

Climate-induced displacement in the Sahel: A question of classification

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Abstract

This article examines legal aspects of climate-induced forced displacement in the Sahel region of North Africa. The Sahel region is being adversely affected by climate change, leading to the displacement of thousands of people, both cross-border migrants and internally displaced persons (IDPs). The conventional stance is that refugee status

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does not extend to individuals displaced as a result of natural or environmental catastrophes and that consequently a normative gap exists in international refugee law. However, the position in international law may not be as clear-cut as this conventional view assumes, in light of recent trends which are moving towards the recognition of the rights of such displaced people. It seems clear that under the terms of the 1951 Refugee Convention, such people are excluded from refugee status, and while the situation is less obvious under the Organisation of African Unity Convention on Refugees in Africa, it appears that the end result is the same, although there seems to be an increasing desire for recognition of refugee status under that treaty. Other regional treaties are also taking tentative steps in this direction; the Kampala Convention on IDPs is especially noteworthy because it makes express references to circumstances such as natural disasters. A human rights approach may offer hope to displaced people, since climate change can impact on a number of rights—particularly significant is the decision of the UN Human Rights Committee in Teitiota v. New Zealand which acknowledged the harmful impact of climate change. The response, legislative and otherwise, of five Sahel States towards forcibly displaced persons is examined in this article.

Keywords: Sahel, climate change, forced displacement, refugee status, policy of Sahel States.

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Partout où quelque chose remue sur cette longue traînée de poussière, rendue plus subtile encore après six mois de sécheresse, on voit s'élever des nuages, et quand le moindre vent passe sur la campagne, la tête alourdie des vieux arbres semble se dissoudre en fumée.

Eugene Fromentin¹

Introduction

This article examines legal aspects of climate-induced forced displacement in the Sahel region of North Africa. As is observed below, such displacement has been ongoing for a number of years but continues to increase to alarming levels. The forcibly displaced can be divided into two categories: firstly, those who by virtue of seeking refuge in another State may have a claim to refugee status under international law, sometimes referred to as cross-border migrants;² and secondly,

1 “Wherever something stirs on this long trail of dust, made even more subtle after six months of drought, clouds are seen to rise, and when the slightest wind passes over the countryside, the heavy heads of the old trees seem to dissolve into smoke.” Eugene Fromentin, *Une année dans le Sahel*, Typographie Wittersheim, Paris, 1859, p. 43.

2 Climate migration refers to “[t]he movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border”: Warsaw International Mechanism, Executive Committee, “Action Area 6: Migration, Displacement and Human Mobility”, submission from the International

those who are uprooted from their homes but remain within the borders of their own disaster-affected country and are therefore classified as internally displaced persons (IDPs).³ The conventional stance is that refugee status does not encompass individuals displaced because of natural disasters or environmental catastrophes whatever the cause, be they sudden-onset events, such as volcanic eruptions or flooding, which may pose an immediate threat to life; or slow-onset events, such as desertification or rising sea levels, which may eventually make life untenable.⁴ Consequently, “cross-border displacement stemming from natural disasters and the effects of climate change has ... been identified as a normative gap in the international legal protection regime”.⁵ This article argues first that the position in international law may not be as clear-cut as the traditional view supposes in light of regional regimes, and explores recent trends towards the legal recognition of the rights of people displaced because of climate change. It then examines the response to climate-induced displaced persons, particularly in terms of domestic legislation, of five Sahel States that form the focus of the article: Burkina Faso, Mali, Niger, Chad and Mauritania.

Organization for Migration (IOM), 2016. The present article seeks to avoid labels such as “environmental refugee” or “climate refugee”, as they have no basis in international law: see Jane McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, Oxford, 2012, pp. 3, 6. These terms also generate considerable controversy as the word “refugee” has a technical legal meaning: see Rafiqul Islam, “Climate Refugees and International Refugee Law”, in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law*, Martinus Nijhoff, Leiden and Boston, MA, 2013, pp. 217–218. Many writers warn of misunderstandings as a result of the misuse of legal terms by lay persons: see, for example, the review of such criticisms in Camillo Boano, Roger Zetter and Tim Morris, *Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration*, Forced Migration Policy Briefing No. 1, Refugee Studies Centre, Oxford, November 2008, p. 10. See also Astri Suhrke, “Environmental Degradation and Population Flows”, *Journal of International Affairs*, Vol. 47, No. 2, 1994, p. 482, who suggests that the definition of refugee in such contexts is a sociological one rather than a legal one. The Office of the UN High Commissioner for Refugees (UNHCR) recommends the term “persons displaced in the context of disasters and climate change”, which is somewhat long-winded: see UNHCR, “Climate Change and Disaster Displacement”, available at: www.unhcr.org/climate-change-and-disasters.html (all internet references were accessed in January 2022). Others suggest “environmental refugees”: see Diane C. Bates, “Environmental Refugees? Classifying Human Migrations Caused by Environmental Change”, *Population and Environment*, Vol. 23, No. 5, 2002.

3 As the United Nations (UN) has observed, “[d]isasters often generate the mass displacement of persons, either across borders (refugees) or within those of a disaster-affected State (internally displaced persons)”. *Report of the Special Rapporteur on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/598, 15 May 2008, para. 27.

4 “The occurrence of a disaster is not envisaged as grounds for granting refugee status”: *ibid.*, para. 28. According to the Intergovernmental Panel on Climate Change (IPCC), the harmful effects of climate change include an increase in the frequency and intensity of extreme weather events forcing people from their homes, possibly permanently; increased warming and drought affecting agriculture and access to clean water; sea-level rises making coastal areas uninhabitable; and increased potential for violence as a result of economic dislocation. Vicente R. Barros *et al.* (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability*, Fifth Assessment Report, Working Group II, IPCC, 2014, Part A, pp. 766–771, and Part B, p. 1175, available at: www.ipcc.ch/report/ar5/wg2/. While international law may draw distinctions between different categories of natural disasters, it has been observed that “disaster categorization” entails a “high degree of arbitrariness” since it is “not always possible to maintain a clear delineation between causes”. *Report of the Special Rapporteur*, above note 3, paras 48–49.

5 J. McAdam, above note 2, p. 1.

The Sahel is a semi-arid region of sub-Saharan Africa that experiences a hot, sunny and dry climate all year round. It is bordered by the Sahara Desert to the north and savannahs to the south, and stretches from Sudan in the east to Senegal in the west, taking in all or parts of Chad, Niger, Burkina Faso, Mauritania and Mali.⁶ In recent decades the Sahel has experienced drought, desertification and soil loss,⁷ which the United Nations (UN), in partnership with African countries, is attempting to reverse.⁸ Such slow-onset environmental degradation, which may be attributable partially to local human activity but is also attributable to global climate change,⁹ has given rise to food insecurity.¹⁰ It has additionally contributed to increased communal violence and armed conflict situations, possibly involving organized armed groups,¹¹ leading to the forced displacement of hundreds of thousands of people across the region.¹² The

- 6 “Sahel”, *Encyclopaedia Britannica*, available at: www.britannica.com/place/Sahel. The Sahel may extend to parts of Nigeria, Eritrea, the Gambia and Guinea-Bissau (Platform on Disaster Displacement (PDD) and Office of the UN High Commissioner for Human Rights (UN Human Rights), *The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants*, 2018, paras 92–93, available at: www.ohchr.org/Documents/Issues/Migration/OHCHR_slow_onset_of_Climate_Change_EN.pdf), as well as other neighbouring countries (Africa Renewal, “The Sahel: Land of Opportunities”, available at: www.un.org/africarenewal/sahel).
- 7 Willem Van Cotthem, “Desertification in the Sahel”, 16 February 2015, available at: <https://desertification.wordpress.com/2015/02/16/the-sahel-desertified/>. See UN Framework Convention on Climate Change, 1771 UNTS 107, 9 May 1992 (entered into force 21 March 1993) (UNFCCC), Art. 1(1).
- 8 See the UN Convention to Combat Desertification, 1954 UNTS 3, 17 June 1994 (entered into force 26 December 1996) (UNCCD), Annex I, available at: www.unccd.int/conventionregions/annex-i-africa. The UNCCD, *inter alia*, establishes a regional programme for Africa to fight land degradation. Land degradation affects much of Africa: see Pablo Muñoz *et al.*, *Land Degradation, Poverty and Inequality*, UNCCD, Bonn, 2019, pp. 8–9, available at: <https://tinyurl.com/yzvnj4h9>.
- 9 UNFCCC, Art. 1(2); PDD and UN Human Rights, above note 6, paras 96–104; UN, “Africa is Particularly Vulnerable to the Expected Impacts of Global Warming”, fact sheet, available at: https://unfccc.int/files/press/backgrounders/application/pdf/factsheet_africa.pdf; ICRC, “Mali-Niger: Climate Change and Conflict Make an Explosive Mix in the Sahel”, news release, 22 January 2019, available at: www.icrc.org/en/document/mali-niger-climate-change-and-conflict-make-explosive-mix-sahel. See also, generally, Oxfam International, *Uprooted by Climate Change: Responding to the Growing Risk of Displacement*, Oxford, November 2017; Isabelle Niang and Olivier C. Ruppel, “Africa”, in V. R. Barros *et al.* (eds), above note 4, Part B, p. 1199.
- 10 See, for example, HRC Res. 13/4, “The Right to Food”, 24 March 2010; ICRC, “A Conflict without Borders Continues to Play Out in the Sahel”, news release, 8 July 2020, available at: www.icrc.org/en/document/conflict-without-borders-continues-play-out-sahel; Robert Muggah and José Luengo Cabrera, “The Sahel is Engulfed by Violence. Climate Change, Food Insecurity and Extremists are Largely to Blame”, World Economic Forum, 23 January 2019, available at: www.weforum.org/agenda/2019/01/all-the-warning-signs-are-showing-in-the-sahel-we-must-act-now/. Finally, see UN Security Council, *Joint Force of the Group of Five for the Sahel: Report of the Secretary-General*, UN Doc. S/2021/442, 10 May 2021, p. 2, para. 4: “The latest available data indicate that, in 2021, 6.8 million people were food-insecure in G5 Sahel countries. The threat of famine is now looming in Burkina Faso. Also, since 2018, in the Liptako-Gourma region, the number of internally displaced people has risen twentyfold. In G5 Sahel States, close to 2.2 million people were internally displaced and more than 880,000 people were refugees. Large-scale displacement continued to have an impact on State service provision and the availability of natural resources, further exacerbating tension and social conflicts.”
- 11 ICRC, above note 9; ICRC, above note 10. The role played by such groups appears to be a complex one: see Lori-Anne Théroux-Bénoni and Baba Dakono, “Are Terrorist Groups Stoking Local Conflicts in the Sahel?”, Institute for Security Studies, 14 October 2019, available at: <https://issafrica.org/iss-today/are-terrorist-groups-stoking-local-conflicts-in-the-sahel>.
- 12 Stefano M. Torelli, “Climate-Driven Migration in Africa”, European Council on Foreign Relations, 20 December 2017, available at: https://ecfr.eu/article/commentary_climate_driven_migration_in_africa/;

Office of the UN High Commissioner for Refugees (UNHCR), the UN refugee agency, recognizes the threat posed by climate change to the displaced. In its Global Compact for Refugees, the UNHCR acknowledges that “climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements”.¹³

The Sahel assumed a higher priority for the UNHCR in 2020. On 23 July 2020, the African Development Bank (AfDB), UNHCR and the G5 Sahel (Burkina Faso, Chad, Mali, Mauritania and Niger)¹⁴ signed an agreement to allocate \$20 million to the COVID-19 response across the Sahel region.¹⁵ The UNHCR has provided emergency shelter to over 81,000 displaced people and amid COVID-19, its work has helped over 338,000 people to receive essential health-care services in the Central Sahel.¹⁶ Additionally, with schools closed, 12,000 displaced and host community children have continued their education through distance learning.¹⁷ At the end of March 2021 the total population of concern for the UNHCR amounted to 3,861,555 individuals, including refugees, asylum-seekers, refugee returnees, IDPs and IDP returnees, in five countries of the Sahel, which are analyzed in this article: Burkina Faso, Mali, Niger, Chad and Mauritania. Excluding returnees, the forcibly displaced numbered 877,773 asylum-seekers and refugees and 2,170,655 IDPs.¹⁸

Lisa Schlein, “Internal Displacement in the Sahel Tops 2 Million as Armed Conflict Intensifies”, VOA, 23 January 2021, available at: www.voanews.com/africa/internal-displacement-sahel-tops-2-million-armed-conflict-intensifies. See UNHCR, *Update of UNHCR’s Operations in Africa*, Executive Committee of the High Commissioner’s Programme, 69th Session, 1–5 October 2018; UNHCR, *UNHCR Global Trends 2019*, 18 June 2020, available at: www.unhcr.org/globaltrends2019/; Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC), *Global Report on Internal Displacement 2020*, April 2020, available at: www.internal-displacement.org/sites/default/files/publications/documents/2020-IDMC-GRID.pdf; UNHCR, “Sahel Refugee Crisis”, available at: www.unrefugees.org/emergencies/sahel/; UNHCR, “Sahel Crisis Explained”, 29 October 2020, available at: www.unrefugees.org/news/sahel-crisis-explained/; Climate Refugees, “Climate, Conflict, Migration in the Sahel – Regional Expert Weighs In”, 5 October 2020, available at: www.climate-refugees.org/perspectives/2020/10/4/sahel. See also Terence Epule, Changhui Pen and Laurent Lepage, “Environmental Refugees in Sub-Saharan Africa: A Review of Perspectives on the Trends, Causes, Challenges and Way Forward”, *GeoJournal*, Vol. 80, No. 1, 2015.

13 *Report of the United Nations High Commissioner for Refugees*, UN Doc. A/73/12 (Part II), 13 September 2018, para. 8, affirmed by UNGA Res. 73/151, 17 December 2018.

14 The G5 Sahel is an institutional framework for coordination of regional cooperation in development policies and security matters in West Africa. It was formed on 16 February 2014 in Mauritania at a summit of five Sahel countries – Burkina Faso, Chad, Mali, Mauritania and Niger – and is permanently seated in Mauritania. Later in 2014, it adopted a Convention of Establishment. See Dominic Chavez, “Sahel G5 Meeting Brings Together Governments and Donors to Accelerate Regional Development”, World Bank, 14 July 2014, available at: www.worldbank.org/en/news/feature/2014/07/14/sahel-g5-meeting-brings-together-governments-and-donors-to-accelerate-regional-development; Abdelhak Bassou, *State, Borders and Territory in the Sahel: The Case of the G5 Sahel*, Policy Brief PB-17/33, OCP Policy Center, October 2017, available at: <https://sahelresearch.africa.ufl.edu/files/OCPPC-PB1733vEn.pdf>; G5 Sahel, Convention portant creation du G5 Sahel, 14 December 2014.

15 UNHCR, “US\$20 Million for Sahel Drive to Curb COVID-19”, 23 July 2020, available at: www.unhcr.org/news/press/2020/7/5f1993eb4/us20-million-sahel-drive-curb-covid-19.html.

16 UNHCR, “UNHCR Warns of Mounting Needs in Sahel as Forced Displacement Intensifies”, 16 October 2020, available at: www.unhcr.org/news/briefing/2020/10/5f894b234/unhcr-warns-mounting-needs-sahel-forced-displacement-intensifies.html.

17 *Ibid.*

18 UNCHR, “Sahel Crisis”, available at: <https://data2.unhcr.org/en/situations/sahelcrisis>.

The definition of refugee according to the 1951 Refugee Convention

The first issue addressed in this article is whether the cross-border climate-induced displaced persons in the Sahel are entitled to refugee status under international law. The established definition of a refugee in international law is found in the 1951 Convention relating to the Status of Refugees (Refugee Convention). As is well known, this instrument defines a refugee as someone who, *inter alia*, leaves or is unable to return to his or her country of nationality as a result of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.¹⁹ There are therefore three essential elements to satisfying the test for refugee status: first, an individual, well-founded fear of persecution;²⁰ secondly, being outside of one’s country of origin or habitual residence; and thirdly, an inability or unwillingness to rely on the protection of that country or to return there due to a fear of persecution.²¹ While the established definition has been subject to judicial interpretation over the years so that, for instance, gender-related violence,²² including female genital mutilation²³ and forced sterilization,²⁴ and sexual orientation²⁵ have become accepted as falling within the Refugee Convention’s grounds for recognizing refugee status, it would ordinarily strain the text beyond breaking point to read into it that natural or environmental disasters in and of themselves, including climate change as a subcategory, are one such ground, even if one invokes the doctrine of evolutive interpretation.²⁶ The fact that a conscious decision was seemingly taken to exclude peoples fleeing natural disasters would render such a

- 19 Convention Relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954) (Refugee Convention), Art. 1(a)(2). The overwhelming majority of African States are parties to the Refugee Convention, including the five Sahel countries in question: see UNHCR, “States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention”, available at: www.unhcr.org/5d9ed32b4.
- 20 The fear of persecution must be based on the five grounds listed in Article 1(a)(2) of the Refugee Convention, which is exhaustive. See Jahid Hossain Bhuiyan, “Refugee Status Determination: Analysis and Application”, in R. Islam and J. Hossain Bhuiyan (eds), above note 2, pp. 54–60.
- 21 UNHCR, “What Is a Refugee?”, available at: www.unhcr.org/what-is-a-refugee.html. See, generally, James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed., Cambridge University Press, Cambridge, 2014.
- 22 UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/02/01, 7 May 2002, available at: www.unhcr.org/uk/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html.
- 23 *Ibid.*; House of Lords, *Fornah v. SSHD*, [2007] 1 AC 412, 2007.
- 24 Supreme Court of Canada, *Cheung v. Canada (Minister of Employment and Immigration)*, 102 DLR (4th) 214, 1993.
- 25 UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/12/09, 23 October 2012, available at: www.unhcr.org/uk/publications/legal/50ae466f9/guidelines-international-protection-9-claims-refugee-status-based-sexual.html; Court of Justice of the European Union, *X, Y, Z v. Minister voor Immigratie en Asiel*, Case Nos C-199/12, C-200/12, C-201/12, ECLI:EU:C:2013:720, 2013.
- 26 See House of Lords, *Hoxha and Anor v. Secretary of State for the Home Department*, [2005] UKHL 19, 2005, paras 8–9, which cautioned against “reading into a treaty [the Refugee Convention] words that are not there”. It should be noted that the first principle of treaty interpretation is that of giving a term

reading extremely unlikely.²⁷ However, the UNHCR is of the view that climate-induced displaced persons do not qualify as refugees “unless they also have well-founded fear of persecution for one of the reasons stated”.²⁸ A causal link must therefore be established between the environmental disaster and the persecution,²⁹ described by the UNHCR as “nexus dynamics”.³⁰ A possible scenario might be flooding caused by the deliberate destruction of dykes or a dam;³¹ another would be discrimination against as a member of a social group in the distribution of disaster relief.³² Nevertheless, unlikely as it may seem, it has been suggested that nature could be viewed as the “persecutor”,³³ but logically, persecution, and/or the fear of it, such as fear for one’s life, must be generated by human agency and by definition cannot be carried out by random and inanimate acts of nature, however calamitous.³⁴ The view has therefore been expressed that,

implicitly, the [Refugee] Convention ... excludes those who are displaced across a state border due to drought, flood or loss of income induced by deforestation. People fleeing such environmental changes would not qualify for refugee status even under liberal interpretations of prevailing legal norms.³⁵

its ordinary meaning: see Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969 (entered into force 27 January 1980), Art. 31(1).

- 27 Ionel Zamfir, “Refugee Status under International Law”, European Parliamentary Research Service, 27 October 2015, p. 24, available at: <https://epthinktank.eu/2015/10/27/refugee-status-under-international-law/>.
- 28 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, January 1992, para. 39, available at: www.unhcr.org/4d93528a9.pdf; UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters*, 1 October 2020, paras 7–9, available at: www.refworld.org/docid/5f75f2734.html.
- 29 UNHCR, *Legal Considerations*, above note 28, para. 10. See also Colloquium on Challenges in International Refugee Law, “International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground”, *Michigan Journal of International Law*, Vol. 23, No. 2, 2002; R. Islam, above note 2, pp. 222–224.
- 30 See Sanjula Weerasinghe, *In Harm’s Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change*, UNHCR, Division of International Protection, December 2018, available at: <https://www.unhcr.org/5c1ba88d4.pdf>.
- 31 See Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, UNHCR, Geneva, May 2011, p. 14.
- 32 *Report of the Special Rapporteur*, above note 2, para. 26; New Zealand Immigration and Protection Tribunal (NZIPT), *AC (Tuvalu)*, [2014] NZIPT 800517-520, 2014, para. 86. A much-cited example is that of the Marsh Arabs of Iraq, many of whom were forced to flee their traditional homeland as a result of the wetlands being drained by the Iraqi government of Saddam Hussein in retribution for a failed uprising. See *Report of the Special Rapporteur of the Commission on Human Rights*, UN Doc. E/CN.4/1995/56, 15 February 1995.
- 33 Jessica B. Cooper, “Environmental Refugees: Meeting the Requirements of the Refugee Definition”, *New York University Environmental Law Journal*, Vol. 6, No. 2, 1998.
- 34 New Zealand Court of Appeal (NZCA), *Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment*, [2014] NZCA 173, 2014, para. 21. See, further, J. McAdam, above note 31, p. 12; Mark Baker-Jones and Melanie Baker-Jones, “*Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment – A Person Displaced*”, *QUT Law Review*, Vol. 15, No. 2, 2015, pp. 114–116. While national courts have assumed different stances on the definition of fear of persecution (see Rafiqul Islam, “The Origin and Evolution of International Refugee Law”, in R. Islam and J. Hossain Bhuiyan (eds), above note 2, pp. 26–27), the circumstances share the common feature of human agency, whether through human rights violations or armed conflict.

35 A. Suhrke, above note 2, p. 492.

This strict interpretation has been upheld by national courts.³⁶ A decision of the New Zealand Court of Appeal (NZCA), rejecting the submission that a climate-induced displaced person could qualify for refugee status, is apposite.³⁷ The case concerned Mr Teitiota and his wife from the Pacific Island State of Kiribati, who were in New Zealand unlawfully and whose application for refugee status and protected person status on the grounds that climate change would make living in Kiribati untenable had been turned down by the New Zealand Immigration and Protection Tribunal (NZIPT).³⁸ The NZIPT held that Teitiota was not a victim of “forced” displacement but had moved voluntarily, and that persecution required human agency under both international law and the relevant New Zealand legislation.³⁹ With specific reference to natural disasters and environmental degradation, while such events could entail serious human rights issues, the criteria in the Refugee Convention had to be met, which in the New Zealand context meant establishing egregious violations of core human rights with a sufficient link to a Refugee Convention ground.⁴⁰ Teitiota appealed the decision, arguing, *inter alia*, that environmental degradation in the form of coastal erosion and sea-level rise meant that there was no future for him and his family in Kiribati.

An appeal against the NZIPT’s decision that the factual circumstances meant that Teitiota did not qualify for refugee status under the Refugee Convention eventually reached the NZCA. It was submitted on behalf of Teitiota that the “word ‘refugee’ constitutes and incorporates those who are refugees by way of climate change and its effects”.⁴¹ The NZCA held that the domestic legislation, which incorporated both the definition of refugee under the Refugee Convention and that of protected person under the International Covenant on Civil and Political Rights (ICCPR), had been correctly interpreted to exclude such persons, and that the categories of refugee and protected person required persecution by a “human agency”.⁴² It has therefore been remarked that

the use of the term refugee in Mr Teitiota’s circumstances [was] conceptually inaccurate and ‘misconceived’, in that the factual circumstances provided no evidence to support the legal interpretation and ‘bring him within the Convention’. On considering the definition, it was not difficult for the courts

36 See J. McAdam, above note 31, pp. 13–14; Law Library of Congress, “New Zealand: ‘Climate Change Refugee’ Case Overview”, Section IV, July 2015, available at: www.loc.gov/item/2016295703/.

37 NZCA, *Teitiota*, above note 34. For comment, see M. Baker-Jones and M. Baker-Jones, above note 34.

38 NZIPT, *AF (Kiribati)*, [2013] NZIPT 800413, 2013. The New Zealand Immigration Act of 2009 incorporates the test for a refugee under the Refugee Convention and the test for protected person status in accordance with the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976) (ICCPR). See Supreme Court of New Zealand (NZSC), *Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107, 2015, paras 5–6.

39 NZIPT, *AF*, above note 38, paras 49, 54.

40 *Ibid.*, para. 65.

41 NZCA, *Teitiota*, above note 34, para. 11. This submission appears to have been based on a “sociological” definition of refugee status, which is broader than the legal definition: see NZIPT, *AF*, above note 38, para. 52.

42 NZCA, *Teitiota*, above note 34, para. 21. See also NZIPT, *AC*, above note 32; NZIPT, *AF*, above note 38.

to conclude that Mr Teitiota did not satisfy the definition of a ‘refugee’ for the purposes of the Convention.⁴³

It is difficult to disagree with this assessment, and neither did an examination of the facts give rise to fears over Mr Teitiota’s human rights if he was returned to Kiribati.⁴⁴ The NZCA was not unsympathetic to the plight of climate-induced displaced persons, but it observed that ultimately, “climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention”.⁴⁵ Whilst the Supreme Court of New Zealand upheld the decisions of the lower courts denying leave to appeal, it agreed with them that it could not be definitively ruled out that climate change or environmental disasters “could never create a pathway into the Refugee Convention”.⁴⁶ The UNHCR has welcomed the fact that the door has been opened to the possibility of relying on the Refugee Convention in such circumstances but has warned against a narrow interpretation of the effects of climate change to the exclusion of other considerations, since the authorities could find the Refugee Convention inapplicable.⁴⁷

International law, in the guise of the Refugee Convention as traditionally understood, may therefore be of limited relevance to persons who are forcibly displaced because of natural disasters. An argument made on human rights grounds may, however, stand a chance of success, and this will be considered below. In light of the somewhat narrow interpretation of the concept of a refugee under the Refugee Convention, States have acted at the regional level to broaden the definition of refugee, particularly in Africa and the Middle East.

The OAU Convention on Refugees

Particularly significant in this context was the adoption by the Organization of African Unity (OAU, now African Union) of the 1969 Convention on Refugees in Africa (OAU Convention).⁴⁸ The OAU Convention is vitally important to the five Sahel States mentioned above, which are parties to it. The OAU was of the view that the existing international law, as enshrined in the 1951 Refugee

43 M. Baker-Jones and M. Baker-Jones, above note 34, pp. 111–112 (footnotes omitted).

44 NZCA, *Teitiota*, above note 34, para. 25.

45 *Ibid.*, para. 41.

46 NZSC, *Teitiota*, above note 38, para. 13. It should be noted that the UN Human Rights Committee did not find reasons to disagree with the conclusions of the New Zealand judiciary: see Human Rights Committee, *Teitiota v. New Zealand*, Communication No. 2728/2016, Views, 24 October 2019.

47 UNHCR, *Legal Considerations*, above note 28, paras. 5–6.

48 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969 (entered into force 20 January 1974) (OAU Convention). As of May 2019, the OAU Convention had been ratified by forty-six States. See, generally, Paul Weis, “The Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems”, *Revue de Droits de l’Homme*, Vol. 3, No. 3, 1970; Rose M. D’Sa, “The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity”, *Netherlands International Law Review*, Vol. 31, No. 3, 1984; Rainer Hofman, “Refugee Law in an African Context”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 52, No. 2, 1992.

Convention, did not adequately reflect the singular difficulties facing Africa as a result of decolonization, such as wars of national liberation and minority rule, which had given rise to mass exoduses and the displacement of whole populations, in addition to the persecution of particular individuals involved in the liberation struggle.⁴⁹ However, the OAU Convention complements, rather than replaces, the Refugee Convention in Africa.⁵⁰

For present purposes, the OAU Convention's main innovation is that it broadens the concept of the refugee.⁵¹ Article 1(2) of the OAU Convention extends the definition of refugee to include persons fleeing "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [their] country of origin or nationality".⁵² This definition was designed to cover flight brought about by the liberation struggle, and placed emphasis on an objective test of fear of persecution.⁵³ Furthermore, it has been argued that the OAU definition does not require "calculated", directed intent but can also apply to "accidental situations".⁵⁴ This broader and more

49 For a different narrative asserting that in fact, national security considerations were uppermost, see George Okoth-Obbo, "Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa", *Refugee Survey Quarterly*, Vol. 20, No. 1, 2001, p. 90; Micah Bond Rankin, "Extending the Limits or Narrowing The Scope? Deconstructing the OAU Refugee Definition Thirty Years On", *South African Journal on Human Rights*, Vol. 21, No. 3, 2005, p. 408.

50 OAU Convention, Art. 8(2). The preamble additionally acknowledges that the Refugee Convention constitutes the basic instrument relating to the status and treatment of refugees. See also African Commission on Human and Peoples' Rights (ACHPR), *Doebbler v. Sudan*, Communication No. 235/2000, 11–25 November 2009, para. 125.

51 Latin American States expanded the definition of refugee through a non-binding declaration, the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984, Art. 3(3), available at: www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html. The Cartagena Declaration makes specific reference to generalized violence, internal conflicts and massive violations of human rights but does not expressly mention natural disasters. European Union legislation is also of interest: Directive 2011/95/EU on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, OJ L 337/9, 13 December 2011, Art. 2(f), known as the Qualifications Directive, whilst accepting that the Refugee Convention constitutes the foundation of the international legal regime for the protection of refugees, introduces the legal concept of "subsidiary protection" for persons who do not qualify as refugees but would be at risk of "serious harm" if returned to their country of origin. "Serious harm" is defined as (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment; and (c) serious and individual threat to a person's life due to indiscriminate violence in situations of international or internal armed conflict (Art. 15). Persons displaced as a result of climate change or environmental disasters may therefore fall outside the scope of the definition.

52 R. Hofman, above note 48, p. 323. Judge Pinto de Albuquerque was of the view that the OAU Convention constituted an example of an instrument incorporating a broader human rights standard enlarging the concept of refugee to those in need of complementary international protection. European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, Judgment (Grand Chamber), 23 February 2012, Concurring Opinion of Judge Pinto de Albuquerque, p. 62.

53 P. Weis, above note 48, p. 455; G. Okoth-Obbo, above note 49, pp. 111–112; Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism", *International Journal of Refugee Law*, Vol. 3, No. 2, 1991, pp. 194–196. However, this view has been challenged: see M. B. Rankin, above note 49, pp. 410–414; Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions", *McGill Law Journal*, Vol. 58, No. 1, 2012, pp. 113–120.

54 G. Okoth-Obbo, above note 49, p. 112.

liberal regime was motivated, as stated in the preamble to the OAU Convention, by “the need for an essentially humanitarian approach towards solving the problems of refugees”.⁵⁵ However, this wider definition is not without its critics, who consider that it contains elements of “vagueness and ambiguity”.⁵⁶ There has been considerable debate as to whether or not population displacement because of natural disasters was initially envisaged as coming within the protective scope of the definition,⁵⁷ and there is persuasive support for the stance that it appears to have been limited to human-made disasters.⁵⁸ Could it nevertheless be said that this understanding has evolved subsequently so that it has become accepted that climate-induced displaced persons would qualify as refugees for the purposes of the OAU Convention?⁵⁹ The key phrase is “events seriously disturbing public order”. It is argued that “public order” refers to disorder caused by social and political unrest, breaches of the peace, riots, violent demonstrations etc., rather than natural calamities,⁶⁰ but there does not seem to be any insuperable reason why this phrase should not be capable of being interpreted to include those fleeing public disorder because of natural catastrophes.⁶¹ The UNHCR has emphasized that a vital element is the *effect* of the disorder rather than the cause, be it human-made or natural.⁶² Yet, crucially, there appears to have been little support for this approach in Africa itself.⁶³ The African Charter on the Rights and Welfare of the Child contains an explicit reference to “natural disasters”, albeit limited to internally displaced children.⁶⁴ Whether this development may cause a rethinking of the above narrative, in that the interpretation of the relevant

55 See also Vienna Declaration and Programme of Action, *International Legal Materials*, Vol. 32, No. 6, 1993, p. 1661, Part I, para. 23(5).

56 M. B. Rankin, above note 49, p. 410; M. Sharpe, above note 53, p. 111.

57 For the “inclusive” view, see, for example, Gino J. Naldi, *The Organization of African Unity: An Analysis of Its Role*, 2nd ed., Mansell, London, 1999, p. 79; Ram C. Chhangani, *African Refugee Law: Problems and Prospects*, University of Maiduguri Press, Maiduguri, 1992, p. 9. In contrast, for the “exclusive” view, see Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention* (“Complementary Protection”), Legal and Protection Policy Research Series No. 9, UNHCR, 2005, pp. 13–14, available at: www.unhcr.org/435df0aa2.pdf.

58 M. B. Rankin, above note 49, p. 415; M. R. Rwelamira, “Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa”, *International Journal of Refugee Law*, Vol. 1, No. 4, 1989, p. 558; Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR, Geneva, February 2012, pp. 33–34; David Keane, “The Environmental Causes and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’”, *Georgetown International Environmental Law Review*, Vol. 16, No. 2, 2004, pp. 216–217.

59 Cristiano d’Orsi, “Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?”, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol. 68, No. 6, 2008, p. 1061.

60 For a summary of these views, see Alice Edwards, “Refugee Determination in Africa”, *African Journal of International and Comparative Law*, Vol. 14, No. 2, 2006, p. 226. However, the view has been expressed that the term “public order” in the Refugee Convention corresponds to the term “ordre public” in French law (see Paul Weis, *The Refugee Convention, 1951*, available at: www.unhcr.org/4ca34be29.pdf), and this may well be the case also with the OAU Convention.

61 M. R. Rwelamira, above note 58, p. 558; A. Edwards, above note 60, p. 227; R. Islam, above note 2, p. 229; W. Kälin and N. Schrepfer, above note 58, p. 34.

62 UNHCR, *Legal Considerations*, above note 28, para. 16.

63 A. Edwards, above note 60; W. Kälin and N. Schrepfer, above note 58.

64 African Charter on the Rights and Welfare of the Child, 1 July 1990 (entered into force 29 November 1999), Art. 23(4).

treaties, as living instruments, may have evolved since to encompass those affected by natural disasters, remains an open question. There is evidence to suggest that a reversal in the legal attitude is under way.⁶⁵

The UNHCR has drawn attention to another issue concerning Article 1(2) of the OAU Convention. The provision in question requires a person to have been “compelled” to leave their place of habitual residence. According to the UNHCR, a high threshold must be met: climate change or a disaster must have an effect or impact on the person’s place of habitual residence and compel or force the person to leave their country – i.e., it must have put the person at risk of serious harm. Whether the effects of climate change or disasters are severe enough to compel a person to leave and seek protection in another country – namely, whether a risk of serious harm is established – depends on how the disaster unfolds and develops; the geographical proximity of the disaster to the person’s place of habitual residence; how it affects their life, physical integrity, liberty and enjoyment of other human rights; and how the State responds.⁶⁶ As such, while a disaster may by definition seriously disrupt public order, it will only warrant refugee status when the State, including with international assistance, is unable or unwilling to address its impacts on the State and its societal order and population.

Recent African Union (AU) treaties deserve mention in this context. The Protocol on Older Persons seeks to ensure that older persons in situations of, *inter alia*, natural disaster are a prioritized group for assistance.⁶⁷ The Protocol on Persons with Disabilities in Africa contains a similar provision, obliging States Parties to take measures to protect persons with disabilities in situations of, *inter alia*, forced displacement, humanitarian emergency and natural disaster.⁶⁸ In the absence of any specifics, the rights in both treaties must be presumed to apply in all cases of displacement. According to the Protocol on Free Movement of Persons, States Parties may establish specific procedures for the movement of specific vulnerable groups, including refugees and, impliedly, IDPs, in addition to the measures provided for by international, regional and subregional instruments, which must, however, be compatible with obligations assumed under such instruments relating to their protection.⁶⁹ It has been suggested that the Protocol could become a substitute for refugee protection among States Parties, particularly through the abolition of visa requirements, but doubt has been cast on the viability of this viewpoint.⁷⁰ In this regard, the Protocol appears to add little to the current state of affairs since States are free, subject to their

65 S. Weerasinghe, above note 30, p. 114.

66 UNHCR, *Legal Considerations*, above note 28, para. 17.

67 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa, 31 January 2016, Art. 14.

68 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018, Art. 12(1).

69 Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment, 29 January 2018, Art. 24.

70 Marina Sharpe, “The Free Movement of Persons within the African Union and Refugee Protection”, 25 May 2020, available at: www.reflaw.org/the-free-movement-of-persons-within-the-african-union-and-refugee-protection/.

international obligations, to determine rights of entry for refugees and other displaced persons.

The Arab Convention on Refugees

The Arab Convention on Regulating Status of Refugees in the Arab Countries (Arab Convention on Refugees) adopted by the League of Arab States also expands the definition of refugee.⁷¹ Unlike the ambiguity surrounding the relevance of the OAU definition discussed above, the Arab Convention on Refugees defines a refugee as any person “who unwillingly takes refuge in a country other than his own ... because of the occurrence of natural disasters or grave events resulting in major disruption of public order”.⁷² Natural disasters are explicitly recognized as a ground for determining refugee status. Because the phrase “natural disasters” is not defined, it can reasonably be argued that persons forcibly displaced because of natural disasters come within the scope of this provision. It should also be observed that in order to qualify for refugee status a person must have moved “unwillingly”, comparable to the element of compulsion in the OAU definition.

The Kampala Convention

Persons who, because of forced or involuntary movement, find themselves in a refugee-like situation but do not qualify for refugee status under international law because they remain within national frontiers—namely, IDPs—have long existed in a legal limbo.⁷³ As has been previously stated, the Refugee Convention does not apply to IDPs. According to the UNHCR, there were over 16.5 million IDPs in Africa by mid-2018, and the Sahel is a problem area.⁷⁴ The OAU had taken steps to deal with the plight of IDPs;⁷⁵ according to the African Charter on the Rights and Welfare of the Child,⁷⁶ children displaced by, *inter alia*, natural disasters are entitled to protection and humanitarian assistance. But the ground-

71 Arab Convention on Regulating Status of Refugees in the Arab Countries, 1994 (not yet in force) (Arab Convention on Refugees). Mauritania and Sudan are the only Sahel States to be members of the League of Arab States.

72 Arab Convention on Refugees, Art. 1.

73 However, the UN has drafted a soft-law document, the Guiding Principles on Internal Displacement, setting out the humanitarian and human rights standards applicable to IDPs: see *Report of the Special Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39*, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, Annex. The Principles apply to those affected by natural disasters (*ibid.*, Introduction, para. 2). Furthermore, according to Principle 6(2)(d), the prohibition on arbitrary displacement includes displacement in cases of disaster, unless required by health and safety reasons. See, further, Francis M. Deng, “The International Protection of the Internally Displaced”, *International Journal of Refugee Law*, Vol. 7, No. 1, 1995, p. 74.

74 UNHCR, *Update of UNHCR’s Operations in Africa*, above note 12. For the situation in the Sahel, see IDMC and NRC, above note 12, pp. 23–24.

75 Rachel Murray, *Human Rights in Africa: From the OAU to the African Union*, Cambridge University Press, Cambridge, 2004, pp. 222–225.

76 See above note 64.

breaking development was the adoption by the AU in 2009 of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).⁷⁷ The basic premise of this instrument seems to be that all persons have a right to be protected against arbitrary displacement.⁷⁸ The Kampala Convention reiterates the basic principle that the primary (though not exclusive) duty and responsibility for providing protection and humanitarian assistance to IDPs within their territory or jurisdiction rests with States.⁷⁹ This extends to taking measures to protect and assist IDPs.⁸⁰ The Kampala Convention defines IDPs as

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.⁸¹

The broad scope of the definition adopted by the Kampala Convention is notable; it expressly refers to circumstances such as natural disasters. Internal displacement is defined as “the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders”.⁸² Clearly, and following from the previous paragraph, forced displacement because of natural disasters comes within the scope of this definition, and this is also apparent from other treaty provisions. The Kampala Convention protects against arbitrary displacement, which includes forced evacuations caused by natural disasters where the evacuations are not necessitated by health and safety reasons.⁸³

77 Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 23 October 2009 (entered into force 6 December 2012), *International Legal Materials*, Vol. 49, No. 1, 2010 (Kampala Convention), p. 83. By June 2020, the Kampala Convention had been ratified by thirty-one States, including the five countries of the Central Sahel. See, generally, Mike Asplet and Megan Bradley, “Introductory Note to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)”, *International Legal Materials*, Vol. 52, No. 1, 2013; Romola Adeola, “The Impact of the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa”, *African Journal of Human Rights Law*, Vol. 19, No. 2, 2019; Allehone M. Abebe, “The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges”, *Refugee Survey Quarterly*, Vol. 29, No. 3, 2010; Flavia Zorzi Giustiniani, “New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa”, *Denver Journal of International Law and Policy*, Vol. 39, No. 2, 2011; Cristiano d’Orsi, “Strengths and Weaknesses in the Protection of the Internally Displaced in Sub-Saharan Africa”, *Connecticut Journal of International Law*, Vol. 28, No. 1, 2012.

78 Kampala Convention, Art. 4(4).

79 *Ibid.*, Art. 5(1).

80 *Ibid.*, Art. 5(4).

81 *Ibid.*, Art. 1(k). It essentially repeats verbatim the description provided by the Guiding Principles on Internal Displacement, above note 73, Introduction, para. 2.

82 Kampala Convention, Art. 1(l).

83 *Ibid.*, Art. 4(4)(f). Accordingly, forced evacuations to protect a population at risk of drowning in floods, for instance, would not come within the scope of the definition.

The Protocol on the Protection and Assistance to Internally Displaced Persons

The Kampala Convention was not the first treaty to address the plight of IDPs, however. That distinction goes to the sub-regional Protocol on the Protection and Assistance to Internally Displaced Persons (Great Lakes Protocol) adopted in 2006 by the International Conference on the Great Lakes Region (ICGLR).⁸⁴ In broad terms, the Great Lakes Protocol places a stress on “the protection function of member states, who bear the primary responsibility” for IDPs.⁸⁵ Arguably, the primary objective of the Great Lakes Protocol is the incorporation of the Guiding Principles on Internal Displacement into national law.⁸⁶ What is important for present purposes is that it explicitly applies to environmentally displaced persons. Article 1(4) defines internally displaced persons as, *inter alia*, those who have had to flee because of natural disasters. Furthermore, States Parties are required, where possible, to “mitigate the consequences of displacement caused by natural disasters and natural causes”.⁸⁷

A human rights approach?

Human rights may offer a gainful route to the protection of persons forcibly displaced because of natural disasters.⁸⁸ In this context, it is important to note that the African Charter on Human and Peoples’ Rights (African Charter)

84 Protocol on the Protection and Assistance to Internally Displaced Persons, 30 November 2006 (entered into force 21 June 2008) (Great Lakes Protocol), available at: www.refworld.org/pdfid/52384fe4.pdf. The Great Lakes Protocol shares many similarities with the Kampala Convention and the UN Guiding Principles on Internal Displacement: see International Refugee Rights Initiative, *Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact*, January 2014, available at: www.refugee-rights.org/wp-content/uploads/2019/03/Comparative-Note-on-the-Kampala-Convention-and-IDP-Protocol-FINAL-EN.pdf. The ICGLR is an intergovernmental organization of the States of the African Great Lakes region with a mandate to promote peace and development. Its members are Angola, Burundi, the Central African Republic, the Republic of Congo, the Democratic Republic of the Congo, Kenya, Uganda, Rwanda, South Sudan, Sudan, Tanzania and Zambia. The relevance of the Great Lakes Protocol for the purposes of this article may be limited as only one State Party, Sudan, is considered to be part of the Sahel region.

85 International Refugee Rights Initiative, *Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact*, January 2014, p. 3, available at: www.refugee-rights.org/wp-content/uploads/2019/03/Comparative-Note-on-the-Kampala-Convention-and-IDP-Protocol-FINAL-EN.pdf; Walter Kälin and Nina Schrepfer, *Internal Displacement and the Kampala Convention: An Opportunity for Development Actors*, IDMC, Geneva, November 2012, pp. 18–19.

86 W. Kälin and N. Schrepfer, above note 85, p. 18.

87 Great Lakes Protocol, Art. 3(2).

88 See Annalisa Savaresi, “Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation”, *Questions of International Law*, Vol. 77, 2021. See, generally, Jane McAdam and Marc Limon, *Human Rights, Climate Change and Cross-Border Displacement: The Role of the International Human Rights Community in Contributing to Effective and Just Solutions*, Universal Rights Group, Versoix, 2015. See also the Climate Change Litigation Databases, available at: <http://climatecasechart.com/non-us-case-category/human-rights/page/3/>.

applies to displaced persons.⁸⁹ The argument that a nexus exists between the protection of the environment and the realization of human rights is increasingly gaining traction.⁹⁰ Additionally, the UNHCR has recognized that human rights violations can amount to persecution.⁹¹ Human rights that may be at stake include a number of first- and second-generation rights, such as the right to life, the right to water, the right to food and the right to health.⁹² It is now clearly established in human rights law that States have assumed both positive and negative obligations in this regard and that consequently, environmental hazards that have adverse effects on human beings and are caused, directly or indirectly, by State action or inaction may lead to a breach of the State's human rights obligations.⁹³ The European Court of Human Rights (ECtHR) pioneered this concept through the employment of the doctrine of implied rights,⁹⁴ and recent developments have continued this approach of securing environmental protection via the interpretation of other rights, with particular emphasis being placed on

89 African Charter on Human and Peoples' Rights, 1520 UNTS 217, 17 June 1981 (entered into force 21 October 1986) (African Charter). The African Charter has been ratified by all the Sahel States.

90 R. Islam, above note 2, pp. 231–234; Walter Kälin, "The Human Rights Dimension of Natural or Human-Made Disasters", *German Yearbook of International Law*, Vol. 55, 2012. See, further, Inter-American Court of Human Rights (IACHR), *Kawas Fernández v. Honduras*, Series C, No. 196, Judgment, 3 April 2009, para. 148; ACHPR, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, Decision, 27 October 2001, para. 51; Federal Constitutional Court of Germany, *Neubauer v. Germany*, BVerfG 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 29 April 2021; Supreme Court of the Netherlands, *State of the Netherlands v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment, 20 December 2019, English translation available at: <https://tinyurl.com/vc5vw9w4>. In the *Urgenda Foundation* case, the Supreme Court held, *inter alia*, that the Netherlands was under a positive obligation under the European Convention on Human Rights to take appropriate and independent measures to mitigate climate change even if it was a minor contributor to greenhouse gas emissions. For comment, see Maiko Meguro, "International Decisions", *American Journal of International Law*, Vol. 114, No. 4, 2020. See, further, Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South", *American Journal of International Law*, Vol. 113, No. 4, 2019; Charlotte Renglet and Stefaan Smis, "The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?", *ASIL Insights*, Vol. 25, No. 21, 2021.

91 UNHCR, *Legal Considerations*, above note 28, para. 11.

92 *Report of the Special Rapporteur*, above note 2, para. 26; *Report of the Special Rapporteur on the Human Rights of Migrants*, UN Doc. A/75/207, 21 July 2020; IACHR, *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Series A, No. 23, Advisory Opinion OC-23/17, 15 November 2017, para. 66; J. McAdam, above note 31, pp. 16–36; James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005.

93 W. Kälin, above note 90, p. 127. See, for example, ECtHR, *Öneriyildiz v. Turkey*, Appl. No. 48939/99, Judgment (Grand Chamber), 30 November 2004 (rights to life and property); ECtHR, *Budayeva and Others v. Russia*, Appl. Nos 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, Judgment (Chamber), 20 March 2008 (right to life); ECtHR, *Kolyadenko and Others v. Russia*, Appl. Nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05, Judgment (Chamber), 28 February 2012 (right to life and respect for private and family life).

94 See, for example, ECtHR, *Lopez Ostra v. Spain*, Appl. No. 16798/90, Judgment, 9 December 1994 (respect for private and family life); ECtHR, *Guerra v. Italy*, Appl. No. 14967/89, Judgment, 19 February 1998 (respect for private and family life); ECtHR, *Giacomelli v. Italy*, Appl. No. 59909/00, Judgment (Chamber), 2 November 2006 (respect for private and family life); ECtHR, *Tătar v. Romania*, Appl. No. 67021/01, Judgment (Chamber), 27 January 2009 (respect for private and family life).

the right to life.⁹⁵ However, it should be observed that in the context of natural hazards “beyond human control”, the ECtHR grants States a considerable margin of appreciation.⁹⁶ A decision of the UN Human Rights Committee is especially significant in this regard. In *Teitiota v. New Zealand*, the applicant, having had his claim for asylum as a refugee or protected person rejected by the New Zealand authorities (as detailed above) and having exhausted all domestic remedies, complained that by removing him to Kiribati, New Zealand had violated his right to life under Article 6 of the ICCPR.⁹⁷ The Human Rights Committee made the point that environmental degradation and climate change “constitute some of the most pressing and serious threats” to the right to life.⁹⁸ While the threat to Kiribati was a slow-onset one, the Committee accepted that the situation there could become incompatible with the right to life.⁹⁹ It determined that in protecting the right to life, States had to take account of “reasonably foreseeable threats and life-threatening situations”.¹⁰⁰ While the Committee concluded that on the facts New Zealand had not violated the applicant’s right to life in that there was no prospect of imminent harm, this decision is nevertheless important because of its reasoning on the impact of climate change.

It is significant that the right to a healthy environment is recognized as an autonomous right in regional human rights treaties.¹⁰¹ The jurisprudence of the Inter-American Court of Human Rights (IACHR) is particularly relevant, especially a recent opinion which has affirmed the right to a healthy environment as “fundamental for the existence of humanity”.¹⁰² Climate change was also explicitly mentioned in the opinion, asserting that the right to a healthy environment is both an individual and collective right that includes current and future generations.¹⁰³ In addition, the IACHR observed that one of the rights at risk from environmental change is the right not to be forcibly displaced.¹⁰⁴

Having examined the status, and certain rights accruing thereby, of people displaced as a result of climate change in international law, this article now focuses on the response to the climate crisis in the Sahel—firstly, by the international community, and secondly, in terms of domestic legislation by the five Sahel States.

95 See, for example, ECtHR, *Öneriyildiz*, above note 93; ECtHR, *Budayeva*, above note 93.

96 ECtHR, *Budayeva*, above note 93, paras 135, 137. As opposed to human-made hazards: ECtHR, *Öneriyildiz*, above note 93. See also J. McAdam, above note 31, pp. 59–60. The obvious point could be made that it is now generally accepted that environmental change is also driven by human activity.

97 For comment, see Simon Behrman and Avidan Kent, “The Teitiota Case and the Limitations of the Human Rights Framework”, *Questions of International Law*, Vol.77, 2021. The ICCPR has been accepted by the five Sahel States in question.

98 Human Rights Committee, *Teitiota*, above note 46, para. 9.4.

99 *Ibid.*, paras 9.11–9.12.

100 *Ibid.*, para. 9.4.

101 African Charter, Art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, OAS Treaty Series No. 69, 16 November 1988 (entered into force 16 November 1999), Art. 11; Arab Charter on Human Rights, 22 May 2004 (entered into force 15 March 2008), Art. 38. See further ACHPR, *SERAC*, above note 90.

102 IACHR, above note 92, para. 59.

103 *Ibid.*, paras 54, 59.

104 *Ibid.*, para. 66.

International responses to climate-induced displacement

For many years, the UN has been expressing concern that climate change could lead to increased displacement and migration in the Sahel region.¹⁰⁵ In January 2021, the AfDB pledged to mobilize up to \$6.5 billion over five years to advance the Sahel's landmark initiative, the Great Green Wall Initiative (GGWI), launched by the AU in 2007.¹⁰⁶ Once that goal is reached, the GGWI should assist in providing a solution to many threats faced not only by Africa but also by the entire world, such as climate change, drought, famine, conflict and migration. The GGWI creates a barrier against climate change running across the Sahel region. To date,¹⁰⁷ notable successes have been achieved, including the restoration of 5 million hectares of land in Niger that will deliver an additional 500,000 tonnes of grain per year, enough to feed 2.5 million people.¹⁰⁸ This will help to alleviate the damage caused by the floods of October 2019 around the Komadugu Yobé River; these caused the displacement of some 23,000 persons, who lost hectares of their

105 UN, *Support Plan for the Sahel (Working Together for a Peaceful and Prosperous Sahel)*, May 2018, p. 8: "For years, the improvements and growth witnessed in the Sahel have been overshadowed by complex and multi-dimensional challenges. These are characterized by mutually reinforcing factors of vulnerability, instability and insecurity. These risks are intensified by political and governance crises, unequal distribution of wealth and lack of access to resources, opportunities and basic services. The demographic bulge, combined with climate change, could worsen a phenomenon of violence and conflict, and lead to displacement and migration".

106 AfDB, "Sahel Region: The African Development Bank Pledges to Mobilise \$6.5 Billion in Support of the Great Green Wall Initiative", 11 January 2021, available at: www.afdb.org/en/news-and-events/press-releases/sahel-region-african-development-bank-pledges-mobilise-65-billion-support-great-green-wall-initiative-40203.

107 20 December 2021.

108 See the GGWI website, available at: www.greatgreenwall.org/results. See also Republic of Niger, *Cadre de Gestion Environnementale et Sociale (CGES) du Projet de Relance et du Développement de la Région du Lac Tchad (PROLAC): Rapport final*, January 2020, para. 2(5) ("Défis environnementaux et sociaux"); Republic of Niger, *Plan d'Action 2016–2020 de l'initiative 3N "Les nigériens nourrissent les nigériens"*, 2016; Soufiane Amadou, Nicola Cantoreggi and Ronald Jaubert, "Les Nigériens nourrissent les Nigériens: Quelles perspectives pour les exploitations familiales?", *Les Cahiers d'Outre-Mer*, Vol. 2018/2, No. 278, 2018, p. 337: "The 3N initiative, 'Nigériens feed Nigériens', supposes to break with the "addiction to aid". The initiative affirms a willingness to address the dependence on aid and the practices of development and humanitarian aid programs through innovations such as the creation of an investment fund, the promotion of small scale irrigation and the supervision of humanitarian aid. The analysis of the achievements of the first phase of the Initiative (2011–2015), of programmatic documents and their evolution between 2012 and 2017 as well as the positioning of donors raises questions on the 3N initiative's capacity and willingness to promote a policy centered on family farms while it is an essential condition for Nigériens to feed Nigériens." See, finally, Republic of Chad, *Stratégie nationale et plan d'action pour la mise en oeuvre de l'initiative Grande Muraille Verte au Tchad*, 2012, p. 34: "L'Initiative GMV vise le développement des communautés locales à travers la mise en place d'une approche novatrice et inclusive consistant à mettre en synergie les actions de lutte contre la désertification avec des activités de restauration des terres et de conservation de la biodiversité. Cette mise en synergie concerne également le développement des systèmes de productions (agricole, sylvicole et pastorale) et aussi le développement des infrastructures socioéconomiques de base et la création de richesses par le développement d'activités génératrices de revenus en vue de contribuer à une sécurité alimentaire stable et à la relance d'une croissance économique durable. L'objectif général visé est de contribuer à la lutte contre l'avancée du désert en mettant en valeur, de manière intégrée, des zones dégradées dans l'emprise de la GMV en vue de lutter contre la pauvreté tout en assurant une gestion durable des ressources naturelles."

soil.¹⁰⁹ Another success of the GGWI has been the 3 million hectares of land that have been rehabilitated in Burkina Faso through a farming technique known as *Zai*, in which pits are dug in the soil during the pre-season to catch water and concentrate compost.¹¹⁰

In October 2020, the UNHCR warned of disastrous consequences in the Sahel region, in what was declared the world's fastest-growing displacement and protection crisis.¹¹¹ Commitments expected to be made at a Ministerial Roundtable for the Central Sahel on 20 October in Copenhagen restored a sense of urgency to a region facing a number of challenges. The Roundtable adopted both financial announcements and non-financial commitments. In the first case, twenty-two States, plus the European Union (EU) and Education Cannot Wait, the first global fund dedicated to education in emergencies and protracted crises,¹¹² pledged to allocate \$725.4 million to help the Sahel for 2021 and beyond.¹¹³

Additionally, eight European States (Denmark, France, Germany, Italy, the Netherlands, Norway, Sweden and the United Kingdom) plus the International NGO Forum in Burkina Faso (INGO Burkina Faso) adopted several non-financial commitments. Several of these commitments directly affect displacement in the region—for example, developing an efficient nexus approach for responding to displacement (Denmark, Italy, Norway, Sweden), and making displacement a priority in bilateral development cooperation with displacement-affected States in the Sahel (Denmark).

Other commitments have been undertaken, for example, to support climate-resilient access to services and infrastructure for refugees, enabling them to pursue self-reliance and contribute to local socio-economic development (Denmark), and to sustain engagement in support of durable solutions, whenever opportunities for ending displacement arise in the Sahel (Denmark, INGO Burkina Faso). Also, humanitarian access and the promotion and implementation

109 “Niger Floods Force 23,000 from their Homes”, *Phys.Org*, 20 October 2019, available at: <https://phys.org/news/2019-10-niger-homes.html>.

110 See the GGWI website, available at: www.greatgreenwall.org/results.

111 UNHCR, “UNHCR Warns of Mounting Needs in Sahel as Forced Displacement Intensifies”, 16 October 2020, available at: www.unhcr.org/news/briefing/2020/10/5f894b234/unhcr-warns-mounting-needs-sahel-forced-displacement-intensifies.html.

112 See the ECW website, available at: www.educationcannotwait.org/about-ecw/. Concerning the action of the EU in the Sahel, see, for example, Louis Balmond, “Les organisations internationales régionales africaines face à l’impact du changement climatique sur les conflits et le cas particulier du Sahel”, *Questions de Droit International*, 30 September 2021, pp. 35-36, available at: www.qil-qdi.org/wp-content/uploads/2021/09/03_Climate-Security_BALMOND_FIN_b.pdf: “Depuis 2008, l’UE préconisait en effet une approche globale en matière de sécurité et de développement pour faire face à la complexité des problèmes auxquels est confrontée la zone. La dégradation de la situation sécuritaire l’a conduite à adopter une stratégie pour la sécurité et le développement au Sahel dont la formulation même est significative de l’ordre des priorités retenues: l’insistance sur la relation entre sécurité et développement traduit le caractère intégré de la stratégie mais la dimension sécuritaire demeure prioritaire.”

113 Ministerial Roundtable for the Central Sahel, “Financial Announcements”, 28 October 2020, available at: <https://tinyurl.com/yckva5pe>.

of international humanitarian law (France, Germany, Netherlands, Norway, Sweden, United Kingdom, INGO Burkina Faso), and the protection from human rights abuses (Italy, Norway, Sweden, United Kingdom, INGO Burkina Faso) found space on the list of commitments.¹¹⁴ Consequently, the co-chairs of the Roundtable, apart from highlighting that the effects of climate change, including as a driver of displacement, should be addressed as a priority, stressed that displacement should be considered a priority both in humanitarian action and in development cooperation, which should be carried out in close collaboration with government authorities and, to the greatest extent possible, within the framework of national development strategies, as called for in the Global Compact on Refugees (GCR).¹¹⁵

In its own words, the GCR is a “framework for more predictable and equitable responsibility-sharing, recognizing that a sustainable solution to refugee situations cannot be achieved without international cooperation”. The GCR may aid refugee protection in Africa because its four objectives address the three principal protection challenges prevailing on the continent. The objectives of the GCR are to ease pressures on host countries, enhance refugee self-reliance, expand access to third-country solutions, and support conditions in countries of origin for return in safety and dignity. The GCR seeks to achieve these objectives through the mobilization of political will and arrangements facilitating more equitable and sustained contributions among States and other relevant stakeholders.¹¹⁶

First among the three principal protection challenges in Africa is the scale of the refugee problem, coupled with limited resources. In this context, the GCR's first objective of easing pressures on host countries and its third objective of expanding third-country solutions are critical. Second, refugees in Africa frequently find some of their most important rights systemically violated. The GCR's second objective, regarding enhanced refugee self-reliance, speaks to rights including education and employment. Thirdly, refugee situations in Africa are often protracted. The GCR's fourth objective of supporting conditions for return in safety and dignity can help address this challenge.¹¹⁷ The GCR builds on the sentiments expressed in the 1969 OAU Convention of harm, fear, and international and intergovernmental assistance to facilitate returns, by incorporating “humanitarian, peacebuilding, and development interventions”.¹¹⁸ This formula is reflective of the 2030 Agenda for Sustainable Development

114 For the list of commitments, see, “Non-Financial Commitments”, 20 October 2020, available at: <https://tinyurl.com/3nw4xjp4>.

115 See Ministerial Roundtable for the Central Sahel, “Co-Chairs’ Summary”, 2020, available at: <https://tinyurl.com/mr33eph7>. For the GCR, see *Report of the UNHCR, Part II: Global Compact on Refugees*, UN Doc. A/73/12, 2 August 2018; see also UN General Assembly, *Office of the United Nations High Commissioner for Refugees*, UN Doc. A/RES/73/151, 17 December 2018.

116 UN, *Global Compact on Refugees*, 2018 (GCR), p. 4, para. C(7).

117 Marina Sharpe, “The Global Compact on Refugees and Conflict Prevention in Africa: ‘Root Causes’ and Yet Another Divide”, *International Journal of Refugee Law*, Vol. 30, No. 4, 2018.

118 GCR, above note 116, para. 88.

Goals¹¹⁹ and, together with mechanisms for livelihood and economic opportunities, facilitates dignified repatriation.¹²⁰

African States have demonstrated their commitment to addressing refugee and migration-related problems in Africa in many international and regional fora. This includes participating in the development and drafting of both the GCR and the Global Compact for Safe, Orderly and Regular Migration (GCM).¹²¹ The GCM, in its Objective No. 2 (“Minimize the adverse drivers and structural factors that compel people to leave their country of origin”), also deals with the effects on migration of natural disasters, the adverse effects of climate change, and environmental degradation. It does so by, *inter alia*, seeking to integrate displacement considerations into disaster preparedness strategies and to promote cooperation with neighbouring and other relevant countries (para. j), developing mechanisms at the regional level to address the vulnerabilities of persons affected by natural catastrophes, in order for them to have access to humanitarian assistance (para. k). Finally, the GCM is also aimed at developing approaches to address the challenges of migration movements in the context of ecological disasters. It does this by taking into consideration recommendations from State-led consultative processes, such as the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.¹²² This document highlights, for example, that in several disaster situations in Africa, migration officials have exercised their authority specially to allow on their territories groups of forcibly displaced persons fleeing disasters who lack domestic legal protection, providing for at least a temporary protection addressing ecological disasters.¹²³ In the framework of the adoption of the GCM, the government of Niger, for example, has reaffirmed that the country has embraced a strategy to adapt to climatic changes and the degradation of soil.¹²⁴ Niger’s National Plan of Adaptation of Agriculture in the Context of Climatic Change was adopted in April 2020. It highlights the will of the government of find a solution to ease the lives of populations obliged to relocate because of climatic

119 UN General Assembly, *Transforming our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, 25 September 2015. For a definition of the Agenda, see the preamble of the resolution: “This Agenda is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom. We recognize that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development. All countries and all stakeholders, acting in collaborative partnership, will implement this plan. We are resolved to free the human race from the tyranny of poverty and want and to heal and secure our planet. We are determined to take the bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path. As we embark on this collective journey, we pledge that no one will be left behind.”

120 Fatima Khan and Cecile Sackeyfio, “What Promise Does the Global Compact on Refugees Hold for African Refugees?”, *International Journal of Refugee Law*, Vol. 30, No. 4, 2018.

121 UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc. A/RES/73/195, 19 December 2018.

122 Nansen Initiative, *Agenda for the Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, 2 vols, December 2015.

123 *Ibid.*, Vol. 2, p. 47.

124 Republic of Niger, *Statement at the Adoption of the GCM*, 10 December 2018, p. 3, available at: www.un.org/en/conf/migration/assets/pdf/GCM-Statements/niger.pdf.

circumstances that are unfavourable to agriculture and, as such, to the livelihoods of those populations.¹²⁵ In general terms, the goal of addressing the environmental challenges in the Sahel region, characterized by forced displacement, was taken up by the UN Economic and Social Council (ECOSOC) in 2018.¹²⁶

In light of the GCR, several African States, but only Chad belonging to the Sahel, are currently rolling out the new Comprehensive Refugee Response Framework (CRRF). The CRRF is the first of two annexes to the New York Declaration for Refugees and Migrants adopted in September 2016 at a high-level meeting of the UN General Assembly. It is a comprehensive set of commitments to be implemented in situations involving large-scale movements of refugees. It lists a number of actions and best practices in four areas: reception and admission measures (para. 5), support for immediate and ongoing needs (para. 6), support for host countries (para. 8), and enhanced opportunities for durable solutions (paras 9–16).¹²⁷ Through the New York Declaration, States commit to assisting displaced persons in countries that are experiencing natural disasters, recognizing the importance of the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (para. 50). The UN Secretary-General has also noted that many people are compelled to leave their homes for reasons that do not fall within the refugee definition contained in the Refugee Convention.¹²⁸

How domestic legislation and policy in the Sahel tackle the plight of climate-induced displaced persons

On 3 May 2018, the Republic of Chad announced its formal implementation of the CRRF through a letter signed by the minister of territorial administration, public security and local governance.¹²⁹ The application of the CRRF aims to strengthen the pursuit of protection, assistance and solutions for refugees and other

125 Republic of Niger, *Stratégie et plan national d'adaptation face aux changements climatiques dans le secteur agricole SPN2A 2020-2035*, 10 April 2020, p. 49 available at: https://reca-niger.org/IMG/pdf/adaptation_niger_spn2a_document_cadre_10042020.pdf.

126 ECOSOC, *Support to the Sahel Region*, UN Doc. E/RES/2020/2, 10 December 2019.

127 UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc. A/RES/71/1, 19 September 2016.

128 *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants: Report of the Secretary-General*, UN Doc. A/70/59, 21 April 2016, p. 6, para. 18. See also p. 8, para. 27: "Disasters have always led to displacement and are likely to do so even more in the future, given the rising concentration of populations in cities and the likelihood that hazards relating to climate change and environmental degradation will increase in frequency and intensity. ... More droughts are likely to lead many rural inhabitants to move to cities, creating pressures on labour markets and housing. Evidence suggests that people displaced by environmental factors tend to move to areas at even greater environmental risk. Sea-level rise and extreme weather events may drive people away from coastal areas and low-lying small island States. While many victims of disasters are able to return to their homes in a relatively short time, in some cases they require permanent relocation."

129 UNHCR, "UNHCR Welcomes the Accession of the Government of Chad to the Comprehensive Refugee Response Framework", 8 May 2018, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Press%20release_UNHCR_CRRF_English.pdf.

displaced populations, and for the communities that host them.¹³⁰ In the framework of the CRRF, the Chadian government also decided to implement a national law governing the status of refugees and asylum-seekers, which was adopted on 23 December 2020.¹³¹ This law does not present any provision on climate-related displaced persons, although it is highlighted that asylum can also be “economic”, in case of unemployment and/or lack of remuneration in the country of origin.¹³² However, it is true that Article 3(2) of the Chadian law, on the definition of refugee, adopts the “expanded” definition provided in Article 1 (2) of the OAU Convention that gave rise to debate as to whether it also includes persons forcibly displaced because of natural disasters.¹³³ The Chadian government has long had a humanitarian action plan in place to ensure the safety of settlements for displaced persons and the availability of education, health care and food.¹³⁴

The Central Sahel countries of Burkina Faso, Mali and Niger are the epicentre of the forced displacement crisis. The number of IDPs inside Burkina Faso increased from 87,000 in January 2019 to more than 1 million in December 2020. Burkina Faso, among the poorest countries in the world and one of the most susceptible to climate risks, faces a major internal security crisis.¹³⁵ Despite relatively favourable rains in 2020, food insecurity and malnutrition remain at

130 UNHCR, “Applying Comprehensive Responses (CRRF) in Africa”, June 2018, available at: www.unhcr.org/5b3346397.pdf.

131 UNHCR, “UNHCR Welcomes New Asylum Law in Chad”, 24 December 2020, available at: <https://tinyurl.com/yckpbp9x>.

132 *Rapport sur le projet de loi portant asile en République du Tchad*, No. 065/AN/TL/CPGILAAJ/2020, 18 December 2020; see also *Loi No. 027/PR/2020 portant d’asile en République du Tchad*, 31 December 2020 (both documents on file with author). Finally, see *Décret No. 11-839/PR/PM/MAT/11 portant création, organisation et attributions de la Commission nationale d’accueil, de réinsertion des réfugiés et des rapatriés (CNARR)*, 2 August 2011.

133 For a doctrinaire debate on this issue, see G. J. Naldi, above note 57, p. 79; R. C. Chhangani, above note 57, p. 9; Aurelie Lopez, “The Protection of Environmentally-Displaced Persons in International Law”, *Environmental Law*, Vol. 37, No. 2, 2007, p. 389; M. R. Rwelamira, above note 58, p. 558; Tatenda N. Muzenda, “The Role of Social and Economic Factors and Natural Disasters in Forced Population Displacements in Africa”, *International Journal of Refugee Law*, Vol. 7, Special Issue, 1995, p. 51; A. Edwards, above note 60, p. 227; Tal H. Schreier, “A Critical Examination of South Africa’s Application of the Expanded OAU Refugee Definition: Is Adequate Protection Being Offered Within the Meaning of the 1969 OAU Refugee Convention?”, LLM diss., University of Cape Town, Faculty of Law, 2008, p. 18 (on file with author).

134 *Combined Periodic Report of the Republic of Chad (1998 to 2015) on the Implementation of the African Charter on Human And Peoples’ Rights*, September 2016, p. 70, para. 323: “The Government and its technical and financial partners have developed a humanitarian action plan to ensure the safety of camps for displaced persons and the availability of food, healthcare and education. Displaced persons live in secure areas including Moundou, Goré, Sarh, Bagassola, GozBeida, etc.”

135 In this regard, see, for example, SB Morgen, *The Search for a Caliphate: Expansionist Agenda of Radical Islam from the Sahel to the Horn of Africa*, May 2021, p. 16, available at: www.sbmintel.com/wp-content/uploads/2021/05/202105_Caliphate.pdf. Between 2017 and 2019, Burkina Faso suffered from 225 terrorist attacks, Chad fifty-eight, Mauritania nine and Niger 134. Burkina Faso is second only to Mali, which suffered from 579 terrorist attacks during the same period. Institute for Economics and Peace, *Global Terrorism Index 2020: Measuring the Impact of Terrorism*, University of Maryland and US National Consortium for the Study of Terrorism and Responses to Terrorism, November 2020, p. 36, Table 2.9.

alarming levels, most worryingly in the areas affected by insecurity.¹³⁶ Worsening insecurity and natural disasters have sparked an unprecedented internal displacement crisis, affecting all thirteen regions of the country. Burkina Faso is also hosting some 19,400 refugees and asylum-seekers, most of whom are from Mali.¹³⁷ In 2009, the government of Burkina Faso adopted a National Multi-Risk Disaster Preparedness and Response Plan in which is detailed the legal framework by which people made vulnerable by ecological disasters are protected within the country.¹³⁸ This plan was updated for the period 2013–2014¹³⁹ and was imitated by similar documents issued in Chad,¹⁴⁰ Mali,¹⁴¹ Mauritania¹⁴² and Niger.¹⁴³ In the Burkinabe National Plan, it is interesting to note that in the list of legal instruments by which people are protected during natural catastrophes, the Kampala Convention, which Burkina Faso ratified in July 2012, does not appear.

In contrast, the 2014 Burkinabe Law on the Prevention and Management of Catastrophes plays a key role in protecting the displaced because of environmental disasters.¹⁴⁴ While its Chapter 6 (Articles 50–59) deals with displacement and resettlement of people obliged to flee because of catastrophes, Chapter 7 (Articles 60–62) specifically focuses on the possible humanitarian crisis derived from the displacement. Local communities play an important part in the case of resettlement because they not only assist displaced persons but also should facilitate the integration, even if temporary, of the displaced into the socio-economic fabric of the host population (Article 57). Additionally, Article 62 calls for cooperation with bordering States in cases where the humanitarian crisis is cross-border. Article 61 makes it clear that the prevention of a humanitarian crisis is essential in order to avoid it becoming a humanitarian “catastrophe” (Article 61). The 2014 law supplements the 2008 Law on the Status of Refugees in Burkina Faso, which does not mention forced displacement because of natural

136 See, for example, Daly Belgamsi, “The Issue of Food Security: The Case of Niger”, *Refugee Survey Quarterly*, Vol. 26, No. 4, 2007, p. 60: “The Niger crisis is a complex food crisis that was caused by a combination of structural causes, last year’s drought and the devastation of crops and grazing lands by locusts, between August and October 2004. High rates of poverty (63%), one of the highest population growths, low access to health care, low agricultural productivity, desertification and structurally high rates of severe child malnutrition (60% of children under five are affected by stunting) all played a role in this crisis. Niger is prone to recurrent droughts, which regularly result in food shortages.” See also Filippo Grandi, “Opening Statement at the 70th Session of the Executive Committee of the High Commissioner’s Programme”, *International Journal of Refugee Law*, Vol. 32, No. 3, 2020, p. 520.

137 UN Office for the Coordination of Humanitarian Affairs (OCHA), *Burkina Faso: Situation Report*, 1 February 2021, p. 2, available at: <https://reports.unocha.org/en/country/burkina-faso/>.

138 *Plan national multirisques de préparation et de réponse aux catastrophes*, 2009, pp. 107–108.

139 *Plan national multirisques de préparation et de réponse aux catastrophes*, 2012, pp. 9–10.

140 *Plan d’action national de renforcement des capacités pour la réduction des risques de catastrophes, la préparation et la réponse aux urgences 2015–2020*, September 2015.

141 *Plan national multirisques de préparation et de réponse aux catastrophes*, 2011.

142 *Plan d’action national de renforcement des capacités en réduction des risques de catastrophes et préparation et réponse aux urgences 2015–2018*, 2014.

143 *Plan d’action national de renforcement des capacités pour la réduction des risques de catastrophe, la préparation et la réponse aux urgences 2015–2018*, March 2015.

144 Loi No. 012-2014/AN portant loi d’orientation relative à la prévention et à la gestion des risques, des crises humanitaires et des catastrophes, 22 April 2014.

disasters.¹⁴⁵ In the case of both natural and human-induced disasters, the National Emergency Assistance and Rehabilitation Council (Conseil National de Secours d’Urgence et de Réhabilitation, CONASUR) provides support for the survival of the population during such events, particularly in the form of food and material assistance.¹⁴⁶

An important reference for Burkina Faso in protecting the displaced is the report of the 2005 World Conference on Disaster Risk Reduction, held in Kobe, including its resolutions. Through this document, States and relevant stakeholders made an effort to ensure that local programmes for displaced persons do not intensify the risk of threats to the displaced.¹⁴⁷

In 2019, Niger adopted a new National Disaster Risk Reduction Strategy (Stratégie Nationale de Réduction des Risques de Catastrophe, SNRRC). The SNRRC recognizes that Niger is vulnerable to the effects of various hazards, including floods and droughts, and that these phenomena are the consequences of its geographical location and the changing nature of the climate. A land-use planning policy encouraging the settlement of populations in areas at risk of environmental degradation has also exacerbated the condition of displaced persons. The SNRRC lists droughts as the most frequent climate phenomenon in the country and the main cause for conflicts over natural resources such as water.¹⁴⁸ It should be noted that the concept of IDPs is relatively new in Niger, becoming prominent with the Boko Haram insurgency. As such, people displaced in the context of floods have not necessarily been perceived as IDPs unless they have also been displaced by conflict. These considerations had implications for the implementation of Niger’s 2018 Law on the Protection and Assistance of Internally Displaced Persons, suggesting the need to raise awareness among important stakeholders concerning their obligations towards IDPs affected by natural catastrophes.¹⁴⁹

In December 2020, Chad adopted its new National Strategy and Action Plan for Disaster Risk Management. One of the objectives of this new strategy is to prevent the risk of new natural disasters and, as a consequence, new displacement of populations as well. In order to do that, this document seeks to encourage Chadians to adopt a culture of prevention of risks of possible new environmental calamities through the cooperation of all the stakeholders involved in such a process of prevention. The principles that guide this new cultural

145 Loi No. 042-2008/AN portant statut des réfugiés au Burkina Faso, 18 December 2008.

146 *Periodic Report of Burkina Faso within the Framework of the Implementation of Article 62 of the African Charter on Human and Peoples’ Rights*, January 2015, p. 58, para. 231.

147 UN, *Report of the World Conference on Disaster Reduction (Kobe, Hyogo 18–22 January 2005)*, UN Doc. A/CONF.206/6, 16 March 2005, p. 16, para 4(ii)(i). At p. 4, the delegates at the Conference note that they “are deeply concerned that communities continue to experience excessive losses of precious human lives and valuable property as well as serious injuries and major displacements due to various disasters worldwide”.

148 Sanjula Weerasinghe, *Bridging the Divide in Approaches to Conflict and Disaster Displacement: Norms, Institutions and Coordination in Afghanistan, Colombia, the Niger, the Philippines and Somalia*, UNHCR and IOM, 2021, p. 134.

149 *Ibid.*, p. 139.

approach are numerous: they include the development and strengthening of the mechanisms of emergency relief and the promotion of resilient attitudes in the communities concerned, guaranteeing the right of prevention and risk reduction of natural disasters for all, because the protection of the well-being of people remains of paramount importance.¹⁵⁰ Interesting to note is the fact that the Chadian authorities envision local integration of the displaced (both refugees and IDPs) because their return to their place of origin seems undesirable in the short to medium term.¹⁵¹

Looking at the domestic legislation on refugees of the remaining three countries under scrutiny,¹⁵² in Mauritania, State Decree No. 22 of 2005 clarifies in its first part the conditions for acquisition and loss of the status of refugee. It creates a National (Consultative) Commission for Refugees that can recommend decisions on recognition of refugee status to the minister of the interior based on positive individual assessments by the UNHCR (Article 5). In the second part, the Mauritanian law enunciates the rights and obligations of refugees, tapping into the provisions of the OAU Convention (ratified by Mauritania in 1972) and the Refugee Convention and its New York Protocol (both ratified by Mauritania in 1987).¹⁵³ No mention is made to forced displacement due to environmental catastrophes; similarly, the National Strategy on Migration, implemented in October 2010, lacks any specific reference to such a situation.¹⁵⁴

The Malian legislation on refugees, dating back to 1998, does not contain any provision on forced displacement because of ecological disasters, having a similar structure to the Mauritanian legislation.¹⁵⁵ Contrary to what happened in Mauritania, the Malian Refugee Law did not create any National Commission on Refugees; that was, however, created by a specific, later decree.¹⁵⁶ While Mali ratified the OAU Convention in 1981, the Refugee Convention had already been ratified in 1973 and its New York Protocol on the same date. In the context of

150 Republic of Chad, *Stratégie nationale et plan d'actions pour la gestion des risques de catastrophes*, December 2020, Chap. 3 (“Stratégie nationale de réduction de risques des catastrophes”), pp. 39–43. On file with authors. For previous documents that also focus on natural disasters in Chad, Republic of Chad, *Rapport d'évaluation des capacités nationales pour la réduction des risques, la préparation et la réponse aux urgences au Tchad*, April 2014; Republic of Chad, *Plan d'action national de renforcement des capacités pour la réduction des risques de catastrophes, la préparation et la réponse aux urgences (2015–2020)*, September 2015.

151 Republic of Chad, *Stratégie nationale*, above note 150, para. 2(3)(5) (“Mouvements de populations”). In more detail, see p. 37: “La présence des camps de réfugiés/déplacés/retournés continue à représenter une préoccupation majeure sur le plan humanitaire. De toute évidence, on devrait s'attendre à ce que la situation se maintienne longtemps encore, le retour de ces réfugiés dans leur pays d'origine restant très improbable. L'approche de réinsertion socio-économique des réfugiés dans les communautés d'accueil en apportant une assistance élargie réfugiés/populations hôtes, en application dans le sud du pays doit être suivi minutieusement. Ces communautés hôtes sont estimées à 734 000 personnes.”

152 On the Refugee Law in Chad, see above note 131.

153 Décret No. 2005-022 fixant les modalités d'application en République islamique de Mauritanie des conventions internationales relatives aux réfugiés, 3 March 2005.

154 *Document de stratégie nationale pour une meilleure gestion de la migration*, October 2010.

155 Loi No. 1998-40 du 1998 portant sur le statut des réfugiés, 18 May 1998.

156 Décret No. 98-354/P-RM portant création de la Commission Nationale chargées des Réfugiés (CNCNR), 28 October 1998.

the constitutionalism of the Sahel, specificity is given by Article 16 of the Malian Constitution, which provides the duty of all citizens to offer support in the event of a natural disaster.¹⁵⁷

Niger's National Law on the Status of Refugees follows the examples of the other two countries in terms of absence of any provision providing for forced displacement because of natural disasters. It is the oldest law among the three countries, having been promulgated in 1997.¹⁵⁸ Niger also adopted the principal international legal instruments on refugees a long time ago, having ratified the OAU Convention in 1971, the Refugee Convention in 1961, and the latter's New York Protocol in 1970.

The principal refugee protection legal instruments of the five countries under discussion do not seem fit to address the concerns raised by the mounting problems of climate-induced displacement. That is why the present authors urge a revision of these documents (through the creation of new instruments or amendments to the existing ones) to incorporate the circumstance of displacement due to natural catastrophes—a situation that evidently was not taken into consideration by the drafters of the refugee law instruments currently in force.

Efficacy of subregional legislation and policy in the Sahel in tackling the plight of climate-induced displaced persons

At a subregional level, the five States are parties to the Community of Sahel–Saharan States (CEN-SAD), whose Treaty Establishing CEN-SAD, in its Article 1, considers free movement of people as a core objective of the subregional economic community. It stipulates that the same rights, advantages and obligations granted to a member State's own citizens should be applied to nationals of the signatory countries, in conformity with the provisions of their respective constitutions. Implementation of this specific objective has been stagnant, but a number of CEN-SAD member States have been increasingly liberalizing their policies and have successfully implemented schemes to foster the intraregional movement of people; those countries that have overlapping memberships with the Economic Community of West African States (ECOWAS) tend to be further along in liberalizing their cross-border mobility restrictions. Burkina Faso, Mali and Niger are also ECOWAS members. The recognition of the need for economic

157 Décret No. 92-0731 P-CTSP portant promulgation de la Constitution, 25 February 1992. See also *Mali Periodic Report to the African Commission on Human and Peoples' Rights relating to the Implementation of the African Charter on Human and Peoples' Rights, 2001–2011*, December 2011, p. 72, para. 363: "The same Constitution stipulates a number of duties that fall on the citizen: the duty for all to protect and defend the environment and the quality of life, the duty for all citizens to provide support in the event of a natural disaster, work, defence of the fatherland, the duty to honour all civic obligations and particularly to pay one's taxes, the duty of respecting the Constitution (Articles 15 to 24)."

158 Loi No. 97-16 portant statut des réfugiés, 20 June 1997. See also Décret No. 98-382/PRN/MI/AT déterminant les modalités d'application de la Loi No. 97-016 portant statut des réfugiés, 24 December 1998; Arrêté No. 208/MI/AT/SP/CNE portant règlement intérieur de la Commission Nationale d'Éligibilité au Statut des Réfugiés, 14 July 2000.

integration, including the free flow of persons, goods and services, stimulated the enactment of the ECOWAS Protocol relating to Free Movement of Persons, Residence and Establishment in 1979.¹⁵⁹ The first phase of the Protocol guaranteed free entry of citizens from member States without visa for ninety days and was ratified by all member States in 1980. The second phase of the Protocol, concerning the right of residence, became effective in July 1986, and all member States ratified it.¹⁶⁰ In contrast, the right of establishment is contained in the 1990 Supplementary Protocol on the Implementation of the Third Phase of the ECOWAS Protocol.¹⁶¹ The Supplementary Protocol entitles nationals of member States to settle or establish in ECOWAS States and to carry out business activities under the same conditions that apply to nationals of the host State.¹⁶² However, the Supplementary Protocol, much like the 1979 Protocol, did not include any special provision concerning forced displacement because of natural disasters in the region. To further develop its policy of mobility within the region, ECOWAS introduced subregional passports in 2000.¹⁶³ While these passports aim to facilitate the movement of people, the challenge remains that those most vulnerable to climate change are frequently the most disadvantaged and least able to move.¹⁶⁴

On the other hand, the governments of Burkina Faso, Chad, Mali, Mauritania and Niger have made a commitment to place the protection of displaced people and their host communities at the core of their actions. On 12 October 2020, these governments launched the Bamako Process, an intergovernmental platform for concrete and rapid actions to strengthen coordination between security and humanitarian actors and to ensure humanitarian access, protection and assistance to affected populations. The five areas of intervention on which the process focuses are: “1) Humanitarian access and civil-military coordination 2) Protection in the context of the UN framework

159 ECOWAS, Protocol relating to Free Movement of Persons, Residence and Establishment, A/P 1/5/79, 29 May 1979. More generally, for the action of ECOWAS in the Sahel, see L. Balmond, above note 112, p. 41: “Pour le Sahel plus particulièrement, elle [ECOWAS] s’est dotée d’une Stratégie pour le Sahel, adoptée en 2014 complétée par une stratégie contre-terroriste et son plan de mise en œuvre²³ puis en 2015 d’une Initiative-base de données socio-économique pour le Sahel pour assurer les actions de suivi et évaluation de sa Stratégie. Toutefois, si l’action de la [ECOWAS] dans le maintien de la paix n’a pas été négligeable, elle n’a pas développé une véritable stratégie intégrée au profit du Sahel, se concentrant sur les questions de sécurité et sur la lutte contre le terrorisme.”

160 John Agyei and Ezekiel Clotney, *Operationalizing ECOWAS Protocol on Free Movement of People among the Member States: Issues of Convergence, Divergence and Prospects for Sub-Regional Integration*, 2008, p. 10, available at: www.migrationinstitute.org/files/events/clotney.pdf.

161 ECOWAS, Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment, A/SP 2/5/90, 29 May 1990.

162 Michael P. Okom and Rose Ohiana Ugbe, “The Right of Establishment under the ECOWAS Protocol”, *International Journal of Law*, Vol. 2, No. 5, 2016.

163 Aderanti Adepoju, Alistair Boulton and Mariah Levin, *Promoting Integration through Mobility: Free Movement and the ECOWAS Protocol*, New Issues in Refugee Research, Research Paper No. 150, December 2007, p. 6, available at: www.unhcr.org/476650ae2.pdf.

164 United Nations Environment Programme (UNEP), *Livelihood Security: Climate Change, Migration and Conflict in the Sahel*, 2011, p. 23, available at: https://postconflict.unep.ch/publications/UNEP_Sahel_EN.pdf.

for the prevention of violent extremism 3) Access to asylum in the context of mass influx and mixed movements 4) Solutions for refugees, IDPs and other civilian population 5) Access to civil registration, identity document[s] and nationality”.¹⁶⁵ This intergovernmental process represents the implementation of the conclusions adopted during the 2019 Regional Dialogue among the five countries that also produced the Bamako Declaration, in which the representatives of the five governments showed their willingness to reinforce cooperation in order to enhance the protection of the forcibly displaced in the region. Although the topic of the environmentally displaced has not been explicitly mentioned, several of the recommendations apply to the category of forced displacement because of climate-induced disasters too. For example, the governments agreed to strengthen coordination between humanitarian actors on the ground and local authorities in order to more easily have access to persons in affected areas of the region. In addition, they agreed to reinforce partnership with local communities in situations of emergency to fill possible lacunae where access by humanitarian actors is limited or difficult, and to put in place an alert system allowing for better coordination between countries in the case of cross-border movement. Finally, the governments of the five countries committed to implementing the Kampala Convention, given that those countries had already ratified it.¹⁶⁶

In this sense, a significant step forward has been taken by Niger, which in 2018 became the first African country to adopt a law on the protection of IDPs.¹⁶⁷ Law No. 2018-74 on the Protection and Assistance of Internally Displaced Persons received a great impulse from the local Ministry on Humanitarian Action and Disaster Management, which in early 2018 created a specific committee to develop a law on IDPs in the country.¹⁶⁸ Even more recently, the Ministry of Justice has confirmed that Law 2018-74 allows the country to promote more solidarity and cooperation among Nigeriens in view of finding durable solutions for the plight of IDPs.¹⁶⁹

Law 2018-74 aims at the promotion and strengthening of measures to prevent, mitigate and eliminate conditions that could lead to internal displacement.¹⁷⁰ This law, having as a reference the Kampala Convention as well

165 UNHCR, *Progress Report: UNHCR Sahel Crisis Response*, October 2020, p. 3 available at: <https://tinyurl.com/yjs8smdr>.

166 *Dialogue régional de protection et de solutions dans le cadre des déplacements forcés au Sahel/Déclaration ministérielle et conclusions de Bamako*, 11–12 September 2019; *Déclaration ministérielle réaffirmant les conclusions de Bamako*, 9 October 2019.

167 Loi No. 2018-74 relative à la protection et à l’assistance aux personnes déplacées internes, 10 December 2018.

168 Arrêté No. 1 MAHCG/SG portant création, attributions et composition du comité directeur chargé de l’élaboration du projet de loi sur les personnes déplacées internes (PDI) au Niger, 2 February 2018.

169 *Note verbale No. 01/MJ/SG/DGDH/PJJ/AS en date du 27 aout 2019 adressée à la Commission de l’Union Africaine par le Ministère de la Justice de la République du Niger*, 29 August 2019, p. 2.

170 *Fifteenth Periodic Report of the Republic of Niger on the Implementation of the African Charter on Human and Peoples’ Rights Covering the Period 2017–2019, Presented Pursuant to Article 62 of the Said Charter*, November 2019, pp. 90–91, paras 444–445, further explains: “The law defines the roles and responsibilities in matters of protection against internal displacements and it makes reference to sustainable solutions, particularly the voluntary return to their places of origin, local integration into their location of displacement and establishment elsewhere in the country.”

as Resolution 1998/50 of the UN Human Rights Commission,¹⁷¹ considers as IDPs also people fleeing their place of origin or habitual residence because of natural catastrophes (Article 2(1)). Law 2018-74 is very detailed when it comes to “vulnerability” because, in its Article 2(8), it clearly refers the meaning of the term “vulnerability” to the connotation given to this word by the 2018 domestic law determining the principles of social protection.¹⁷² In the case of an environmental catastrophe, the relevant national authorities adopt all necessary measures to prevent the risk of internal displacement (Article 7), and if the displacement is inevitable, national authorities should do their best to reduce its effects (Article 9). Of particular relevance is Article 31, which concerns offences against IDPs. Arbitrary displacement in the context of environmental calamities is included among punishable offences. Such offences include forced evacuation in the event of natural disasters or due to other triggers, if the evacuations are not required with respect to the safety and health of the persons affected. The sanction is the same for both offences: fifteen to thirty years in jail and a fine of 3 to 7 million Central Africa francs. After the adoption of Law 2018-74, Niger adopted two decrees as part of efforts to implement it, in April 2020. One of these decrees concerns the modalities of application of Law 2018-74 and is to be implemented by the Ministry of Humanitarian Action and Disaster Management.¹⁷³ The second adopted decree concerns the organization and modalities of operation of the National Coordination Committee for the Protection and Assistance of IDPs established under Article 26 of the IDP law.¹⁷⁴

In paragraph 8 of Resolution 1998/50, the Human Rights Commission thanked governments that invited the representative of the UN Secretary-General to visit their countries and assess the situation of IDPs. At the somewhat belated invitation of Niger, the UN Special Rapporteur on the Human Rights of IDPs visited the country (18–24 March 2018), stressing that IDPs should be consulted in all initiatives relating to their situation (para. 32), and applauding the creation, in 2016, of the above-mentioned Ministry of Humanitarian Action and Disaster Management. This ministry is one of the institutional pillars entrusted with responding to the situation of IDPs in the country.¹⁷⁵ Among other tasks, it is

171 Commission on Human Rights Res. 1998/50, “Internally Displaced Persons”, UN Doc. E/CN.4/RES/1998/50, 17 April 1998.

172 Loi No. 2018-22 déterminant les principes fondamentaux de la protection sociale, 27 April 2018.

173 Décret No. 2020-298/PRN/MAH/GC déterminant les modalités d’application de la Loi No. 2018-74 du décembre 2018 relative à la protection et à l’assistance aux personnes déplacées internes, 17 April 2020.

174 Décret No. 2020-297/PRN/MAH/GC déterminant l’organisation et les modalités de fonctionnement du comité de coordination nationale de protection et d’assistance aux personnes déplacées internes, 17 April 2020.

175 *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on Her Mission to the Niger*, UN Doc. A/HRC/38/39/Add.3, 9 May 2018, p. 6, para. 22. In full, para. 22 reads as follows: “The Ministry of Humanitarian Action and Disaster Management, established in 2016 on the basis of the former Humanitarian Coordination Unit, is one of the institutions entrusted with responding to the situation of internally displaced persons. With its regional counterparts, it is at the forefront of the Government’s response to the humanitarian crisis. This Ministry’s responsibilities include: coordinating responses at the national level with the other ministries and bodies involved in preparing contingency plans and action plans; ensuring cross-sectoral coordination with national institutions (ministries, regions and subregions) and agencies involved in humanitarian action and disaster management; conducting

also entrusted with elaborating and implementing all projects concerning hospitality towards IDPs in the region where they are displaced and reintegration of IDPs into their regions of origin.¹⁷⁶

In 2009, the Special Rapporteur also visited Chad (3–9 February). On this occasion, the Special Rapporteur realized that displacement towards areas with an already fragile ecosystem would have put pressure on the limited resources in those areas. Without any intervention by the government in, for example, halting the illegal cutting of trees and the over-utilization of land for grazing, the situation would certainly have deteriorated. This could have resulted in even more limited availability of primary resources (arable land, water, wood) for both locals and IDPs. Such limited availability would have triggered potential civil conflicts and, as a consequence, new displacements.¹⁷⁷ However, in his report, the Special Rapporteur did not indicate any possible concrete solutions to limit the growing number of climate-induced IDPs. Chad, which recently saw the passing of the long-standing President Idriss Deby (1991–2021),¹⁷⁸ has struggled for a long time to accommodate IDPs, particularly in the eastern part of the country. In 2019, the number of IDPs in Chad because of conflict and violence was more than six times the amount of IDPs because of natural disasters.¹⁷⁹ Unfortunately, governmental action to integrate IDPs in the host regions (given that it was impossible to send them back home) has somewhat failed to meet expectations, but national and international actors hope that a new momentum can be gained

surveys and assessments to diagnose humanitarian emergencies and disasters, assess needs and provide preliminary responses; developing and implementing projects to support the reception and reintegration of returnees and repatriated persons, internally displaced persons and host populations; and, in conjunction with the relevant ministries, managing the camps for refugees and internally displaced persons in the Niger.”

176 Ministry of Humanitarian Action and Disaster Management, *Avant-projet de politique nationale de l'action humanitaire et de la gestion des catastrophes*, August 2018, p. 20, para. 4(1)(1)(3). At p. 41, this document provides several interesting definitions: “*Catastrophe*: Rupture grave du fonctionnement d’une communauté ou d’une société engendrant d’importants impacts et pertes humaines, matérielles, économiques ou environnementales que la communauté ou la société affectée ne peut surmonter avec ses seules ressources”; “*Catastrophe naturelle*: c’est un événement d’origine naturelle, subit et brutal, qui provoque des bouleversements importants pouvant engendrer de grands dégâts matériels et humains. Il s’agit des inondations, des sécheresses, des invasions acridiennes et d’autres calamités”; “*Catastrophe anthropique*: Est considérée comme une catastrophe anthropique, toute menace comportant un élément intentionnel, de négligence ou d’erreur humaine ou impliquant la défaillance d’un système conçu par l’homme.”

177 *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons. Addendum: Mission to the Republic of Chad*, UN Doc. A/HRC/13/21/Add.5, 22 December 2009, p. 14, para. 49. In this regard, para. 50 of this document clarifies: “Pour prévenir de nouveaux déplacements, le Représentant estime que cette situation nécessite de la part du Gouvernement tchadien à la fois une action humanitaire et des projets de relèvement précoce en étroite coopération avec les acteurs de développement. Ces projets devraient viser la réhabilitation de l’environnement dans les zones de déplacement et la promotion des moyens de production respectueux de l’environnement et adaptés aux conditions climatiques extrêmes afin d’atteindre l’autosuffisance des communautés affectées par le déplacement.”

178 “Idriss Déby Obituary: End of Chad’s ‘Great Survivor’”, *BBC News*, 21 April 2021, available at: www.bbc.com/news/world-africa-56816290.

179 IDMC, “Chad: Country Information”, available at: www.internal-displacement.org/countries/chad.

in order to find lasting solutions to the plight of the internally displaced.¹⁸⁰ At the same time, the Chadian government has been solicited by non-governmental organizations, international organizations and UN agencies engaged in protection work in humanitarian crises to elaborate a plan of action to identify the challenges involved and provide for some concrete response, and to review its domestic laws in light of the plight of IDPs.¹⁸¹ A detailed and coherent plan is needed to address the growing number of IDPs that are starving in the areas around Lake Chad.¹⁸² Many of the populations living around the lake have been displaced because of conflict a number of times, spending their savings during the displacements. Crop diversification, important to ensure that there is enough food, is less possible as farmers no longer have enough financial resources to plant multiple crops in different locations.¹⁸³

Community outreach on gender-based violence is also needed given that many of the IDPs in the country are women.¹⁸⁴ This action should be coupled with an effort to improve the access of IDPs to health-care facilities and schools.¹⁸⁵ In 2013, given the delicate situation of IDPs in the country, the AU organized in N'djamena a workshop on the domestic legal implementation and application of the Kampala Convention in Africa. The workshop dedicated a working group to the particular condition of IDPs in Chad. The working group has elaborated a series of recommendations covering what we have already analyzed here, and it has also sought the promulgation of some domestic legislation on the protection of IDPs, though Chad has not yet adopted this legislation.¹⁸⁶

As noted above, Burkina Faso is another country that has recently experienced a rise in the number of IDPs. According to CONASUR, by the end of 2020 the country had 1,074,993 IDPs.¹⁸⁷ A consultation with communities of IDPs in Burkina Faso, carried out by the UNHCR and other organizations in the field in 2020, revealed that the concerns and requests of IDP communities are similar throughout the country. IDPs have levelled criticism at the government's

180 ACTED, OXFAM *et al.*, *Solutions durables pour les personnes déplacées: Les défis à l'est du Tchad*, March 2012, pp. 19–21.

181 Protection Cluster Chad, *Stratégie du cluster protection: Tchad*, August 2016, p. 15.

182 Action contre le Faim, *Réfugiés et déplacés autour du Lac Tchad*, Quarterly Bulletin No. 123, September–November 2016, pp. 7–8. See also Oxfam International, above note 9, p. 24: “To date, 2.6 million people, including 1.5 million children, have been displaced by the humanitarian crisis in and around the Lake Chad Basin, putting them at risk of violence and malnutrition.”

183 Janani Vivekananda *et al.*, *Shoring Up Stability: Addressing Climate and Fragility Risks in the Lake Chad Region*, Adelphi, Berlin, 2019, p. 51, available at: www.adelphi.de/en/publication/shoring-stability. See also Amali Tower, *Shrinking Options: The Nexus between Climate Change, Displacement and Security in the Lake Chad Basin*, Climate Refugees, 18 September 2017, p. 10, available at: <https://indd.adobe.com/view/bf1670bb-4562-402e-a6c2-ebb3298cf8e5>.

184 OCHA, *Plan de reponse humanitaire: Tchad*, February 2020, p. 59.

185 *Ibid.*, p. 77.

186 AU, *Atelier de l'Union Africaine sur la transposition en droit national et l'application de la Convention de Kampala sur les personnes déplacées internes: Résumé de discussions, conclusions et recommandations*, 2–3 May 2013, pp. 5–6.

187 Alice S. Thiombiano, “Burkina Faso: 1 074 993 déplacés internes en 2020, selon le CONASUR”, *Burkina 24*, 9 January 2021, available at: www.burkina24.com/2021/01/09/burkina-faso-1-074-993-deplaces-internes-en-2020-selon-le-conasur/.

efforts to prevent displacement and foster social dialogue.¹⁸⁸ Moreover, IDPs note the exclusion of women, elders and persons with physical disabilities from decisions concerning their situation. Additionally, IDPs also noted a low rate of access to education. In contrast, IDP communities declared that they had received sufficient information about the COVID-19 pandemic. However, given their living conditions, the implementation of measures such as social distancing and regular hand-washing was problematic.¹⁸⁹ This was already noted in a July 2020 report by the UN Office for the Coordination of Humanitarian Affairs (OCHA), which also stressed the necessity of building more shelters to avoid overcrowding in the existing ones.¹⁹⁰

The pandemic, coupled with civil strife, drought and floods, has also affected the situation of IDPs in Mali, of which there were almost 300,000 in early 2021.¹⁹¹ In 2020, the AfDB allocated an amount of about \$50 million to help Mali assist IDPs in the context of the pandemic.¹⁹² In March 2021 it allocated a further \$150,000 to help IDPs in the country, providing them with food, access to drinkable water and more durable shelters, as well as identifying women at risk of gender-based violence.¹⁹³ In May 2015, the Ministry for Humanitarian Action, Solidarity and Reconstruction of the North published a national strategy on how to manage the situation of IDPs in the country. The Ministry developed this strategy based on the mandate given to it by National Decree No. 280 of 2014.¹⁹⁴ In this framework, it was stressed that the reintegration process of IDPs into their regions of origin is of fundamental importance.¹⁹⁵ The same goal was previously highlighted by the document *Orientations et priorités du gouvernement (Malien) pour la période 2013–2018*.¹⁹⁶ However, further studies on reforming the governmental architecture have made

188 UNHCR, OCHA *et al.*, *Burkina Faso: Consultations avec les personnes déplacées internes et les communautés hôtes au nom du Panel de Haut Niveau sur le Déplacement Interne: Rapport Final*, September 2020, pp. 28–29.

189 *Ibid.*

190 OCHA, *Burkina Faso: Plan de réponse humanitaire révisé*, July 2020, pp. 62–63. For a general reference on the humanitarian response to the influx of IDPs in Burkina Faso, see Haruna Kientore, “Analyse de la dimension genre dans la réponse humanitaire face à l’afflux de personnes déplacées internes au Burkina Faso”, master’s thesis, Institut International d’Ingénierie, Ouagadougou, 2019, available at: http://documentation.2ie-edu.org/cdi2ie/opac_css/doc_num.php?explnum_id=3491.

191 OCHA, *Mali: Rapport de situation*, 3 February 2021, available at: <https://reports.unocha.org/fr/country/mali/>.

192 AfDB, “Mali: La Banque africaine de développement accorde une aide humanitaire d’urgence de 150 000 dollars pour la prise en charge des personnes déplacées internes à Bamako”, 11 March 2021, available at: <https://tinyurl.com/4z4p2mu8>.

193 *Ibid.*

194 Décret No. 2014-0280/P-RM fixant les attributions spécifiques des membres du gouvernement, 25 April 2014.

195 *Stratégie nationale de gestion des personnes déplacées internes et des rapatriés*, May 2015, p. 2, para. 2(1): “L’objectif général est de contribuer à la stabilisation ... par le biais de la réinsertion socioéconomique des populations affectées ... afin de créer un environnement favorable au développement durable du pays.”

196 *Orientations et priorités du gouvernement (Malien) pour la période 2013–2018*, 2012; see, particularly, pp. 10–12, para. 6 (“Mise en œuvre d’une politique active de développement sociale”). See also *Plan d’action prioritaires d’urgence (PAPU) du gouvernement (2013–2014)*, March 2013, p. 1, where humanitarian aid to IDPs is set as a top priority for the government.

Decree 280 not applicable, at the same time weakening the competencies of the Ministry.¹⁹⁷ Moreover, although the Malian government ratified the Kampala Convention on 16 June 2010, the Technical Committee for the Domestication of the Kampala Convention in Mali is still working on its domestication.¹⁹⁸ Further, the adoption of the Kampala Convention does not preclude the necessity of adopting a number of legislative amendments to complement coherently the norms introduced by the Convention.¹⁹⁹

Finally, Mauritania is the country with the lowest number of IDPs in the region: 6,600 in 2019, all due to natural disasters (mostly floods, but some because of earthquakes).²⁰⁰ However, the problem of IDPs in the country is not yet perceived as a matter of urgency by local institutions that until now have never provided, for example, an institutional framework dealing (fully or partially) with the situation (Mauritania ratified the Kampala Convention on 5 March 2015).²⁰¹ As such, for example, IDPs are not mentioned in the Periodic Report that the country submitted to the African Commission on Human and Peoples' Rights (ACHPR) in March 2017,²⁰² and nor has the ACHPR noted this missing information in its observations replying to the report.²⁰³ In 2017, the most recent report of activities of the Mauritanian commissioner for human rights and humanitarian action was published, but that publication also fails to make any mention of IDPs.²⁰⁴ A major initiative envisaging the protection of IDPs is sought and is expected to be developed by the Mauritanian institutions as soon as possible.

The AU has intervened in the Sahel, drafting a strategy for the region. However, the commitments regarding displacement in the region have been broad, limited to assisting in mobilizing funds for indigent populations, including IDPs and refugees.²⁰⁵ Yet the AU recognizes that the degradation of the

197 UNHCR, NRC and IDMC, *Examen du cadre normatif et institutionnel malien relatif à la protection des personnes déplacées à l'intérieur du Mali*, March 2017, p. 11.

198 Décision No. 2016-0109/MSAHRN/SG portant création du Comité Technique de Domestication de la Convention de Kampala, 28 April 2016.

199 UNHCR, NRC and IDMC, above note 197, p. 13.

200 IDMC, "Mauritania: Country Information", available at: www.internal-displacement.org/countries/mauritania.

201 See, for example, Office of the Commissioner for Human Rights, Humanitarian Action and Relations with Civil Society, *Recueil des textes juridiques de protection et de promotion des droits humains en Mauritanie*, November 2019. This document, however, does not contain any provision regarding the protection of the IDPs in the country.

202 *10th, 11th, 12th, 13th and 14th Periodic Reports of the Islamic Republic of Mauritania on the Implementation of the Provisions of the African Charter on Human and Peoples' Rights*, July 2016 (submitted 22 March 2017).

203 ACHPR, *Concluding Observations – Mauritania: 10th, 11th, 12th, 13th and 14th Periodic Report, 2006–2014*, 13–22 February 2018.

204 Office of the Commissioner for Human Rights, Humanitarian Action and Relations with Civil Society, *Rapport d'activités 2016: Des progrès importants accomplis*, 2017. See also Office of the Commissioner for Human Rights, Humanitarian Action and Relations with Civil Society, *Plan d'actions stratégique 2015–2017 et Perspectives 2018–2019*, available at: www.cdah.gov.mr/index.php/10-strategies/14-plan-d-action-triennal.

205 AU, *The African Union Strategy for the Sahel Region*, PSC/PR/3(CDXLIX), 11 August 2014, p. 9, para. 22 (5).

environment caused by climate change and other natural disasters, for example droughts and floods, is one of the factors affecting development scenarios in the region.²⁰⁶ For this reason, another task of the AU is to assist in the establishment of coordination centres for the management of natural disasters.²⁰⁷ The AU has also noted that in situations of natural disaster, the right to freedom of movement and residence of persons, as enshrined in Article 12(1) of the African Charter, should not be restricted unless the law provides restrictions that are essential to respond to the threat to the health, safety or life of affected persons. Following the emergency, these persons have the right to return to their places of habitual residence unless those places of residence are still dangerous for the returnees.²⁰⁸

Conclusion

In Africa, climate change has consequences in terms of human displacement, and its impact has progressively increased over the years. However, given the complex relationship between displacement and climate change, it is worth recalling that climatic hazards do not automatically lead to displacements.²⁰⁹

The Sahel region is experiencing adverse effects because of climate change. This in turn is displacing thousands of people, some into neighbouring countries, others within the affected States. One of the questions this article has sought to answer is whether cross-border, climate-induced forcibly displaced persons are entitled to refugee status under international law. This article is in accord with the weight of opinion that persons forcibly displaced because of natural disasters cannot, on that basis alone, satisfy the criteria for refugee status under the Refugee Convention. The situation with regard to the OAU Convention is less clear-cut since its refugee definition may be open to an interpretation that extends to situations affected by climate change. Opinion on this question is divided, although it seems that the arguments in favour of a liberal and inclusive interpretation are gaining ground.²¹⁰ In cases where people do not qualify as refugees but are clearly susceptible to harm, complementary forms of protection

206 *Ibid.*, p. 17, para. 35.

207 *Ibid.*, p. 16, para. 33(vi).

208 ACHPR, “General Comment No. 5 on the African Charter on Human and Peoples’ Rights: The Right to Freedom of Movement and Residence (Article 12(1))”, 10 November 2019, p. 6, para. 18. For a general analysis of General Comment No. 5, see Romola Adeola, Frans Viljoen and Tresor Makunya Muhindo, “A Commentary on the African Commission’s General Comment on the Right to Freedom of Movement and Residence under Article 12(1) of the African Charter on Human and Peoples’ Rights”, *Journal of African Law*, Vol. 65, No. S1, 2021, p. 150: “It is important that the African Commission continually engages states on the provisions of General Comment No 5 and leverages on the state reporting process as a means to interact more visibly and vocally with states on the subject. Moreover, it is important that General Comment No 5 is utilized in regional human rights jurisprudence. Overall, there should be significant engagement with civil society, in its broadest understanding, and with states at various levels of governance, to ensure that the right to free movement of persons is ensured in practice.”

209 Etienne Piguet, Antoine Pecoud and Paul de Guchteneire, “Migration and Climate Change: An Overview”, *Refugee Survey Quarterly*, Vol. 30, No. 3, 2011, p. 23.

210 As a general reference, see, for example, M. Bond Rankin, above note 49; E. Arboleda, above note 53.

should be offered by States.²¹¹ However, it is arguably feasible that the criteria for refugee status could be satisfied on human rights grounds, including the right to life, the right to non-discrimination, the right to liberty and security of persons, the right to food, the right to water, the right to housing and the right to a healthy environment, amongst others.²¹² The position with regard to IDPs is given legal certainty by the Kampala Convention; African States have the primary responsibility to prevent displacement and protect the displaced.²¹³ The UN Environment Programme has suggested that forced displacement in the Sahel can be minimized by investing resources in disaster risk reduction and climate change adaptation to enhance the resilience of local communities while simultaneously strengthening humanitarian action to meet the challenges of climate change, for example by enacting measures to ensure assistance and protection for people displaced by environmental factors.²¹⁴

Given the difficulties that persons forcibly displaced because of natural disasters face in meeting the grounds for refugee status under the Refugee Convention, a relevant question for States is whether the Refugee Convention should be amended to include climate change as such a ground.²¹⁵ Alternatively, an additional protocol to that effect could be drafted. (Similar considerations arise in relation to regional treaties.) While such steps would help to address the issue, one key challenge is the political will for such change.

At the subregional level, the ICRC believes that more importance should be given to institutions such like the G5 Sahel. Among its objectives, this institution guarantees conditions of security amid its member States and offers a strategic framework of intervention to enhance the living standards of its population, at the same time promoting durable and inclusive development in the Sahel.²¹⁶ Within this framework, in November 2020 a meeting in Bamako (Mali) confirmed that the challenges posed by climate change and natural disasters remain one of the top priorities for the G5 Sahel, presently and in the future,

211 UNHCR, *Legal Considerations*, above note 28, para. 19.

212 *Ibid.*, para. 7.

213 In this regard see also ECOSOC, *Final report of the Special Rapporteur, Paulo Sérgio Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Doc. E/CN.4/Sub.2/2005/17, 28 June 2005, Principle 5(4) (“The right to be protected from displacement”): “States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.” More generally, see also Principle 5(1): “Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.”

214 UNEP, above note 164, p. 76.

215 The Refugee Convention can be revised in accordance with its Article 45 (“Revision”). In full, Article 45 reads: “1) Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations. 2) The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request”.

216 G5 Sahel Convention of Establishment, 19 December 2014, Art. 4. In this regard, see A. Bassou, above note 14, p. 2: “Article 4 of Title II (“Objectifs du G5 Sahel”) sets out the goals, which are essentially to ensure development and security to improve the population’s quality of life. Special focus is placed on using democracy and good governance as means to that end, and international and regional cooperation as a framework for such efforts.”

because, as these phenomena cause displacement of populations, they may negatively impact on the development of the five countries.²¹⁷

In 2016, President Roch M. C. Kabore of Burkina Faso stated: “Facing these plights [natural disasters, among others], the aspiration of leaving [one’s place of origin] is natural and legitimate. Better still, it is a fundamental human right.”²¹⁸ This is why he appealed not only for subregional and regional (African) cooperation, but, more generally, for world cooperation.²¹⁹ It is clear that an improvement in relations in the context of the G5 Sahel will certainly have positive effects on the policies of its five member States vis-à-vis the conditions of persons forcibly displaced because of natural disasters. In this regard, in 2000 Zachary Lomo argued that many African States have failed to enact laws indispensable to creating the institutional frameworks to give effect to the international human rights protection regime. While we may not agree with this statement (indeed, after twenty-one years, perhaps Lomo has changed his mind on this point), we believe he is still correct when affirming that many people throughout the continent are not always aware of their rights, and are thus vulnerable to manipulation and coercion.²²⁰

217 G5 Sahel, “L’impact du changement climatique sur la sécurité et le développement au Sahel”, 20 November 2020, available at: www.g5sahel.org/limpact-du-changement-climatique-sur-la-securite-et-le-developpement-au-sahel/.

218 G5 Sahel, “Le président du Faso plaide la cause des réfugiés et migrants”, 21 September 2016, available at: www.g5sahel.org/le-president-du-faso-plaide-la-cause-des-refugies-et-migrants/ (authors’ translation).

219 *Ibid.*

220 Zachary Lomo, “The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work”, *Berkeley Journal of International Law*, Vol. 18, No. 2, 2000, p. 269.