

Extra-territorial human rights obligations towards SADC climate migrants

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"I can do all things through Christ who strengthens me."

Philippians 4:13

LIST OF ABBREVIATIONS

ACPC	African Climate Policy Centre
ACPMO	African Common Position on Migration and Development
AMCEN	African Ministerial Conference on the Environment
AU	African Union
CAF	Cancun Adaptation Framework
CBDR	Common but Differentiated Responsibilities
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
DRP	Declaration on Refugee Protection
DPFM	Draft Protocol on the Facilitation of Movement of Persons
GFMD	Global Forum on Migration and Development
GHG	Greenhouse Gases
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJCCSM	International Journal of Climate Change Strategies and Management
ILO	International Labour Organisation
MOU	Memorandum of Understanding
MPFA	Migration Policy Framework for Africa

NCCRP	National Climate Change Response Policy White Paper
OAU	Organization of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change

Abstract

Keywords: climate change, human rights, climate migrants, migration, legal protection, refugee, SADC, extra-territorial

This study aims to determine the extent to which existing law provides for states' obligations towards climate migrants, with its main focus on the SADC region. The study starts by explaining the meaning of climate migration; as well as identifying the group of people that can be described as climate migrants. The study starts by defining the term "climate migrants" and identifying the group of people that can be classified as climate migrants. A discussion of the effects of climate change as the cause of climate migration follows. The study turns to focus on the obligations of receiving countries towards climate migrants. In this regard, it explores the concept of extra-territorial human rights as it applies in refugee law, from an international and regional perspective. At regional level the thrust is on the extent to which the African Union and SADC impose obligations on host countries in order to offer legal protection to climate migrants.

This study concludes that there are no specific legal frameworks to deal with the host states' obligations towards climate migrants or their rights. Therefore there is a need for a legal framework which provides for the rights of climate migrant at international, regional and national levels. This would assist in the treatment of climate migrants in host countries. The clearer the states' obligations towards the rights of climate migrants; the more peaceful the environment for the host countries and climate migrants.

1 Introduction

1.1 Background

Climate change is a reality in the Southern African Development Community (SADC) region. Many definitions have been put forward for climate change . In the *United Nations Framework Convention on Climate Change (UNFCCC)*, 1992, climate change is defined as:

A change of climate, which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and is observed over comparable time periods.¹

In the *South African National Climate Change Response Policy White Paper* , 2011 (NCCRP) (hereafter White Paper), it is defined as on-going trend changes in the earth's general weather conditions resulting from an average rise in the temperature of the earth's surface, often referred to as global warming.² Brazier concurs with the *White Paper* as he defines climate change as the long-term changes in the earth's climate caused by the release of greenhouse gases (GHG) from a number of human and natural activities, which leads to global warming.³ Human activities related to elevated GHG emissions include, but are not restricted to the use of fossil fuels, deforestation, and large scale commercial agriculture.⁴ Fossil fuels include coal, oil and natural gas.

Human activities can directly or indirectly cause climate change to neighbouring countries. For instance, the gas emissions from the use of coal by people in South Africa can affect neighbouring countries such as Zimbabwe and Mozambique and cause transboundary climate change. Climate change multiplies threats as it has impacts on

¹ Article 1 of the UNFCCC, 1992.

² *White Paper* para 1.1.

³ Brazier *Climate change in Zimbabwe x*.

⁴ Brazier *Climate change in Zimbabwe x*.

physical, socio-economic and biological systems.⁵ According to Foundation,⁶ climate change leads to the increasing change of weather events such as drought, ecosystem damage, poverty, floods, heat waves, *etc.*⁷ Other impacts include agricultural problems, human health problems, disturbances in human settlements; death of wild animals, fisheries and aquatic systems; and more recently, climate migration.

Climate migration is a reality in Sub-Saharan Africa. According to During, environmental problems are causing the movement of people giving rise to climate migration. Different scholars use a range of terms to describe climate migrants, including "climate change refugees," "climate-induced displaced migrants," "survival migrants," "environmental migrants" or "environmental refugees."⁸ During⁹ states that although these terms seem to be synonyms, their meanings differ. The International Organisation on Migration (IOM) defines "environmental migrants" as a:

Group 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 own country or abroad.¹⁰

El-Hinnawi¹¹ defines environmentally displaced persons as:

Those people 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 jeopardized their existence and/or seriously affected the quality of their lives. By 'environmental disruption' in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.

Other scholars such as Bates¹² criticize the above definition for not differentiating environmental refugees from other types of refugees and for using the term as an umbrella term. During explains the difference between migrants and displaced

⁵ Shriner and Street *The Regional Impacts of Climate Change* 284.

⁶ Foundation 2016 *OHCHR Discussion Paper* 1.

⁷ Foundation 2016 *OHCHR Discussion Paper* 1.

⁸ During *The legal protection of cross-border climate-induced displaced persons in South Africa* 7.

⁹ During *The Legal protection of cross-border climate-induced displaced persons in South Africa* 7.

¹⁰ IOM "Discussion note: Migration and the Environment" 1-2.

¹¹ El-Hinnawi *Environmental Refugees* 4.

¹² Bates 2002 *Population and environment* 2.

persons.¹³ The former are those people who notice their environment deteriorating, and make a decision to move to another country in search of greener pastures,¹⁴ whilst for displaced persons, the movement is less planned and the deterioration of the environment is much more acute.¹⁵ In the case of displacement, the movement is primarily caused by push factors, which include life-threatening situations such as earthquakes.¹⁶ However, 'migrants' can become displaced at a later stage. This happens if the environment in the country of origin deteriorates such that it becomes impossible for people to return.¹⁷

According to Schapper and Lederer,¹⁸ the link between climate change and human rights is that its impacts violate people's rights.¹⁹ For instance, flooding is a result of climate change; and causes loss of land, damage and destruction of homes as well as many diseases.²⁰ This leads to the infringement of the following human rights:²¹ life,²² self-determination,²³ adequate housing²⁴ and health.²⁵ Further, climate change affects all three types of rights, namely first, second and third generation rights.²⁶

Since there is no generally accepted definition of a climate migrant in the international law context, related terms include climate-induced displaced persons,²⁷ forced migrants, displaced persons, climate change refugees or environmental migrants. However, in this

¹³ During *The legal protection of cross-border climate-induced displaced persons in Southern Africa* 10.

¹⁴ During *The legal protection of cross-border climate-induced displaced persons in Southern Africa* 10.

¹⁵ During *The legal protection of cross-border climate-induced displaced persons in Southern Africa* 10.

¹⁶ King 2005 *Georgetown International Environmental Law Review* 556.

¹⁷ King 2005 *Georgetown International Environmental Law Review* 556.

¹⁸ Schapper and Lederer 2014 *Cambridge Review of International affairs* 668.

¹⁹ Schapper and Lederer 2014 *Cambridge Review of International affairs* 668.

²⁰ Schapper and Lederer 2014 *Cambridge Review of International affairs* 668.

²¹ Schapper and Lederer 2014 *Cambridge Review of International affairs* 670.

²² Article 6 of *International Covenant on Civil and Political Rights* (ICCPR), 1976.

²³ Article 11 of *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966.

²⁴ Article 11 of *ICESCR*.

²⁵ Article 12 of *ICESCR*.

²⁶ Schapper and Lederer 2014 *Cambridge Review of International affairs* 668.

²⁷ During *The legal protection of cross-border climate-induced displaced persons in Southern Africa* 11.

study the employs the definition by El Hinnawi for environmental refugees ²⁸ El Hinnawi defines environmental refugees as

Those people 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 jeopardized their existence and/or seriously affected the quality of their lives. By 'environmental disruption' in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.²⁹

With this understanding, the study examines the content of the extra-territorial human rights obligations of SADC member states with respect to these climate migrants or environmental refugees. The inquiry is whether there is a legal framework to protect climate migrants where they experience human rights violations in their host country.

Climate migrants, as with other citizens, have rights that need to be respected and protected. It is the obligation of every nation to protect these people and their rights. It is every country's responsibility, rich and poor, to cooperate in reducing and preventing climate change impacts in accordance with the concept of climate justice;³⁰ and their common but differentiated responsibilities.³¹ Climate justice demands the consideration, respect and protection of the rights of climate migrants.³² Climate justice also requires states to ensure that their responses to climate change are accountable, participatory and transparent, and must focus more on vulnerable persons such as the disabled, old people and the children.³³

In order to ensure the protection of the human rights for those people who are at risk of being affected by climate change impacts; such impacts should be limited. This entails limiting global warming³⁴ by reducing emissions of carbon dioxide from

²⁸ El-Hinnawi *Environmental Refugees* 4.

²⁹ El Hinnawi *Environmental Refugees* 4.

³⁰ Shue *Climate Justice, vulnerability and Protection* 30.

³¹ Article 3(1) of the UNFCCC, 1992.

³² Foundation 2016 *OHCHR Discussion Paper* 2.

³³ Foundation 2016 *OHCHR Discussion Paper* 2.

³⁴ Limiting global warming will also limit the infringement of human rights, e.g. if there is no global warming, there will be no drought, hence people's right to life will not be affected.

the burning of fossil fuels and eliminating the burning of fossil fuels.³⁵ This means that limiting the impacts of climate change reduces the risks. The Paris Agreement to the United Nations Framework Convention on Climate Change, 2015 states that it is the responsibility of every country to keep temperatures below 2 degrees Celsius.³⁶ Limiting the impacts of climate change will reduce the infringement of human rights. Since there is no specific international legal instrument to govern climate migration, human rights law and refugee law may, where applicable, protect climate migrants.³⁷

In the *OHCHR Discussion Paper*, Foundation³⁸ states that, human rights law is relevant to climate migration because it provides the minimum standards for the treatment of those individuals. Human rights law also provides the legal basis on which the protection of such people can be sought, and in cases of relocation it sets out the minimum standards of treatment.³⁹ In determining the minimum standards that should be given to climate migrants, the human rights that should be taken into consideration include the right to life, the right not to be tortured or treated inhumanely and the right to self-determination.⁴⁰ Human rights law also provides for complementary protection, which is applicable when a state has a duty of *non-refoulement*.⁴¹ This principle obligates states keep foreigners from returning to their original countries if this would violate their right to life or the right to be free from torture.⁴² International instruments that address the needs of the climate migrants includes: the United Nations Framework Convention on Climate Change (UNFCCC), 1992; the Global Forum on Migration and Development (GFMD) 2007; the High

³⁵ Shue *Climate Justice, vulnerability and Protection* 3.

³⁶ Article 2(1)(a) of the Paris Agreement

³⁷ During *The legal protection of cross-border climate-induced displaced persons in Southern Africa* 2.

³⁸ Foundation 2016 *OHCHR Discussion Paper* 4.

³⁹ Foundation 2016 *OHCHR Discussion Paper* 4.

⁴⁰ Foundation 2016 *OHCHR Discussion Paper* 4.

⁴¹ During *The Legal protection of cross-border climate induced displaced persons in Southern Africa* 22. Non-refoulement occurs when returning a foreigner back to his/her own country of origin would result in infringement of their right to life, or right to be free from torture or cruel, or punishment or other serious human rights infringements.

⁴² During *The Legal protection of cross-border climate induced displaced persons in Southern Africa* 22.

Level Summit for Refugees and Migration, 2016; the Addis Ababa Action Agenda, 2015; the 2030 Agenda for Sustainable Development; etc.⁴³

Against this background, it is necessary to determine the content of extra-territorial human rights obligations towards SADC climate migrants from the international, regional and national perspectives. In this study, the focus is on cross-border climate migrants.⁴⁴

1.2 Objective

The research question of this study is “What is the content of extra-territorial human rights obligations towards SADC climate migrants?”, hence the objective of this study is to determine the extra-territorial human rights obligation of states towards climate migrants in the SADC region; particularly their legal protection in existing law, if any. To this end, the study refers to refugee law; climate change law, human rights law as well as various secondary sources.

1.3 Framework of the study

Chapter 2 discusses the historical and theoretical background of climate migration. It commences by providing definitions of climate migrants and climate migration. The discussion that follows provides and discusses the effects of climate change and their impact on human rights.

Chapter 3 focuses on the international climate change law relating to climate migrants. The chapter discusses the international instruments that deal with climate change and focuses on the relevant international environmental principles including the principle of common but differentiated responsibilities (CBDR). Thereafter, the chapter discusses the climate change law in the African Union and SADC.

⁴³ Foundation 2016 *OHCHR Discussion Paper 6*.

⁴⁴ Refer to those people who leave their countries and move to other nearby countries as a result of climate change impacts.

Chapter 4 explores the international human rights law relevant to climate migration. To determine the human rights of climate migrants; the chapter discusses the concept of extra-territorial human rights obligations. Thereafter, the chapter determines the refugee law relating to refugees affected by climate change. The chapter also considers the law on the stateless persons to establish whether climate migrants may also qualify as stateless persons.

Chapter 5 provides the conclusion and recommendations from the study.

1.4 Research methods

The study is a desktop research of the sources and authorities drawn from environmental law, human rights law and refugee law relating to climate migrants. It is also a literature review that is based on international, regional and national human rights law, textbooks, reported case laws and academic journal articles.

2 Theoretical background

2.1 Introduction

Africa is at risk of climate change and its impacts because of its many landlocked countries and states that are not economically viable.⁴⁵ The link between climate change and human rights is that climate change impacts can undermine the enjoyment of human rights.⁴⁶ This chapter provides a brief background on climate change and climate migration. It discusses the impacts of climate change and their influence on climate migration and human rights. The discussion serves to clarify the seriousness of climate change on the full enjoyment of their human rights as well as to determine who climate migrants are and how their human rights are being violated.

Climate change poses challenges to every sector of the society including transportation, agriculture, livestock, energy and industry.⁴⁷ The impacts include agricultural problems, human health problems, challenges with human settlements and industry; death of wild animals, fisheries and aquatic systems; and migration.⁴⁸ Climate change and its adverse impacts affect the enjoyment of billions of people's human rights now and in the future.⁴⁹ Some of these effects are discussed below.

2.2 Agricultural problems

Climate change has effects on agriculture as sudden weather and temperature changes that affect the crops leading to drought.⁵⁰ This is a great challenge especially for countries that are dependent on agriculture for survival as these changes will lead to food insecurity.⁵¹ In Europe, between the year 2000 and 2008, the number of the

⁴⁵ During *The legal protection of cross-border climate-induced displaced persons in Southern Africa* 2.

⁴⁶ Atapattu *Human Rights Approaches to Climate Change* 6.

⁴⁷ Atapattu *Human Rights Approaches to Climate Change* 3.

⁴⁸ Shriner and Street *The Regional Impacts of Climate Change* 285.

⁴⁹ UNEP 2015 https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf.

⁵⁰ Shriner and Street *The Regional Impacts of Climate Change* 285.

⁵¹ Brazier *Climate change in Zimbabwe* 17.

people that were affected by drought and extreme temperatures were around 83 million each year.⁵²

2.3 Human health problems

Climate change has direct and indirect impacts on human health. ⁵³ The direct impacts include increased heat related and cold-related illnesses. Climate warming can also cause respiratory disorders.⁵⁴ Global warming can worsen the severity of seasonal allergies and risk human lives. The most common diseases caused by climate change includes malaria whose transmission is related to high temperatures and rainfall during rainy seasons;⁵⁵ tuberculosis and diarrhoeal infections.⁵⁶ In developing countries' regions, diarrhoea is projected to rise by 8% to 9% by 2030.⁵⁷ In addition, climate change has adverse effects on children, especially those younger than five years of age who are the most vulnerable to malnutrition from food and water shortages.⁵⁸

2.4 Wild animals and fisheries, and biodiversity

Climate change induced droughts diminish vegetation and bushes for food, exposing wild animals to hunger.⁵⁹ The climate induced changes in water temperatures also has effects on fisheries, particularly on their growth and reproductive capacity⁶⁰

2.5 Climate migration

The effects of climate change such as flooding or storms and hunger are making vulnerable nations increasingly uninhabitable practically and economically.⁶¹ This is

⁵² Piguet *The Migration/Climate Change Nexus: An Assessment* 7.

⁵³ Muhammed and Balarabe Kura 2017 *SSRG-IJHSS* 1.

⁵⁴ Shriner and Street *The Regional Impacts of Climate Change* 287.

⁵⁵ Ahmed 2017 *IJCCSM* 10. Also of the water borne diseases

⁵⁶ Brazier *Climate change in Zimbabwe* 17. Diarrhoeal infections are mainly as a result of the consumption of unsafe drinking water.

⁵⁷ Levy *et al* 2015 *Review* 314.

⁵⁸ Levy *et al* 2015 *Review* 314.

⁵⁹ Ahmed 2017 *IJCCSM* 10.

⁶⁰ Shriner and Street *The Regional Impacts of Climate Change* 289-290.

⁶¹ Leal-Arcas 2012 *Procedia* 89.

forcing people to migrate in search of habitable environments.⁶² These movements impact on the right to an adequate standard of living, the right to property and the right to housing⁶³ as people leave their habitats and their belongings.

The history of climate change as a push factor for migration dates back to the year 1988.⁶⁴ Bangladesh has among the greatest number of victims of climate change and its impacts. Reports state that by the year 2050, Bangladesh will lose 17% of its land to flooding as a result of climate change.⁶⁵ This will force the people residing in this region of that country to migrate to other places.⁶⁶ In the West African Sahel, acuteness in the dry season may cause people to migrate.⁶⁷ In the Caribbean region, hurricanes have been causing migrations⁶⁸ to places with pull factors such as better socio-economic conditions.⁶⁹

Different schools of thoughts refer to climate migration as the greatest impact of climate change.⁷⁰ It is estimated that by the year 2050, the number of climate migrants will be around one billion, with two hundred million more migrants than today.⁷¹ Efforts thus far relate to the protection of internally displaced persons. The main instrument is the *United Nations' Guiding Principles on Internal Displacement and the Protocol on the Protection and Assistance of Internally Displaced Persons, (2006)*.⁷² However, the same cannot be said concerning cross-border climate migrants in the absence of any existing applicable laws to protect them.⁷³ In the event that there are laws that protect these

⁶² Leal-Arcas 2012 *Procedia* 89.

⁶³ UNEP 2015 https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights_pdf 4.

⁶⁴ Barnett and Webber 2010 *Policy Research Working Paper* 6.

⁶⁵ Ahmed 2017 *IJCCSM* 7.

⁶⁶ Such people who migrates in search of better living environment are ,in this case climate refugees/ climate migrants.

⁶⁷ McLeman and Hunter 2009 *Institute of Behavioural Sciences* 3.

⁶⁸ McLeman and Hunter 2009 *Institute of Behavioural Sciences* 3.

⁶⁹ Leal-Arcas 2012 *Procedia* 89.

⁷⁰ Brown 2007 *IOM Migration Research Series* 9.

⁷¹ Brown 2007 *IOM Migration Research Series* 9.

⁷² During *The Legal protection of cross- border climate-induced displaced persons in Southern Africa* 3.

⁷³ This will be discussed in broad in the following chapters.

cross-border migrants; the extent of the protection and the obligations of states towards these migrants are unclear.

To date, there is no exact definition for climate refugees/migrants. The closest to this, is definition of the *UN Environmental Programme* (UNEP) of the term 'environmental refugees'.⁷⁴ UNEP defines environmental refugees as:

People 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 jeopardized their existence and/or seriously affected the quality of their life.⁷⁵

This definition draws a distinction among three groups of refugees, namely temporary refugees;⁷⁶ permanent refugees and those who leave their habitats in search of better living conditions because their places of origin have been degraded to a point that their basic needs are not met.⁷⁷

However, other scholars are in favour of the term 'climate refugee'.⁷⁸ The reference to "refugees" has a strong moral connotation of societal protection in many regions and cultures across the world; and has become the centre of attention since 1945.⁷⁹ Climate refugees are defined as:

People who must leave their homes and communities because of the effects of climate change and global warming.⁸⁰

Thus, for a person to qualify as a climate refugee, the movement from their original place/habitat must be as a result of climate change or its impacts. Many climate refugees are from those developing countries that lack resources and capacity to adapt to climate change.⁸¹ A country's adaptive capacity determines its level of development,

⁷⁴ The term has been used and become a catch-all term .

⁷⁵ El-Hinnawi *UN Environmental Programme (UNEP)* .

⁷⁶ This group can be able to go back to their original place once the damage has been fixed.

⁷⁷ Scholts 2011 *South African Yearbook of International Law* 38.

⁷⁸ Biermann and Boas *Climate Change and Human Migration* 292.

⁷⁹ Biermann and Boas *Climate Change and Human Migration* 292.

⁸⁰ Ahmed 2017 *IJCCSM* 8.

⁸¹ Biermann and Boas *Climate Change and Human Migration* 192.

poverty limits that capacity whilst resources and technology increase it.⁸² This means that where a country lacks the resources and technology; the chances for combating climate change are low.

Some researchers believe that the countries which are more likely to be affected by the impacts of climate change are those that have contributed the least to greenhouse emissions. This calls for climate justice to protect the rights of climate migrants coming from these countries.⁸³ Other schools of thoughts suggest that climate migrants should be given special focus because climate change is not natural and may be triggered by the failure of other governments to reduce greenhouse emissions.⁸⁴

Since there is no uniform terminology to describe the people whose movement to other countries is as a result of climate change impacts, other scholars also use the terms 'climate change-related movement' and 'climate-related movement'.⁸⁵ This lack of accepted terminology to define people migrating due to climate change impacts is a major hindrance for the protection of their rights and creates a gap in the existing legal framework.⁸⁶ For the purposes of this study, the terms 'climate refugee', 'environmental refugees', 'climate migrant', 'climate change-related movement' and 'climate-related movement' will be used as synonyms.⁸⁷

Although the specific figure for climate migrants is unknown, scholars have estimated that within the next few decades, climate change will result in migration of tens of millions of people.⁸⁸ Other researchers estimate that there are around two hundred million international migrants most of which have been as a result of climate change.⁸⁹ This shows that climate migration is a reality needing serious attention. The protection

⁸² McAdam *Climate Change, Forced migration, and International Law* 4.

⁸³ McAdam *Climate Change, Forced migration, and International Law* 38.

⁸⁴ McAdam *Climate Change, Forced migration and International Law* 38.

⁸⁵ McAdam *Climate Change, Forced migration, and International Law* 7.

⁸⁶ Corendea *Migration and Human Rights in the Wake of Climate Change* 21.

⁸⁷ Foundation *Human rights, migration, and displacement* 1.

⁸⁸ Bierman and Boas *Climate Change and Human Migration* 291.

⁸⁹ McAdam *Climate Change, Forced Migration, and International Law* 16.

of refugees in general; creates non-refoulement obligations for every state in terms of international law.⁹⁰

2.6 Climate migrants and the violation of their human rights

Climate migrants face a lot of problems in the countries they move to, including violations of their human rights. Some of the challenges include xenophobic attacks from locals, living as illegal immigrants without legal documentation, among others.⁹¹ This prompts an inquiry into the existence applicable laws to protect their rights. The responsibility for internal climate migrants is upon the nation to which they belong.⁹² However, for cross- border climate migrants the position is debatable; with others arguing that the country of destination should be responsible in terms of either refugee law or the non-refoulement principle.⁹³ Still propose that those top climate polluting countries must take responsibility of climate migrants.⁹⁴

The paragraphs below that precede the paragraph are repetitive and in my opinion unnecessary. However, I have edited the language.

Climate change and its related challenges impact on the enjoyment of human rights. The challenges include agricultural problems; human health problems and many more.⁹⁵ Agricultural problems affect the right to life and the right to food.⁹⁶ Climate change affect freshwater resources, which threatens the right to water and sanitation; the right to health; the right to life; the right to food as well as the right to an adequate standard

⁹⁰ McAdam *Climate Change, Forced Migration, and International law* 6. Non-refoulement principle in terms of article 33 of the Refugee Convention entails that "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race ,religion, nationality, membership of a particular social group or political opinion".

⁹¹ During *The legal protection of cross-border climate-induced displaced persons in Southern Africa* 6.

⁹² Leal-Arcas 2012 *Procedia* 90.

⁹³ Leal-Arcas 2012 *Procedia* 90.

⁹⁴ Ahmed 2017 *IJCCSM* 8.

⁹⁵ Para 2.2-2.5.

⁹⁶ Muhammed and Balarabe Kura 2017 *SSRG International Journal of Humanities and Social Science (IJHSS)* 1.

of living.⁹⁷ The challenges faced by wildlife and fisheries and biodiversity affects the right of both humans and wildlife to a safe and healthy environment,⁹⁸ as well as the right of humans to food.⁹⁹

For receiving countries; climate migrants create challenges for the host governments to respond to this in the absence of diplomatic recognition of these climate migrants.¹⁰⁰ Due to this lack of diplomatic recognition, tensions arise between the climate migrants and the citizens of the receiving country ;¹⁰¹ for the sharing of available resources. Additional challenges for the climate migrants relate to the reestablishment to find for new shelter to live, language barriers, cultural and traditional differences as well as unemployment. These challenges typically threaten the right to adequate standard of living,¹⁰² the right to freedom of expression,¹⁰³ the right to life, the right to health, right to housing; right to standard of living; their children's right to education.

2.7 Conclusion

In this chapter, a brief discussion of climate migration has been provided, starting with some of the impacts of climate change that push migrants out of their countries of origin. These impacts include agricultural problems, human health problems, effects on fisheries and wild life. It has been established that the agricultural problems affect the human rights to food, health and life. Human health problems affect the right to health and the right to life. The impacts on fisheries and wild life affect the rights of animals and fisheries relating to their and the right of humans to health.

During migration, the rights of climate migrants are also affected. For instance, the right to standard of living is affected as the migrants leave their shelter in search of new ones. The right to property and the right to housing are also affected. In the host

⁹⁷ UNEP 2015 https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights_pdf 3.

⁹⁸ Muhammed and Balarabe Kura 2017 *SSRG-IJHSS* 1.

⁹⁹ The fact that sea food is part of human diet .

¹⁰⁰ Aggarwal 2009 *Sociology of Migration* 3.

¹⁰¹ Aggarwal 2009 *Sociology of Migration* 3.

¹⁰² Nakayama et al 2016 *International Journal of Social Science Studies* 40.

¹⁰³ The right to freedom of opinion and expression is articulated in Article 19 of ICCPR.

country; migrants can face many challenges that can affect their rights. The challenges include the poor living conditions; language barriers and lack of employment. These challenges affect their rights to food, education, health, life, and the freedom of expression.

3 International Climate Change Law on Climate Migrants

3.1 Introduction

At international level, there is no legal instrument that specifically deals with climate migrants. Instead there are instruments that deal with climate change in general. The climate change instruments are helpful for their focus on combating climate change and its adverse impacts, which includes climate migration. This chapter, begins with a discussion of the international climate change law, focusing the measures to prevent and reduce climate change and its impacts. The relevant international climate change legal instruments are: the UNFCCC1992; the *Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998 (hereafter referred as Kyoto Protocol)*; the *Cancun Adaptation Framework (CAF)*, 2010 and the *Paris Agreement on Climate Change*, 2015.

The Chapter will also discuss international environmental principles such as the CBDR principle the duty to prevent, reduce and control environmental harm, the concept of sustainable development, the environment as a common concern of human kind and the duty to cooperate. The discussion on these international principles stresses the importance of the availability of a healthy and safe environment for climate migrants.¹⁰⁴ The chapter turns to a discussion of the Southern African Development Community (SADC) framework on climate change law in order to determine the protection towards climate migrants, if at all. The relevant SADC instruments include: the *SADC Declaration on Poverty Eradication and Sustainable Development, 2008*; the *SADC Protocol on Health, 1999 (hereafter referred as Health Protocol)*; and the *Southern Africa Climate Change Framework, 2010*.

This chapter examines primary sources of law, particularly international and regional instruments. The chapter also makes use of secondary sources including books and journal articles. The chapter addresses the research question by focussing on the climate change law that is of importance in the reduction of climate migrants. The

¹⁰⁴ During *The legal protection of cross-border climate-induced displaced persons* 17.

environmental law principles will serve to refine the relationship between the fulfilment of human rights and a healthy and safe environment.

3.2 International climate change law

The discussion of climate change law instruments focuses on the necessity of a safe environment for the fulfilment of human rights. It also addresses how climate change law can help in the protection of the rights of climate migrants and establishes the relationship between the safe environment and the protection of human rights.

3.2.1 The UNFCCC

In response to the climate change dilemma, measures have been taken at international level in an attempt to combat climate change and its adverse impacts. The adoption of the UNFCCC in 1992 is the stepping stone for dealing with climate change and its impacts. The UNFCCC is an ambitious legal framework for addressing global warming.¹⁰⁵ The objective of the Convention is:

To achieve, in accordance with the relevant provisions of the Convention, the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.¹⁰⁶

The objective of the UNFCCC clearly shows that it mainly focuses on the prevention of climate change and adaptation.¹⁰⁷ The Convention requires all member states to have commitments to formulate and implement programmes to facilitate adequate adaptation to climate change.¹⁰⁸ In terms of Article 4(1)(e), the Convention commits all parties to cooperate in the adaptation to the adverse effects of climate change. This includes measures to develop appropriate and integrated plans for coastal zone management, water resources and agriculture. It also calls for the protection and rehabilitation of vulnerable areas, especially in Africa, which are affected by drought, desertification and floods. The Convention urges developed countries to assist

¹⁰⁵ Peel *Climate Change- The emerging of a new legal discipline* 928.

¹⁰⁶ Article 1 of the UNFCCC.

¹⁰⁷ Olsson *Environmental migrants in International Law* 15.

¹⁰⁸ Article 4(1)(b) of the UNFCCC.

developing countries that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation.¹⁰⁹

The UNFCCC sets guidelines for member states for the ongoing operation and adaptation of climate change.¹¹⁰ For instance, member states should protect the climate systems for the benefit of present and future generations of humankind;¹¹¹ consider the specific needs and special circumstances of developing country parties;¹¹² and take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse impacts.¹¹³ The Convention also sets out principles such as the CBDR, which requires the developed countries to take a lead in the reduction of the GHG emissions.¹¹⁴

The Convention is silent on the rights and needs of the climate migrants. Yet, it emphasizes the need for member states to take measures and cooperate especially with regard to those most affected by climate change.¹¹⁵ Since climate migration is one of the effects of climate change, it can be concluded that the Convention offers legal protection to climate migrants as well.

3.3.1 The principle of common but differentiated responsibility (CBDR)

The UNFCCC provides for the CBDR where the developed countries are expected to take the lead in ensuring that the GHG emissions are reduced.¹¹⁶ The Rio Declaration explains the principle as follows:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem .In view of the different contributions to global environmental degradation; States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their

¹⁰⁹ Article 4(4) of the UNFCCC.

¹¹⁰ Article 3 of UNFCCC.

¹¹¹ Article 3(1) of the UNFCCC.

¹¹² Article 3(2) of the UNFCCC.

¹¹³ Article 4(3) of the UNFCCC.

¹¹⁴ *Article 4 of the UNFCCC.*

¹¹⁵ Olsson *Environmental Migrants in International Law* 15.

¹¹⁶ Article 3 of the UNFCCC.

societies place on the global environment and of the technologies and financial resources they command.¹¹⁷

From the above, it is clear that the principle entails that all member states have the common responsibility when it comes to the protection of the environment. However; they have different responsibilities taking into account the different circumstances, including their financial contributions to address environmental problems.¹¹⁸ All countries are to join hands in order to reduce emissions, with developed countries taking the lead for bearing a higher responsibility than the rest.¹¹⁹

The UNFCCC states that the Annex 1 countries, developed countries, must take the lead in ensuring the reduction of GHG emissions.¹²⁰ The responsibility on the developing countries is less than that of developed countries, with the latter responsible for assisting the developing countries in mitigating and adapting to climate change. The UNFCCC and the Kyoto Protocol give the developed countries the responsibility to assist the developing countries with financial resources in order for them to be able to implement the objectives of the Convention.¹²¹ This responsibility can be extended to offering support for addressing the needs of the climate migrants in developing countries.¹²²

3.2.2 Kyoto protocol to the United Nations Framework Convention on Climate Change, 1998

The Kyoto Protocol was also adopted and came into force in 2005 to pursue the objectives of the UNFCCC. Its main objective is the reduction of GHG emissions in the

¹¹⁷ Principle 7 of the Rio Declaration.

¹¹⁸ Scholtz 2008 *South African Yearbook of International Law* 120, Scholtz referred the above mentioned to as the main two elements of the principle of common but differentiated responsibility.

¹¹⁹ Harris 1999 *N.Y.U Environmental law journal* 30.

¹²⁰ Article 3 of the UNFCCC.

¹²¹ Article 4(3) of the UNFCCC and article 10(c) of the Kyoto Protocol.

¹²² During *The legal protection of cross-border climate-induced displaced persons* 31.

atmosphere.¹²³ The Protocol provides some guidelines for the fulfilment of the objective of the Protocol.¹²⁴ The guidelines includes that the Annex 1 parties should ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the GHG listed in Annex A do not exceed their assigned amounts.¹²⁵ The Protocol in article 12(2) provides for 'a clean development mechanism 'to assist non-Annex 1 parties to achieve sustainable development and contribute to the ultimate objective of the UNFCCC. This clean development mechanism focuses on international cooperation in the reduction of GHG emissions. The discussion of this instrument is relevant for this study since these efforts address the effects of climate change that affect climate migrants. If climate change and its adverse impacts decline, the number of climate migrants should also decline.

The Kyoto Protocol also provides for the CBDR principle. In this Protocol, the CBDR principle revolves around fairness recognising that developed countries are responsible for GHG emissions and have the greatest capacity to act.¹²⁶ The Kyoto imposes few demands on the much less responsible and usually much less capable developing countries. This is where the notion of fairness comes in; since the developed countries are the largest sources of GHG emissions , their responsibility is more in dealing with GHG impacts.¹²⁷

The CBDR principle can be useful for ascribing responsibility on states for the climate migrants depending on the ability of each country.

¹²³ Article 2 of the Kyoto Protocol.

¹²⁴ Article 3 of the Kyoto Protocol.

¹²⁵ Article 3(1) of the Protocol.

¹²⁶ Article 10(1) of the Kyoto Protocol , Harris 1999 *N.Y.U Environmental Law journal* 28,.

¹²⁷ Harris 1999 *N.Y.U Environmental Law Journal* 28.

3.2.3 The Cancun Adaptation Framework (CAF) and the Paris Agreement

The *Cancun Adaptation Framework* was adopted in 2010 in Mexico as part of the Cancun Agreements.¹²⁸ The main objective of the Framework is adaptation to climate change through international cooperation.¹²⁹ The other objectives of the Framework are 'to reduce vulnerability and build resilience in developing country parties and to consider urgent and immediate needs of those that are particularly vulnerable'.¹³⁰ Since the Framework calls for the consideration of the needs of the vulnerable; the inclusion of climate migrants in this criteria, positions the Framework as an instrument that offers legal protection to the climate migrants. The *Paris Agreement* was adopted in 2015 and entered into force in 2016.¹³¹ Its aim is to strengthen the global responses to climate change by keeping the global temperature rise below 2 degrees Celsius above the pre-industrial levels, and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.¹³²

Critics argue that the existing climate change instruments focus on the climate change and how to address it to the exclusion of the people whose environments are affected.¹³³ On that note, different schools of thoughts believe that these climate change policies do not consider climate refugees.¹³⁴ Therefore, a lot needs to be done as far as the protection of climate migrants is concerned. However, the fact that these instruments specifically deal with the prevention and the reduction of climate change is a big step in the development of instruments dealing with the rights of climate migrants. Climate change law is an important aspect with principles that can be incorporated in human rights law instruments for climate migrants.

¹²⁸ Anon <http://unfccc.int/adaptation/items/5852.php>.

¹²⁹ Cancun Adaptation Framework 2.4

¹³⁰ Cancun Adaptation Framework 2.

¹³¹ UN 2014.

¹³² Paris Agreement 2016.

¹³³ Geboers, Straatsma and Wijmenga *Protecting and Preventing climate refugees* 17.

¹³⁴ Geboers, Straatsma and Wijmenga *Protecting and Preventing climate refugees* 17.

3.3 International Environmental Law

International environmental law is vital to any discussion on climate change. There is a relationship between the fulfilment of human rights and a safe environment.¹³⁵ This was already recognized with the adoption of the *Declaration of the United Nations Conference on the Human Environment*, 1972 (referred to as the Stockholm Declaration). The right to the environment incorporates the issue of climate change. There are international environmental principles relevant to human rights protection that need to be adhered to in order to prevent and minimise climate change and its adverse impacts including climate migration. These principles can also be relevant to the climate migrants whose livelihoods depend on the state of the environment.¹³⁶ The international environmental principles which are relevant to the climate migrants are the duty to prevent reduce and control environmental harm, and the principle of the environment as a common concern and the duty to cooperate.

3.3.1 The duty to prevent, reduce and control environmental harm and the concept of sustainable development

The duty to prevent, reduce and control environmental harm is an obligation of customary international law. International instruments and case laws, for instance the *Trail Smelter Arbitration* Case elaborate on this principle.¹³⁷ In terms of Principle 2 of the Rio Declaration; the principle entails that states have a:

Responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.¹³⁸

This duty to prevent places an obligation on the state to prevent harm even within its own jurisdiction.¹³⁹ It promotes sustainable development.¹⁴⁰ The *Brundtland Report* of 1987 defines sustainable development as

¹³⁵ During *The legal protection of cross-border climate-induced displaced persons* 27.

¹³⁶ During *Birnie, Boyle and Redgewell International Law and the Environment* 106.

¹³⁷ Stockholm Declaration and Rio Declaration.

¹³⁸ Principle 2 of the Rio Declaration.

Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

Sustainable development imposes the idea of limitations on developmental activities in accordance with the environment's capacity, in order to meet both present and future generations.¹⁴¹ As reflected in international agreements, the principle of sustainable development consists of a triple bottom line approach namely intergenerational equity, sustainable use of natural resources and integration of environment and development.¹⁴² In terms of sustainable development, national and international economic development should not exceed its social and ecological cost.¹⁴³

In the context of climate change, this is relevant as 'the extent of climate change is directly proportionate to the increase in GHG emissions associated with economic development.'¹⁴⁴ Thus, the principle of sustainable development imposes a duty on states to limit their GHG emissions, through mitigation measures, and to assist those vulnerable displaced persons through adaptation measures). Hence this principle is important for the protection of climate migrants.

3.3.2 The environment as a common concern and the duty to cooperate

The common concern principle establishes the general legal basis for the concerned community to act.¹⁴⁵ The principle is said to have first appeared early in international treaties concerning the exploitation of natural resources; such as *International Convention for the Regulation of Whaling, 1942* and the *Convention for the High Seas Fisheries of the North Pacific Ocean, 1952*.¹⁴⁶ For the fulfilment of sustainable development, the respect for human rights, economic development, and environmental protection must be a common concern for all mankind.¹⁴⁷ From human rights

¹³⁹ Soto 1996 *ILSA Journal of International law and Comparative Law* 199.

¹⁴⁰ During *The legal protection of cross-border climate-induced displaced persons* 28.

¹⁴¹ Soto 1996 *ILSA Journal of International Law and Comparative Law* 200.

¹⁴² Soto 1996 *ILSA Journal of International Law and Comparative Law* 206-207.

¹⁴³ During *The legal protection of cross-border climate-induced displaced persons* 29.

¹⁴⁴ During *The legal protection of cross-border climate-induced displaced person* 29.

¹⁴⁵ Shelton and Kiss *Guide to International environmental Law* 13.

¹⁴⁶ These instruments contain the term 'common interest'.

¹⁴⁷ Shelton and Kiss *Guide to International environmental law* 14.

perspective, therefore, the rights of climate migrants must be also of common concern to humanity.

The duty to cooperate is formulated in the *Stockholm Declaration*,¹⁴⁸ and all international environmental law treaties. It is a requirement of the duty to cooperate for the international community to act as one regarding the global threat of climate change in general and to human rights.¹⁴⁹ Looking at the wording in the preamble of the UNFCCC, and also the fact that it was adopted mainly to deal with climate change and its adverse impacts; climate change is a 'common concern of humans'.¹⁵⁰ Therefore, since climate migration is one of the effects of climate change; the protection of climate migrants' rights must also be taken seriously as a 'common concern of mankind'.

3.4 Climate Change law in the African Union (AU)

In the African region, a number of instruments are in place to adapt to climate change and its adverse impacts. These include: the *African Ministerial Conference on the Environment* (AMCEN), 2017; the *African Climate Policy Centre* (ACPC) and the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009* (hereafter referred to as the *Kampala Convention*). The AMCEN was formed to discuss the environmental issues in Africa. It plays a pivotal role in the African response to climate change.¹⁵¹ The ACPC was also formed in 2010 for the development of an educational learning hub based on climate change and to address the adverse impacts of climate change.¹⁵²

The Kampala Convention is the first binding regional instrument explicitly offering protection to people displaced by natural disasters.¹⁵³ It entered into force in 2012 and consists of 39 signatories.¹⁵⁴ Although the Kampala Convention provides for the

¹⁴⁸ Principle 24.

¹⁴⁹ Knox 2009 *Virginia Journal of International Law* 52.

¹⁵⁰ The fact that climate change has become a global subject in the UNFCCC and other international instruments such as Kyoto Protocol shows that it is a 'common concern of mankind'.

¹⁵¹ Libebe *Climate Change Governance in the SADC Region* 39.

¹⁵² Libebe *Climate Change Governance in the SADC Region* 40.

¹⁵³ Jacobs-Mata *A Regional perspective on the environment-climate change-migration nexus* 14.

¹⁵⁴ Ruppel and van Wyk *Climate change induced persons in Africa* 25.

protection to internally displaced persons only, it can also cater for cross-border migrants.¹⁵⁵ The Convention obliges state parties to protect the rights of the displaced persons.¹⁵⁶ The Convention in article 5 obliges state parties to assess the needs and vulnerabilities of displaced persons in cooperation with international agencies and to provide adequate assistance. The state parties to the Convention are also responsible for establishing an effective legal framework to provide just and fair compensation and other forms of reparations for damage incurred as a result of displacement.¹⁵⁷

The Kampala Convention mentions climate change as one of the push factors for displacement.¹⁵⁸ Article 5(4) of the Convention makes a special provision regarding climate change displacement. it obliges state parties to take measures to protect and assist displaced persons due to natural or human made disasters, including climate change. The Convention further provides for the warning systems, the establishment and implementation of disaster risk reduction strategies, emergency and disaster preparedness and protection and assistance for displaced persons.¹⁵⁹

3.5 Climate change law in the SADC region

The SADC was established in 1992 in Namibia, It consists of 15 countries, which are Angola, Botswana, Democratic Republic of Congo , Lesotho , Madagascar, Malawi , Mauritius , Mozambique, Namibia, Seychelles , South Africa , Swaziland, Tanzania , Zambia and Zimbabwe .¹⁶⁰

As a developing region and most vulnerable to climate change, SADC has a large proportion of climate migrants . This calls for significant efforts for climate change adaptation in the SADC region.¹⁶¹ The region faces the greatest threats of climate

¹⁵⁵ During *Abebe The Kampala convention and environmentally induced displacement in Africa* 1.

¹⁵⁶ Article 4 of the Kampala convention.

¹⁵⁷ Article 12 of the convention.

¹⁵⁸ Article 5 of the Convention.

¹⁵⁹ Article 4(2) of the Convention.

¹⁶⁰ www.sadc.org.

¹⁶¹ Libele *Climate change governance in SADC region* 4.

change, which disturbs the agriculture, health, water resources, coastal areas as well as the ecosystems and biodiversity.¹⁶² A disturbance of these sectors by climate change leads to the infringements of human rights such as the right to life, health and food. In SADC, migration is mainly triggered by economic motives, with South Africa being the primary destination.¹⁶³ Thus, climate change adaptation is a necessity in the SADC region for the reduction of vulnerability to climate change.

The SADC climate change instruments include: the *SADC Declaration on Poverty Eradication and Sustainable Development*, 2008 (Declaration on Poverty Eradication); *the Protocol on Health*, 1999 (Health Protocol); the *Windhoek Declaration on SADC and International Cooperating Partners*, 2006; Windhoek Declaration) the *Regional Indicative Strategic Development Plan* (RISDP), 2003; the *Southern Africa Climate Change Framework*, 2010 and the *SADC Climate Change Agenda*, 2012.

3.4.1 Declaration on Poverty Eradication

Article 1(ii) of the Declaration addresses the adverse effects of climate change in the fight against poverty as a priority which requires the urgent attention of SADC member states. The Declaration states that the member States need to increase climate change resilience 'by preparing and implementing national and regional adaptation and mitigation plans'.¹⁶⁴ The Declaration also calls for assistance from the international level to address climate change displacement in the spirit of solidarity, common but differentiated responsibility, the duty to cooperate and the environment as a common concern.¹⁶⁵ This Declaration is an important instrument for the protection of climate

¹⁶² Libele *Climate Change governance in SADC region* 5.

¹⁶³ Dodson and Crush *Migration Governance and Migrant Rights in the SADC* 1. In 2011 census which was held in South Africa; it showed that the number of foreign born people residing in South Africa amounts to approximately 4% of the population (bearing in mind that some foreign national do not have valid papers, so they are not included in that percentage).

¹⁶⁴ Article 2(vi) of the Declaration on Poverty Eradication.

¹⁶⁵ During *The legal protection of cross-border climate induced displaced persons* 51.

migrants as it deals with climate change displacement as a measure of adaptation to climate change.¹⁶⁶

3.4.2 Health Protocol

Article 25 of the Health Protocol; calls for cooperation and assistance in the coordination and management of disaster and emergency situations. it requires parties to collaborate and facilitate regional efforts in developing awareness, risk reduction, preparedness and management plans for natural and man-made disasters.¹⁶⁷ The Protocol also requires parties to develop mechanisms for co-operation and assistance in emergency services.¹⁶⁸ According to During,

The Health Protocol could therefore serve as a means of coordinating the management of possibly large numbers of cross-border displaced persons fleeing from climate events. It could also implement early warning mechanisms to raise awareness and help the relevant countries prepare for possible impending disasters of this kind.¹⁶⁹

3.4.3 Regional Indicative Strategic Development Plan (RISDP), 2003

This Development Plan was adopted in 2003¹⁷⁰ and it acknowledges the impacts of climate change and provides some mechanisms to implement various environmental agreements. The main goal of the Plan is to ensure the equitable and sustainable use of the environment and natural resources for the benefit of present and future generations.¹⁷¹ Although the RISDP is not in itself legally binding, it does indicate that the SADC member states are must to cooperate in order for them to be able to address the effects of climate change in the region.¹⁷²

¹⁶⁶ During *The legal protection of cross-border climate-induced displaced persons* 51.

¹⁶⁷ Article 25 of the Health Protocol.

¹⁶⁸ Article 25 of the Protocol.

¹⁶⁹ During *The Legal protection of cross-border climate-induced displaced person* 52.

¹⁷⁰ Anon <https://www.sadc.int/about-sa>.

¹⁷¹ Libebe *Climate change governance in the SADC region* 11.

¹⁷² During *The legal protection of cross-border climate-induced displaced persons* 52.

3.4.4 Southern Africa Climate Change Framework, 2010

The Framework of 2010 sets out recommendations to SADC countries to streamline climate change responses to sub-regional level.¹⁷³ The Framework identifies climate change adaptation as one of the priorities. It proposes adaptation measures such as risk reduction and management and building economic and social resilience.¹⁷⁴ However this Framework was not legally binding.

After the Framework of 2010, the SADC members arranged a *Regional Policy Dialogue* session which had the theme “Beyond Durban-What is the regional climate change and sustainable development agenda”.¹⁷⁵

3.4.5 SADC Climate Change Agenda of 2012

The 2012 Agenda refers specifically to the need for harmonized sub-regional climate change responses and proposes a regional climate change programme of action.¹⁷⁶ However, no progress had been made as far as the formulation of the proposed SADC Climate Change Programme of Action is concerned.

3.5 Conclusion

In this chapter, the international climate change legal instruments discussed. The UNFCCC is the first international legal instrument to deal with climate change adaptation. Its objective is to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.¹⁷⁷ The Kyoto Protocol has also been discussed. Its objective is the reduction of GHG emissions in the atmosphere.¹⁷⁸ As highlighted in this study; these instruments do not specifically address climate migrants. However, the focus on the

¹⁷³ Libebe *Climate change governance in the SADC region* 11.

¹⁷⁴ Barnard 2014 *Journal of Energy in Southern Africa* 30.

¹⁷⁵ Barnard 2014 *Journal of Energy in Southern Africa* 30.

¹⁷⁶ Barnard 2014 *Journal of Energy in Southern Africa* 30-31.

¹⁷⁷ Article 1 of the UNFCCC.

¹⁷⁸ Article 2 of the Kyoto Protocol.

adaptation to climate change in these instruments implies an inclusion of climate migration and thereby offer legal protection to climate migrants as well. International environmental principles have also been discussed, particularly, the principle of common but differentiated responsibilities. This principle entails that every member party has a common responsibility to climate change adaptation but that such responsibility is different taking into account the capacity of a country to adapt

The SADC climate change framework has also been discussed. The instruments discussed include the *Declaration on Poverty Eradication; the Health Protocol as well as the Regional Indicative Strategic Development Plan* (RISDP). The Declaration on Poverty Eradication prioritises climate change measures in fighting against poverty as a matter of urgency for SADC members.¹⁷⁹ The Health Protocol calls for member parties to cooperate and help each other in the management and co-ordination of disaster and emergency situations.¹⁸⁰ In this case, scholars use the word 'disasters' to include climate migration, which means that the protection offered by the Protocol can as well extend to those people who have been displaced as a result of climate change. The RISDP also acknowledges the effects of climate change. Its main objective is to ensure the equitable and sustainable use of the environment and natural resources for the benefit of both present and future generations.

Having highlighted the climate change legal instruments discussed in this chapter; it is clear that much has been done on adaptation to climate change. However the same cannot be for the protection of climate migrants. There is a legal gap as far as the protection of climate migrants is concerned. There is no legal framework that specifically deals with the protection of climate migrants from an international perspective to the SADC perspective. As was discussed and proposed in the 2012 Agenda; there is need for a harmonized sub-regional climate change response.¹⁸¹ It would be more relieving to have a legal framework that specifically deals with the climate change displaced persons.

¹⁷⁹ Article 1(ii) of the Declaration on Poverty Eradication.

¹⁸⁰ Article 25 of the Health Protocol.

¹⁸¹ Barnard 2014 *Journal of Energy Law in Southern Africa* 30.

4 International Human Rights Law on Climate Migrants

4.1 Introduction

In an attempt to identify the extra-territorial human rights obligations of states towards climate migrants, it is important to determine what the concept of extra-territorial human rights obligation entails and the extent to which the international law offers protection to climate migrants. The question which arises is whether there is any legal instrument that offers this protection. There is no formal legal instrument which specifically provides for the protection of climate migrants. Although there are no specific legal instruments which provide protection to climate migrants; their protection can be drawn from human rights law (non-refoulement principle); refugee law; as well as the law on the stateless persons.¹⁸²

The chapter will be structured as follows: firstly, it discusses the concept of extra-territorial human rights obligation; secondly, it discusses the international human rights law, African Union human rights law and SADC human rights law on climate migrants. The aim is to determine whether climate migrants have rights and whether the non-refoulement principle is applicable to them. Thirdly, the chapter discusses refugee law to determine whether climate migrants can be regarded as refugees. Lastly, the analysis of the law of the stateless people follows, to establish whether climate migrants qualify as stateless people. In fulfilling the aim of this chapter, the discussion will be drawn from international and regional instruments and case law on human rights law, refugee law, the law on stateless persons.

4.2 Protection gap

There is a protection gap in the contemporary legal framework for the protection of climate migrants as a result of the lack of a universally accepted definition for climate migrants.¹⁸³ According to Wyman, under existing law, persons who migrate to another

¹⁸² Olsson 2015 *Juridicum* 11.

¹⁸³ Picchi 2016 *US China Law Review* 577.

country as a result of climate change impacts have no right to dwell permanently in the destination country.¹⁸⁴ This rights gap is because of the following:

First, the domestic immigration policies of most countries generally do not allow non-citizens to remain permanently because of environmental conditions in their home countries. Secondly, climate migrants are unlikely to qualify for protection under international law for two main reasons.¹⁸⁵

Additionally, climate migrants are unlikely to qualify for protection under international law because they are not classified as refugees under the *United Nations Convention Relating to the Status of Refugees (Refugee Convention)*, 1951. They are also unable to invoke the non-refoulement principle under existing international human rights law.¹⁸⁶

4.3 The concept of extra-territorial human rights obligations

Extra-territorial human rights obligations stems from the universality of human rights and their applicability even outside the state's territory.¹⁸⁷ According to the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 2011 (hereafter Maastricht Principles), extra-territorial obligation in international law is used to describe:

Obligations related to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory.¹⁸⁸

This definition suggests that people's rights are dependent on extra-territorial acts and omission of states.¹⁸⁹ Generally, there are three human rights obligations of states, namely to respect; protect and to fulfil economic, social and cultural rights.¹⁹⁰ The obligation of States to respect, includes the obligation not to do activities that can violate human rights outside of their jurisdictions. Thus, the responsibility of a State is a result of conduct attributable to it, either separately or jointly with other States, which

¹⁸⁴ Wyman 2013 *Harvard Environmental Law Review* 177.

¹⁸⁵ Wyman 2013 *Harvard Environmental Law Review* 177.

¹⁸⁶ Wyman 2013 *Harvard Environmental Law Review* 177-178.

¹⁸⁷ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011.

¹⁸⁸ Para 8(a) of the Maastricht Principles

¹⁸⁹ Preamble of the Maastricht Principle.

¹⁹⁰ Maastricht Principle para 3.

constitutes a breach of its international human rights obligations whether within or outside its territory (extra-territorially).¹⁹¹

The state has got an obligation to avoid causing harm¹⁹² and remains responsible for its conduct with regards to human rights obligations within and outside its territory.¹⁹³ Also, from the definition, extra-territorial obligations comprise of both positive and negative rights.¹⁹⁴ Positive rights create an obligation for the State to do certain things; whilst negative ones create a duty upon States to refrain from doing certain activities.¹⁹⁵

Extra-territorial human rights obligations place a duty on every State to fulfil its obligations within and outside their territories. However, this is debatable as some scholars argue that it is unreasonable for all states to attempt to protect everyone's human rights everywhere. Universal coverage is only possible if a state protects the human rights that it recognises in its own territory and has other states respect them everywhere.¹⁹⁶ The obligation to respect, protect and fulfil also includes the obligation:

to take steps ,individually and through international assistance and cooperation...to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.¹⁹⁷

From the above, every state has obligations to take action on its own or through international assistance to make sure that the vulnerable are not suffering. Positive obligations depend on whether the burden imposed is possible and appropriate.¹⁹⁸

4.4 Human rights law

¹⁹¹ Para 11.

¹⁹² Para 13.

¹⁹³ Para 15.

¹⁹⁴ Kamchibekova 2007 *Buffalo Human Rights Law Review* 96.

¹⁹⁵ Kamchibekova 2007 *Buffalo Human Rights Law Review* 96.

¹⁹⁶ Kamchibekova 2007 *Buffalo Human Rights Review* 97-98.

¹⁹⁷ ICESCR General Comment No. 3: para 9.

¹⁹⁸ *Osman v United Kingdom* 23452/92 1988 para 116

4.4.1 International human rights law

Every person is entitled to human rights. This includes migrants who have rights before and after migration.¹⁹⁹ The fact that there is migration must not deprive them of their rights in their original and the destination countries.²⁰⁰ Climate change disturbs the enjoyment of human right both directly and indirectly.²⁰¹ As an example, climate change threatens the right to life since this right depends on the fulfilment of other rights such as the right to food, water and housing.²⁰² Therefore, international human rights law is important for the rights of climate migrant because it requires minimum standards of treatment to be observed in the host country. International human rights law is also relevant for the legal status afforded to climate migrants.²⁰³ International human rights law is also important because it provides for the legal basis for the complementary protection of climate migrants.²⁰⁴ On this note, the non-refoulement principle forms the central feature of the complementary protection²⁰⁵ as it protects migrants from the violation of their human rights.²⁰⁶

The non-refoulement principle states that:

No person shall be rejected, returned or expelled in any manner whatever where this would compel them to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman, or degrading treatment or punishment .This principle allows for no limitation or exception.²⁰⁷

¹⁹⁹ UNHR *The slow onset effects of climate change and human rights protection for cross-border migrants* . Climate migrants , like everyone else ; also have human rights 18.

²⁰⁰ UNHR *The slow onset effects of climate change and human rights protection for cross-border migrants* 18.

²⁰¹ Olsson 2015 *Environmental migrants in international law* 19.

²⁰² During *The legal protection of cross-border climate-induced displaced persons* 24.

²⁰³ McAdam *Climate change related movement and international law* 52.

²⁰⁴ During *The legal protection of cross-border climate-induced displaced persons* 21.

²⁰⁵ During *The legal protection of cross-border climate-induced displaced persons* 22.

²⁰⁶ UNHR *The slow onset effects of climate change and human rights protection for cross border migrant* 22.

²⁰⁷ Goodwin-Gill and McAdam *The Refugee in International Law* 344.

It is clear, from this principle, that the human rights to consider for complementary protection are the right to life²⁰⁸ and the right not to be tortured or cruel, inhuman or degrading treatment or punishment.²⁰⁹ In other words, the principle of non-refoulement is closely linked to the human right to be protected from torture, cruel, inhuman or degrading treatment or punishment and the right to life.²¹⁰ However, these are not the only rights that give rise to the obligation of non-refoulement but they are clearly recognized in international law.²¹¹ The question that arises is whether the non-refoulement principle also applies to climate migrants. Considering the definition of the non-refoulement principle; torture is an essential element for the principle to be applicable. The *Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 1987 defines torture as the intentional infliction of severe pain or suffering by a public official for an enumerated purpose such as punishment or obtaining a confession.²¹² Looking at this definition, it is clear that the treatment of climate migrants is not torture. Moreover, the push factors for climate migrants do not amount to cruel, inhuman or degrading treatment; because inhuman treatment requires actual bodily injury or mental suffering.²¹³ Degrading refers to the humiliation of a person's dignity.²¹⁴ This is not the case with climate migrants. In addition, climate migrants are not subjected to any risk.

The non-refoulement principle is only applicable where the return would amount to persecution and also where the person is subjected to risk of cruel, torture, inhuman degrading treatment or punishment. However, scholars like During are of the opinion that the protection offered by the principle can only be applicable in the 'most exceptional cases'.²¹⁵ According to Leal-Arcas, climate change is unlikely to pose harm that is dangerous enough for people to use the non-refoulement principle. Even though

²⁰⁸ Article 6 of ICCPR.

²⁰⁹ Article 17 of ICCPR.

²¹⁰ Article 5 of the Universal Declaration of Human Rights.

²¹¹ McAdam *Climate change related movement and international law* 55.

²¹² Article 1 of the *European Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

²¹³ McAdam *Climate change, forced migration and international law* 64.

²¹⁴ Olsson 2015 *Juridicum* 19.

²¹⁵ During *The legal protection of cross-border climate-induced persons* 24.

climate migrants could be successful in using the principle, it only protects them from being expelled from the host country and offers them no other rights.²¹⁶

The fact that climate migrants cannot qualify as refugees or as stateless persons does not necessarily mean that they cannot enjoy human rights. Climate migrants, just like everyone else, have human rights. Thus, where there is no specific legal framework which deals with the protection of climate migrants, they still enjoy the rights in the *Universal Declaration of Human Rights* (UDHR) and *International Covenant on Civil and Political Rights* (ICCPR), and many more. In particular, the UDHR gives everyone the right to life, liberty and the security of the person;²¹⁷ the right to equality before the law;²¹⁸ the right to privacy²¹⁹ and the right not to be deprived of his/her property.²²⁰ In terms of the ICCPR, every human being has the inherent right to life that should be protected by the law; and no one should be deprived of such right.²²¹ Article 7 of the ICCPR gives every human being the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.²²²

Since human rights include labour rights,²²³ climate migrants can also enjoy such rights. The *ILO's Declaration on the Fundamental Principles and Rights at Work* provides for the labour rights that may be available to migrants.²²⁴ The ILO provides the rights of migrant workers, into the following four categories: freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or

²¹⁶ Leal-Arcas 2012 *Procedia Social and Behavioral Sciences* 94.

²¹⁷ Article 3 of UDHR.

²¹⁸ Article 7 of UDHR.

²¹⁹ Article 12 of the UDHR.

²²⁰ Article 17 of UDHR.

²²¹ Article 61) of the ICCPR. The fact that the article says 'every human being' shows that even climate migrants are included as far as the right to inherent life is concerned.

²²² see also article 5 of the UDHR.

²²³ UNHR *The slow onset effects of climate change and human rights protection for cross-border migrants* 19.

²²⁴ UNHR *The slow onset effects of climate change and human rights protection for cross-border migrants* 19.

compulsory labour; the abolition of child labour and the elimination of discrimination in respect of employment and occupation.²²⁵

There are other legal instruments that specifically deal with the rights of migrants. These include the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); the Protocol against the Smuggling of Migrants by Land, Sea and Air and the C143-Migrant Workers Convention.²²⁶ For example; the CMW provides for the right to freedom from slavery or compulsory labour,²²⁷ the right of equality before the courts,²²⁸ the freedom of thought, conscience and religion,²²⁹ the right to life²³⁰ and many more.

4.4.2 Human rights law in the African Union Context

The *African Charter on Human and Peoples' Rights (African Charter)* is the principal instrument for human rights law in Africa. It provides in its preamble for the establishment of bodies for the promotion and protection of human and people's rights in Africa.²³¹ The Charter provides for the right of persecuted individuals to seek and obtain asylum in destination countries in accordance with the laws of those countries as well as international conventions.²³² In terms of article 2, everyone has the right to the enjoyment of the rights and freedoms which are recognized in the Charter without discrimination on any ground. In terms of the Charter, everyone is equal before the law and entitled to equal protection.²³³ The Charter also provides for the right to life and the right to security.²³⁴ With respect to the non-refoulement principle, the Charter states that:

²²⁵ ILO's Declaration on the Fundamental Principles and Rights at Work. The rights contained therein also apply to those climate migrants workers.

²²⁶ Kamuli *Rights of refugees, migrants, stateless persons, and IDPs* 20.

²²⁷ Article 11 of the CMW.

²²⁸ Article 18 of the CMW.

²²⁹ Article 12 of the CMW.

²³⁰ Article 9 of the CMW.

²³¹ The Preamble to the African Charter.

²³² Article 12(3) of the African Charter.

²³³ Article 3 of the African Charter.

²³⁴ Article 4 and 6 of the African Charter.

A non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.²³⁵

The Charter provides people with the right to leave any country and to return . This right 'may only be subject to restrictions provided by the protection of national security, law and order, public health and morality'.²³⁶ Therefore, climate migrants have the right to leave their own countries provided that does not jeopardize national security, law and order, public health and morality. Article 12(5) prohibits the mass expulsion of non-nationals except in cases where 'such an expulsion is aimed at national, racial, ethnic or religious groups'.²³⁷ Article 20 guarantees the right of all people to existence. The Charter also provides everyone with the right to national and international peace and security in terms of which the relations between states are governed by the principles and friendly relations.²³⁸ Furthermore, article 24 of the Charter is also of importance as it gives everyone the right to a general satisfactory environment that is favourable to their development.

The Charter does not specifically provide the rights of climate migrants. However, it is useful as it provides human rights to 'everyone' and protection to all people and guarantees them of the enjoyment of basic human rights.²³⁹ According to Maas, the African Charter does not directly address the issue of environmentally displaced migrants but is important because it is binding in nature and contains provisions that are applicable even to migrants.²⁴⁰ Thus in terms of the Charter, environmentally displaced persons should not be expelled back to their countries of origin in cases where the conditions in their original countries are a threat to their life and security.²⁴¹

²³⁵ Article 12(4) of the African Charter.

²³⁶ Article 12(2) of the African Charter.

²³⁷ Article 12(5) of the African Charter.

²³⁸ Article 23 of the African Charter.

²³⁹ Maas *An analysis of the normative framework providing for human environmentally induced migration in SADC* 48.

²⁴⁰ Maas *An Analysis of the normative framework providing for human environmentally induced migration in SADC* 49.

²⁴¹ Expulsion in this case will be against the right in article 6 of the Charter which provides everyone the right to security of his person.

However, the Charter remains of little use as it says nothing concerning the obligations and responsibilities of states or the international community.²⁴² Thus, the African Charter only provides general protection to everyone guaranteeing them the full enjoyment of basic human rights and nothing more.

4.4.3 Human rights law in the SADC

In the SADC region, the *Charter of Fundamental Social Rights in the SADC* (Social Charter), 2003 is the only relevant instrument.²⁴³ The Charter recognises the basic human rights proclaimed in instruments such as the *United Nations Universal Declaration of Human Rights*, 1948; the *African Charter on Human and Peoples' Rights*, 1981 and the *Constitution of the ILO*.²⁴⁴ For example, article 10 of the Charter provides every worker with a right to adequate social protection regardless of the status and type of employment. However, the Charter focuses on workers but does not mention asylum seekers or refugees.²⁴⁵ Hence, it is difficult to say that the Charter contributes towards the legal protection of climate migrants' human rights.²⁴⁶ A lot still has to be done regarding the legal approach in the climate migrants' protection in the SADC.

4.5 Refugee law

4.5.1 International Refugee law

The *United Nations Convention Relating to the Status of Refugees* (Refugee Convention), defines a refugee as:

²⁴² Maas *An Analysis of the normative framework providing for human environmentally induced migration in SADC* 49.

²⁴³ Makhema 2009 *World Bank Social Protection Discussion Paper* No 0906 20. As in article 2.1 on one of its objectives is 'to promote the establishment and harmonization of social security schemes'.

²⁴⁴ Article 3 of the Social Charter.

²⁴⁵ Makhema 2009 *World Bank Social Protection Discussion Paper* No 0906 20.

²⁴⁶ During *The Legal protection of cross-border climate-induced displaced persons* 49.

Any person who owing to a well-founded fear of being prosecuted for reasons of race, religion, nationality, membership, of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear is unwilling to return to it.²⁴⁷

This definition seems to exclude climate migrants.²⁴⁸ To qualify as refugees, climate migrants must meet the criterion of being 'outside the country'. However they do not satisfy the rest of the definition. There must be a well-founded fear of being prosecuted based on race, religion, nationality, membership of a particular social group or political opinion. Climate migrants are therefore unlikely to be refugees under the given definition because they are not victims of persecution.²⁴⁹ The definition of refugee identifies five grounds of persecution which are race, religion, nationality, membership of a particular social group and political opinion. Therefore, it is unlikely that climate migrants experience these grounds of persecution.²⁵⁰ Also, the definition of the refugee requires a person to be outside his/her nationality.²⁵¹ As such, even if the climate migrants could be able to prove that they faced persecution on these grounds, the definition requires them to have left their countries before being able to claim refugee status under the Refugee Convention.²⁵² Scholars conclude that climate change impacts are not in themselves grounds for the granting of a refugee status under the 1951 Convention.²⁵³

From the definition of a refugee; the other element is that 'the person must be unable or unwilling to avail himself/herself of the protection of that country, or to return there for fear of prosecution'.²⁵⁴ The unwillingness to return to the original country must be as

²⁴⁷ Article 1(A) (2) of the Refugee Convention.

²⁴⁸ Leal-Arcas 2012 *Procedia Social and Behavioral Sciences* 93.

²⁴⁹ Leal-Arcas 2012 *Procedia Social and Behavioral Sciences* 93.

²⁵⁰ During *The legal protection of cross-border climate –induced displaced persons* 18

²⁵¹ Article 1 of the Refugee Convention.

²⁵² Leal-Arcas 2012 *Procedia Social and Behavioral Sciences* 93.

²⁵³ Olsson *Environmental migrants in International Law* 12.

²⁵⁴ Article 1 of the Refugee Convention.

a result of fear of prosecution. In the case of climate migrants, the existence of a fear of prosecution is difficult to prove.²⁵⁵

In Australia and New Zealand, the courts have had to reject claims by environmentally displaced persons to be awarded refugee status.²⁵⁶ In *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* (2014) NZCA 173, 2014), Teitiota who was displaced by climate change effects was denied an asylum as a refugee. Following from the decision of the court, he was deported back to his original country, which was against the non-refoulement principle.²⁵⁷ He then took his case to the Human Rights Commission contending that New Zealand government had, by deporting him, violated his right to life under the ICCPR. The court held that the New Zealand government had the human right duty to protect him from effects of climate change.²⁵⁸ This case illustrates the difficulties for a climate migrant to be awarded refugee status in a host country. However, in exceptional circumstances, such cases can only be won in the human rights context.

4.5.2 Refugee Law in the African Union context

4.5.2.1 The Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugees Convention), 1969

The OAU Refugees Convention stems from the 1951 Refugee Convention. According to During, 'the Convention forms the principal binding regional instrument relating to refugees in the African Union'.²⁵⁹ The definition of refugee in this Convention is broader

²⁵⁵ Kamuli *Rights of refugees, migrants, stateless, and IDPs* 5.

²⁵⁶ Leal-Arcas 2012 *Procedia Social and Behavioral Sciences* 93.

²⁵⁷ *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* (2014) NZCA 173, 2014) 688.

²⁵⁸ *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* (2014) NZCA 173, 2014) 688.

²⁵⁹ During *The legal protection of cross-border climate-induced displaced persons* 35.

to an extent that it can also include environmental migrants.²⁶⁰ In this Convention; a refugee is defined as:

Any person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in the whole of his country of origin or nationality, was compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²⁶¹

Unlike the Refugee Convention of 1951, the OAU Convention does not require 'a well-founded fear of persecution', rather it needs an examination of the facts.²⁶² Some scholars contend that the wording of 'events seriously disturbing public order' includes people displaced by climate induced natural disasters.²⁶³ Others are of the opinion that even though those environmental push factors which causes migration are 'events seriously disturbing public order' the Convention is 'not forward looking in its assessment of harm' .²⁶⁴ Even if climate migrants could be considered as refugees in terms of the OAU Refugee Convention, it only offers little protection.²⁶⁵ Thus, the creation and adoption of relevant legal instruments to deal with the protection of climate migrants is still necessary.

4.5.2.2 The Migration Policy Framework for Africa (MPFA), 2006

The MPFA includes environmental degradation among the push-pull factors of migration in Africa This Framework identifies nine key migration issues and makes recommendation for consideration by AU member States and Regional Economic Communities (RECs). The key migration issues include border management; forced

²⁶⁰ Olsson *Environmental migrants in international law* 17.

²⁶¹ Article 1(2) of Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

²⁶² Maas An analysis of the normative framework provides for human environmentally induced migration in SADC 50.

²⁶³ Lopez 2007 *Environmental Law* 390; Olsson *Environmental migrants in international law* 14. In this regard, scholars contend that climate change and its adverse impacts can also be grouped as events seriously disturbing public order since they lead to displacements.

²⁶⁴ Olsson *Environmental migrants in international law* 14.

²⁶⁵ Olsson *Environmental migrants in International law* 15.

displacement; and inter-state co-operation and partnerships.²⁶⁶ The estimated numbers of cross-border migrants in Africa amounts to 16.3 million, and among these some of them are as a result of climate change and its adverse impacts.²⁶⁷ Regardless of the non-binding nature of the Framework; it provides guidelines and principles aimed at assisting governments and their RECs in resource mobilization for the implementation and formulation of national and regional migration policies.²⁶⁸

Under the heading 'The need for a comprehensive migration policy strategy in Africa,' the Framework recommends the development of a more comprehensive migration policy strategy in Africa. The proposed policy strategy could 'contribute to addressing the challenges posed by migration and to ensure the integration of migration and related issues into the national and regional agenda for security, stability, development and cooperation'.²⁶⁹ Under a section titled 'Protraction Displacement Situations'; it provides for the situations where displacement becomes protracted when the causes of displacement are not addressed or remain unresolved.²⁷⁰ In such situations, the Framework recommends the adoption of measures to enhance the self-sufficiency of refugees and IDPs residing in camps; and to ensure such people have access to education.²⁷¹ Under this heading; it is clear that it only benefits the 'refugees and IDPs'. The Framework also recognises the human rights of migrants as the 'fundamental component of comprehensive and balanced migration management systems'.²⁷² These includes the right to accommodation; the right to adequate food and clothing; the right of access to courts; as well as the right to adequate and free administrative support.²⁷³

Under the heading 'Migration and Environment'; the Framework recommends that states should incorporate environmental considerations in the formulation of national and regional migration management policies for the betterment of addressing

²⁶⁶ MPFA1-2.

²⁶⁷ MPFA 3-4.

²⁶⁸ MPFA 2.

²⁶⁹ MPFA 5.

²⁷⁰ MPFA 22.

²⁷¹ MPFA 23.

²⁷² Issue 2 of MPFA 24.

²⁷³ Issue 2 of the MPFA 25.

environment related causes of migratory movements. It also recommends that states should counter environmental degradation that is caused by the large prolonged presence of displaced persons.²⁷⁴

Due to the fact that the MPFA is a non-binding instrument which was adopted as a guideline for states and RECs in developing their own national and regional migration policies, it is of little help in providing the status and protection for climate migrants.²⁷⁵

4.5.2.3 African Common Position on Migration and Development (ACPM), 2006

The ACPMD was adopted in 2006 and it covers a number of issues including migration and development, the human resource and brain drain, migration and peace, security and stability as well as migration and human rights.²⁷⁶ The document lists environmental factors among the push-pull factors that induce migration. The ministers who are responsible for migration from member states of the African Union are aware that environmental factors are among the underlying causes of migration that must be addressed in order to effectively manage migration.²⁷⁷ The document also states that the effective protection of economic, social and cultural rights of migrants, including the right to development should be prioritized as a fundamental component of comprehensive and balanced migration management systems.²⁷⁸ In this case; ratification and enforcement of human rights instruments that deal with the treatment of migrants is a necessity.²⁷⁹ In article 4.2, the ACPMD states that environmental factors play a role in causing migration and that such migration has an impact on the environment. The problems which are caused by a large number of displaced persons in the host countries include refugee camps that have negative effects on local

²⁷⁴ Issue 6.3 of the MPFA 37.

²⁷⁵ Maas *An analysis of the normative framework provides for human environmentally induced migration in SADC* 61.

²⁷⁶ ACPMD.

²⁷⁷ The Preamble of the ACPMD.

²⁷⁸ Article 3.7 of the ACPMD.

²⁷⁹ Article 3.7 of the ACPMD.

environments.²⁸⁰ The ACPMD in article 5 provides recommendations for actions to ensure that the problems caused by migration are effectively addressed at all levels; that is; the national, continental, and international levels.

Therefore, the ACPMD is clear concerning migrants.²⁸¹ It provides clear recommendations on what to be done to combat migration and manage this challenge in a developmental and peaceful manner. However, the onus is on member states to adopt these recommendations.²⁸²

4.5 .3 Refugee law and policy in the SADC

The *Declaration on Refugee Protection within Southern Africa* (DRP), 1998, calls for harmony in the national policies, laws, and procedures for refugees among its member states.²⁸³ The Declaration recalls the memorandum of understanding between SADC and UNHCR of 1996 which enjoins the parties to co-operate in the area of refugees.²⁸⁴ The Declaration mentions 'events seriously disturbing public order' as one of the push factors for refugees.²⁸⁵ This is essential as the Declaration seems to follow the meaning of refugee that is in the OAU Convention. The African values and hospitality, human rights and relevant humanitarian principles of refugees must be taken into consideration in addressing the needs of migrants.²⁸⁶ The member states recognise that effective

²⁸⁰ Article 4.2 of the ACPMD.

²⁸¹ Maas *An analysis of the normative framework provides for human environmentally induced migration in SADC* 63.

²⁸² Maas *An analysis of the normative framework provides for human environmentally induced migration in SADC* 63.

²⁸³ Declaration on Refugee Protection within Southern Africa, 1998.

²⁸⁴ DRP 1.

²⁸⁵ DRP 1.

²⁸⁶ DRP 2.

measures to address the challenges of refugee protection require regional and international co-operation.²⁸⁷

The Declaration calls for support and assistance from the international community, including the United Nations, the UNHCR and other relevant organisations in fulfilling their responsibilities regarding refugees in a manner which is consistent with the principles of international refugee law.²⁸⁸ The member states to the Declaration commit themselves to address the root causes of refugee movement through establishing a firm foundation for democratic institutions and good governance.²⁸⁹ Notwithstanding the above, the DRP is only a declaration and cannot be regarded as a suitable instrument in the regulation of refugee protection.²⁹⁰ Other scholars believe that those people who are displaced by climate change may possibly be included in the DRP considering its definition for a refugee.²⁹¹ Yet, the declaration still does not provide a comprehensive legal protection for refugees in the SADC region.

The other SADC instrument regarding the protection of refugees is the *Draft Protocol on the Facilitation of Movement of Persons in SADC*, (DPFM) 2005. This instrument only provides very general clauses on the refugee protection.²⁹² Article 28 provides that state parties 'reaffirm their commitment to their obligations under international agreements to which they are parties, and which relate to refugees'.²⁹³ It goes on the regulation of 'the management of refugees' by a specific Memorandum of Understanding (MOU) between member states'.²⁹⁴ According to Makhema, 'such MOU has not yet been

²⁸⁷ DRP 3.

²⁸⁸ DRP 3.

²⁸⁹ DRP 3.

²⁹⁰ Maas *An analysis of the normative framework provides for human environmentally induced migration in SADC* 70.

²⁹¹ During *The legal protection of cross-border climate-induced persons* 48. Such conclusion comes from the provision of the Declaration (paragraph B(iii)) which states that becoming a refugee is: a symptom of crisis which affects many societies , in particular conflicts and civil strife, economic and social imbalances , ethnic and other forms of intolerance , lack of respect for human rights and good governance." Scholars argue that climate change displacement could be regarded as a result of 'the lack of ...good governance.'

²⁹² Makhema 2009 *World Bank Social Protection Discussion Papers* No 0906 19.

²⁹³ Article 28(1) of the DPFM.

²⁹⁴ Article 28(2) of the DPFM.

drafted, but would have a relatively weak legal purchase'.²⁹⁵ This shows that so far a little has been done in the SADC refugee law regarding the legal protection of climate migrants.

4.6 Law of the stateless persons

As mentioned in the introduction, the legal protection of climate migrants can also be drawn from the law relating to stateless persons. It is important to determine whether climate migrants fit into the meaning of stateless persons. If they do, it means they can be accorded the same protection meant for stateless persons. However, if climate migrants do not qualify as stateless persons, they cannot be accorded the protection meant for stateless people.

A stateless person is defined in the *Convention Relating to the Status of Stateless Persons*, 1954 as a person who is not considered as a national by any State under the operation of its law.²⁹⁶ In other words, a stateless person is a person who does not have the nationality of any country.²⁹⁷ In terms of the Convention, for a person to qualify as a stateless person, his or her territory, population or government is required to have disappeared.²⁹⁸ Looking at this requirement, it is difficult to group climate migrants as stateless persons because climate migrants formally have a nationality. Scholars believe that there is a gap when it comes to the application of the law on the stateless persons to climate migrants. There is a need for their protection before statelessness. Cases of pre-emptive migration cannot be covered by the law on stateless people.²⁹⁹ The *Convention on the Reduction of Statelessness*, 1961 provides in its preamble that it is 'desirable to reduce statelessness by international agreement'.³⁰⁰ This means that even if the climate migrants would qualify as stateless persons pre-emptively; 'the

²⁹⁵ Makhema 2009 *World Bank Social Protection Discussion Paper* No 0906 20.

²⁹⁶ Article 1 of the Convention Relating to the Status of Stateless Persons.

²⁹⁷ Kamuli *Rights of refugees, migrants, stateless persons, and IDPs* 22. A person who does not belong to any nationality.

²⁹⁸ Olsson *Environmental migrants in international law* 17.

²⁹⁹ Olsson *Environmental migrants in International law* 17.

³⁰⁰ Preamble of the Convention on the Reduction of Statelessness.

Convention does not provide any enforceable right to a nationality and cannot be materialized into some concrete right to protection under international law'.³⁰¹

The *Convention relating to the Status of Stateless Persons*, in article 31, only protects stateless persons who are staying in the territory lawfully from being expelled from the country, except on grounds of national security or public order. Therefore, the Convention does not offer adequate protection to climate migrants. The only protection it provides is the prohibition of people from being expelled from the territory.³⁰² Thus, if climate migrants would qualify as stateless persons, the Convention offers them no other protection rights besides the right not to be expelled. Also, the Convention limits the protection it offers to those stateless persons who are staying in the territory 'lawfully'. This means that the only way climate migrants can qualify for the rights in the Convention is when they are 'lawfully' present in a receiving state.

As discussed in this section; climate migrants do not qualify as stateless persons and are not entitled to the adequate protection offered by the two conventions mentioned above.³⁰³ More so, even if they could be defined as stateless persons, the Conventions are not rights oriented. Therefore these instruments only offer protection to the right not to be returned to their original territories; and they can only be offered such right if they are lawfully present in the host territory.³⁰⁴

4.7 Conclusion

In this chapter, the discussion focussed on the concept of extraterritorial human rights obligations. It has been noted that every state has got obligations to respect; protect and fulfil the objects of the human rights, which it can undertake individually or through cooperation. Human rights law was also discussed and it was concluded that the fact that those climate migrants are 'humans' just like everyone else can qualify them for human rights, such as the rights in the UDHR as well as in the ICCPR. Refugee law was

³⁰¹ Olsson *Environmental migrants in International Law* 17.

³⁰² Article 31 of the Convention relating to the Status of Stateless Persons.

³⁰³ Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.

³⁰⁴ Article 31 of the Convention relating to the Status of Stateless Persons .

also discussed in an attempt to determine whether climate migrants could qualify as refugees and be accorded the same legal protection as refugees. In this study, it has been concluded that the climate migrants cannot qualify as refugees considering the requirements of a refugee in the definition provided for by the Refugees Convention. In case of climate migrants; there is no 'fear of prosecution' and the five grounds for persecution cannot be proven; hence they cannot be given the same protection as refugees. It has also been concluded that climate migrants do not qualify as stateless persons because they do not meet the description for stateless persons. Moreover, it has been highlighted that climate migrants cannot apply the *non-refoulement* principle as they do not comply with the 'torture' requirement of the principle. Even if the climate migrants would qualify to use the *non-refoulement* principle; the only right the principle can offer to them is the right not to be returned to their original countries and nothing more.

5. Conclusion and recommendations

In attempt to fulfil the objective of this study, namely: to determine the extra-territorial human rights obligations which the member states have towards the SADC climate migrants; as well as the extent to which the existing law (if any) offers legal protection to such climate migrants, the following topics have been looked at. In chapter two; the theoretical background of this study focused on the effects of climate change and the violation of climate migrants' human rights. It has been noted that climate change is a threat towards humans as well as wildlife. The effects of climate change discussed include agricultural problems arising from climate change. This affects human rights such as the right to food and life. Climate change also causes human health problems leading to the violations of human rights including the right to health and the right to life.³⁰⁵ Climate migration have also been discussed in chapter two where it was highlighted that human rights are infringed before; during and even after the process of climate migration. These rights include the right to health; right to life; the right to education; the right to certain minimum standard of living and many more.³⁰⁶ Therefore, Chapter two was mainly to give a brief background on climate migration and acknowledge the reality that the rights of climate migrants are being violated and must be addressed.

Chapter three discussed the climate change law relevant to climate migrants. A few international instruments on climate change have been discussed including the *United Nations Framework Convention on climate change* (UNFCCC); the Kyoto Protocol and the *Paris Agreement*. The climate change instruments are useful as they focus on combating climate change and its adverse impacts, which includes climate migration.³⁰⁷ If states follow the guidelines provided by these instruments; this would be a stepping stone in reducing climate change and its adverse impacts including climate migration.

³⁰⁵ See the discussion in chapter 2.

³⁰⁶ See the discussion in para 2.2-2.6.

³⁰⁷ See the discussion in para 3.2.

Chapter 3 also discussed international environmental principles including the duty to prevent, reduce and control environmental harm. These principles are important for showing that the lives of the climate migrants also depend on the state of the environment.³⁰⁸ If the environment is safe; the climate migrants will be safe too; hence states should adhere to these environmental principles to reduce the cases of climate migration.

Climate change law in the African Union and SADC have also been discussed in chapter three. The relevant AU policies are the *African Climate Policy Centre* (ACPC) and the Kampala convention. The *Kampala Convention* mentions climate change as one of the push factors for displacement; hence it obliges states to cooperate in combating climate change. The discussion of the SADC climate change framework focused on the *Health Protocol* and the *Declaration on Poverty Eradication*. The *Health Protocol* calls for states to cooperate in fighting emergencies, which may include climate migration. The *Declaration on Poverty Eradication* is an important instrument for the protection of climate migrants for its recognition of the need to have a legal framework addressing climate change displacement as part of adaptation to climate change.³⁰⁹

The instruments discussed in Chapter three focussed on the prevention and reduction of climate change and its adverse impacts. If states follow these provided guidelines; it would be a mile forward for the protection of climate migrants.

Chapter four discussed the human rights law on climate migrants. It started with discussing the concept of extra-territorial human rights obligations. It was found that the human rights are universal and every state must respect, protect and fulfil human rights obligations within and outside its territory.³¹⁰ Under the international human rights law, several instruments have been discussed including the *ICESR* and the *ICCPR*. It has been highlighted that climate migrants are humans just like everyone else and have rights. Therefore they should be accorded the same protection as every human

³⁰⁸ See the discussion in para 3.3.

³⁰⁹ See the discussion in para 3.4-3.5.

³¹⁰ See the discussion in para 4.2.

being deserves.³¹¹ Refugee law was discussed to determine whether climate migrants can qualify as refugees and receive the same legal protection as refugees. It was established that that climate migrants do not qualify for the status of refugee status or refugee protection because they do not meet the criteria for refugees.³¹²

The law of stateless persons was also discussed to determine whether the climate migrants would qualify as stateless persons in order for them to be accorded the same legal protection for stateless persons. It was found that climate migrants do not meet the requirements for stateless persons therefore they cannot qualify for such protection.³¹³

This study has shown that various branches of law can be applied as far as the legal protection of climate migrants is concerned. The branches of law discussed include human rights law, environmental law and refugee law. The study has shown that the protection provided by these branches differs. Looking at the human rights law and the extra-territorial concept; it has been concluded that human rights law is the most relevant branch where climate migrants' protection can be drawn from. Environmental law alone does not suffice as it only provides for some principles. However these principles can play a pivotal role when combined with other branches of law, for the benefit of climate migrants. When it comes to refugee law; the possibility of applying it to climate migrants is too slim as they cannot be accorded the refugee status.

As highlighted in this study; there is no single specific legal instrument that specifically provides for state obligations towards the climate migrants. However, climate migrants can acquire their legal protection from the branches mentioned above. The fact that human rights law applies to every human being and the concept of extra-territoriality of human rights obligations, is a stepping stone towards the protection of climate migrants; as states are obliged to fulfil those human rights obligations. In answering the research question of this study, namely: what should be the content of extra-territorial human rights obligations towards SADC climate migrants, it can be concluded

³¹¹ See the discussion in para 4.3.

³¹² See the discussion in para 4.4.

³¹³ See the discussion in para 4.5.

that the obligation can be drawn from the discussed branches of law. In addition, the concept of extra-territoriality applies as states are obligated to respect, protect and fulfil human rights obligations. Given the discussion in this study; there is still a protection gap when it comes to the legal protection of climate migrants. Nevertheless, a lot still has to be done regarding climate migrants. There is no legal instrument which provides states with duties; responsibilities and obligations on how they can treat climate migrants in their countries. The legal protection provided by instruments from these branches is not sufficient; hence the formation of other instruments that specifically deal with the legal protection of climate migrants. States' extra-territorial obligations remain a necessity and highly recommended.

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