverse effects of climate change may be admitted into developed states who are accountable for the historic emissions causing climate change. For example, the wording of the ICCPR that restricts a state's obligations to individuals with its effective control or jurisdiction,<sup>25</sup> is comprehensive to include other person in a different state who are adversely affected by the extraterritorial consequences of the state's contributions to the global climate crises. In order to be considered under the jurisdiction of a state under international law, an individual should be within the 'effective control' of such state.<sup>26</sup> The other weakness with the ICCPR in relation to protecting the rights of refugees is that most rights do not directly speak to the needs of climate refugees who are often unrecognised and largely undocumented.

The historical development of the international refugee protection system is instructive in examining the protection of climate refugees. For instance, the failed efforts of the international community to repatriate European refugees after the World War II boosted and influenced arrangements for resettling refugees in third countries.<sup>27</sup> It is recorded that more than 1 million refugees were resettled by the then International Refugee Organisation (IRO) from 1947 and 1951.<sup>28</sup> The inability of the IRO to resettle or repatriate all refugees within its mandated timeframe led to the development of the existing international refugee protection system as the UN found a solution in the assimilation of refugees through a new international human rights system.<sup>29</sup> Consequently, the United Nations High Commissioner for Refugees (UNHCR) was established alongside the development and

22 As above.

23 Mayer (n 1).

24 JH Knox 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477-498.

25 Although the ICCPR actually refers to duties extending only to individuals 'within [the State's] territory and subject to its jurisdiction,' the general view is that the language should be read disjunctively, to require the state to respect and ensure the rights of those within its territory *and* those within its jurisdiction. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004), ICJ 136, para 111.

26 Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para 6.

27 Independent Commission on International Humanitarian Issues (ICHI) 'Refugees: The dynamics of displacement' (1986) 32.

28 As above.

29 UN Department of Social Affairs 'A study of statelessness' UN Doc E/1112, (1949) 23.

adoption of the UN Refugee Convention,<sup>30</sup> with the Convention becoming the foundation of refugee rights protection under international law. The 1951 Refugee Convention and the adoption of its Protocol<sup>31</sup> in 1967 was significantly driven by the need to construct a new framework to govern international action in response to the colossal calamity that befell persons displaced in Europe through the World War II.<sup>32</sup> Both the UN Convention and its 1967 Protocol were widely signed with 147 states parties to one or both mechanisms, comprising over 50 states from African. However, climate refugees are not covered by the conventional definition enshrined in the UN Refugee Convention and the seriousness of the climate crisis should inspire similar action from the UN.

Under the UN Convention, states committed themselves to the obligation of non-refoulement, or non-returning of persons with well-founded fear of persecution on the grounds of their race, religion, nationality, membership of a particular social group, or political opinion.<sup>33</sup> The protection of non-discrimination, under article 3, states that the provisions guaranteed under the Convention should be applied by states 'without discrimination as to race, religion or country of origin'.<sup>34</sup> Non-penalisation, under article 31, ensures that states do not penalise refugees 'on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorization ...'.<sup>35</sup> The principle of non-refoulement, under article 33 entails that no state 'shall expel or return (refouler) a refugee in a manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.<sup>36</sup>

Under this obligation, such persons, whether individually or in groups, were not to be returned to the frontiers of territories where their lives or human rights would be undermined. Arbel and others argue that the principle of non-refoulement has assumed the status of customary international law that binds states which are not states parties to the UN Convention and 1967 Protocol.<sup>37</sup> Persons or groups fleeing their habitual country of residence on the grounds of climate-related events such as famine, drought, or flooding may not meet the

30 Hathaway (n 11 above).

31 The 1967 Protocol erases the geographical and temporary limitations provided in the 1951 Convention and made the Convention a truly internationally inclusive system of protection for those fleeing persecution.

32 A Guterres *UN Refugee Agency, 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) 1.

33 E Lauterpacht and D Bethlehem 'The scope and content of the principle of non-refoulement: opinion' in E Feller, V Turk and F Nicholson (eds) *Refugee protection in international law: UNHCR's Global Consultation On international protection* (2003) 87, 142.

34 1951 Convention, art 3.

35 1951 Convention, art 31.

36 1951 Convention, art 33.

37 As above.

requirements stipulated in the 1951 Convention's definition of a refugee under Article 1 since it is impossible for such a person or group to articulate a 'well-founded fear' of persecution. The provisions in the UN Convention have however been generously interpreted since its adoption to respond to developments in international law particularly in the field of international human rights and humanitarian law. For example, states now recognise people fleeing armed conflict as refugees; and most states also recognise gender-based violence including rape, female genital mutilation and forced sterilisation as a form of persecution as provided in the UN Convention.<sup>38</sup> However, legal protection of climate refugees is yet to benefit from such generous interpretation of its provisions. Also, the instrument is non-binding and hence lacks a treaty body to monitor member states' compliance with the obligations imposed by it. Also, the right of non-refoulement has drawbacks in that states disagree about its breadth, a development that has led to inconsistent protection of refugees.<sup>39</sup> Arguably these disagreements undermine the application of the principle to respond to the plights of climate migrants.

At the African regional level, the 1969 African Union (AU) (formerly Organisation of African Unity [OAU]) Convention governing the specific aspects of refugee problems in Africa defined refugees to include persons who are fleeing 'events seriously disturbing public order'.<sup>40</sup> This definition can be understood to cover persons fleeing climate-induced disasters and extreme weather events, but, requires further clarification by the treaty monitoring body. The 1984 Cartagena Declaration on Refugees contains similar provision.<sup>41</sup> It implores states parties to define refugee as person who is among others 'fleeing their country because their lives, safety or freedom have been threatened by... massive violation of human rights or other circumstances which have seriously disturbed public order'.<sup>42</sup> These definitions were applied by some states in the Horn of Africa during the 2011-12 droughts in

38 See, generally, E Arbel, C Dauvergne and J Millbank (eds) *Gender in refugee law: from the margins to the centre* (2014).

39 S Momin 'A human rights based approach to refugees: a look at the Syrian refugee crisis and the responses from Germany and the United States' (2017) 9 *Duke Forum for Law and Social Change* 55-79. For instance, Hathaway posits that states fear that the existing treaty-based regime for refugee protection maybe be threatened by those who seek to 'leverage' undefined asylum by extending non-refoulement and refugee rights to 'non-refugees'. See JC Hathaway 'Leveraging asylum' (2010) 45 *Texas International Law Journal* 506, 507. Goodwin-Gill on the other hand supports a broader application of the notion to all who are at risk. He observes that Hathaway's observation 'lacks a sense of the big picture, of a world in which customary international law is a dynamic or, a continuing process, responding, growing, contracting, and refining under the lens of daily practice by States and international institutions'. See, GS Goodwin-Gill 'Non-refoulement, temporary refuge, and the "new" asylum seekers' in DJ Cantor and J-F Durieux (eds) *Refuge from inhumanity? war refugees and international humanitarian law* (2014) 447.

40 Africa Union (AU), Convention Governing the Specific Aspects of Refugee Problems in Africa, art 1(2) (10 September 1969)

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

42 As above.

admitting displaced persons from Somalia.<sup>43</sup> Also, some states in Latin America granted asylum to persons who were displaced by the 2010 earthquake in Haiti.<sup>44</sup> These scenarios are analogous to the circumstance of climate refugees fleeing the adverse effects of climate change such as flooding and water-related risks, hunger and starvation and extreme heat as it was generally accepted by states in Latin America that Haitian asylum seekers had a 'well-founded fear of persecution by non-state actors that arose from the vacuum of governmental authority after the earthquake'.<sup>45</sup> Although the OAU Refugee Convention is obligatory in Africa, it has no monitoring mechanism and has hardly been applied to respond to the situations of climate refugees. Also the Cartagena Declaration is a soft law. The apparent weaknesses in the refugee protection regime regarding the protection of climate refugees has inspired scholars to explore how the legal weaknesses could be addressed. Some scholars have argued for a reform of the UN Refugee Convention through the adoption of a second protocol to revise the definition of refugees to include climate migrants.<sup>46</sup> Other scholars such as Moberg argues that political refugees may suffer collateral damage by losing the specificity of their protection through any substantial revision of the definition in the UN Refugee Convention scope.<sup>47</sup> The potential within the AU Kampala Convention for climate induced displacement and extraterritorial application has also been explored as an option in the context of indigenous peoples.<sup>48</sup> Recognising and protecting the rights of climate refugees has, nevertheless, always been and continues to be subject to political, economic, legal and humanitarian contestations.<sup>49</sup>

Yet, failure to find a durable solution may lead to the greatest humanitarian crises in the 21st century. For instance, the First Assessment Report of the IPCC observes that the highest single impact of climate change will be on human migration.<sup>50</sup> The report recognises that while people moving across international borders due to climate-

43 E Ferris & J Bergmann 'Soft law, migration and climate change governance' (2017) 8 *Journal of Human Rights and the Environment* 6-29.

44 As above.

45 Nansen Initiative, 'Protection Agenda' (2015) 54, <https://nanseninitiative.org/wp-content/uploads/2015/02/protection-agenda-volume-1.pdf> and <https://nanseninitiative.org/wp-content/uploads/2015/02/protection-agenda-volume-2.pdf> (accessed 25 January 2019).

46 DZ Falstrom 'Stemming the flow of environmental displacement: creating a convention to protect persons and preserve the environment' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 17.

47 KK Moberg 'Extending refugee definitions to cover environmentally displaced persons displaces necessary protection' (2009) 94 *Iowa Law Review* 1121.

48 AO Jegede 'Rights away from home: climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention' (2016) 16 *African Human Rights Law Journal* 58-82.

49 B Mayer 'Climate change and international law in the grim days' (2013) 24(3) *European Journal of International Law* 949; F Biermann and I Boas 'Preparing for a warmer world: towards a global governance system to protect climate refugees' (2010) 10 *Global Environmental Politics* 60-88.

50 UN Human Rights Council, *Report of the Office of the U.N. High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, 20-41, UN Doc A/HRC/10/61 (15 January 2009).

related events are entitled to general human rights guarantees in the receiving state, they may not have legitimate right of entry.<sup>51</sup> International law instruments on climate change, the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the 2015 Paris Agreement do not offer any protection to climate refugees,<sup>52</sup> but, promisingly, climate-induced migration was incorporated into the agenda of the 2010 Cancun Adaptation Framework. Consequently, article 14(f) of the Cancun Framework obliges states parties to adopt 'measures to reinforce understanding, coordination and cooperation relevant to climate-induced displacement, migration, and planned relocation'.<sup>53</sup> Therefore, the question that falls for consideration is whether there exists in the African regional human rights system a set of values that can shape the debate on the recognition and protection of climate refugees in Africa.

### **3 PROTECTION OF CLIMATE REFUGEES: AFRICAN HUMAN RIGHTS SYSTEM AND A VALUE DRIVEN APPROACH**

The discussions in section two demonstrate that the international and regional instruments developed under the auspices of the UN and AU are not sufficient in protecting climate refugees leaving identifiable gaps in the international framework. These gaps are primarily related to a lack of an explicit confirmation of the link between climate change and forced migration and corresponding obligations of supranational and international humanitarian institutions. The UN, however, has long encouraged the development of regional human rights systems to complement the international system of human rights protection.<sup>54</sup> Regional human rights systems comprise of regional instruments, mechanisms and institutions which play significant role in the promotion and protection of human and peoples' rights.<sup>55</sup> Regional human rights systems are developed to reflect mainly regional values and offer a more specific framework than international system.

The OAU (now AU) became the third after Europe and the Americas to establish a pan-regional system for human rights protection. In particular, the African human rights system is driven by

51 As above.

52 R Kuusipalo 'Exiled by emissions - climate change related displacement and migration in international law: gaps in global governance and the role of the UN Climate Convention' (2017) 18 *Vermont Journal of Environmental Law* 615-647.

53 Conference of the Parties to the Framework Convention on Climate Change, *Report of the Conference of the Parties on its Sixteenth Session*, 14, 14(f), UN Doc. FCCC/CP/2010/7/Add.1 (15 March 2011), <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> (accessed 12 August 2018).

54 The role of regional human rights mechanisms, European Parliament, Directorate General for External Policies – Policy Department, doc EXPO/DROI/2009, 19-20.

55 J Klucka 'Regional judicial and non-judicial bodies: an effective means for protecting human rights?' (2018) 1 *Eastern European Yearbook on Human Rights* 56.

the goal of safeguarding collective security, territorial integrity and the promotion of solidarity among African states. Regional human rights instruments and mechanisms, thus, support the identification of international human rights norms and standards that reflect the particular human rights concerns of geographic regions as well as in implementing these instruments on the ground.<sup>56</sup> The AU can arguably encourage regional efforts to host refugees which would be cost-effective and, particularly at times when there are similarities in local languages and customs across neighbouring states.<sup>57</sup> Regional approaches also have the potential to help pre-empt migration flows and in managing cross border displacement which might cost far less than supporting individuals who arrive in a country *en masse* because of climate-induced conflict.<sup>58</sup> However, the success of the legal protection of climate refugees in Africa would fundamentally depend on states' commitment to and involvement in regional negotiations in this regard. Arguably, finding durable solution to the predicament of climate refugees in Africa requires states to embrace the spirit of pan-African solidarity and regional cooperation in order to minimise the human suffering associated with the adverse effects of climate change. These two concepts could thus form a value-driven human rights-based approach to climate refugee protection in Africa.

In relation to the spirit of pan-African solidarity, the African human rights system is by tradition observed to be driven by a communistic understanding of humanity, human values and the individual human being.<sup>59</sup> In a typical African society, the individual interests and rights are subsumed under the broader interests and well-being of the community and in a suitable context, community may imply any form of social unit that consists of more than a single human being. Winks argues that 'the collective units or groups include the individual family group through the clan, the tribe, the people, the nation, and the state to the Pan-African community'.<sup>60</sup> The communal culture as developed and practised in Africa is underpinned by communistic values in the sense of the African conception of right and wrong and good and evil. This notion strongly influences the origins, contents, ethos and objectives of the African human rights system.

The African Charter on Human and Peoples' Rights (African Charter),<sup>61</sup> which is the fundamental instrument of the African human rights system, recognises individual rights as well as peoples' rights. The Charter unequivocally emphasises that 'the virtues of the historical

56 As above

57 VO Kolmannskog *Norwegian Refugee Council, Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration* (2008) 19-21 [http://www.nrc.no/arch/\\_img/9268480.pdf](http://www.nrc.no/arch/_img/9268480.pdf) (accessed 10 August 2019).

58 HJ Schellnhuber *Climate Change as a Security Risk* (2008) 204-07, [http://www.wbgu.de/wbgu\\_jg2007\\_engl.pdf](http://www.wbgu.de/wbgu_jg2007_engl.pdf) (accessed 10 August 2019).

59 BE Winks 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 447-464.

60 *Ibid.*

61 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force on 21 October 1986.

tradition and the values of African civilisation should inspire and characterise the reflection on the concept of human and peoples' rights by recognising that fundamental human rights originate from the attributes of human beings'.<sup>62</sup> Important from the perspective of climate refugees, as a collective and individuals, the African Charter underscores the critical necessity in giving special consideration to the right to development and to the recognition that civil and political rights cannot be detached from economic, social and cultural rights in their realisation as well as universality and that the fulfilment of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.<sup>63</sup> This is necessary for climate refugees whose problems often straddle around the violation of both political and socio-economic rights at individual and collective levels. The international and regional refugee law in Africa generally guarantees the rights of all refugees and migrants, including the right to housing;<sup>64</sup> the right to work;<sup>65</sup> the right to education;<sup>66</sup> the right to access the courts;<sup>67</sup> the right to freedom of movement within the territory;<sup>68</sup> as well as the right to be issued with identity and travel documents<sup>69</sup> to aid them to live decent lives in dignity.<sup>70</sup> However, as indicated earlier in the article, there are millions of climate refugees in Africa who are exposed to abuse as they are not recognised, and thus, need protection to safeguard their human rights and fundamental freedoms. Mayer argues that recognising and offering protection to climate refugees requires a political decision due to the challenges associated with negotiating for a legal solution.<sup>71</sup> Consequently, in the spirit of pan-African solidarity, the negotiation of legal solutions for climate refugees should be more feasible as it affords an opportunity to demonstrate the commitment of member states to the belief system which informed the formulation and adoption of the African Charter. More so, it was something similar that led to the adoption of the OAU Refugee Convention to respond to the specific protection challenges that was confronting refugees in Africa. Hence, the AU needs to be guided by its shared values and guiding principles in order to find a durable solution

62 African Charter, preambular para. 4.

63 TP Van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: progress after 5 years' (2011) 8 *SUR International Journal on Human Rights* 133-165 at 137.

64 1951 Convention, art 21.

65 1951 Convention, arts 17, 18 & 19.

66 1951 Convention, art 22.

67 1951 Convention, art 16.

68 1951 Convention, art 26.

69 1951 Convention, arts 27 & 28.

70 Addaney (n 16); ZA Lomo 'The struggle for protection of the rights of refugees and IDPs in Africa: making the existing international legal regime work' (2000) 18 *Berkeley Journal of International Law* 6.

71 B Mayer *The concept of climate migration* (2016). See, also, B Docherty & T Giannini 'Confronting a rising tide: a proposal for a convention on climate change refugees' (2009) 33 *Harvard Environmental Law Review* 363; J McAdam 'Swimming against the tide: why a climate change displacement treaty is not the answer' (2011) 23 *International Journal of Refugee Law* 2.

as the African continent is regarded as the most vulnerable to the adverse effects of climate change.

Besides, the transformation of the OAU into the AU in 2000 has reinforced the consciousness that the sustainable development of Africa is significantly dependent on effective regional integration and pan-African solidarity, protection of human rights, good governance,<sup>72</sup> and more importantly, the operationalisation of African shared values. The concept of African shared values, is however contested as scholars such as Smith claim that Africans have not collated or explicitly conceptualised a value system and as such, values are ingrained in customs, traditions and established practices.<sup>73</sup> Notwithstanding, Gluckman argues that ‘the denial of an African conception and system of law is an erroneous position stemming from a belief imbued with ignorance about how law works among Africans’,<sup>74</sup> African shared values has been conceptualised as ‘the norms, principles and practices adopted by the AU, which provide the basis for collective actions and solutions in addressing the political, economic and social challenges that impede Africa’s integration and development’.<sup>75</sup>

As informed by the shared values of Africa, the principle of pan-African solidarity has remained a fundamental basis in African regional law since the establishment of the OAU in 1963, with the founding charter proclaiming among others the ‘promotion of unity and solidarity among African states’,<sup>76</sup> and the ‘co-ordination and intensification of their co-operation and efforts to achieve a better life for the peoples of Africa’.<sup>77</sup> The AU exists to also ‘achieve unity and solidarity between African countries and the peoples of Africa’.<sup>78</sup> The principle of solidarity under international law is generally conceptualised as an appreciation and recognition by each member of a community that it determinedly conceives of its own interests as being inseparable from the interests of the whole community.<sup>79</sup> From this perspective, due to the unique vulnerability of the continent and its peoples to the adverse consequences of climate change, member states of the AU have to rally behind the principle of solidarity in recognising and protecting populations and peoples fleeing such effects since regional efforts will require mutual cooperation and support. It is plausible, then, that the principle of solidarity strongly influences any

72 See ‘Agenda 2063: The Africa we want’ <http://archive.au.int/assets/images/agenda2063.pdf> (accessed 7 July 2019).

73 K M’Baye ‘The African conception of law’ in R David (ed) *The legal systems of the world and their common comparison and unification* (1975) 56.

74 M Gluckman *The allocation of responsibility* (1986) 173.

75 K Matlosa ‘The African Union’s African Governance Architecture linkages with the African Peace and Security Architecture’ (2014) 4 *GREAT Insight Magazine* 14

76 Charter of the Organization of African Unity, 25 May 1963 (OAU Charter), art 2(1)(a).

77 OAU Charter, art 2(1)(b).

78 Constitutive Act of the African Union, 11 July 2000 (AU Constitutive Act), art 3(a).

79 RSJ MacDonald ‘Solidarity in the practice and discourse of public international law’ (1996) 8 *Pace International Law Review* 290.

regional action towards the protection of climate refugees under African regional law.

Underpinned and influenced largely by the principle of solidarity, the OAU Convention expanded the definition of refugee to include those fleeing 'events seriously disturbing public order'<sup>80</sup> in order to protect people fleeing events that were associated with the independence struggle. While expanding this to cover climate refugees in Africa may face political resistance, its relevance is not assailable. Any effort of the AU to recognise and protect climate refugees will without doubt be challenging as the UNHCR has clearly clarified that persecution is customarily related to action by the authorities of a state either by the national authorities persecuting someone or because they let someone be persecuted.<sup>81</sup> This condition makes any regional effort to afford protection to climate refugees difficult and politically challenging.<sup>82</sup> However, relying on the AU shared values and fundamental principles such as pan-African solidarity and cooperation requires a rethinking on how such value is applicable in the context of cross border climate migration on the African continent is promising.

Central to the conception of human and peoples' rights or pan-African solidarity is the values of African humanism the principles of compassion, community and solidarity. Poe explains it as effort by African peoples to creatively harness their cultural diversity and innovate around their common challenges for the collective empowerment and development of the African peoples.<sup>83</sup> Boshoff and Owiso summarised the objective of Pan-Africanism as follows:<sup>84</sup>

The endeavour by African peoples to overcome the geographic barrier of an expansive continent and peoples spread widely across the globe; contemporary effects of historical evils such as slavery, colonialism, apartheid and neo-colonialism; arbitrarily imposed colonial borders; and other natural and social barriers by harnessing positive values rooted in the diverse African cultures in order to achieve socio-economic and political development of the collective.

The implication is that pan-African solidarity is underpinned by the resolve to promote unity among the African peoples through ensuring economic (and political) integration and addressing the continent's underdevelopment through a people-centric approach. The spirit and rationale of pan-Africanism outlined in the AU mechanisms is clearly needed if the AU is to locate a durable solution for the predicament of climate refugees on the continent which is fast becoming a human security concern. For instance, article 3(a) of the AU Constitutive Act,

80 *Africa Union Convention Governing the Specific Aspects of Refugee Problems in Africa*, art 1(2) (10 September 1969)

81 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to The Status of Refugees* (1979) 39.

82 Inter-Agency Standing Committee (IASC), *Climate change, migration and displacement: Who will be affected?* (2008) 4, <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf> (accessed 10 August 2019).

83 DZ Poe Kwame Nkrumah's contribution to *Pan-Africanism: an Afro-centric analysis* (2003) 43-44.

84 Constitutive Act of the African Union, adopted on November 7, 2000 and entered into force on 26 May 2001, art 3(a).

on the objectives of the AU, seeks to ‘achieve greater unity and solidarity between the African countries and the peoples of Africa’.<sup>85</sup> This provision is particularly significant in the quest to offer protection to climate refugees in Africa in an era when states are closing their borders to refugees. The principle of pan-African solidarity and mutual assistance underlined the formation of the OAU (now the AU) and is being tested in the era of climate change that requires cooperation in managing its adverse impacts such as human migration.

Pan-Africanism, the broader notion that informs pan-African solidarity, is a complex and multi-faceted concept.<sup>86</sup> From the perspective of pan-African solidarity and humanism, it can however be argued that internationally and regionally recognised fundamental human rights in so far as they are aimed at demonstrating the principles of compassion, community and solidarity should be applicable to climate refugees. Although pan-African solidarity as a principle was invoked largely to rid the continent of colonial domination, the struggle for the survival and equality of the African peoples, sustained economic development and a healthy environment still remain.<sup>87</sup> Gonthier observes that the ‘the first value of solidarity is the recognition that there are certain people within the community who require special protection’.<sup>88</sup> Mayer takes this further by arguing that more than compassion and generosity, human rights and humanitarian action symbolise this demand for protection of human dignity in society.<sup>89</sup> Although the OAU Refugee Convention has often been justified through the notions of solidarity, the provisions are not applicable to climate refugees.<sup>90</sup> As a result, regional solidarity may need to be invoked to justify a moral, if not legal, obligation of states to somehow intervene to offer assistance to other states whose populations are facing climate-related displacement through admitting their citizens into their territories on humanitarian grounds. Thus, affording protection to climate refugees on the grounds of the AU’s shared values and guiding principles would restore trust in its damaging and weakening reputation as just being a paper tiger.

Pan-African solidarity is also an important aspect of the concept of ‘African humanism’ which generally embraces the various social theories and beliefs that the individuality of a person are inseparably connected to their relationships with others in society.<sup>91</sup> An example of this humanism is the ethical concept of Ubuntu which is embodied in

85 Constitutive Act of the African Union, adopted on November 7, 2000 and entered into force on 26 May 2001, art 3(a).

86 F Viljoen *International human rights law in Africa* (2012) 152.

87 Winks (n 59).

88 CD Gonthier ‘Liberty, equality, fraternity: the forgotten leg of the trilogy, or fraternity, the unspoken third pillar of democracy’ (2000) 45 *McGill Law Journal* 574

89 Mayer (n 1) 357.

90 See, for example, Resolution adopted by UN General Assembly on Assistance to Refugees, Returnees and Displaced Persons in Africa, G.A. Res. 65/193, UN G.A.O.R., 6th Sess., Supp. No. 49, A/RES/65/193 (2010).

91 Winks (n 59).

the Nguni proverb *umuntu ngumuntu ngabantu* (accurately translates, a person is a person through people) succinctly expresses the notion of African humanism. *Ubuntu* 'incases the fundamental values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'.<sup>92</sup> Thus, the conception that 'we are not islands unto ourselves' is central to the understanding of the individual in African thought.<sup>93</sup> Despite its many detractors,<sup>94</sup> African humanism is undeniably justifiable as a legal value, and that pan-African solidarity carries distinctive jurisprudential significance that can be invoked to influence regional action towards the protection of climate refugees in Africa as Ubuntu requires the balancing of competing interests to promote the continental vision of a caring society based on good neighbourliness and shared concern.

Regarding the value of cooperation, in addition to its relevance to pan-African solidarity, it can be argued that the AU can adopt a regional policy to legally recognise and protect climate refugees. A regional cooperation has the prospect of helping to preempt refugee flows as well as in managing climate refugees which may be relatively less costly as compared to managing regional climate-induced conflicts or mass climate-induced migration.<sup>95</sup> In the end, the effectiveness of the legal recognition and protection of climate refugees in Africa would largely depend on the commitment of states to cooperate and act in this regard. If the AU cannot do anything without the consent of states, it should do everything possible to encourage states to cooperate especially through the spirit of pan-African solidarity and regional cooperation to lessen the human suffering arising from the adverse effects of climate change.

## 4 CONCLUSION

This article establishes that gaps existing in the refugee protection regime for climate refugees is historical and continues to date. It further contends that the best way to ensure protection for climate refugees in Africa is the operationalising by AU of its solidarity and humanistic approach as a demonstration of its belief in the ideals of Pan-African cooperation for addressing common continental problems. From the perspective of pan-African solidarity, AU and African states that would be hosting climate refugees should bear this as a moral and ethical duty as the obligations enumerated in the international and regional refugee protection framework largely fall on host states. Based on the same approach, hosting states should ensure that the standards of treatment

92 OB Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 148.

93 *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 1 SA 474 (CC) para 53.

94 See generally, IJ Kroeze 'Doing things with values II: the case of *Ubuntu*' (2002) 13 *Stellenbosch Law Review* 252.

95 German Advisory Council on Global Change, *Climate Change as a Security Risk* (2008) 204-07 [http://www.wbgu.de/wbgu\\_jg2007\\_engl.pdf](http://www.wbgu.de/wbgu_jg2007_engl.pdf) (accessed 29 July 2019).

as established in the regional refugee protection system and human rights law are fully enjoyed in the host states through the adoption of appropriate legislation and policy measures. Aside the recognition and protection of climate refugees in Africa, the international community, especially the developed states that have contributed largely to the climate crisis have an obligation. This is in terms of supporting regional efforts through financial assistance proportional to their contributions to climate change so as to help states parties to instruments under the African human rights system to fully commit to the implementation of a value driven approach.