Defining Climate Displacement in Africa: Legal Implications in Light of the *African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers*

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Online ISSN
1727-3781

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Date Submitted

09 March 2025

Date Revised

05 March 2026

Date Accepted

05 March 2026

Date Published

21 April 2026

Editor

Prof Germarié Viljoen

Journal Editor

Prof Wian Erlank

How to cite this contribution

Fox BE "Defining Climate Displacement in Africa: Legal Implications in Light of the *African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers*" *PER/PELJ* 2026(29) - DOI http://dx.doi.org/10.17159/1727-3781/2026/v29i0a21494

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DOI
http://dx.doi.org/10.17159/1727-3781/2026/v29i0a21494

Abstract

Legal definitions shape rights, obligations, and protections in international, regional and domestic law. However, there is no universally accepted legal definition for individuals forced across borders by the impacts of climate change. This legal uncertainty creates protection gaps, leaving climate-displaced persons in limbo. The *African Guiding Principles on the Human Rights of All Migrants, Refugees, and Asylum Seekers* (2023) seeks to address this by explicitly defining "climate refugees" and "climate migrants". These definitions clarify state obligations and provide a framework for protecting climate-displaced persons, though as a *soft law* instrument its legal force depends on state domestication. This article examines the implications of these definitions within African regional law. It first explores the role of legal definitions in shaping and enforcing rights. It then evaluates pre-existing international and regional frameworks, highlighting the legal gaps in addressing climate displacement and mobility. The article critically analyses how the *African Guiding Principles* strengthen the protection of persons displaced by the impacts of climate change by confirming that they may qualify as refugees under the *OAU Refugee Convention* and introducing "climate migrant" as a distinct legal category. Finally, it assesses the challenges and opportunities in domesticating these definitions within African Union member states. The *African Guiding Principles* set a global precedent for legal responses to climate-induced displacement by formally recognising climate-displaced persons. This article argues that the domestic adoption of these definitions is essential to closing the gaps in protection and ensuring that the rights of African climate-displaced persons are respected, protected and fulfilled.

Keywords

Climate change displacement; refugees; migrants; African regional law; soft law; domestication.

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1 Introduction

In the much-loved tale of Romeo and Juliet, Shakespeare[1] asks the audience to consider, "[w]hat's in a name? That which we call a rose by any other word would smell as sweet." While poetic, this sentiment does not hold true in law. Legal terms and their accompanying definitions, whether in domestic legislation or international instruments, play a crucial role in establishing rights, obligations and consequences.[2] Without clear definitions, ambiguity may appear, undermining legal protections and creating hurdles to the enforcement of the law.

In the context of persons displaced across state borders by the impacts of climate change, a phenomenon recognised by the Intergovernmental Panel on Climate Change (IPCC), as well as the United Nations Human Rights Committee, there appears to be a pathological fear of committing to a set definition or terminology.[3] There is therefore currently no universally accepted term or definition encompassing climate-displaced persons.[4] The reluctance to provide a universal term or definition for those displaced across state borders by the impacts of climate change has resulted in what Nicholson[5] describes as "a panoply of categories and labels". These include terms and phrases that may have been popularised by the media and civil society, which play an emotive or political role but which may not reflect the legal realities of such terms, for example, "environmental refugees", "climate migrants", and "climate displaced persons", among others which are used interchangeably without consideration as to what it means legally to be considered a refugee versus a migrant.[6] On the other hand, Nicolson[7] further notes that researchers, scholars, lawyers and policymakers will often choose the terminology that best suits their argument, allowing them to sidestep potential legal gaps or ambiguities that arise from the limitations

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1 Shakespeare *Romeo and Juliet* Act II Scene II.

2 Jopek-Bosiacka 2011 *Research in Language* 9-29.

3 *Ioane Teitiota v New Zealand (24 October 2019) CCPR/C/127/D/2728/2016 para 9.11;* O'Neill *et al* "Key Risks Across Sectors and Regions" 2428; Cissé *et al* "Health, Wellbeing and the Changing Structure of Communities" 1080.

4 Gromilova and Jägers "Climate Change Induced Displacement" 70.

5 Nicholson "Conceptualising 'Climate Migration'" 21. Nicholson has often been outwardly critical of the multitude of synonyms used to describe the phenomenon of cross-border displacement due to climate change impacts. Also see Nicholson 2014 *Geographical Journal* 151-160; Nicholson 2012 *JRS* 584-585.

6 Cantor *et al* 2024 *IJRL* 177; Nicholson "Conceptualising 'Climate Migration'" 21.

7 Nicholson "Conceptualising 'Climate Migration'" 22.

created by the terms in use. For example, scholars may choose to use the term climate migrant in their research to navigate the difficulties of adhering to the individual persecution requirements found in the definition of a refugee in the *Convention Relating to the Status of Refugees* (hereafter the 1951 *Refugee Convention*).[8]

The African Commission on Human and Peoples Rights (hereafter the African Commission), however, in the 2023 *African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers* (hereafter the *African Guiding Principles*), appears to be the first regional or international body, to break free from this fear of commitment, through the creation of a set of definitions for persons displaced by the impacts of climate change in Africa. As this article will show below, these principles not only provide a clear legal definition of "refugee", which explicitly includes persons displaced by the impacts of climate change, but they also introduce a new, legally grounded definition for "climate migrants."[9]

It is noted that the *African Guiding Principles* is a soft law instrument - in particular, a primary soft law instrument.[10] Primary soft law instruments consist of normative instruments that are not explicitly adopted as treaties or conventions but address the international or regional community and are usually foundationally based on existing binding instruments.[11] As such, primary soft law may declare new norms and reaffirm or rearticulate existing binding norms and obligations in a new context. Notably, soft law can become binding "hard law" when a state domesticates the normative principles, but it will remain soft law at the international or regional level.[12]

Canvassed against the above, this article aims to examine how the introduction of distinct legal definitions for both "climate refugees" and

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8 Article 1A(2) of the UNHCR *Convention Relating to the Status of Refugees* (1951) (hereafter the 1951 *Refugee Convention*); Nicholson "Conceptualising 'Climate Migration'" 21-22.

9 Principle 2(2)-(4) of the *African Guiding Principles* in ACHPR 2023 https://achpr.au.int/sites/default/files/files/2023-11/engafrican-guiding-principles-migrants-refugees-and-asylum-seekers.pdf.

10 Soft law is not explicitly listed as a source of international law in Art 38(1) of the *Statute of the International Court of Justice* (1946). Shelton "Soft Law" 68-72 notes that state practice has increasingly included normative statements in non-binding political instruments, such as declarations, resolutions and programmes of action, indicating an expectation of compliance with the norms they contain. Also see the *African Guiding Principles*; Guzman and Meyer 2010 *J Legal Anal* 171-226.

11 Secondary soft law is the recommendations and general comments from various United Nations or regional supervisory bodies, the jurisprudence of international and regional courts, decisions of special rapporteurs, and resolutions from organs such as the United Nations General Assembly. Notably, soft law becomes "hard law" when a state domesticates it on a national level, but will remain soft law at the international or regional level. Shelton "Soft Law" 68-72; Guzman and Meyer 2010 *J Legal Anal* 171-226.

12 Shelton "Soft Law" 68-72; Guzman and Meyer 2010 *J Legal Anal* 171-226.

"climate migrants" within the *African Guiding Principles* may aid in protecting the rights of persons displaced by the impacts of climate change across state borders in Africa. First, the article will highlight the importance of legal definitions for the interpretation and application of law. It will then outline the legal position of "climate refugees" and "climate migrants" in international law and African regional law before these new definitions were adopted, highlighting the resulting gaps in the protection of rights. The article will then examine the definitions adopted by the *African Guiding Principles* and the potential impact they may have on addressing the previously identified gaps in protection. Finally, the article will make recommendations as to how these new definitions may be incorporated into the domestic law of African Union (AU) states.

2 Definitions and the interpretation and application of the law

Legal philosophers such as Hart[13] and Dworkin[14] have explored how legal definitions shape the structure and interpretation of law. Hart emphasises the importance of precise legal definitions for the functioning of legal systems, while Dworkin highlights the interpretive nature of law, where definitions are not static but involve principles and context which guide decision-making. Further, Searle,[15] and also Kelsen,[16] have examined how legal definitions describe and create legal realities, making the role of definitions essential in applying the law. As such, legal terms and definitions are not just written text but are rather tools for decision-making, enabling classification, and guiding interpretation, thus affecting and shaping the application and development of the law and providing legal certainty.

This interpretative function of legal definitions is reflected in how drafters include definitions in domestic legislation and international instruments to provide an explanatory list of terms which aid in the application of the law.[17] In domestic legislation an explicit definition acts as an internal aid for interpretation and will prevail as the authoritative meaning of a term unless the context in which the word appears suggests the drafters intended otherwise.[18] Where words are internally defined in this way, this is taken as an indication that the drafters contemplated a specific meaning for the word or phrase and not an ordinary meaning.[19] In international and regional instruments, definitions in the instrument may serve as an internal limiting

13 Hart *Concept of Law* 17.
14 Dworkin *Law's Empire* 45-86.
15 Searle *Speech Acts*.
16 Kelson 1935 *LQR* 517-535.
17 Botha *Statutory Interpretation* 120.
18 *Canca v Mount Frere Municipality* 1984 2 SA 830 (TkSC) 832 B-G.
19 *Minister of Defence and Military Veterans v Thomas* 2016 1 SA 103 (CC) para 20.

factor which binds adjudicators or judicial decision-makers to that meaning, unless the meaning is vague or ambiguous.[20]

Therefore, definitions in all legal instruments must be clear and precise to avoid ambiguity. They should also be sensitive to context, oriented toward purpose, and aligned with the drafters' intentions. Essentially, a robust legal definition not only clarifies meaning but also anchors interpretation, maintains consistency, and guides the application and development of the law in accordance with both the letter and the spirit of the legal instrument.

Clear and precise definitions are especially important when addressing emerging legal challenges such as recognising and protecting persons displaced by climate change. As such, the following discussions in sections 3 and 4 explore the definitions, or lack thereof, surrounding displacement due to the impacts of climate change and the gaps in protection created at both the international and the regional levels.

3 Climate refugees and migrants in international law

3.1 Climate refugees

El-Hinnawi[21] is regarded as one of the first authors to have attempted to formally define persons displaced by climate change by introducing the term "environmental refugees" in a 1985 United Nations Environment Programme report. According to him, environmental refugees are persons "who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life."[22] El-Hinnawi intended the definition to include persons displaced by both sudden-onset and slow-onset impacts of climate change, noting that his definition covers persons temporarily displaced by disasters, persons permanently displaced by drastic environmental changes, and persons forced to leave their place of origin due to the gradual deterioration of the environment.[23] McAdam[24] notes, however, that while El-Hinnawi uses the language of the protection of refugees in his definition, he intended to draw attention more to the damaging effects of anthropogenic climate change on human settlement rather than to advocate the extension of the international refugee protection regime. Nevertheless, the term "environmental refugees" or its contemporary counterpart, "climate refugees", has subsequently gained

20 Botha *Statutory Interpretation* 68.
21 Brown *Migration and Climate Change* 13-15; Atapattu 2009 *Wis Int'l LJ* 619; Ramos "Climate Change, Disasters and Migration" 744.
22 El-Hinnawi *Environmental Refugees* 4.
23 El-Hinnawi *Environmental Refugees* 4-5.
24 McAdam *Climate Change* 3.

traction in popular culture and the media, and is often used as a social and political tool to induce the general public to understand the mass displacement of persons due to climate impacts.[25] For example, the *Washington Post* declared, "[t]he climate refugee crisis is here" in an article describing the displacements which followed the catastrophic flooding experienced in southern Brazil in 2024.[26] The use of the term "refugee" in this context is intended to highlight the forced nature of the movement. However, this disregards the fact that the term "refugee" is, in fact, a term of art, in that it has a precise, specialised meaning in the international refugee protection regime.

This international refugee protection regime is governed by the legal framework created by the 1951 *Refugee Convention* and the 1967 *Protocol Relating to the Status of Refugees* (hereafter the 1967 *Protocol*).[27] This framework provides a precise definition of who may qualify for refugee protection. Article 1A of the 1951 *Refugee Convention* defines a refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[28]

This definition, Goodwin-Gill, McAdam and Dunlop suggest, contains four elemental characteristics which must be fulfilled before the status of a refugee may be conferred upon an individual.[29] These characteristics include that the person 1) is outside his/her state of origin; 2) is unable or unwilling to seek or take advantage of the protection of that state or to return there; 3) can attribute this inability or unwillingness to a well-founded fear of being persecuted; and 4) can identify the persecution as being based on the grounds of race, religion, nationality, membership of a particular social group, or political opinion.[30]

The climate refugees mentioned above are generally not fleeing subjective, individualistic government persecution based on an enumerated ground of discrimination. There are several reasons for this, including the fact that persecution requires human agency and typically arises from the actions of

25 Mayer *Concept of Climate Migration* 36; Nicolson 2014 *Geographical Journal* 152; Masquelier 2006 *American Anthropologist* 738.

26 Dias and McCoy 2024 https://www.washingtonpost.com/world/2024/05/28/brazil-floods-climate-refugees/. Those displaced by the flooding are, in reality, internally displaced persons, as they were primarily displaced within their country of origin. For more on internally displaced persons, see UNHCR 1998 https://www.unhcr.org/media/guiding-principles-internal-displacement.

27 UNHCR *Protocol Relating to the Status of Refugees* (1967); UNHCR *Handbook on Procedures and Criteria* paras I-II.

28 Article 1A(2) of the 1951 *Refugee Convention*.

29 Goodwin-Gill, McAdam and Dunlop *The Refugee in International Law* 40-45.

30 Goodwin-Gill, McAdam and Dunlop *The Refugee in International Law* 40-45.

state or non-state actors.[31] In contrast, the impacts of sudden or slow-onset climate events that cause displacement are often indiscriminate, and it is therefore challenging to identify who, if anyone, is responsible for persecution in this context.[32]

Thus, despite the widespread media use of the term "refugee" to describe persons displaced by the impacts of climate change, it is difficult to use the international refugee protection framework to protect such persons. This protection framework creates many challenges which have to be overcome before displaced persons can have their rights thus respected, protected and fulfilled.

3.2 Climate migrants

Due to the historically controversial nature of defining persons displaced by climate change across state borders as refugees in international law, it has been suggested that terms such as "environmental migrant" or its contemporary counterpart "climate migrant" should be used instead to designate such persons.[33] However, unlike the term refugee, the term migrant does not have a universally accepted definition in a binding international protection framework.[34] In fact, there is currently no overarching binding legal framework with the mandate to protect the rights of all migrants.[35]

As such, the term migrant often serves as an umbrella term commonly used by the media, civil society, and the general public to describe individuals who have left their places of origin, either internally or moving across state borders, temporarily or permanently, for a variety of reasons, whether voluntarily or by force.[36] The term is intended to encompass all forms of human mobility away from a place of origin and does not give rise to the same legal difficulties associated with the term refugee, as there are no set requirements to be met for individuals to be classified as migrants outside of their having left their places of origin.

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31 *AF (Kiribati)* [2013] NZIPT 800413 para 54.

32 McAdam *Climate Change* 45-47. For a detailed discussion on who may be considered persecutors in the context of climate displacement, see McAdam "Displacement in the Context of Climate Change" 836.

33 Mayer *Concept of Climate Migration* 98-185.

34 IOM *International Migration Law* 132-133.

35 There are, however, soft law instruments such as the UNGA *New York Declaration for Refugees and Migrants* UN Doc A/RES/71/1 (2016) and the UNGA *Global Compact for Safe, Orderly and Regular Migration* UN Doc A/RES/73/195 (2018), which purport to enhance cooperation in international migration in all its dimensions. However, neither defines the term "migrant".

36 Atak and Crépeau "Refugees as Migrants" 134; IOM *International Migration Law* 132-133.

A criticism of the use of the term migrant is that it is often used to denote some form of voluntariness in the mobility undertaken by persons seeking entry into a host state.[37] However, assuming that the movement away from one's place of origin is a voluntary decision does not take into consideration the complex, multi-causal push and pull factors associated with human mobility in the 21st century.[38] Factors such as political, ethnic, and religious oppression and economic instability frequently "push" individuals away from their places of origin, while at the same time, better economic prospects, cultural appeal and personal ambitions can "pull" them toward particular destinations.[39] Human mobility is an interplay between these push and pull factors, and thus the distinction between voluntary and forced mobility is not always clear-cut.

This blurring of the line between voluntary and forced migration becomes further complicated when attempting to identify climate change as the sole cause of displacement, with the intention of identifying persons specifically as climate migrants. The challenge lies in determining to what extent the decision to leave one's place of origin can be causally linked to the sudden or slow-onset climate change impacts versus other broader mobility concerns.[40]

For example, causality is straightforward in the context of sudden-onset climate impacts, such as severe storms or floods, where the direct link to displacement is evident.[41] Imagine a coastal community that is hit by a powerful tropical cyclone.[42] The storm surge and heavy rains which follow destroy homes, contaminate water sources and leave entire neighbourhoods uninhabitable.[43] Most families are forced to evacuate to emergency shelters in nearby towns, hoping to return once the waters recede and their homes are rebuilt. In this case, the direct link between the cyclone and displacement is clear. However, as extreme weather events become more intense and frequent due to climate change, these temporary displacements become longer and in some cases permanent.[44]

Now, consider that this coastal community also has limited infrastructure and disaster risk reduction strategies, with poorly maintained flood defences

37 Atak and Crépeau "Refugees as Migrants" 137; Hamlin *Crossing* 1-3; Crawly and Skleparis 2017 *Journal of Ethnic and Migration Studies* 48-64.
38 Atak and Crépeau "Refugees as Migrants" 137.
39 Mayer *Concept of Climate Migration* 16.
40 Mayer *Concept of Climate Migration* 16; McAdam *Climate Change* 28-30, 247.
41 McAdam *Climate Change* 5-6.
42 For example, tropical storm Kristine displaced +- 950 000 people in the Philippines in 2024. IFRC 2024 https://www.ifrc.org/emergency/philippines-severe-tropical-storm-kristine-0.
43 Pörtner *et al* "Summary for Policymakers" 3-9.
44 McAdam *Climate Change* 5-6; Kolmannskog 2012 *Journal of International Development* 1071, 1776.

and inadequate housing in low-lying areas. Some argue that the resulting displacement will be partly due to a lack of state investment in climate change adaptation strategies rather than the cyclone itself.[45] This raises the question of whether the displacement can be solely attributed to the sudden-onset climate change impacts or whether it is also a consequence of the state's failure to respond adequately to the situation.

What is certain, however, is that persons displaced by these impacts did not choose to leave their place of origin voluntarily. They are a vulnerable group negatively affected by the impacts of climate change and are in need of protection of their rights.

Causally linking slow-onset impacts such as drought or desertification to displacement rather than other mobility push factors is also difficult. It has been well established that the impacts of climate change act as a "threat multiplier", exacerbating already existing push factors such as population growth, urbanisation and poverty, which in turn drive displacement, rather than the impacts themselves acting as the displacement driver.[46] For instance, consider a farming family whose livelihood has been steadily eroded by years of drought.[47] With each dry season, their crops yield less, and local resources grow scarcer. Facing the reality that they can no longer support themselves and facing food and water scarcity, they decide to pre-emptively move to a nearby city in search of stable work and access to basic necessities. Are they climate migrants driven from their homes by the cumulative effects of drought? Or are they what have been referred to as "economic migrants" seeking better job opportunities in urban areas?[48] Economic migrants are perceived as persons moving by choice and thus without a need for special protections from host states.[49] It has been suggested that states feel that they do not have a duty to protect those who cross a state border seeking greater economic prospects in the same way as they would a refugee, for example.[50] The reasoning put forward is that if

45 Nicholson "Conceptualising 'Climate Migration'" 26-27; Kelman "Climate Change–Disaster–Migration" 50-53.

46 McAdam *Climate Change* 24; Nishimura *Slow Onset Effects of Climate Change* 3; ASWAN Forum *Climate Displacement Nexus in Africa* 1; Boas *et al* 2019 *Nature Climate Change* 901-902.

47 For an in-depth discussion of this, see Nishimura *Slow Onset Effects of Climate Change*.

48 The term "economic migrant" has no legal definition in international or regional law. Rather, it is a term used in public discourse, which, like the term climate migrant, has derogative connotations. The term is also often used to inflame anti-immigrant and xenophobic rhetoric. Althaus date unknown https://weblog.iom.int/false-dichotomy-between-economic-migrants-and-refugees.

49 Althaus date unknown https://weblog.iom.int/false-dichotomy-between-economic-migrants-and-refugees.

50 Althaus date unknown https://weblog.iom.int/false-dichotomy-between-economic-migrants-and-refugees.

persons deemed to be economic migrants are turned away, they are merely forced to remain in a situation of poverty; but if refugees are turned away, their lives may be at imminent risk.[51] Further, Atak and Crepeau[52] note that states increasingly view the act of allowing entrance and then subsequent rights protection to those seeking better economic prospects as a threat to their sovereignty and security.

However, it is clear in the above example that the family's "choice" was forced by a combination of deteriorating environmental conditions and an underlying threat to their fundamental rights. As such, it is difficult to identify the mobility of persons in the context of slow-onset climate change impacts as solely the result of climate change, or to identify their mobility as solely voluntary or forced.[53]

This forced-voluntary binary, at its simplest, relies on the assumption that there are only two distinct and entirely distinguishable motivations for crossing an international border.[54] It overlooks the overlapping and fluid nature of human mobility and perpetuates what Crawley and Skleparis[55] describe as a form of "categorical fetishism" that obscures individual histories and contexts. The blurred line between voluntary and forced climate-related human mobility underscores the need to protect the rights of those displaced by climate impacts, underscoring the need for a rights-based approach to climate change mobility and migrants.[56]

However, a rights-based approach to climate change mobility should encompass more than just the right to migrate across borders.[57] Rather, it should also ensure the protection of the fundamental rights of climate-displaced persons.[58] Mayer[59] highlights in this regard that it is fundamental that the sovereignty of states over their borders is respected, but within the bounds of their human rights obligations.

Based on the above argument, any new or legally binding definition of "climate migrant" should recognise the complexities of human mobility in the context of the impacts of climate change, incorporating both sudden and slow-onset impacts that influence the timing and nature of the migrants' mobility. It should also acknowledge the blurred lines between voluntary and

51 Atak and Crépeau "Refugees as Migrants" 138.
52 Atak and Crépeau "Refugees as Migrants" 142.
53 Boas *et al* 2019 *Nature Climate Change* 901-902; Nishimura *Slow Onset Effects of Climate Change* 3; Nicholson "Conceptualising 'Climate Migration'" 17; McAdam *Climate Change* 24.
54 Hamlin *Crossing* 9.
55 Crawly and Skleparis 2017 *Journal of Ethnic and Migration Studies* 48-64.
56 Mayer *Concept of Climate Migration* 100.
57 Mayer *Concept of Climate Migration* 100.
58 Mayer *Concept of Climate Migration* 100.
59 Mayer *Concept of Climate Migration* 100.

forced migration and the multi-causal push and pull factors associated with such mobility. Finally, a comprehensive definition should highlight the vulnerability and rights of climate migrants, emphasising that they are a group in need of protection. This approach would offer a nuanced, inclusive understanding of climate migrants and their unique needs. Such a definition would help respect, protect, and fulfil the rights of persons displaced across state borders by climate change.

4 Climate refugees and migrants in African regional law and in the context of the *African Guiding Principles*

4.1 Climate refugees in Africa

The above discussion has identified the narrow, subjective, individualistic nature of the 1951 *Refugee Convention* definition of who is deemed to be a refugee. This creates a gap in the protection of persons displaced by climate change across state borders, as they are not recognised as a group in need of international protection. This gap, it has been suggested, may be ameliorated to an extent by the African regional refugee protection framework governed by the Organisation of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (hereafter the *OAU Refugee Convention*).[60]

The *OAU Refugee Convention* was drafted in the context of the African decolonial project of the 1960s and is intended to be complementary to the 1951 *Refugee Convention* and the 1967 *Protocol*.[61] This decolonial project dealt with needs unique to the continent, particularly in protecting persons who may have been exiled outside of their state of origin due to their activities as freedom fighters and not due to persecution based on one of the grounds enumerated in the 1951 *Refugee Convention*.[62] The result is that the *OAU Refugee Convention* contains a broader definition of who may qualify as a refugee in terms of the law.[63] In addition to the 1951 refugee definition, the *OAU Refugee Convention* states that:

> The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (emphasis added).[64]

As with the 1951 definition of a refugee, the OAU definition can be broken down into core components, which consist of 1), one or more of the four

60 OAU *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) (hereafter *OAU Refugee Convention*).
61 Sharp "Regional Refugee Regimes: Africa" 282-283; Wood 2014 *IJRL* 557-558.
62 Sharp "Regional Refugee Regimes: Africa" 282-283.
63 Wood 2014 *IJRL* 557-558.
64 Article 1(1) of the *OAU Refugee Convention*.

enumerated refugee-producing events existing in the state of origin, and 2), the refugee's being compelled to leave as a result one or more of the events enumerated.[65]

The expanded definition has been praised as the "most celebrated feature" of the *OAU Refugee Convention*.[66] Adeola notes that this expanded definition reflects the altruistic traditions of hospitality in Africa and aims to offer refuge to displaced populations by accommodating various circumstances leading to their displacement.[67] In particular, this definition shifts from a subjective, individualistic, persecution-based view of who qualifies as a refugee to a more objective view, making space for situations of mass displacement.[68] Importantly, Wood notes that the interpretation and application of this expanded definition should not be limited by its origins in the decolonial project but rather should be interpreted as an instance of legal evolution in light of modern-day meanings and developments in international law.[69] As such, it has been suggested that the "events which seriously disturb public order" referred to may also include impacts of climate change.[70] This suggests that the existing regional framework, which stems from the *OAU Refugee Convention*, might already be flexible enough to protect persons displaced across state borders by climate change.

The question then arises as to whether sudden and slow-onset climate events "seriously disturb public order".[71] Hansen-Lohrey proposes a set of indicators that may be used to determine this.[72] These indicators include 1) that the event threatens the right to life, physical integrity, and/or liberty of individuals; 2) that the event affects society at large to the extent that it creates a general sense of instability undermining public peace, safety or security; and 3) that the state of origin is unable or unwilling to restore public order.[73] Kälin and Chapusiat highlight, in this regard, that climate impacts, whether sudden or slow-onset, will not often be sufficiently life-threatening to disturb public order.[74] They state that in order for the *OAU Refugee*

65 Wood "International and Regional Refugee Definitions Compared" 631.
66 Okoth-Obbo 2001 *Refugee Survey Quarterly* 109.
67 Adeola "Protecting 'Climate Refugees'" 367.
68 Kälin and Chapuisat 2024 https://www.refworld.org/reference/lpprs/unhcr/2024/en/148128 14; Wood "International and Regional Refugee Definitions Compared" 636; Wood 2014 *IJRL* 555-580.
69 Wood 2019 *IJRL* 314.
70 Wood 2019 *IJRL* 314; Adeola "Protecting 'Climate Refugees'" 368.
71 Adeola "Protecting 'Climate Refugees'" 370.
72 Hansen-Lohrey 2023 https://www.unhcr.org/sites/default/files/2023-09/legal-protection-policy-research-series-no-41.pdf 45.
73 Hansen-Lohrey 2023 https://www.unhcr.org/sites/default/files/2023-09/legal-protection-policy-research-series-no-41.pdf 45; Kälin and Chapuisat 2024 https://www.refworld.org/reference/lpprs/unhcr/2024/en/148128 15.
74 Kälin and Chapuisat 2024 https://www.refworld.org/reference/lpprs/unhcr/2024/en/148128 15-16.

Convention definition of a refugee to be applicable in these instances, the climate events and their impacts would have to go beyond the "level of chaos that often erupts during the days and weeks following the occurrence of a sudden-onset hazard."[75] Thus, while it is plausible that this definition encompasses displacement due to the impacts of climate change, a gap in protection is nevertheless still present due to the high threshold that a climate event must overcome in order to be determined as seriously disturbing public order.

Furthermore, state practice with regard to extending the *OAU Refugee Convention* definition to those displaced by climate change has thus far been rare and inconsistent.[76] As a result, Wood has noted that African states are reluctant and unsure of how and when to apply this definition without clarification from bodies such as the AU or the African Commission.[77]

Thus, despite the *OAU Refugee Convention's* widening the definition of a refugee, gaps in the protection of persons displaced across state borders by climate impacts still exist. As a vulnerable group they are in need of international protection. There is a need for a clear and precise legal definition for this group, which is sensitive to the context of their displacement, ensuring consistent state practice, and that the rights of persons displaced by the impacts of climate change are respected, protected and fulfilled by host states.[78] This is what the *African Guiding Principles* purport to do.

4.1.1 Climate refugees under the African Guiding Principles

The African Commission, in a 2021 resolution, identified the urgent need to study African responses to migration and the protection of migrants with a view to developing guidelines on the human rights of migrants, refugees and asylum seekers.[79] The study by the African Commission, which followed this

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75 Kälin and Chapuisat 2024 https://www.refworld.org/reference/lpprs/unhcr/2024/en/148128 15-16.

76 For a discussion on examples of where this has taken place, see Kälin and Chapuisat 2024 https://www.refworld.org/reference/lpprs/unhcr/2024/en/148128 14; Sharp "Regional Refugee Regimes: Africa" 294.

77 Wood 2019 *IJRL* 299; AU 2019 https://reliefweb.int/report/world/summary-conclusions-roundtable-addressing-root-causes-forced-displacement-and-achieving 6.

78 The AU has also addressed climate-related displacement in the context of internal displacement through Art 4(4) of the AU *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (2009) (the *Kampala Convention*). While the Convention applies only to internal displacement, it expressly recognises displacement caused by natural disasters and climate change, reflecting the early regional acknowledgment of climate-induced mobility and protection needs.

79 ACHPR *Resolution to Study African Responses to Migration and the Protection of Migrants with a View to Developing Guidelines on the Human Rights of Migrants,*

resolution highlighted that the impacts of climate change are a driver of both internal and cross-border displacement and migration in all regions of Africa.[80] As such, there is an express need for an instrument which addresses, at the African regional level, the challenges which exist in respecting, protecting, and fulfilling human rights in this context.[81] The African Commission, therefore, in line with its powers derived from the *African Charter on Human and Peoples Rights* (hereafter the *African Charter*), developed the 2023 *African Guiding Principles*.[82]

The *African Guiding Principles* is a primary soft law instrument for mobility challenges.[83] This aim is achieved by explicitly recognising persons displaced by climate change as refugees in two distinct ways. The first is found within the explanatory note of Principle 2, in which the text states unequivocally that the expanded definition of a refugee, as found in Article 1 of the *OAU Refugee Convention*, does in fact include persons displaced by climate change,[84] thus providing much-needed clarification on the matter for state parties. However, this confirmation does not remove the barrier against recognition and protection created by the requirement that climate impacts must rise to the level of an event that seriously disturbs public order, as described above. Nevertheless, the explicit applicability of the *OAU Refugee Convention* definition ensures that the group is, at a minimum, afforded the protections owed to refugees by host states, including *inter alia* freedom of movement in the host state, the right to access education, justice, employment and other fundamental freedoms and privileges as found in both international and regional human rights treaties.[85]

Refugees and Asylum Seekers AU Doc ACHPR/Res 481 (LXVIII) (2021). This resolution follows a series of resolutions by the African Commission regarding the rights of migrants, asylum seekers and refugees, which include the ACHPR *Resolution on Migration and Human Rights* AU Doc ACHPR/Res 114(XXXXII)07 (2007); ACHPR *Resolution on the Situation of Migrants in Africa* AU Doc ACHPR/Res 333 (EXT.OS/XIX) (2016); AU 2019 https://reliefweb.int/report/world/summary-conclusions-roundtable-addressing-root-causes-forced-displacement-and-achieving; ACHPR *Resolution on the Protection of Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in the Fight Against the COVID-19 Pandemic in Africa* AU Doc ACHPR/Res 470 (LXVII) (2020).

80 ACHPR 2023 https://achpr.au.int/en/soft-law/study-african-responses-migration-and-protection-migrant-rights/ 55-56.

81 ACHPR 2023 https://achpr.au.int/en/soft-law/study-african-responses-migration-and-protection-migrant-rights/ 55-56.

82 *African Charter on Human and Peoples Rights* (1981) (hereafter the *African Charter*).

83 These obligations are found in regional treaties, case law, standards and resolutions of the African Commission. The Commission derives its powers to create this instrument from Art 45(1)(b) of the *African Charter*; Foreword 6 of the *African Guiding Principles*.

84 Principle 15 of the *African Guiding Principles*.

85 The 1951 *Refugee Convention* primarily established these rights. The *OAU Refugee Convention* acknowledges the 1951 *Refugee Convention* as the foundational

In addition, the principles go further than merely confirming the application of the *OAU Refugee Convention* definition. The second way in which these principles recognise as refugees persons displaced by the impacts of climate change is through Principle 2(4), which states that "[t]he term 'refugee' may also apply to those compelled to seek refuge outside their country of origin, nationality or habitual residence as a result [of] climate change that affects their fundamental rights, *regardless,* of whether such events seriously disturb public order (emphasis added)."[86]

The application of the term "refugee" in this context may, at first glance, seem radical in relation to the discussions of the term above. It represents a significant step forward in terms of protecting individuals displaced by climate change, extending the protections of the refugee regime into a new, modern category of forcibly displaced persons, which goes further than both the international and regional refugee protection frameworks. However, upon closer examination of how the definition in Principle 2(4) is constructed, this recognition may not be as radical as it initially appears to be.

The qualification that the term refugee will apply "regardless" of whether the climate events disturbed public order or if such events affected fundamental rights encapsulates the protections which have up to this point been associated with the provision of complementary protection in international refugee law. There is, however, no binding definition for complementary protection in international refugee law. Nevertheless, it is generally accepted that this concept describes the notion that those persons who do not fall within the ambit of the definition of a refugee as found within either the 1951 *Refugee Convention* or the *OAU Refugee Convention* are entitled to *non-refoulement* protections if return to their states of origin would result in serious risk of irreparable harm to their fundamental human rights.[87]

As such, this form of protection is not derived from refugee protection frameworks but rather the international and regional human rights frameworks.[88] It is well known that climate change will have many adverse

international framework for refugee status and the standard of treatment. As the regional complement to the 1951 *Refugee Convention* (Art 18), the *OAU Refugee Convention* indicates that the basic rights afforded to refugees should be extended to persons displaced by climate change impacts in Africa who are recognised as refugees by a host state.

86 Principle 2(3)-2(4) of the *African Guiding Principles*.

87 McAdam *Complementary Protection* 2.

88 For example, international rights frameworks can be found in instruments such as the UN *Universal Declaration on Human Rights* (1948)*;* the *Covenant on Civil and Political Rights* (1966); *International Covenant on Economic, Social and Cultural Rights* (1966); the *Convention on the Elimination of All Forms of Discrimination against Women* (1979); the *Convention on the Rights of the Child* (1989);

direct and indirect impacts on the rights of persons globally.[89] Further, despite contributing the least to cumulative greenhouse gases that influence global surface temperature, Africa has experienced the most significant rise in regional surface temperatures.[90] It is anticipated that every state in the African region will face the impacts of climate change, leading to violations of human rights and potential displacement across state borders.[91] Thus, making use of the international and regional human frameworks as well as the right to *non-refoulment* would provide some protection to those who do not meet the criteria for refugee status but nevertheless require international protection.[92] This aligns directly with the purpose of the *African Guiding Principles*, which purport to protect the rights of all persons on the move on the continent.[93] The requirement of *non-refoulment,* that the harm be irreparable, has been described as a reasonably high threshold, implying that a violation of the right to be free from torture, inhuman or degrading treatment or punishment, the right to life, or the violation of another right in a clear and "flagrant" manner has taken place in the state of origin.[94] Importantly, the rights violations do not need to be rooted in discrimination and may emanate from both human sources and natural hazards.[95]

This definition clarifies the rights and obligations owed by states towards persons displaced by climate change. Stating that those whose fundamental

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

89 The United Nations Human Rights Council (UNHRC) has found that climate change will definitely have an impact on human rights in a number of ways and thus has adopted several resolutions speaking to issues associated with human rights and climate change impacts. These resolutions note *inter alia* that climate change will, directly and indirectly, impact on all human rights, with the impacts being felt particularly by those in already vulnerable populations. Further, these resolutions also call for urgency when dealing with the impacts of climate change, including climate-displaced persons, noting a need for greater state cooperation in dealing with the impacts of climate change on human rights, as well as an increase in the adaptation to climate change by states. See UNHRC *Human Rights and Climate Change* UN Doc A/HRC/RES/10/4 (2009); UNHRC *Human Rights and Climate Change* UN Doc A/HRC/Res/26/27 (2014); UNHRC *Human Rights and Climate Change* UN Doc A/HRC/RES/29/15 (2015); UNHRC *Human Rights and Climate Change* UN Doc A/HRC/RES/32/33 (2016); UNHRC *Human Rights and Climate Change* UN Doc A/HRC/RES/35/20 (2017); UNHRC *Human Rights and Climate Change* UN Doc A/HRC/RES/47/24 (2021).

90 Trisos *et al* "Africa" 1285, 1289.

91 Trisos *et al* "Africa" 1391-1392; UNICEF 2023 https://www.unicef.org/esa/media/12946/file/UNICEF-Time-to-Act-Advocacy-Brief-2023.pdf 16.

92 Kälin and Chapuisat 2024 https://www.refworld.org/reference/lpprs/unhcr/2024/en/148128 16.

93 Principle 1 of the *African Guiding Principles*.

94 Cantor *et al* 2024 *IJRL* 194.

95 Cantor *et al* 2024 *IJRL* 194.

rights are affected by climate impacts may also be refugees ensures that they are afforded all the protections associated with refugee status.

Thus, in the African regional context the term refugee is now definitively applicable to persons displaced by the impacts of climate change, making it the first region globally to fully embrace in law this emerging issue of forced displacement, to ensure that all persons who have been forced to leave their states of origin have their rights respected, protected and fulfilled.[96] However, due to the high thresholds needed to be considered a refugee and therefore to receive protection as a refugee, there is still the potential that some persons who have left their places of origin due to climate change may fall in the gap and still be in need of recognition and rights protection. The discussion which follows will look at how the *African Guiding Principles* attempts to ensure protection for those who may not be refugees in its new and innovative definition of "climate migrant".

4.2 Climate migrants in the African Guiding Principles

The *African Guiding Principles* adopt a human rights-based approach, explicitly recognising migrants as rights holders, to support AU member states in fulfilling their legal obligations owed to all migrants.[97] This rights-based framing is further reinforced by recent developments at the international level. In its 2025 Advisory Opinion on the *Obligations of States in Respect of Climate Change*, the International Court of Justice affirmed that individuals adversely affected by climate change are rights-holders under international human rights law, and that states' obligations to respect, protect and fulfil human rights may be engaged by climate-related harm, including in contexts of displacement.[98]

These principles rearticulate already existing legal obligations binding on states to ensure that various rights, including *inter alia* the rights to non-

96 The Inter-American Commission on Human Rights has drafted similar principles in the IACHR *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking* Resolution 04/19 (2019). However, these principles do not speak to climate change displacement outside of recognising that environmental factors may be a driver for migration.

97 The principles reaffirm that all individuals who cross an international border, regardless of their status, are entitled to the rights established in binding regional human rights instruments, such as the *African Charter*, as well as in international human rights instruments, such as the *International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights*; Foreword and Principle 1(1)-1(2) of the *African Guiding Principles*; Preamble of the *African Guiding Principles*.

98 *Obligations of States in Respect of Climate Change* (ICJ) (Advisory Opinion) 2025 https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf paras 372, 377-378, 385.

discrimination,[99] life,[100] dignity,[101] freedom from torture,[102] legal personhood,[103] security of person,[104] justice and due process,[105] freedom of movement,[106] asylum,[107] health,[108] an adequate standard of living,[109] and education[110] are available and protected for all migrants.

The *African Guiding Principles* seek to do this by addressing the full range of issues affecting human mobility, including those emerging from the impacts of climate change.[111] As such, the principles purport to provide "a novel legally supported definition of climate migrant."[112]

This definition in Principle 2(2) states that persons shall be called climate migrants "when climate change induced human mobility involves movement across international borders."[113] This definition is qualified by the following:

> Human mobility in the context of climate change shall mean displacement motivated by the adverse effects of sudden- or slow-onset climate impacts, whether within and across national borders. Climate change induced human mobility involves different levels of constraints, agency, and vulnerability and encompasses both forced displacement and migration, including planned relocation. Climate change induced human mobility occurs over different distances and can be temporary, recurrent, or permanent.[114]

The above definition does three key things that will aid in recognising persons in Africa displaced by climate change impacts as a legitimate group in need of protection.

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99 Principle 3 of the *African Guiding Principles*.
100 Principle 4 of the *African Guiding Principles*.
101 Principle 5 of the *African Guiding Principles*.
102 Principle 6 of the *African Guiding Principles*.
103 Principle 7 of the *African Guiding Principles*.
104 Principle 8 of the *African Guiding Principles*.
105 Principles 11 and 33 of the *African Guiding Principles*.
106 Principle18 of the *African Guiding Principles*.
107 Principle 21 of the *African Guiding Principles*.
108 Principle 27 of the *African Guiding Principles*.
109 Principle 28 of the *African Guiding Principles*.
110 Principle 29 of the *African Guiding Principles*.
111 Foreword of the *African Guiding Principles*.
112 Importantly, the principles make it clear that there is a distinction between the definition of a climate migrant and the definition of a migrant found within them. Principle 2(1) of the *African Guiding Principles* states: "The term 'migrant' in these guiding principles refers to a person who is outside of a State of which they are a citizen or national, or, in the case of a stateless person of undetermined nationality, their state of birth or habitual residence." This definition is derived from that used by the African Migrant Rights Initiative, which has subsequently also been used by the OHCHR *The Recommended Principles and Guidelines on Human Rights at International Borders* in UN Doc A/69/277 (2014). Furthermore, the Inter-American Commission on Human Rights has drafted similar principles in the IACHR *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking* Resolution 04/19 (2019).
113 Principle 2(2) of the *African Guiding Principles*.
114 Principle 2(2) of the *African Guiding Principles*.

Firstly, it recognises that both sudden and slow-onset climate impacts drive displacement. It ensures that all climate impacts, whether floods, fires, droughts or desertification, are acknowledged as factors pushing people from their place of origin. Principle 32(2) states that "[s]tates shall recognise the adverse and extra-territorial effects of climate change and environmental degradation as important drivers of displacement and climate migration."[115]

Furthermore, by framing this displacement as driven by "the adverse effects" of climate change, the *African Guiding Principles* recognises that displacement is caused not only by the impacts themselves but also by broader effects such as *inter alia* the loss of livelihoods, food insecurity, a scarcity of water, and degraded living conditions. Thus, while not explicitly referencing the multi-causal nature of displacement due to climate change, this complexity is implied.[116]

Secondly, the definition recognises that the displacement associated with climate impacts can vary in duration and distance. By explicitly including temporary, recurrent and permanent forms of displacement, it once again broadens the scope of protection, encompassing a wide range of experiences, from those who may be displaced for short periods or recurrent periods, such as those displaced by seasonal floods, to those forced to relocate permanently due to the uninhabitable nature of their place of origin or those experiencing several successive drought or famine seasons.[117] This inclusivity ensures that individuals affected by displacement due to climate are not excluded due to temporal restrictions.

Finally, the definition acknowledges the varying "constraints, agency, and vulnerability" experienced by persons displaced by climate change,

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115 Principle 32(2) of the *African Guiding Principles*.

116 The *African Guiding Principles* appears to draw a lot from the definition of an "environmental migrant" in the IOM *Discussion Note: Migration and the Environment*. The IOM define "environmental migrants" as: "Persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad." (IOM 2007 https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf 1-2). The IOM highlights that this definition does not intend to ignore other interesting political, economic or social migration-related factors. Instead, it provides a policy-driven alternative term to "environmental refugee", which is legally unfounded. The IOM has subsequently reproduced this definition in its *Glossary on Migration*. The glossary highlights that climate migrants are a subcategory of environmental migrants, where the change in the environment, which results in mobility, is specifically due to climate change. See also IOM *International Migration Law* 31, 64.

117 McAdam *Climate Change* 24; Nishimura *Slow Onset Effects of Climate Change* 3; ASWAN Forum *Climate Displacement Nexus in Africa* 1; Boas *et al* 2019 *Nature Climate Change* 901-902.

reflecting the diversity of their experiences, which are shaped by a mix of push and pull factors. It captures the reality that while some people leave their place of origin with a degree of choice, others face coercion and limited options. The needs of those with the voluntary agency to relocate differ significantly from those experiencing acute vulnerabilities due to forced displacement, underscoring the need for a nuanced approach to protecting those displaced by the impacts of climate change.

The recognition of these varying constraints, agency and aspects of vulnerability moves the definition of climate migrant beyond the traditional voluntary-forced binary of human mobility, recognising climate mobility as a spectrum. Instances of purely voluntary migration or wholly forced displacement in this context will be rare, with most cases falling between these extremes. By embracing this spectrum the *African Guiding Principles* offers a more inclusive and flexible protection framework, which aims to ensure that those displaced by climate change receive protections tailored to their unique circumstances rather than being rigidly categorised as voluntary or forced migrants. This approach should in particular protect, respect, and fulfil the rights of persons who might otherwise fall into the gaps left by international and regional refugee protection regimes, even under the expanded OAU definition of a refugee.

As such, it is clear that the definition of a climate migrant in the *African Guiding Principles* could be a significant step forward for the holistic protection of the rights of persons displaced by climate change in the AU, ensuring that they have access to the rights that the *African Guiding Principles* seeks to ensure are respected, protected and fulfilled for all migrants.

5 Domesticating the *African Guiding Principles*: challenges and pathways for recognising displacement due to climate change impacts

The definitions of a refugee and climate migrant introduced by the *African Guiding Principles* represent a significant advancement in the legal recognition and protection of persons displaced by climate change. These definitions provide much-needed clarity by explicitly including climate-displaced persons in the African regional legal framework, ensuring that affected individuals do not fall into a legal lacuna. This recognition is essential in closing gaps in their protection that might arise due to the absence of reference to climate-related displacement in existing international refugee law, particularly the 1951 *Refugee Convention*. Additionally, these definitions help impose clear obligations on AU member states to acknowledge climate displacement as a legitimate basis for

international protection, preventing the arbitrary denial of asylum claims and reinforcing states' responsibility to provide humanitarian assistance.

However, to be effective, states must domesticate these principles into their national laws and policies and take measures to ensure their implementation.[118] As noted by Viljoen, [119] the incorporation of international and regional law into domestic law determines the ability of international human rights norms and standards to reflect in the lives of individuals in states. As such, domestication would strengthen national migration policies, enhance judicial interpretation, and provide a uniform standard for responding to climate displacement across the region. There are, however, various hurdles that will need to be overcome by states to domesticate these principles.

First, these principles are soft law, meaning that they are not binding on states. However, they are a primary soft law instrument as they are foundationally based on already existing, binding obligations made by AU member states, rearticulated in the context of migrants, refugees and asylum seekers.[120] As such, these principles should guide states in applying their existing domesticated regional laws in this new context. For example, 47 of the AU's 55 member states have already ratified the *OAU Refugee Convention*, and at least 31 have enacted domestic laws which are aligned with its refugee definition.[121] The *African Guiding Principles* provides explicit guidance to states that the definition of a refugee in the *OAU Refugee Convention* includes those displaced by climate change and thus aims to support a more consistent application of this definition by member states. No new legislation would be needed for these states. Instead, only policy and training for decision-makers dealing with refugee status determination procedures would be needed. This may be politically difficult to implement, as highlighted by Stone,[122] as domestication will inevitably take into account the state's policy considerations, which often reflect a disjuncture between the agreement to protect and the reality of granting rights to displaced persons. For example, South Africa has been praised for its refugee legislation aligned with both the *OAU Refugee Convention* and the 1951 *Refugee Convention*.[123] However, recent policy shifts, such as the April

118 This is made explicit by the Preamble to the *African Guiding Principles*, which states that these principles are to be adopted as minimum standards and definitions of the rights of all migrants in Africa and that all state parties in the AU are urged to incorporate and domesticate them to ensure effective implementation. Also see Art 1 of the *African Charter*.

119 Viljoen *International Human Rights Law* 517-529.

120 See section 1 for an explanation of the form and purpose of primary soft law instruments.

121 Sharp "Regional Refugee Regimes: Africa" 293.

122 Stone *Divergence Between Refugee Law and Policy* 209.

123 *Refugee Act* 130 of 1998.

2024 White Paper on Citizenship, Immigration, and Refugee Protection, propose repealing the refugee legislation and restricting refugee socioeconomic rights, citing budget constraints and concern about border control.[124] This highlights the tension between legal commitments and domestic political considerations.

Practical implementation of the *African Guiding Principles* and their definitions presents another major hurdle to domesticating these soft law standards. As described above, the definition of a climate migrant introduces the idea of a spectrum of displacement, recognising varying needs and protections for persons displaced by climate impacts, incorporating all, including those who may be defined as refugees. This nuanced spectrum requires decision-makers to assess complex interlinking socio-environmental displacement driving factors without clear guidelines. In this regard the *African Guiding Principles* provides limited guidance to states on the procedural and evidentiary dimensions of status determination in the context of climate-induced mobility.[125] The absence of explicit criteria *inter alia* for inclusion and exclusion, the burden of proof, causal link assessments or future risk evaluation may leave considerable discretion to domestic decision-makers.[126] The absence of clarity, coupled with the discretion left to decision-makers, risks inconsistent application and unequal protection for persons displaced by the impacts of climate change.

Without clearer operational guidance, even progressive normative frameworks such as the *African Guiding Principles* may struggle to translate into meaningful protection in practice, particularly in already overburdened asylum and migration systems. These limitations do not detract from the importance of the *African Guiding Principles*; rather, they underscore the need for their continued elaboration through interpretive guidance, domestic implementation measures, and complementary regional instruments, ensuring that the protections they envisage are realised consistently and effectively.

One potential way to address this hurdle would be the development of detailed domestic guidelines or standard operating procedures (SOPs) for status determination in the context of climate mobility.[127] For example, a

124 GN 4745 in GG 50530 of 17 April 2024 paras 32.10, 55-56, 110-112.

125 For the importance of standardised procedures for status determination, see UNHCR *Handbook on Procedures and Criteria.*

126 UNHCR *Legal Considerations* paras 6-12; Cantor 2015 *Refugee Survey Quarterly* 79-106.

127 Standard operating procedures (SOPs) are step-by-step instructions which outline how to perform a task or process effectively. They are used to ensure that tasks are completed consistently and in compliance with regulations and standards, e.g. Department of Home Affairs 2018 https://www.refugee.co.za/documents/fam_reunification.pdf; DPSA 2013

SOP checklist based on the *African Guiding Principles* might involve the following steps:

1. Assess, under Principle 2(3), whether the individual qualifies as a refugee by determining if the climate impact "seriously disturbed public order" as required by the *OAU Refugee Convention*.
2. If this threshold is not met, consider Principle 2(4) to evaluate whether the individual's fundamental rights were infringed, thereby granting refugee status based on human rights considerations.
3. If neither condition is met, turn to Principle 2(2) to determine if the person qualifies as a climate migrant, assessing the interplay between forced and voluntary factors and identifying the level of protection required from the host state.

To be effective, these SOPs would also need to incorporate state-specific obligations under existing domestic rights instruments, legislation, jurisprudence and policy concerns to ensure consistent and fair domestic application. While this process may strain already burdened refugee and asylum status determination systems,[128] it is also essential to prevent the *African Guiding Principles* from failing to comprehensively protect the rights of all migrants, including those displaced by climate change.

6 Conclusion

At the outset this article emphasised the essential role of legal terms and definitions in establishing states' rights, obligations and consequences. However, in the context of persons displaced due to climate change, there has been a persistent reluctance at the international level to adopt a legal definition that fully encompasses this group. As a result, those displaced across state borders have found themselves in legal limbo, neither recognised as a group in need of international protection nor classified as "regular migrants".

The *African Guiding Principles* have sought to address this gap at the regional level by introducing two key definitions. First, they expand the definition of "refugee" to explicitly include persons displaced by climate change, removing the restrictive requirement that such displacement must seriously disturb public order. Second, they introduce the novel category of "climate migrant," acknowledging the spectrum of climate-induced mobility and ensuring that those who do not qualify as refugees still receive legal recognition and protection. As such, the African Commission, in creating

https://www.scribd.com/document/387915626/Toolkit-on-Standard-Operating-Procedures-March-2013.

128 Stone *Divergence Between Refugee Law and Policy* 211.

and refining these definitions, has ensured that as a group recognised as in need of protection, the rights of persons displaced across state borders by the impacts of climate change in Africa are more fully and consistently respected, protected and fulfilled by the host states in which they find themselves.

This article has underscored that legal definitions are more than mere text; they are tools that shape decision-making, enable classification, and guide interpretation, ultimately influencing the development and application of the law. The definitions provided by the African Guiding Principles are context-sensitive, rights-oriented, and aligned with the African Commission's broader objective of ensuring the protection of all persons on the move. If domesticated by AU member states, these definitions would serve as anchors for legal interpretation, would promote consistency in state practice, and would guide the evolution of legal frameworks in accordance with the spirit of the *African Guiding Principles.* In doing so, they would represent a critical step toward closing the gaps in the protection afforded to persons displaced by climate change in Africa. However, successfully domesticating these definitions would depend on political will, resource allocation, and the harmonisation of national policies with regional frameworks.

By embracing the definitions found in the *African Guiding Principles*, Africa could set a powerful precedent for the global community, showcasing how legal innovation can respond to our time's evolving challenges while ensuring all people's rights are respected, protected and fulfilled.

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List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
IACHR	Inter-American Commission on Human Rights
DPSA	Department of Public Service and Administration
IFRC	International Federation of Red Cross and Red Crescent Societies
IJRL	International Journal of Refugee Law
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel on Climate Change
J Legal Anal	Journal of Legal Analysis
JRS	Journal of Refugee Studies
LQR	Law Quarterly Review
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
SOPs	standard operating procedures
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
Wis Int'l LJ	Wisconsin International Law Journal