

An analysis of States' obligations towards climate displaced persons under the African Human Rights System

(Research Dissertation submitted in fulfilment of the requirements for the degree of Masters of
Laws in human rights at the University of Venda)

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Declaration

I, **SIMANGO VICTOR**, hereby declare that this research dissertation for Masters of Laws in human rights titled **An analysis of States' obligations towards climate displaced persons under the African Human Rights System** hereby submitted by me at the University of Venda, has not been submitted previously for a degree at this or any other institution and that it is my own work in design and execution, and that all reference material contained therein has been duly acknowledged.

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Signed in my presence on this the day of2022

Commissioner of Oaths.

Acknowledgment

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Abstract

Climate change poses the most menacing threat to the environment today. The effects of climate change are experienced globally, and Africa in particular is one of the most vulnerable regions. One of the main consequences of changes in climate is the displacement of populations, mostly internally. Those who are forced to leave their places of residence due to the effects of climate change are often not specifically protected by both the United Nations Framework Convention on Climate Change (UNFCCC) and the subsequent instruments such as the Kyoto Protocol to the United Nations Convention on Climate Change and the Paris Agreement. However, under the African Human Rights System (AHRS), the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) which entered force is novel in its provision in article 5(4) on the obligation of State Parties towards persons displaced by climate change. While it is clear under international human rights law that states have the obligation to respect, protect and fulfil rights, whether these obligations apply, and if so, what the nature of their application means for climate displaced persons under the African Human Rights System is not clear. The study interrogates the basis and how obligations to respect, protect, and fulfil rights apply to climate induced persons in Africa.

Keywords: States Obligations, Climate Displaced Persons, African Human Rights System, Kampala Convention

List of Abbreviations and Acronyms

AC	: African Charter
ACERWC	: African Committee of the Experts on the Rights and Welfare of the Child
ACHPR	: African Commission on Human and Peoples' Rights
ACOHPRS	: African Court on Human and Peoples' Rights
ACN	: African Commission
AHRC	: African Human Rights System
AU	: African Union
CDRI	: Capacity of Disaster Reduction Initiative
COSP	: Conference of State Parties
CRSR	: Convention Relating to Status of Refugees
DRC	: Democratic Republic of Congo
HRC	: Human Rights Council
IDP's	: Internally Displaced Persons
IOM	: International Organization for Migration
IMC	: Internal Monitoring Centre
IPCC	: Intergovernmental Panel on Climate Change
NIDMRR	: National Institution for Disaster Management and Risk Reduction
UN	: United Nations
UNCRC	: United Nations Convention on the Rights of the Child
UNEP	: United Nations Environmental Programme
UNFCCC	: United Nations Framework Convention on Climate Change
UNHCR	: United Nations High Commissioner for Refugees
UNHRC	: United Nations Human Rights Council

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CHAPTER ONE: INTRODUCTION

1.1. Background

Changes in climate are felt worldwide, mainly, in African countries which are the more susceptible.¹ This is attributable mainly to limited capacity of many of these people to adjust to the fast-changing climate patterns,² and it therefore follows that most of these countries are unable to deal adequately with the negative effects of climate change.³ The United Nations High Commissioner for refugees' (UNHCR) report on displacement shows that at least 23.1 million people have been displaced due to climate related events.⁴ The World Bank estimates that by 2050, the number of internal climate displaced persons could surpass 143 million with approximately 86 million people displaced Sub-Saharan Africa.⁵ Changes in climate have resulted in the production of greenhouse gases, which resulted in reduced rainfall, erratic rainfall patterns, temperature changes,⁶ drought and floods. As a result, the world experiences a decrease in the production of food.⁷ It could be argued that these adverse changes occasioned by these climate changes will persist in shaping the lives of many in African, mainly those from agriculture-dependent countries.⁸ The effects of climate change are far-reaching as they will impact negatively on the lives of future

¹ A Power 'Climate Change and Pollution: Addressing Intersecting threats to oceans, coasts and small island States: in D Leary and B Pisupati (eds) *The future of International Environmental Law* (2010) 19-41; MM Naser 'Climate Change-Induced Displacement : Definitional Issues and Concerns' (2013) 2 *Chicago-Kent Journal of Environmental and Energy Law* 3; The Intergovernmental Policy on Climate Change (IPCC) Fourth Assessment Group II report Chapter Four http://www.ipcc.ch/publications_data/_ar4/wg2/en/contents.html (accessed on the 1st of May 2020).

² ON Awojobi & J Tetteh 'The Impacts of Climate Change in Africa: A Review of the Scientific Literature' (2017) 5(1) *Journal of International Academic Research for Multidisciplinary* 40.

³ K Gray & T Gupta 'The United Nations Climate Regime in Africa' in B Chaytor and KR Gray (eds) *International law and policy in Africa* (2003) 60-82.

⁴ www.unhcr.org (accessed on the 14th of April 2022); E Easton-Caabria Horn of Africa: Climate-induced Displacement on the Rise www.citiesalliance.org (accessed on the 14th of April 2022).

⁵ www.unhcr.org (accessed on the 14th of April 2022); E Easton-Caabria Horn of Africa: Climate-induced Displacement on the Rise www.citiesalliance.org (accessed on the 14th of April 2022).

⁶ B Mayer 'The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22 (2) *Colorado Journal of International Environmental Law & Policy* 362.

⁷ D Gracia 'The Climate security divide: Bridging human security in Africa' (2008) 17(3) *African Security Review* 2-17; D Kuwali 'From the west to the rest: Climate change as a challenge to human security in Africa' (2008) 17(3) *African Security Review* 18-38.

⁸ D Hummel 'Climate Change, and degradation and migration in Mali and Senegal – Some Policy Implications' (2015) 5 (2) *Migration and Development* 211-233.

generations.⁹ The challenges of food shortages, droughts and floods, may force people to move from one place to another, thereby rendering some displaced and homeless. However, there are current international legal efforts spearheaded by the United Nations (UN) to deal with climate change. These are the United Nations Framework Convention on Climate Change (UNFCCC),¹⁰ the Kyoto Protocol¹¹ and the Paris Agreement.¹² However, these international legal instruments do not have any specific provision on climate displacement or the obligations of states towards persons displaced by climate change.

Though populations in Africa are affected negatively by changes in climate, it is argued that the continent has not contributed significantly to the production of the greenhouse gases.¹³ There are numerous effects of climate change in Africa. In particular, the connection with population displacements within national boundaries has been noted.¹⁴ Under the African Union (AU) human rights system, as defined by its normative instruments and jurisprudence,¹⁵ the novel instrument called the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),¹⁶ links climate change to displacement through article 5(4) which mandates state parties to have an obligation towards persons displaced by climate change. However, what this entails for climate- displaced persons is neither specified in the instrument nor explained in the jurisprudence of the African Commission on Human and People's Rights (ACHPR). Under the international human rights law, member nations should respect and protect persons displaced by climate

⁹ D French 'The principle of common but differentiated responsibilities and the balance of commitments under climate regime' (2000) 9 (2) *Review of European Community and International Environmental Law* 120-131; AO Jegede, Climate Change and the Future Generation under the African Human Rights System: Fostering Pathways and Partnership, 2021 <http://repository.gchumanrights.org/handle/20.500.11825/2337> (accessed 07 January 2022).

¹⁰ United Nations Framework Convention on Climate Change (Convention on Climate Change).

¹¹ Kyoto Protocol to the United Nations Framework on Climate Change Convention of 1998 ILM 37 22 (Kyoto Protocol).

¹² The Paris Agreement to the United Nations Convention on Climate Change adopted by the United Nations on December 2015 (Paris Agreement).

¹³ P Cameroon 'From Principles to Practice: The Kyoto Protocol' (2000) 18 (1) *Journal of Energy and Natural Resources of Law* 1-8; P Collier *et al* 'Climate Change and Africa' (2008) 24 *Oxford Review of Economic Policy* 337.

¹⁴ Mayer (n 6 above) 358-415; Awojobi & Tetteh (n 2 above) 39-52.

¹⁵ MW Mutua 'The African Human Rights System: A Critical Evaluation', Prepared for the United Nations Development Programme, Human Development Report (2000) <https://digitalcommons.law.buffalo.edu/other-scholarship/16> (accessed on the 20th of May 2020).

¹⁶ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) adopted by the United Nations in 2009.

change,¹⁷ and to this effect there are a number of instruments and writings relating climate change to human rights.¹⁸ Notable, is the UN Human Rights Council (HRC) Resolution 47/24,¹⁹ which recognised how climate change affects the rights of vulnerable people. However, whether obligations under international human rights law apply, and if so, what the nature of their application mean for climate-displaced persons under the African Human Rights System (AHRS) is not clear. It is against this background that this study seeks to interrogate the basis and how obligations to respect, protect and fulfil rights apply to people displaced by climate change.

1.2. Problem statement

There is clear and comprehensive scholarship on science and adverse effects of changes in climate on various populations. As displacement due to climate change continues to increase, there has been a range of international instruments on climate change and resolutions linking climate change and human rights,²⁰ and those specifying the nature of state responsibilities under international law.²¹ At the African regional level, there is the Kampala Convention which specifically has a provision on climate-induced displacement.²² In addition to not providing a definition on climate-induced displacement, the instrument does not specify the nature of obligations which apply to climate-displaced persons in Africa. The lack of clarity on these obligations is

¹⁷ G Rona & L Aarons 'State Responsibility to Respect, Protect and Fulfil Human Rights Obligations in Cyberspace' (2016) 18 *Journal of National Security Law and Policy* 503-530.

¹⁸ United Nations (UN) Human Rights Council Resolution 47/24 A/HRC/RES/47/24 adopted on the 14th of July 2021; UN Human Rights Council Resolution 44/7 A/HRC/RES/44/7 adopted on the 16th of July 2020; African Commission on Human and People's Rights Resolution 342 on Climate Change and Human Rights in Africa ACHPR/RES.342 (LVIII) 2016; Convention on Climate Change (n 10 above); Kyoto Protocol (n 11 above); The Paris Agreement (n 12 above); Kampala Convention (n 16 above); AO Jegede 'The Protection of Indigenous Peoples' Lands by Domestic Legislation on Climate Change Response Measures: Exploring Potentials in the Regional Human Rights System of Africa' (2017) 24 (1) *International Journal of Minority and Group Rights* 24-56; M Limon 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harvard Environmental Law Review* 439-476; S Caney 'Climate Change and the Duties of the Advantaged' (2009) 13 *Critical Review of International Social and Political Philosophy* 2013-228.

¹⁹ UN Human Rights Council Resolution 47/24 A/HRC/RES/47/24 (n 18 above); UN Human Rights Council Resolution 44/7 A/HRC/RES/44/7 adopted on the 16th of July 2020 which recognised how climate change affect the rights of older persons.

²⁰ Kampala Convention (n 16 above); Resolution 7/23 A/HRC/RES/7/23 adopted on the 28th of March 2008; Resolution 10/4 A/HRC/RES/10/4 adopted on the 25th of March 2009; Resolution 18/22 A/HRC/RES/18/22 adopted on the 17th of October 2011; Resolution 26/33 A/ HRC/ 26/33 Add.2 of 2014; Resolution 32/34 A/HRC/RES/32/34 of 2016.

²¹ Committee on Economic, Social and Cultural Rights General Comment No.03: The Nature of States Parties' Obligations (art 2, Para 1 of the Covenant) adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (General Comment).

²² Kampala Convention, art 4 (n 16 above).

problematic for displaced persons who seek to benefit from these obligations, and the fulfilment of these obligations and the judiciary in the enforcement of these obligations.

1.3. Aim and objectives

The aim of this study is to investigate whether states have obligation towards displaced persons due to climate change in Africa, and if so, what the nature of their application entails under the AHRS for climate displaced persons.

Based on this aim, the study seeks to achieve the objectives below:

- 1.3.1 Examine the concepts of displacement and climate-induced displacement under international human rights law.
- 1.3.2 Examine states' obligations towards climate-displaced persons and demonstrate how states' obligations may apply to climate displaced persons under the AHRS.
- 1.3.3 Analyse the potential implications of article 5(4) of Kampala Convention for states' responsibilities towards climate-induced displacement in Africa.
- 1.3.4 Recommend legal instruments for the recognition and safety of people displaced by changes in climate and application under AHRS.

1.4. Research question

In order to realise the aim identified above, a question should be posed: Are nations held responsible for persons displaced as a result of climate change, and if so, what are these obligations and how do they apply to people displaced by changes in climate according to the AHRS?

In order to achieve the objectives stated above, the questions below should be stated:

- 1.4.1 What does displacement and climate displacement of persons mean under international human rights law?
- 1.4.2. Do states have obligations in terms of national and international instruments towards climate-displaced persons based on treaties and how do such obligations apply?

1.4.3. What are the potential implications of article 5(4) of Kampala Convention for States' obligations towards climate-induced displacement in Africa?

1.4.4. What are the legal measures and policies which can be incorporated to protect human rights of people displaced by climate change and enforce states' obligations towards climate-displaced persons?

1.5. Assumptions

The Kampala Convention recognises the need for the protection of people displaced by changes in climate as specified in article 5(4) and states the obligations relating to human rights under international law. The implications of article 5(4) is that the obligations that states have towards climate-induced displaced persons inform different parameters such as norm setting, creation of new laws and domestication of laws, creation of institutions and establishing momentum in addressing the issue of climate-induced displacement. These parameters inform how the different states obligations may apply to climate-induced displaced persons.

1.6. Methodology

This research is desk-based as it focuses on the study of literature relevant to the legal instruments with respect to the legal obligations of states towards people displaced by changes in climate. Literature relating to both the African and the global levels is examined.

1.7. Literature review

Many scholars have researched on the effects of climate change,²³ on human security,²⁴ settlement²⁵ and rights.²⁶ However, there is scanty literature regarding the

²³ DO Gemedda & AD Sima 'The impacts of climate change on African continent and the way forward' (2015) 7 (10) *Journal of Economy and the Natural Environment* 216-262.

²⁴ J Barnett "Security and climate change' (2003) 13 *Global Environmental Change* 7: Kuwali (n 7 above) 20; Gracia (n 7 above).

²⁵ Mayer (n 6 above) 362.

²⁶ B Lewis *Environmental Human Rights and Climate Change* (2018) 1-249; A Savaresi 'Human rights and the impacts of Climate Change: Revisiting the assumptions' (2021) 11 (1) *Onati Socio-Legal Series* 231-253; S Levy & A Patz 'Climate Change, Human Rights and Social Justice' (2015) 81 (3) *Annals of Global Health* 310-322.

responsibilities of countries to people displaced by climate-related changes. Scholarship suggests the need to protect persons displaced by climate change with some arguing for a new instrument at the UN level which makes provision for people displaced by climate change.²⁷ In particular, Docherty & Giannini,²⁸ Angela,²⁹ and Betaille *et al*³⁰ argue that a framework that specifically deals with people displaced by changes in climate would be a commendable initiative. The UNFCCC falls short as it does not deal specifically with displacements caused by changes in climate.³¹ While there have been instruments dealing with climate change, for example, the UNFCCC,³² the Kyoto Protocol,³³ the Paris Agreement³⁴ and the Kampala Convention,³⁵ Docherty & Giannini³⁶ point out that the UNFCCC does not deal with the position of people displaced by changes in climate though it assists countries with adaptation to the climate-induced changes.³⁷ Scholarship has shown adverse effects of changes in climate particularly in Africa.³⁸ According to Gemedda and Sima,³⁹ and Addaney, Boshoff and Olutola⁴⁰ the most consequences of climate change are droughts, floods, lack of water and outbreaks of waterborne diseases which lead to displacement.⁴¹ There has been a number of decisions passed by the UNHRC, and these include Resolution 10/4 (2009), 18/22 (2011), 26/27 (2014), 47/24 (2021), which, however, dealt briefly with *inter alia*, the effects of climate-induced changes on vulnerable populations⁴² and on how human rights can inform and strengthen climate

²⁷ B Docherty & T Giannini 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees (2009) 33 *Havard Environmental Law Review* 358; W Angela 'Turning the Tide: Recognising Climate Change Refugees in International Law (2008) 30 *Law and Policy* 502.

²⁸ Docherty & Giannini (n 27 above) 358.

²⁹ Angela (n 27 above) 502.

³⁰ J Betaille *et al* 'Draft Convention on the International Status of Environmentally - Displaced Persons' (2008) 12 (4) *Review Europeenne de Droit de L' Environnement* 395.

³¹ Docherty & Giannini (n 27 above) 358. See

³² Convention on Climate Change (n 10 above).

³³ Kyoto Protocol (n 11 above).

³⁴ Paris Agreement (n 12 above).

³⁵ Kampala Convention (n 16 above).

³⁶ Docherty & Giannini (n 27 above).

³⁷ Docherty & Giannini (n 27 above) 358.

³⁸ For a discussion on the impacts of climate change see Gemedda & Sima (n 23 above) 256-262; M Addaney *et al* 'The Climate Change and Human Rights Nexus in Africa' (2017) 9(3) *Amsterdam Law Forum* 6-28; M Hansungule & AO Jegede 'The impact of climate change on indigenous peoples' land tenure and use: The case for a regional policy in Africa' (2014) 21 *International Journal on Minority and Group Rights* 256.

³⁹ Gemedda & Sima (n 21 above) 257.

⁴⁰ Addaney *et al* (n 36 above) 6.

⁴¹ Gemedda & Sima (n 23 above) 259; Addaney *et al* (n 38 above) 6.

⁴² UN Human Rights Council Resolution 10/4 (n 20 above); Resolution 18/22 (n 20 above); UN Human Rights Council Resolution 47/24 (n 18 above); Resolution 26/27 A/HRC/RES/26/27 adopted on 23 June 2014 which calls for enhancement of cooperation for addressing climate change.

change policy-making.⁴³ Resolution 35/20 of 2017 on climate change⁴⁴ focuses on the adverse impacts of climate change on children and challenges on the protection of the rights of climate-induced migrants,⁴⁵ and those of the present and future generations of humankind.⁴⁶ In 2019, the UNHRC passed Resolution 42/21 (2019), which recognises the rights of people with disabilities against climate change. None of these scholarly works and normative developments refer to or clarify the potential in the AHRS regarding states' obligations in the context of climate-induced displacement in Africa.

Authors have examined the Kampala Convention within the framework of the AHRS, but none have expatiated on states' obligations towards climate-displaced persons in Africa. Jegede,⁴⁷ discusses climate-induced displacement and its consequences on indigenous peoples.⁴⁸ The author mainly argues that the Kampala Convention may apply extraterritorially in protecting indigenous peoples.⁴⁹ However, like many other authors, Jegede does not discuss whether states have obligations towards climate-displaced persons and the nature of such obligations where such exist. The author has also argued for the need for a right to safe climate under the UN system, an argument which is not made in the context of climate displacement.⁵⁰ Addaney, Boshoff and Olutola⁵¹ discuss climate change inducement and its impacts but there is no reflection on states' obligations towards climate-displaced persons. Mutua⁵² discussed the meaning of AHRS in terms of its normative development and jurisprudence. The author discusses the instruments such as the African Charter (AC), and the African Commission (ACN) as the treaty monitoring body.⁵³ However, this is not done in the context of climate-induced displacement.

⁴³ UN Human Rights Council Resolution 18/22 (n 20 above).

⁴⁴ UN Human Rights Council Resolution 35/20 A/HRC/RES/35/20 adopted on the 7th of July 2017.

⁴⁵ UN Human Rights Council Resolution 3 /20 (As above).

⁴⁶ (As above).

⁴⁷ AO Jegede 'Rights away from home: Climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention' (2016) 16 *African Human Rights Law Journal* 58-82.

⁴⁸ (As above) 59.

⁴⁹ For a discussion of the Kampala Convention and indigenous peoples, see Jegede (n 47 above) 58.

⁵⁰ AO Jegede 'Arguing the Right to a safe Climate under the UN Human Rights System' (2020) 9 (2) *International Human Rights Law Review* 196.

⁵¹ Addaney *et al* (n 38 above) 6-28.

⁵² Mutua (n 15 above).

⁵³ Mutua (n 15 above).

The state obligations on human rights have been classified under international human rights law. These are obligations to respect, protect and fulfil human rights.⁵⁴ The obligation to respect human rights entails that action or measures that are imposed by a state should not be contrary to the rights as provided by a treaty.⁵⁵ States are further obliged to protect human rights. This requires states to take measures or steps which ensure that individuals are not deprived of their rights.⁵⁶ This can be done through implementing statutes and establishing democratic institutions, amongst others.⁵⁷ States are also required to fulfil human rights and this basically entails the promotion of human rights.⁵⁸ Shue⁵⁹ specifically discusses the obligation to protect human rights.⁶⁰ The author suggests a framework for international justice.⁶¹ Under the AHRS, these layers of obligations have been increased to four, with the addition of responsibility to support human rights.⁶² The ACN in *The Social and Economic Rights Action and another v Nigeria*,⁶³ commonly known as the *SERAC case*, noted a number of obligations supported by human rights and these obligations connote respect, protection, fulfilment and promotion of human rights by the countries that chose to conform to the provisions as set by international law.⁶⁴ As a result, the connotation of the obligation to respect is that the collective groups should enjoy their rights without interference by states.⁶⁵

In accordance with the ACN, the obligation for protection compels states to take measures by implementing effective legislation and remedies to protect rights holders

⁵⁴ Committee on Economic, Social and Cultural Rights General Comment No.24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights adopted on the 10th of August 2017.

⁵⁵ (As above).

⁵⁶ Mutua (n 15 above).

⁵⁷ (As above).

⁵⁸ Mutua (n 15 above).

⁵⁹ H Shue 'Subsistence emissions and luxury emissions' (1993) 15 (1) *Law & Policy Journal* 39-59.

⁶⁰ Shue (n 59 above) 40.

⁶¹ Shue (n 59 above) 40.

⁶² See *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, (2001) AHRLR 60 (ACHPR 2001) (*SERAC Case*).

⁶³ *SERAC Case* (n 60 above).

⁶⁴ *SERAC Case* (n 60 above) para 44: F Coomans 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 752; The Preamble of the Kampala Convention (n 16 above); GJH van Hoof 'The legal nature of economic, social and cultural rights: a rebuttal of some traditional views' in: Ph. Alston & K Tomasevski (eds), *The Right to Food*, Utrecht: Martinus Nijhoff, (1984) 106,108.

⁶⁵ *SERAC Case* (n 62 above) para 45; Jegede (n 47 above); Coomans (n 64 above) 752.

against interference by others.⁶⁶ The obligation to fulfil requires states to ensure the realisation of the rights.⁶⁷ The obligation to promote human rights obligates states to ensure ‘that individuals are able to exercise their rights, for example, by promoting tolerance, raising awareness, and even building infrastructures’.⁶⁸ However, there has been no clarity on how these obligations may apply to persons displaced by climate change under the AHRs.⁶⁹ Hence, this present study investigates the obligations of states towards climate change displaced persons in Africa, and if such obligations exist, how they apply under the AHRs towards persons displaced by changes in climate.

1.8. Definition of keywords

1.8.1. Climate change

The UNFCCC defines climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable periods”.⁷⁰ According to Rahman⁷¹ climate change is literally the long term variations in the weather phenomena through several years,⁷² which is primarily brought by human beings.⁷³

1.8.2. Climate induced displacement or persons

Displacement induced by changes in climate refers to a move from one’s home, primarily due to sudden or gradual environmental climate-induced changes that negatively affect the lives or living conditions of those moving and their movement can

⁶⁶ SERAC Case (n 60 above) para 46; Jegede (n 47 above) 77; Coomans (n 64 above) 752.

⁶⁷ SERAC Case (n 60 above) para 47; Jegede (n 47 above) 78; Coomans (n 64 above) 752.

⁶⁸ SERAC Case (n 60 above) para 46; Jegede (n 47 above) 79; Coomans (n 64 above) 752;

⁶⁹ For a discussion on obligation to respect, protect, fulfil and promote human rights, see Chapter three below.

⁷⁰ Convention on Climate Change (n 10 above).

⁷¹ MI Rahman ‘Climate Change: A Theoretical Review’ (2013) 11(1) *Interdisciplinary Description of Complex System* 2.

⁷² As above.

⁷³ Rahman (n 71 above).

be either within or outside their country or border.⁷⁴ There is no internationally-accepted term to define climate-induced displaced persons.⁷⁵ International organizations, including, the United Nations Environmental Programme (UNEP), the United Nations High Commissioner for Refugees (UNHCR) and the International Organisations on Migration (IOM) suggest terms such as “environmental migrants” or “climate change migrants” or “environmentally displaced persons” as alternatives.⁷⁶ Similarly, neither the Kyoto Protocol,⁷⁷ the Paris Agreement⁷⁸ nor the Kampala Convention⁷⁹ defines what climate change-induced displacement or climate change induced displaced persons mean.

1.8.3. African human rights system

Under the AU there are three judicial or quasi-judicial regional human rights system⁸⁰ which includes a number of treaties or agreements amongst the member countries of the AU.⁸¹ This system regulates human rights violation on the AU member countries.⁸² It also has monitoring bodies such as the ACHPR,⁸³ the African Court on Human and Peoples’ Rights (ACHPR),⁸⁴ and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).⁸⁵

1.9. Ethical considerations

Desk-based research is not amenable with ethical clearance concerns as is the case with qualitative research methodology where the participants are human beings. In

⁷⁴ Naser (n 1 above) 23.

⁷⁵ Naser (n 1 above) 5.

⁷⁶ F Biermann & I Boas ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate for Human Security? Climate-Induced Displacement and International Law 1 (Sydney Centre for International Law, Sydney Centre Working Paper No4. 2008).

⁷⁷ Kyoto Protocol (n 11 above).

⁷⁸ Paris Agreement (n 12 above).

⁷⁹ Kampala Convention (n 16 above).

⁸⁰ <https://ijrcenter.org> (accessed on the 24th of June 2020).

⁸¹ <https://www.womenenbaled.org> (accessed on the 24th of June 2020).

⁸² <https://www.womenenbaled.org> (accessed on the 24th of June 2020).

⁸³ The African Commission on Human and Peoples’ Rights was established in terms of art 30 of the African Charter on Human and Peoples’ Rights, OAU Doc.CAB/LEG/67/3 rev.5,21 ILM 58 (1982).

⁸⁴ The African Court on Human and Peoples’ Rights was established by the Protocol to the African Charter on Human and Peoples’ Rights in 1998.

⁸⁵ The African Committee of Experts on the Rights and Welfare of the Child was established in 2001 drawing its mandate from art 32-46 of the African Charter on the Rights and Welfare of the Child.

this current research it suffices to make due acknowledgement to the sources consulted.

1.10. Delineation of the study

The scope of this study is limited to the effects of climate change on people displaced by changes in climate. However, the effects of climate change are wide-ranging. It should also be borne in mind that there are measures that are taken on a yearly basis to mitigate these effects, hence, this study is restricted to developments prior to December 2020. The focus of this study is Africa, although climate-induced displacement is a global phenomenon. The focus of this study is on regional level of intervention. While this will bear relevance to what happens at the domestic level, the focus of this study is not on any individual state in Africa.

1.11. Overview of chapters

1.11.1. Chapter One: Introduction

This chapter introduces the problem of the study, the rationale, research question and the methodology as well as the delimitation.

1.11.2. Chapter Two: The concept of displacement and climate induced displacement under international human rights law

Chapter Two focuses on what displacement generally entails, its typology and how it is understood within international law on human rights. The examination of climate-induced displacement and climate displaced persons will be done in terms of African human rights law.

1.11.3. Chapter Three: States' obligations towards climate displaced persons

Thus, chapter examines the existing obligations that states have under national and international law towards climate affected persons in terms of relevant instruments including *inter alia*, the Kampala Convention.

1.11.4. Chapter Four: The potential implications of article 5(4) of the Kampala Convention state based obligations for states in Africa

This chapter examines the potential implications of article 5(4) towards states that are signatories to the Kampala Convention and the parameters that are informed by the provisions of article 5(4) of Kampala Convention.

1.11.5. Chapter Five: Summary of finding, Conclusion and recommendations

This chapter is a summary of the chapters that preceded it. It concludes the study and presents the suggested recommendations.

CHAPTER TWO: THE CONCEPT OF DISPLACEMENT AND, CLIMATE INDUCED DISPLACEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

2.1. Introduction

This chapter examines what displacement generally entails, its typology and how it is understood under international human rights law. It explores the nature of the relationship between displacements in general and displacement informed by climate change, in particular. The chapter further examines the importance of displacement caused by climate change and the extent to which displacement and climate induced displacement are recognised under international human rights law as urgent concerns and requiring immediate attention under the AHRS. The major focus of the present chapter is to establish that even though displacement can be triggered by other factors linked to it, it can also be occasioned by climate change.

2.2. Displacement under international human rights law

Under international human rights law, there is no specific definition of displacement.⁸⁶ However, from the UN Guiding Principles⁸⁷ and the Kampala Convention,⁸⁸ what is evident is that from international human rights law instruments, displacement is distinguished between internal and external displacement.⁸⁹ Before the adoption of the UN Guiding Principles⁹⁰ in 1998, internal displacement was regarded as an internal state affair which was not up for discussion before the international legal community in line with the principle of non-interference.⁹¹ Hence, the Convention Relating to Status of Refugees and its 1967 Protocol⁹² deals with displacement beyond the

⁸⁶ See the 1951 Refugee Convention 1951 which only dealt with Refugees; The United Nations Guiding Principles on Internal Displacement 1998 (Guiding Principles), which only defines internal displacement; the Kampala Convention (n 16 above) which also defines arbitrary displacement and internal displacement.

⁸⁷ Guiding Principles (n 86 above).

⁸⁸ Kampala Convention (n 16 above).

⁸⁹ Guiding Principles (n 86 above); see also the Kampala Convention (n 16 above).

⁹⁰ Guiding Principles (n 86 above).

⁹¹ R Adeola 'The Impact of the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa' (2019) 19 *African Human Rights Law Journal* 592.

⁹² Refugee Convention (n 86 above).

international borders. A refugee is defined, under the Refugee Convention, as someone who, due to persecution because of their beliefs, religion, race and other factors which threatens their safety, are unable or not willing to return to their original country.⁹³ The above definition of a refugee refers to a displaced person beyond the borders of their country, and it does not protect or apply to climate induced displacement. With the increased displacement internally on the African continent, a need for the protection and recognition of internal displacement arose.⁹⁴ The UN Guiding Principles which were adopted in order to provide normative guidance to the state on how to protect internally displaced persons is instructive.⁹⁵ According to the UN Guiding Principles, internally displaced persons are:

‘...persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border’.⁹⁶

After the guiding principles were streamlined, the Kampala Convention⁹⁷ was adopted at the African regional level. Internally displaced persons are defined as people or groups of people forced or obliged to run away from their places of residence or habitual residence as a result of or in order to avoid armed conflict, violence, violations of their rights or natural or man-made calamities. These people have not gone out of their national borders.⁹⁸ Alternatively, displacement of people internally may be viewed as the arbitrary evacuation or relocation or forced movement of people or groups of people within their countries.⁹⁹ The elements contained in the Kampala Convention definition are similar to the definition in the UN Guiding Principles. What

⁹³ The Refugee Convention, art 1 (n 86 above).

⁹⁴ Adeola (n 91 above) 592; C Beyani ‘Recent developments: The elaboration of a legal framework for the protection of internally-displaced persons in Africa’ (2006) 50 *Journal of African Law* 187; J Crisp ‘Forced displacement in Africa: Dimensions, difficulties and policy directions’ (2010) 29 *Refugee Survey Quarterly* 1; KM Dejesus ‘Forced migration and displacement in Africa: Contexts, causes and consequence’ (2018) 37 *African Geographical Review* 79-82.

⁹⁵ UN Commission on Human Rights, Addendum, ‘Guiding Principles on Internal Displacement’ Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights Resolution 1997/39, UN Doc E/CN.4/1998/53/ADD.2 11 February 1998 (UN Guiding Principles).

⁹⁶ The Guiding Principles (n 86 above).

⁹⁷ Kampala Convention (n 16 above).

⁹⁸ Kampala Convention, article 1 (k) (n 16 above).

⁹⁹ Kampala Convention, art 1 (j) (n 16 above)

can be noted from the above definitions of internal displacement is that one must have been compelled to move from their habitual home by circumstances which if not avoided, can result in harm or loss of life. It then becomes necessary for one to move from one place to another. It is clear that internally displaced persons from different factors are protected under human rights system. The Kampala Convention, in particular elaborates on duties of states towards displaced person arising from different incidence even though this is to the exclusion of climate change displacement.

Displacement does not only affect adults who move either within or outside their border due to extenuating circumstances but also affects children who are compelled to move with their parents. The UN special Representative of the Secretary-General for Children and Armed Conflict considered that the aftermath of displacement are destabilizing and traumatic for children as they are at their most vulnerable age and are exposed to danger and risks when they need protection the most.¹⁰⁰ According to Adeola and Mezmur,¹⁰¹ the risks that peoples who are displaced by climate change are likely to experience include sexual violation, human trafficking, health complications and deprivation of access to education. One can argue that it is also against this notion that the UN Guiding Principles¹⁰² and the Kampala Convention¹⁰³ safeguard the rights of people displaced from their homes. Notably, the UN Guiding Principles prohibit mutilation and gender-specific violence against internally displaced persons and the Kampala Convention goes further and prohibits harmful practices which may cause displacement. There are other circumstances where displacement is permissible under the Kampala Convention, such as in armed conflicts situations for military necessity or for the protection of civilian population. Similarly, displacement is permitted in situations of natural disaster, for the safety of and health of people affected.

¹⁰⁰ E Mooney and D Paul 'The rights and guarantees of internally displaced children in armed conflict' (Office of the Special Representative of the Secretary-General for Children and Armed Conflict, working paper no 2, September 2010) at 11.

¹⁰¹ R Adeola & BD Mezmur 'The Protection of Internally Displaced Children in Africa: A Doctrinal Analysis of Article 23(4) of the African Children's Charter' (2021) 65 *Journal of African Law* 117.

¹⁰² Guiding Principles (n 86 above).

¹⁰³ Kampala Convention (n 16 above).

2.3. Typology of displacement under international human rights law

Displacement may be triggered by a number of factors. It can be voluntary or involuntary (forced or arbitrary),¹⁰⁴ temporary or permanent. It can be because of different projects taking place in a particular area,¹⁰⁵ or internally or externally (which brings to the fore the discussion of a Refugee)¹⁰⁶ and it can be climate change-induced displacement.

2.3.1. Voluntary and involuntary (forced or arbitrary) displacement

It is possible that displacement occurs out of the free will of the people involved. Such displacement is referred to as voluntary displacement. Similarly, displacement may occur involuntarily or arbitrarily and can be said to be forced displacement. Thus, a distinction between arbitrary/forced displacement and voluntary displacements exists.¹⁰⁷ Most of the instruments under international human rights law do not address voluntary displacement as it is out of the will of the person and may not give rise to a violation of a human right. The UN Guiding Principles,¹⁰⁸ however, prohibit arbitrary displacement of a person from their homes or place of habitual residence.¹⁰⁹ The UN Guiding Principles, however, further set out range of displacements that are regarded as arbitrary and prohibited. These types of displacements are provided in principle 6(2) of the UN Guiding Principles.¹¹⁰

From the description in the UN Guiding Principles, it is clear that a number of factors can be said to trigger forced displacement. The most common form of forced displacement from the above definition in the UN Guiding Principles is displacement caused by armed conflicts and one caused by disasters. According to Adeola¹¹¹ in Uganda, as a result of a two-decade conflict between the government and the Lord's Resistance Army, more than 2 000 000 people in the province were displaced.¹¹² In

¹⁰⁴ Guiding Principles (n 86 above).

¹⁰⁵ Kampala Convention, art 10 (n 16 above).

¹⁰⁶ Refugee Convention (n 86 above).

¹⁰⁷ Biermann & Boas (n 76 above) 21.

¹⁰⁸ Guiding Principles (n 86 above).

¹⁰⁹ Guiding Principles art 6(1) and (2) (n 86 above).

¹¹⁰ Guiding Principles, art 6(2) (a)-(e) (n 86 above).

¹¹¹ Adeola (n 91 above) 83.

¹¹² Adeola (n 91 above) 85.

2014, the Democratic Republic of Congo (DRC) had close to 2 700 000 people who were displaced due to conflicts between government forces and armed militias group.¹¹³ This goes on to reveal that forced displacement has a huge impact on the population and if not addressed, it will continue to pose serious problems in Africa. It must be noted that like the UN Guiding Principles, the Kampala Convention also prohibits forced or arbitrary displacement.¹¹⁴ The prohibition on arbitrary displacement is informed by the fact that displacement may not be carried out in a manner that violates human rights. It is apparent that arbitrary displacement is prohibited and individuals are protected from such under the international human rights law.

2.3.2. Temporary and permanent displacement

Displacement which can be triggered by any factor can be temporary or permanent. The UN Guiding Principles and Kampala Convention do not address displacement as either temporary or permanent displacement. According Biermann and Boas¹¹⁵ whether relocation is permanent or temporary should not matter. An inference can be drawn that failure on the part of the UN Guiding Principles and the Kampala Convention to outline what would constitute temporary or permanent displacement was due to the fact that, whether temporary or permanent, protection must be afforded to the person displaced by whatever factor. This is based largely on the fact that displacement may start as temporary and later on, becomes permanent. Other scholars define temporary displacement as a period of displacement that takes up to three years¹¹⁶ and permanent displacement as displacement longer than three years and the displaced may not return due to irreparable damage rendering their former area uninhabitable,¹¹⁷ though sometimes it might eventually be possible for them to return. Other authors define the displacement to the exclusion of temporary displacement.¹¹⁸

¹¹³ Adeola (n 91 above) 85.

¹¹⁴ Kampala Convention, art IV (4) (n 16 above).

¹¹⁵ Biermann & Boas (n 76 above) 8.

¹¹⁶ O Dun *et al*, 'Environmental Displaced Persons: Working Definitions for the EACH0FOR Project, 23.

¹¹⁷ Docherty & Giannini (n 27 above) 358.

¹¹⁸ N Myers 'Environmental Refugees: An Emergent Security Issue' (Paper presented at the 13th OSCE Economic Forum, Prague, 23-27 May 2005).

2.3.3. Displacement induced by projects

There are a number of projects that can induce displacement. According to Vermeulen and Cotula¹¹⁹ under article 2 paragraphs 1(a)(iv) of the Kyoto Protocol, there are projects that promote renewable sources of energy that trigger displacement.¹²⁰ The Kampala Convention protects individuals from displacement that can be triggered by businesses done by public or private institutions.¹²¹ Article 10 of the Convention indicates that states are required, “as much as possible”, to curtail displacement due to development. The AC has dealt with numerous cases which involved complaints as a result of projects that were being carried out. One can, in this regard, refer to the *SERAC Case*¹²² which involved oil production by the Nigerian State and other parties to the detriment of the health or environment of the peoples of Ogoniland.¹²³ It was in this case that three obligations of states under international human rights law were discussed.¹²⁴ Even though, the people of Ogoniland did not relocate, the oil production that was going on in their environment was likely to have eventually led to that situation.

2.3.4. Environmental refugees

There exists no definition of environmental refugees which is in a form of a legal instrument that explicitly protects refugees from environmental threats.¹²⁵ Thus, much weight is attached to the various definitions provided by academics. El-Hinnawi defines the term environmental refugees as;

‘those people who have been forced to flee 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

¹¹⁹ S Vermeulen & L Cotula ‘Over the heads of local people: Consultations, consent, and recompense in large-scale land deals for biofuels projects in Africa’ (2010) 37 *Journal of Peasant Studies* 899; L Cotula *et al* *Fuelling exclusion? The biofuel boom and poor peoples’ access to land* (2008) 1-82.

¹²⁰ Vermeulen & Cotula (n 119 above); Jegede (n 47 above) 65.

¹²¹ Kampala Convention, art 10 (n 16 above).

¹²² *SERAC Case* (n 62 above)

¹²³ *SERAC Case* (n 62 above) para 2.

¹²⁴ *SERAC Case* (n 62 above) para 44, 45 & 47; Coomans (n 64 above) 752; The Preamble of the Kampala Convention (n 16 above); Van Hoof (n 64 above) 108.

¹²⁵ Docherty & Giannini (n 27 above) 363.

the quality of their lives.¹²⁶ By environmental disruption in this definition is meant any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it, temporarily or permanently, unsuitable to support human life'.¹²⁷

Myers describes environmental refugees as those;

“people who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty. In their desperation, these people feel they have no alternative but to seek sanctuary elsewhere, however hazardous the attempt. Not all of them have fled their countries, many of them being internally displaced. But all have abandoned their homelands on a semi-permanent if not permanent basis, with little hope of foreseeable return.”¹²⁸

In the definition of El-Hinnawi, both temporary and permanent refugees are considered. However, Myers defines environmental refugees as those people displaced on a semi-permanent or permanent basis.¹²⁹ Suffice to say that many scholars do consider whether relocation is temporary or permanent, hence, different definitions. People may move out for a short period if it would be possible to come back after the disaster. In such a situation, it is defined as temporary displacement. Conversely, when the displaced do not come back, it is considered permanent displacement.¹³⁰ Dun, Gemenne & Stojanov¹³¹ identify three categories of environmental refugees based on the extent to which they were forced to leave, and for each, they apply the terms temporary and permanent displacement. In that instance, according to the authors, temporary displacement is described as one lasting for up to three years.¹³² Moreover, they define permanent displacement as anything longer, though the return of the displaced people may eventually be possible.¹³³

¹²⁶ E El-Hinnawi, 'Environmental Refugees' (1985) 4.

¹²⁷ (As above).

¹²⁸ Myers (n 118 above) 1.

¹²⁹ El-Hinnawi (n 126 above) 4.

¹³⁰ Docherty & Giannini (n 27 above) 264.

¹³¹ Dun *et al* (n 116 above) 23.

¹³² Dun *et al* (n 116 above) 23.

¹³³ Dun *et al* (n 116 above) 23.

Environmental refugees are also defined by the character of their movement: forced or on their own volition. Many authors concur that most major forced displacements result from environmental disasters.¹³⁴ For instance, Docherty & Giannini¹³⁵ note that extreme disasters such as the submersion of an island state or the general degradation of the natural environment of a region might force populations to leave for other places offering better opportunities.¹³⁶ Docherty and Giannini¹³⁷ further point out that people threatened by rising sea levels might relocate to higher ground within the same country, or to another state if the home country is still too low for comfort. However, the current legal definition of the term refugee,¹³⁸ is restricted to transboundary migrants. Authors¹³⁹ should however, have a definition inclusive of the terms transboundary and internally displaced persons with regards to environmental refugees.

Biermann and Boas offer an incisive summary when they write that person should not hold a particular status for them to be afforded global governance protection and whether they have crossed a border or not due to climate change should not be a determining factor.¹⁴⁰ Thus, it is advisable that the definition of refugees should incorporate climate change displaced person so that the refugee convention will afford the protection guaranteed to refugees also to people displaced by climate change outside their national boundaries.

2.4. Climate change induced displacement

Several people are displaced due to changes in climate. In most instances for people living within the several meters of sea level, the consequences for such a nation are quite overwhelming.¹⁴¹ Although displacement may occur as a result of several factors,

¹³⁴ E Piguet 'Climate Change and Forced Migration: How Can International Policy Respond to Climate Change Induced Displacement? (Research Paper No 153, United Nations High Commissioner for Refugees, 2008) 8.

¹³⁵ Docherty & Giannini (n 27 above).

¹³⁶ Docherty Giannini (n 27 above) 264.

¹³⁷ Docherty & Giannini (n 27 above).

¹³⁸ Refugee Convention (n 86 above).

¹³⁹ El-Hinnawi (n 126 above) 4; Myers (n 118 above) 1; Dun *et al* (n 116 above) 23.

¹⁴⁰ Biermann & Boas (n 76 above) 8.

¹⁴¹ D Hodgkinson & L Young 'In the face of Looming Catastrophe: A Convention for Climate-Change Displaced Persons' (2013) *Cambridge University Press* 1.

displacement caused by climate change has become common.¹⁴² This then gives rise to a need for a critical appraisal of what constitutes climate change displacement, the controversies surrounding it, the law regulating it and the implications of recognising such laws by states.

2.4.1. The normative problem

Estimates of populations prone to displacement due to changes to climate have been made.¹⁴³ Regardless of estimation by Myer,¹⁴⁴ being accepted and considered conservative, several authors have been cautious in making estimates of the extent of displacement.¹⁴⁵ However, Piguet¹⁴⁶ argues that there is general agreement that changes in climate result in major forced displacements.¹⁴⁷ According to Biermann and Baos,¹⁴⁸ existing literature reveals that climate change impact in relation to displacement is going to exceed any refugees crisis yet recorded in history.¹⁴⁹ A number of intergovernmental organizations such as the Intergovernmental Panel on Climate Change (IPCC),¹⁵⁰ UNHCR¹⁵¹ and the IOM¹⁵² point out that change in climate is one of the leading factors responsible for increased population movement globally.¹⁵³ According to Kniveton *et al*,¹⁵⁴ the most displaced people will be internal.¹⁵⁵ This observation is corroborated by Hodgkinson & Young.¹⁵⁶ Thus, the consequences of climate change on displaced person nationally are very crucial.

¹⁴² Hodgkinson & Young (As above) 21.

¹⁴³ Myers (n 118 above).

¹⁴⁴ (As above).

¹⁴⁵ VO Kolmannskog, *Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration* (2008). See also N Stern *The Economics of Climate Change* (2007) 1-712; Piguet (n 134 above) 8.

¹⁴⁶ Piguet (n 134 above) 8.

¹⁴⁷ Piguet (n 134 above) 8; Naser (n 1 above) 3; Angela (n 27 above) 505.

¹⁴⁸ Biermann & Boas (n 76 above) 61.

¹⁴⁹ Biermann & Boas (n 76 above) 4.

¹⁵⁰ Intergovernmental Panel on Climate Change.

¹⁵¹ The Office of the United Nations High Commissioner for Refugees was established in December 14, 1950 by the United Nations General Assembly as the lead international agency on refugees.

¹⁵² The International Organization for Migration was established in 1951 as the leading inter-governmental organization in the field of migration and works closely with governmental, intergovernmental and non-governmental partners.

¹⁵³ Naser (n 1 above) 4.

¹⁵⁴ D Kniveton *et al* *Climate Change and Migration: Improving Methodologies to Estimate Flows*, (2008) (Research Series No 33, International Organisation for Migration) 29.

¹⁵⁵ (As above).

¹⁵⁶ Hodgkinson & Young (n 141 above) 15.

Despite climate change displacement being a problem, it is not adequately addressed under these instruments and similarly, the obligations that states have towards climate displaced persons are not considered. Thus, it becomes unclear how climate change displaced persons should be treated under the international human rights in terms of their rights. Notably, climate change displaced persons are not specifically protected and there is no internationally accepted definition of people displaced by climate change.¹⁵⁷ Failure to address climate change displacement as an issue of urgency, results in difficulties with establishing how states' obligations under international human rights law apply to persons displaced by climate change. This results in difficulties in establishing how climate change displaced persons should be treated under the international human rights. Much of the difficulties in relation to climate change induced displacement are based largely on the absence of a proper definition of what constitutes climate-induced displacement. This means that the nature and scope of the definition of climate-induced displacement has not found recognition under international human rights law.

2.4.2. The nature and scope of the definition of climate induced displacement

The absence of a definition of climate change displacement from international instruments creates a controversy on what climate change displacement entails and how people displaced by climate change should be protected. In attempting to establish what would constitute climate change displacement, scholars have used a wide variety of terminologies in existing literature.¹⁵⁸ The terms “refugee” or “migrant” or “displacement” have been used. Most scholars have used “environmental refugee” to describe those who are displaced by climate change.¹⁵⁹ According to Naser¹⁶⁰ the above-mentioned term is not acknowledged under the international law though it has received attention globally and this has great effect on those whose displacement is caused by environmental change.¹⁶¹ The term “environmental refugee” is not a new

¹⁵⁷ International Organization on Migration (IOM), *Migration, Climate Change and the Environment* 4 (IOM, IOM Policy Brief, 2009); Naser (n 1 above) 5.

¹⁵⁸ Piguet (n 134 above)

¹⁵⁹ Naser (n 1 above) 8.

¹⁶⁰ Naser (n 1 above) 8.

¹⁶¹ Naser (n 1 above); C Boano et al *Environmentally Displaced People: Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration* 1 (Refugees Studies Centre, Forced Migration Policy Briefing No.1, 2008).

concept. It was first discovered or used by Lester Brown from the World Watch Institute in 1970,¹⁶² and it was also used by the UNEP researcher, Essam El-Hinnawi in 1985 in the UNEP policy paper entitled “Environmental Refugees”.¹⁶³

The definition provided by El-Hinnawi does not distinguish environmental refugees from migrants and covers many people under the umbrella of environmental refugee without assisting on climate change displacement. According to Docherty and Giannini¹⁶⁴ climate change refugee is different from environmental refugee. They define climate change refugee as “an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as a result of sudden or gradual environmental disruption that is consistent with climate change and to which humans, most likely than not, contributed”.¹⁶⁵ Naser¹⁶⁶ criticises Docherty and Giannini’s definition on the basis that it excludes persons who are forced to move within their country due to climate change.¹⁶⁷ The above definition fails to establish how states obligations towards climate displaced persons can apply and the nature of their application as they do not specifically address climate change displacement. Naser,¹⁶⁸ through a combination of “environmental and climate refugees” definitions, suggested a model definition of climate change displaced people as “persons or groups of persons who are forced to leave their homes, predominantly for reasons of sudden or gradual changes in the environment as a consequence of climate change (to which humans more likely than not contributed) that adversely affects their lives or living conditions and who move either within their country or abroad”.¹⁶⁹ Naser also notes that the definition of climate displaced persons reveals that there is a causal line with respect to degradation of the environment as a result of changes in climate and consequent displacement.¹⁷⁰ A definition of this nature is crucial because it does not distinguish those who are displaced within the borders from those who are displaced

¹⁶² J Morrissey *Environmental Change and Forced Migration* 3 (Refugees Studies Centre (RSC), RSC Background Paper, 2009).

¹⁶³ Biermann & Boas (n 76 above); Morrissey (n 162 above) 3.

¹⁶⁴ Docherty & Giannini (n 27 above)

¹⁶⁵ Docherty & Giannini (n 27 above) 361.

¹⁶⁶ Naser (n 1 above) 8.

¹⁶⁷ For a further discussion on the definition of environmental refugee and climate migrant see Biermann & Boas (n 76 above); International Organization on Migration (IOM 2009), revised definition of climate change migrants; Kniveton *et al* (n 154 above) 31.

¹⁶⁸ Naser (n 1 above) 22.

¹⁶⁹ Naser (n 1 above) 24.

¹⁷⁰ Naser (n 1 above) 24.

beyond the borders. It also does not discriminate between those who are temporarily displaced from those who are permanently displaced. However, this definition does not necessarily address specifically the situation of those who are displaced due to human caused changes in climate. This can be said to be a great shortcoming of this definition as it will be difficult to distinguish man caused change in climate from nature-induced change in climate.

In examining the definition of climate-induced displacement, it is crucial to look at people displaced by climate change internationally, and these are people who enter another country due to the effects of climate change and are unable to return to their country.¹⁷¹ It becomes unclear if such displaced persons internationally can be regarded as refugees to afford them the protection guaranteed to refugees. The definition of a refugee as incorporated in the 1951 Refugee Convention includes ‘fear’ as one of the determining factors for one to relocate. This may be as a result of race, religion, nationality, being a member of a certain group with its beliefs and while being outside of one’s country of nationality.¹⁷² McAdam¹⁷³ notes how difficult it is to establish if a person displaced specifically by changes in climate could be considered to have been persecuted as defined by the Refugee Convention and the existing law. Therefore, it is argued that the Refugee Convention is not the relevant instrument to address climate-induced displacement, whether internally or externally. Most authors argue that people displaced by climate change can still expect protection from their home countries unlike those fleeing traditional persecution.¹⁷⁴

2.4.3. Climate change induced displacement – Legal deficits

According to Hodgkinson & Young¹⁷⁵ the global community is expected to assist and protect people who are internally displaced by changes in climate. They further state according to the provisions of the Convention, the home country and other signatories to the convention are expected to assist victims of internal displacement.¹⁷⁶ However,

¹⁷¹ Hodgkinson & Young (n 141 above) 6.

¹⁷² Refugee Convention (n 86 above).

¹⁷³ J McAdam ‘Climate Change “Refugees” and International Law’ (Paper presented at the New South Wales Bar Association, Sydney, 24 October 2007) 5.

¹⁷⁴ Docherty & Young (n 27 above) 358.

¹⁷⁵ Hodgkinson & Young (n 141 above) 16.

¹⁷⁶ Hodgkinson & Young (n 141 above).

the fact that the home state must first make a request, which may be granted or denied, means that the power still rests on other state parties on whether or not to grant the assistance to victims of climate-induced displacement. This undermines the obligation to protect and assist climate induced displaced persons.

The Kampala Convention¹⁷⁷ which came into effect in December 2012 is the first legally binding regional tool for protecting populations internally displaced by changes in climate. Currently, it is the only such continental convention detailing the parameters with respect to protecting internally displaced persons regardless of the cause of the displacement. Article 5(4) directly mandates member states to offer protection and assistance to people who are displaced internally by natural or human-made disasters, as well as those caused by changes in climate.¹⁷⁸ Article 2(a) also stipulates the objectives of the Convention which are prevention, mitigation, prohibition and elimination of the causes of internal displacement.¹⁷⁹ A broader discussion of the states' obligations towards internally displaced persons because of climate change is discussed in the next chapter. The idea behind the discussion of article 5(4) is to elucidate what might be the implications of article 5(4) in recognising and protecting climate-induced displaced persons.

Keane notes that another concern with regard to affording protection to climate change displaced persons under the Refugee Convention is that to do so risks devaluing current protection for refugees.¹⁸⁰ Hodgkinson & Young¹⁸¹ submit that to broaden the term 'Refugee' so it encompasses both displacement of people due to climate change and the traditional refugees would blur critical differences in the experiences between the groups, and this includes the nature of the relationship between these people displaced by climate change and their home countries – whether it was amicable or severed by persecution. The authors also state that the UNFCCC,¹⁸² which is the law applicable to climate change, does not contemplate or address the issue of

¹⁷⁷ Kampala Convention (n 16 above).

¹⁷⁸ Kampala Convention, art 5(4) (n 16 above).

¹⁷⁹ Kampala Convention, art 2(a) (n 16 above).

¹⁸⁰ D Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 16 *Georgetown International Environmental Law Review* 209, 214.

¹⁸¹ Hodgkinson & Young (n 141 above) 4.

¹⁸² Convention on Climate Change (n 10 above).

displacement.¹⁸³ It has been pointed out that although the UNFCCC focuses on adaptation and mitigation, displacement is not its focus.¹⁸⁴

The same submissions are made by Docherty & Giannini¹⁸⁵ that the UNFCCC has legal limitations for dealing with people displaced by changes in climate, although it applies directly to climate change. Moreover, it mainly focuses on country to country relations, and not the responsibilities of countries to individuals or communities, such as those specified in human rights or refugee law.¹⁸⁶ The authors further highlight that there are shortcomings in attaching climate change refugee protocol to the UNFCCC. The limitations of the UNFCCC's are that it is not focused on remedies; there is reluctance to combine human rights issues in environmental treaties, and the UNFCCC' has a track record of reluctance to take action.¹⁸⁷ Biermann and Boas¹⁸⁸ intentionally do not distinguish in their definition between internal and transboundary migrants. They object to these distinctions primarily because they do not want different categories of people who flee climate change events to receive different levels of protection.¹⁸⁹ Their argument is easy to accept as it advocates for equal protection to those displaced by climate change under the human rights system.

Hodgkinson & Young¹⁹⁰ state that displacement as a result of climate change can be said to be forced rather than voluntary. Whether it be an arbitrary or voluntary climate changed displacement, such displacement can be internal/domestic displacement or international displacement.¹⁹¹ Internal displacement which is climate change induced, like any other internal displacement, is one which occurs within state borders whereas international displacement is one in which the displaced people move outside their own borders due to the influence of climate change.¹⁹² Kniveton *et al*¹⁹³ state that most persons displaced by climate change will be unlikely to cross an international boarder.

¹⁸³ Hodgkinson & Young (n 141 above) 5.

¹⁸⁴ Hodgkinson & Young (n 141 above).

¹⁸⁵ Docherty & Giannini (n 27 above) 358.

¹⁸⁶ Docherty & Giannini (n 27 above) 358.

¹⁸⁷ Docherty & Giannini (n 27 above) 395.

¹⁸⁸ Biermann & Boas (n 76 above) 4.

¹⁸⁹ Biermann & Boas (n 76 above) 4.

¹⁹⁰ Hodgkinson & Young (n 141 above) 11.

¹⁹¹ Hodgkinson & Young (n 141 above) 6.

¹⁹² Hodgkinson & Young (n 141 above) 7.

¹⁹³ Kniveton *et al* (n 154 above) 29.

Hodgkinson & Young¹⁹⁴ further note that most climate change displacement is likely to occur within state borders. Therefore, climate change displaced persons would not be the subject of protection even under the 1951 Convention¹⁹⁵ relating to the Status of Refugees (the “Refugee Convention”).¹⁹⁶

2.4.4. Definitional consensus on climate induced displacement

There is no clear definition of what constitutes climate-induced displacement. Even though there are instruments that have incorporated some position as well as authors who have attempted some definitions, none of them has done justice to the concept. This makes climate-induced displacement difficult to address as there lacks a clear understanding of what it constitutes. It is therefore clear that there has to be regulations that guarantee the rights of internally and internationally displaced persons due to climate change. Kalin¹⁹⁷ states that most of the displaced people remain inside their country and as internally displaced receive protection and assistance under human rights law¹⁹⁸ and in accordance with the UN Guiding Principles on internal displacement.¹⁹⁹ However, according to the author, the existing normative framework is sufficient.²⁰⁰

It is argued that there is a consensus on the above point that climate displaced persons, whether internal or transboundary, temporary or permanent and voluntary or arbitrary, fall within a certain lawfully protected group. Hence, the same protection afforded by the state can be afforded to climate change induced displaced persons at national and international levels. However, it remains unclear what the nature of states’ obligations towards climate change displaced persons in Africa is. The states’

¹⁹⁴ Hodgkinson & Young (n 141 above) 15.

¹⁹⁵ Refugee Convention (n 86 above).

¹⁹⁶ A Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008), *Law and Policy* 502.

¹⁹⁷ W Kalin ‘Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are The Gaps in the Normative Framework in their Protection?’ 10 October 2008, <http://www.brookings.edu/research/displacement-caused-by-the-effect-of-climate-change-who-will-be-affected-and-what-are-the-normative-gaps-in-the-normative-framework-for-their-protection/> (accessed on the 18th of July 2021).

¹⁹⁸ The Kampala Convention (n 16 above); Kyoto Protocol (n 11 above); Convention on Climate Change (n 10 above).

¹⁹⁹ Guiding Principles (n 86 above).

²⁰⁰ Kalin (n 197 above).

obligation towards climate change displaced persons who have crossed borders shall be thoroughly examined in the following chapter with the main focus being the UNFCCC,²⁰¹ Kyoto protocol²⁰² and the Kampala Convention.²⁰³

2.5. Conclusion

The chapter examined the concept displacement under international human rights system. It identified different types of displacement, their meaning and how they differ in causation and effects. Under international human rights law, the meaning of displacement is clear. A number of international human rights instruments and many scholars have also examined the concept displacement within the context of international human rights law. The chapter further revealed that there is no instrument that has sufficiently addressed displacement as a result of climate change. There is no internationally accepted definition and the leading instrument on climate change, the Kampala Convention, has also failed to define climate change induced displacement. The chapter argued that climate change induced displacement or persons' rights in relation to how they should be protected, respected, fulfilled and promoted are not recognised. There is a need to address the rights of climate induced displaced persons and this can be achieved by creating a clear definition of what constitutes a climate induced displacement under international human rights law.

²⁰¹ Convention on Climate Change (n 10 above).

²⁰² Kyoto Protocol (n 11 above).

²⁰³ Kampala Convention (n 16 above).

CHAPTER THREE: STATES' OBLIGATION TOWARDS CLIMATE-DISPLACED PERSONS

3.1. Introduction

This chapter examines the responsibilities which States have towards climate displaced persons under the AHRS. Countries have responsibilities for the respect, protection, promotion and fulfilment of the human rights under the AHRS. However, the extent to which such obligations apply to climate displaced persons has not been clearly clarified. Significant attention is often attached to the general conception of the states' obligation to protect social, economic and cultural rights. However, legal instruments do not thoroughly elaborate on how the states' obligations to respect, protect, promote and fulfil human rights of climate induced persons, are to be enforced. This chapter thus provides clarity on states' obligations to respect, protect, promote and fulfil human rights towards climate-displaced persons attaching weight to instruments under the AHRS and their provisions which support the obligations.

3.2. Typology of human rights obligations and climate displaced persons

There are obligations that states have towards climate displaced persons under the African human rights system. These are obligations to respect, protect, promote and to fulfil. The application of such obligations towards climate-induced displaced persons, and their scope and nature are not specifically provided for. This means that because of lack of clarity on these obligations, climate change displaced persons who seek to benefit from these obligations and other stakeholders who seek to enforce them may not know how they apply. Thus, it is prudent to engage these obligations with reference to climate change instruments and human rights instruments, in particular, article 25 of the AC²⁰⁴ which makes provision for the promotion and respect

²⁰⁴ The African Charter on Human and Peoples' Rights adopted 27 June 1981, AOU DOC. CAB/LEG/67/3 REV.5, 21 I.L. 58 (1982).

of human rights, the General Comment on States Obligations,²⁰⁵ the Kampala Convention²⁰⁶ the UNFCCC,²⁰⁷ and the Kyoto Protocol.²⁰⁸

3.2.1. Obligation to respect human rights

The responsibility to respect compels nations not to interfere with the fundamental human rights. The freedom, autonomy, material, and liberty of their choices should be respected.²⁰⁹ With respect to socio-economic rights, the countries are mandated to recognise that people have a right to use and enjoy freely the materials they owned, and this includes household or family.²¹⁰ In the application of states' obligation to respect human rights of climate induced displaced persons, it has to be determined as to what the nature of respect to be afforded to climate displaced persons is. To elaborate on the extent to which the states' obligation to respect human rights of people displaced by climate change applies, instruments under the AHRS are referred to in order to understand the corpus of respect afforded to persons displaced by climate change. .

Article 3 of the Kampala Convention states that member countries have to respect and make sure that the principles of humanity and human dignity of those internally displaced persons are observed,²¹¹ and this includes appropriate treatment without discrimination and equality before the law.²¹² Nations must also respect and ensure respect for international humanitarian law and the humanitarian and civilian character of the protection and assistance rendered to internally displaced persons, including the prevention of subversive activities.²¹³ Therefore, article 3 of the Kampala Convention is that it goes beyond merely refraining from doing something. This means that states are obliged to take necessary measures to ensure that human rights are

²⁰⁵ General Comment (n 21 above).

²⁰⁶ Kampala Convention (n 16 above).

²⁰⁷ Convention on Climate Change (n 10 above).

²⁰⁸ Kyoto Protocol (n 11 above).

²⁰⁹ K Drzewicki "Internationalization of Human rights and their juridization" in Raija Hanski and Markku Suksi (eds), second Revised Edition, *An Introduction to the International Protection of Human Rights: A Textbook*, 1999, 31.

²¹⁰ Drzewicki (n 209 above).

²¹¹ Kampala Convention art 3(1) (c) (n 16 above).

²¹² Kampala Convention art 3(1) (d) (n 16 above).

²¹³ Kampala Convention art 3(1) (e) & (f) (n 16 above).

realised. In the context of climate displacement, this means that states are obligated to refrain from doing actions that might hinder the safety of those who are displaced by climate change. A state may, for example, be said to have failed to respect a climate-displaced person where the state fails to treat that person in a humane manner. Similarly, discriminating against a person displaced by climate change will result in not fulfilling the obligation to respect.

Article 4(1) of the Kampala Convention states that respect should be given to people displaced by changes in climate to safeguard their protection and human rights and humanitarian law, so as to minimise circumstances that might cause the arbitrary displacement of persons.²¹⁴ Article 5(9) recognises the right of people displaced by climate change to protection and assistance, within the precincts of national and international laws, and they shall not be persecuted, prosecuted or punished for this.²¹⁵ The displaced people also have a right to seek safety in another part of the state and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.²¹⁶ Alternatively, article 9 (2) (f) requires the respect for and maintenance of the civilian and humanitarian character of the places of shelter for the internally displaced people.²¹⁷ Applied in the context of climate induced displacement, the provision of article 4(1) of the Kampala Convention similar meaning to article 3 of the Kampala Convention in that if a state enforces or creates displacement due to its climate change intervention actions, this would be construed as failure to fulfil the obligation to respect. In the context of climate-induced displacement, states must refrain from engaging in activities that impose danger to the environment and climate. It then be said that states which are conducting activities which pose a threat to the climate are failing to fulfil their obligation to respect, in particular, those states that are parties to instruments that advocate for the safety of the environment. This is one area of the law that still needs to be addressed. However, it can be noted that the states' obligation to respect the human rights of climate displaced persons is fairly established in the Kampala Convention. Several provisions,

²¹⁴ Kampala Convention art 4 (1) (n 16 above).

²¹⁵ Kampala Convention art 5(9) (n 16 above).

²¹⁶ Kampala Convention art 9(2) (e) (n 16 above).

²¹⁷ Kampala Convention art 9(2) (g) (n 16 above).

as highlighted, clearly describe the nature of respect and the basis upon which the respect must be afforded by states' parties to climate-displaced persons.

Although the UNFCCC applies directly to climate change, Docherty and Giannini²¹⁸ identify some legal limitations with regard to dealing with climate change refugees.²¹⁹ The primary issues of the UNFCCC are the relations between and among nations. It does not deal with the responsibilities of nations to individuals or communities, as stipulated in the Kampala Convention, human rights or refugee law.²²⁰ It does not provide for the states' obligation to respect human rights of climate displaced persons. Article 3 (3) of the UNFCCC states that the parties should be cautious and anticipate the causes of and try to prevent or minimise the effects of changes to climate.²²¹ Although this provision recognises that climate change has adverse effects, which include displacement of people, the provision does not thoroughly discuss the effects of climate change and its impact on people. It only recognises the effects of climate change but fails to address them. However, an inference can be drawn from the wording of article 3(3) of the UNFCCC, in particular in relation to the fact that states must take measures to prevent causes of climate change. Even though this speaks to the obligation to protect, an obligation to respect can also be said to exist in that context. This is because not refraining from creating activities that are harmful to the environment and thus causing climate change, is failure to carry out the obligation to respect human rights.

Hodgkinson and Young²²² state that the Kyoto protocol fails to address the issue of displacement.²²³ This instrument focuses on climate change mitigation and adaptation, and related funding and support mechanisms.²²⁴ Thus, as it fails to contemplate displacement, it also does not discuss states' obligations to respect human rights of climate displaced persons. Being part of the UNFCCC it has the same shortcomings as the UNFCCC. The Refugee Convention has been regarded as the most

²¹⁸ Docherty & Giannini (n 27 above) 358.

²¹⁹ Docherty & Giannini (n 27 above).

²²⁰ Docherty & Giannini (n 27 above).

²²¹ Convention on Climate Change, art 3(3) (n 10 above).

²²² Hodgkinson & Young (n 141 above) 5.

²²³ Hodgkinson & Young (n 141 above).

²²⁴ Kyoto Protocol, art 11, 12, 13 (n 11 above).

comprehensive articulation of refugee rights and states obligations.²²⁵ The definition of refugee in the Refugee Convention has not been interpreted to incorporate climate-displaced persons.²²⁶ The Refugee Convention explicitly states the obligations of states to provide access to courts, public relief, public education and housing, amongst others.²²⁷ However, there is a confusion if people displaced by climate change should receive the benefits afforded refugees. Thus, states' obligation to protect human rights of refugees cannot be extended to climate-induced displaced people. McAdam²²⁸ argues that it is hard to prove that people who are displaced by climate change have been persecuted too to suit the definition of the Refugee Convention. It is clear from the above discussion that there are many shortcomings in both climate change and human rights instruments in detailing and addressing the obligation to respect human rights. This is the case even in relation to climate change. Instruments that address the obligation to respect, fail to give clarity on how such obligation can be fulfilled or even how a state can be said to have failed to ensure the realisation of such obligation. It is however, clear that it is possible to ensure the realisation of the obligation to respect the rights of climate displaced persons, where there is a clear understanding of what that obligation entails.

3.2.2. Obligation to protect human rights

The responsibility to protect human rights expects nations to protect the victims of climate change against other subjects.²²⁹ Nations are required to take steps to safeguard the rights of the displaced against various interferences which include the political, economic and social. Drzewicki points out that protection involves creating and maintaining the conditions or framework through the working together of the laws and regulations for the realisation of rights and freedoms of people displaced by changes in climate.²³⁰ It however, remains unclear whether or not States have obligation to protect human rights of climate displaced persons. Furthermore, should

²²⁵ Hodgkinson & Young (n 141 above) 4.

²²⁶ Refugee Convention, art 1 (A) (2), (n 82 above); A Refugee is defined as someone with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

²²⁷ Refugee Convention, art 16, 19, 21, 22 and 23 (n 86 above).

²²⁸ McAdam (n 173 above) 4.

²²⁹ Drzewicki (n 209 above) 31.

²³⁰ Drzewicki (n 209 above) 31.

such obligation be established, the nature of the obligation to protect and how it is to be enforced by each state party requires further examination.

Article 9 (1) of the Kampala Convention stipulates that nations should protect the rights of people internally displaced without considering the cause of displacement and by ensuring that certain adverse acts are prevented.²³¹ It is the main responsibility of the nations to protect and assist people displaced within their borders.²³² Article 4 (5) requires the state parties to try to protect people within their land to which they are attached and dependent on as such places have culture and spiritual values for the displaced.²³³ It therefore follows that the people internally displaced by climate change are also covered under article 4 since these victims should be assisted regardless of the cause of displacement. It is required of states to take measures that ensure the safety of those displaced even by climate change. Therefore, failure to, for instance establish a safe environment by a state can be said to amount to failure to protect a displaced person, where climate change intervention actions due to the negligence of the state result in displacement. An inference can also be drawn that where the state fails to take action against institutions responsible for climate change, such a state can be said to have failed to protect individuals who will become displaced due to climate change.

Nations are expected to ensure the protection and assistance to people who have been internally displaced because of climate change or other man-made disasters.²³⁴ Article 9 (2) (c) states that member states shall protect and assist displaced people with unique needs, such as separated and unaccompanied children, or vulnerable women and children, the elderly, and people with disabilities or in ill-health.²³⁵ Mooney and Paul²³⁶ point out that forced movement is a destabilizing and traumatic phenomenon which uproots people from their familiar surroundings²³⁷ Adeola²³⁸ states the displaced people are prone to various levels of vulnerability such as sexual

²³¹ Kampala Convention art 9(1) (n 16 above).

²³² Kampala Convention art 5(1) (n 16 above).

²³³ Kampala Convention art 4(4) (n 16 above).

²³⁴ Kampala Convention art 5(4) (n 16 above).

²³⁵ Kampala Convention art 9 (2) (c) (n 16 above).

²³⁶ Mooney & Paul (n 100 above) 11.

²³⁷ (As above).

²³⁸ Adeola (n 91 above)

exploitation, forced involvement in armed conflicts, human trafficking, and a number of other health and education issues.²³⁹ As a result, nations must ensure that the property of displaced people whether individual or collective or cultural, should be protected.²⁴⁰ What can be drawn from the above discussion is that displacement may be caused by climate change but its consequences are likely to be far beyond displacement. It can result in lack of education, for example. Therefore, failure to protect climate displacement by a State can result in failure to adequate education, sexual exploitation and even loss of life which is also another human right violation.

The Kampala Convention acknowledges that harmful actions are the main causes of displacement internally, and international organizations and humanitarian agencies are very central in mitigating the effects of changes in climate.²⁴¹ It underscores the importance of international humanitarian and human rights law in contextualizing protection of internally displaced persons.²⁴² According to the Kampala Convention, states should protect their countries against harmful practices. Failure by the state to control or stop harmful activities of institutions likely to lead to the displacement of populations means the state has failed to carry out its mandate to protect the human rights of its citizens. The nature of the states' obligation to protect human rights of people displaced by climate change in the Kampala Convention has been fairly clarified. However, how the protection by states parties is to be implemented on the protection remains the conundrum of this instrument and for States.

Hodgkinson and Young²⁴³ argue that the UNFCCC does not deal with the displacement.²⁴⁴ It does not specify the obligations of states to protect the rights of people displaced by changes in climate. The authors' further note that its structure and institutions are not meant to deal with displacement and the associated issue.²⁴⁵ One can argue that lack of clear illustration on some human rights instruments on the obligation to protect human rights is a shortcoming as a party to one instruments may

²³⁹ (As above) 1109.

²⁴⁰ Kampala Convention, art 9 (2) (i) (n 16 above).

²⁴¹ Adeola (n 91 above) 596.

²⁴² (As above).

²⁴³ Hodgkinson & Young (n 141 above) 5.

²⁴⁴ Hodgkinson & Young (n 141 above).

²⁴⁵ Hodgkinson & Young (n 141 above) 5.

not be a party to another. Therefore, an obligation written in an instrument to which they are not a party to, will not be binding on them.

Article 2 (1) (a) (i) of the Kyoto Protocol mandates the states to protect and improve sources of greenhouse gases that are not covered by the Montreal Protocol, while bearing in mind agreements undertaken in other relevant international environment undertakings to promote sustainable development initiatives particularly in forestry management.²⁴⁶ It should be pointed out that this provision does not protect the rights of people displaced by changes in climate. The Kyoto Protocol applies directly to climate change but its focus is on relations between state parties. It fails to discuss the effects of climate change, displacement and states' obligation to protect human rights of climate displaced persons. The Kyoto Protocol has significantly failed to set out a clear revelation of an obligation to protect climate induced displaced persons even though it specifically applies to changes in climate. States' obligation to protect human rights of refugees also requires recognition of climate displaced persons in the Refugee Convention. Keane²⁴⁷ identifies another issue regarding affording protection to persons displaced by changes in climate as stipulated in the Refugee Convention is that to do so devalues current protection for refugees.²⁴⁸ Moreover, to expand the term refugee so that it is inclusive of both people displaced by changes in climate and usual refugees blurs the important differences in experiences between the groups, since the critical point hinges on whether or not relations between the displaced people and their country have been severed through as a result of persecution.²⁴⁹ Also, the Great Lakes Protocol provides for the protection and for the rights of people displaced within their country borders.²⁵⁰ It states a clear definition of internally displaced persons.²⁵¹ It incorporates as its objective the duty on member states to safeguard legally the physical protection and property people displaced internally as provided for in the UN Guiding Principles.²⁵² Article 3 specifically deals with the responsibility on the Member States for protecting internally displaced persons.²⁵³ The Great Protocols

²⁴⁶ Kyoto Protocol, art 2 (1) (a) (ii) (n 11 above).

²⁴⁷ Keane (n 180 above) 215.

²⁴⁸ (As above).

²⁴⁹ Hodgkinson & Young (n 141 above) 4.

²⁵⁰ Protocol on the Protection and Assistance of Internally Displaced Persons adopted by the International Conference on the Great Lakes Region in 2006 (The Great Lake Protocol).

²⁵¹ Great Lakes Protocol, art 1 (n 250 above).

²⁵² Great Lakes Protocol, art 2 (n 250 above).

²⁵³ Great Lakes Protocol, art 3 (n 250 above).

is one instrument that specifically refers to legal protection of those displaced. This means that a state must take any legal step to ensure that displaced persons, including climate change displaced persons are protected. In the case of *Minister of Water and Environmental Affairs and Another v Really Useful Investment No 219 (Pty) Ltd and Another*²⁵⁴ the Minister issued a directive in terms of section 31A of the Environmental Conservation Act²⁵⁵ which required the appellant who wanted to develop property in low-lying areas adjacent to the Disa River to take necessary steps to prevent harm to the environment before developing the area. What can be drawn from the action of the Minister is that the Minister acted in line with the obligation to protect the environment. Had the Minister acting on behalf of the state not issued such a directive, the appellant would have developed the area without taking necessary steps to prevent harm to the environment and thus, contribute towards climate change.

3.2.3. Obligation to promote human rights

It is the primary responsibility of nation states to promote the realisation of all human rights by ensuring that people are able to enjoy their rights and freedoms, through the promotion of tolerance, awareness campaigns, and even the provision of infrastructure.²⁵⁶ Adeola²⁵⁷ states that often the people displaced by climate change are most vulnerable to abuse and torture, sexual exploitation, sale, trafficking and abduction and children also vulnerable to separation from parents.²⁵⁸ Thus, States have a duty to promote the human rights to ensure that people have sufficient knowledge of what their rights are and how they are to be fulfilled. The states' obligation to promote human rights of people displaced by climate change under the AHRS requires an understanding and examination of the provisions of instruments that support such obligations towards climate displaced persons.

Article 3 of the Kampala Convention has as its objective the promotion and strengthening of regional and country-based initiatives for the prevention or mitigation, prohibition and elimination of the main sources of internal displacement and offer

²⁵⁴ (436/2015) [2016] ZASCA 156.

²⁵⁵ Act 73 of 1989.

²⁵⁶ Drzewicki (n 209 above) 31.

²⁵⁷ Adeola (n 101 above) 123.

²⁵⁸ (As above).

lasting solutions to the problems.²⁵⁹ Furthermore, states parties have obligations to promote independence and sustainable development amongst the people who have been displaced internally.²⁶⁰ As already noted the obligation of the state in promoting the rights of people displaced within the borders of the country has not been extensively discussed in the Kampala Convention. The extent of the promotion of the human rights of climate displaced persons is unclear. The Convention only states the obligation to promote self-reliance but fails to elaborate the process through which such promotion is to be undertaken. There is a gap on the specific activities that states parties should carry out to promote the human rights of internally displaced persons. It is argued that in promoting the displaced persons, and climate induced displaced persons, education on this area of the law is very important. Similarly, where people are already victims of climate change displacement, the duty rests on the state to ensure that they are provided with sufficient information and knowledge to the better understanding of climate change. A State that fails to bring awareness to the public, in particular on climate change, which is a global concern, can be said to have failed to promote the right to a safe environment.

The above point is supported by Article 4 (1) (i) of the UNFCCC which states that all parties have a duty to engage in promotion and cooperation to educate, train and raise public awareness regarding changes in climate and encourage the extensive involvement in development carried out by both government and non-governmental organisations.²⁶¹ This provision on the requirement of parties to promote human rights does not entail the promotion of the human right of climate displaced persons. In the context of climate displaced persons, the above provision can be applied through different summits that can be conducted from time to time, advertisements on media platforms, outreaches in schools and other institutions. This should be the mandate of every State.

Article 6 puts a responsibility on State Parties to support and ease the development and implement initiatives that educates the public on climate change and its effects

²⁵⁹ Kampala Convention, art 2(a) (n 16 above).

²⁶⁰ Kampala Convention, art 3 (1) (k) (n 16 above).

²⁶¹ Convention on Climate Change, art 4 (1) (i) (n 10 above).

and encourages public participation on climate change related matters including its management.²⁶² The UNFCCC silently notes the obligation on the States to promote the human rights. This provision vividly highlights the right to information on changes in climate and the obligation of states to promote campaigns to raise public awareness on climate change and its effects. It does not however, with specificity, provide for States' obligation to promote human rights of people displaced by climate change. However, by stating the effects of climate change as part of its provision, it silently acknowledges displacement as an effect of climate change. Article 6(1) (a) and Article 4(1) (d) of UNFCCC are open to interpretation and different inferences may be drawn from them.

Article 2(1) (a) (ii) of Kyoto Protocol states that nations have a responsibility to promote sustainable agriculture to mitigate the effects of climate change.²⁶³ Furthermore, article 10 (e) makes provision for states to, *inter alia*, engage different bodies in addressing climate change through educational and training programmes in bringing awareness to the public on climate change.²⁶⁴ With further interpretation this article does provide for the duty on the States to promote awareness and the availability to information on changes in climate. This is a human right of access to information which climate displaced persons are entitled to. It however, does not necessarily attach weight to that obligation on climate displaced persons but generally towards climate change. What can be drawn from the above discussion is that an obligation to promote human rights, in this context (the rights of a climate-induced displaced person) a number of instruments recognise such right and states that fail to carry out such an obligation can be said to have failed to promote human rights.

3.2.4. Obligation to fulfil human rights

The States Parties are required to create an environment in which the people can exercise their rights as provided for in numerous protocols to which the states are signatories. This is supported by Drzewicki²⁶⁵ who states that it is an expected duty of

²⁶² Convention on Climate Change, art 6 (n 10 above).

²⁶³ Convention on Climate Change, art 6 (ii) (n 10 above).

²⁶⁴ Kyoto Protocol, art 10 (e) (n 11 above).

²⁶⁵ Drzewicki (n 209 above) 31.

the state and its various arms of government to ensure that these rights are realised and enjoyed by the beneficiaries.²⁶⁶ This is also very much closely linked to the duty to promote the exercise of human rights in general. Once the human rights have been established, the states' parties have to fulfil them. It also remains open whether or not states are able to fulfil the human rights as an obligation they have.

The Kampala Convention silently states the obligation the states parties have to fulfil the human rights of internally displaced persons. Article 3 (2) (a) requires states parties to include their responsibilities as specified under the Kampala Convention into various categories to capture the functions herein implied : domestic law and enacting or amending pertinent pieces of legislation regarding people displaced by changes in climate as governed by international law.²⁶⁷ This enables states parties to fulfil their obligations as incorporated in the Kampala Convention by making the obligations law in their states. States parties are required to implement appropriate strategies and policies with respect to displacement at both national and local levels, without ignoring the needs of the host populations.²⁶⁸ Article 4 (2) requires as an obligation state parties to put in place effect disaster management strategies which include giving early warnings, establishing and implementing disaster risk-reduction measure; all this to ensure effective preparedness and management of any eventuality with respect to the effects of climate change.²⁶⁹ The States obligation to fulfil the rights of internally displaced persons also remains the responsibility of each state party. It cannot be disputed that giving warnings before climate disasters is one thing that will be expected of any state. A state that fails to inform the public and other states in general of a climate disaster, such as a cyclone, will have failed to carry out its obligation to fulfil. With many cyclones having taken place in the past, a number of institutions gave out warnings to the public. This means that such institutions have fulfilled their obligations and in line with the above-mentioned instrument.

²⁶⁶ Drzewicki (n 209 above) 31.

²⁶⁷ Kampala Convention, art 3(2)(a) (n 16 above).

²⁶⁸ Kampala Convention, art 3(2)(c) (n 16 above).

²⁶⁹ Kampala Convention art 4 (2) (n 16 above).

There are instruments, however, that fail to create an enabling environment for the fulfilment of the human rights. Docherty and Giannini²⁷⁰ specifically discuss the shortcoming of the UNFCCC. They note that the UNFCCC was not meant for the challenges relating to refugees due to changes in climate.²⁷¹ It does not provide for states' obligation to fulfil human rights of climate displaced persons. Furthermore, though the UNFCCC has a programme to help states with adapting to changes in climate, that programme does not specifically address the situation of climate change displacement.²⁷² The Kyoto Protocol applies directly to climate change, but falls short of establishing states' obligation to fulfil human rights of climate displaced persons. It has legal limitations and it does not address this obligation. The argument presented on states' obligation to promote human rights of climate induced person is applicable to the obligation to fulfil such rights. The obligation to fulfil human rights of refugees is not inclusive of climate displaced persons. Williams²⁷³ points out that refugees due to changes in climate always look forward to their home government for protection and assistance in ways different from those fleeing persecution often by their governments.²⁷⁴ Even though some instruments do not recognise the obligation to fulfil or fails to set it out, States do apply this obligation.

3.5. Conclusion

The states' obligations to look after the people displaced by the effects of changes in climate as provided for by regional and international law, have been vigorously discussed in this chapter. The instruments under AHRS have gaps on the states' obligations to respect, protect, promote and fulfil human rights of climate induced persons. These instruments do not adequately address the issue of displacement. Generally, states have obligations to respect, protect, promote and fulfil human rights. The Kampala Convention fairly provides clarity on these obligations of states. However, the Kampala Convention only addresses the states' obligations towards the rights of internally displaced persons. Thus, it is not aimed at addressing the displacement of those displaced and who have crossed the borders. It is a useful

²⁷⁰ Docherty & Giannini (n 27 above) 358.

²⁷¹ Docherty & Giannini (n 27 above) 358.

²⁷² Docherty & Giannini (n 27 above) 358.

²⁷³ Williams (n 196 above) 512.

²⁷⁴ (As above).

instrument for clarity on the rights of internally displaced persons. Other instruments, *inter alia*, UNFCCC, does not address displacement in its provisions.

CHAPTER FOUR: THE POTENTIAL IMPLICATIONS OF ARTICLE 5(4) OF KAMPALA CONVENTION STATES' BASED OBLIGATIONS FOR STATES IN AFRICA

4.1. Introduction

Chapter 4 presents the potential impact article 5(4) of the Kampala Convention may have on the obligations of states towards climate displaced persons' in Africa. The previous chapters have established the issue surrounding displacement and obligations which States have to respect, protect, promote and fulfil with regards to the human rights of internally displaced persons. The Kampala Convention is the most recent and relevant treaty on states' obligation towards internally displaced persons. Article 5(4) clearly mentions that state parties have obligations for the protection and assistance of internally displaced persons. This chapter explores how the provision may inform the application of state obligations towards persons displaced by climate change at both regional and states' levels. This chapter establishes the expectations on states and the possible responses from the states on how they must carry out their obligations, which stems from article 5(4) of the Kampala Convention. Establishing the potential implications of article 5(4) offers clarity on the understanding which states might require and enable them to envision and fully comprehend the role they have, to ensure the realization and enforcement of article 5(4) and the Kampala Convention in general.

4.2. Article 5(4) of the Kampala Convention

Article 5(4) states that states parties shall ensure the protection and assistance to those displaced internally as a result of natural or human-made disasters, which include changes in climate.²⁷⁵ It has an instructive relevance to state parties in its demand. Treaties are meant to effect change regarding a particular issue, consequently, article 5(4) effects changes around the issue of internal displacement.²⁷⁶ There are several parameters which stem from the analyses of article

²⁷⁵ Kampala Convention, article 5(4) (n 16 above).

²⁷⁶ (As above).

5(4). It has been argued that the entire Kampala Convention can have direct substantive, indirect substantive, direct symbolic and indirect symbolic impact on the domestic legal environment for the protection of internally displaced population.²⁷⁷ From these four parameters stem elements such as norm settings, creation of new laws and domestication of laws, creation of institutions, the urgency on issues of internal displacement and the establishment of momentum in addressing the issue of internal displacement.²⁷⁸ It is necessary to interrogate this position with specific focus on article 5 (4) of the Kampala Convention.

4.3. The Implications of Article 5(4) of the Kampala Conventions²⁷⁹

Adeola²⁸⁰ stresses the point that the aim of treaties is to effect changes within the scope of a particular issue. This may be through norm setting or institution creation, creation and domestication of new laws, establishing urgency for addressing internal displacement issues. Moreover, the main focus of human rights treaties is to orientate responses of participants towards a particular issue.²⁸¹ Arguably, article 5(4), is a tool for measuring the pertinence of the provision and its effect, in determining its utility. As alluded to above, few parameters or implications informed by article 5(4) can be drawn from the obligations of state parties towards climate-displaced persons.

4.3.1. Norm Setting

It is imperative to point out that when referring to norm setting one can immediately note that it creates a particular way of doing things. When it comes to the law, it creates a culture where laws are created and states must comply and abide by. Adeola²⁸² states that since the adoption of the Kampala Convention in 2009, norms have emerged at the national levels as a direct substantive effect of the treaty.²⁸³ This means that states can create laws and set up policies to operationalise article 5(4) of the Kampala Convention. Through these norms, parties can take measures to protect

²⁷⁷ Adeola (n 91 above) 597.

²⁷⁸ Adeola (n 91 above) 603.

²⁷⁹ Kampala Convention, art 5(4) (n 16 above).

²⁸⁰ Adeola (n 91 above) 600.

²⁸¹ Adeola (n 91 above).

²⁸² Adeola (n 91 above).

²⁸³ Adeola (n 91 above) 598.

and assist persons who have been internally displaced by climate change. Through the norm settings and effective application of emerging norms, the instructive authority of article 5(4) towards African countries becomes imperative. It becomes a norm that laws and policies in African countries are established to govern and regulate the internal displacement of people. The general relevance of the entire instrument has been shown through establishment of laws and policies in different states in Africa on internal displacement.²⁸⁴ There is nothing preventing states from relying on article 5(4) to inform urgent steps and guidelines to respond to climate change induced displacement at the domestic level. Hence, article 5(4) can serve as a tool for inspiring direct substantive impact on climate displaced persons.

The fact that there are countries which are recognising the rights of IDP's to an extent that they even incorporate in their framework provisions leveraging from the Kampala Convention, reveals the extent to which the provisions of article 5(4) may influence the norm settings on climate-induced displacement. The critical question that can then be asked is whether this norm setting can be forced on state parties or whether it should be left to the discretion of each state party. International standards can only be presented and not forced because states operate in that space as sovereign and free agents. However, one hopes that since article 5 (4) is to help states respond to climate-induced displacement, a challenge over which they have a duty, states will be more willing to adopt such a normative standard.

A significant instrument that can be used to shed light on norm setting is the United Nations Convention on the Rights of the Child (UNCRC) which requires state parties to implement the rights guaranteed to children.²⁸⁵ State parties to this instrument have no discretion but to comply.²⁸⁶ The Committee on the Rights of the Child (the committee)²⁸⁷ makes recommendations for the incorporation of instruments and

²⁸⁴ Policy Framework on Displacement within Somalia (2014) (Somalia IDPs Policy); Malawi Durable Solutions Framework for Internally Displaced Persons and Floods affected Populations (2015) (Malawi IDPs Framework); Federal Republic of Nigeria National Policy on Internally Displaced Persons in Nigeria (2012) (Nigerian IDPs Policy); Puntland Policy Guidelines on Displacement (2014) (Puntland IDPs Policy).

²⁸⁵ UN Convention on the Rights of the Child, art 4.

²⁸⁶ UN Committee in the Rights of the Child General Comment No 14, (2013), para 18.

²⁸⁷ As above.

adaptation of instruments by states.²⁸⁸ As a result, states such as Ireland have amended their Constitution to give effect to the right of the child to be heard and have their best interests taken into account.²⁸⁹ Similarly, in Welsh, an engagement between children and the government on safeguarding and promoting children's rights, is implemented.²⁹⁰ All of the above stem from the UNCRC. To respond to the challenge of climate-induced displacement, states can incorporate the Kampala Convention. The incorporation of the Kampala Convention will ease the realisation of the protection of the rights of internally displaced persons. It will also compel states to comply with their obligations and as such, it becomes simple to enforce those obligations. It is clear that the provisions of article 5(4) do not enforce the obligations imposed on state parties, just as the UNCRC did not before its incorporation. The incorporation of the UNCRC will lead to the enforcement of children's rights and the incorporation of the Kampala Convention will lead to the enforcement of the obligations of states.

4.3.2. Creation and domestication of Laws and Policies

Article 5(4) requires State Parties to take measures which protect internally displaced persons.²⁹¹ The measures may entail, amongst others, creation and domestication of laws and policies. The creation of laws and policies is a direct substantive impact of article 5(4).²⁹² The development of frameworks, laws and policies by States constitutes a measure to protect and assist persons who have been internally displaced.

Adeola²⁹³ states that much of the progress in the implementation of Kampala Convention comes from the development of law and policy frameworks at various levels of governance.²⁹⁴ Several African countries have developed laws and frameworks drawing provisions from Kampala Convention. Somalia has a Policy

²⁸⁸ U Kilkelly 'The UN Convention on the rights of the child: incremental and transformative approaches to legal implementation' (2019) 23 (3) *The International Journal of Human Rights* 325.

²⁸⁹ Kilkelly (n 288 above); S Hoffman & RT Stern 'Incorporation of the UN Convention on the Rights of the Child in National law' (2020) 28 *International Journal of Children's Rights* 323.

²⁹⁰ S Hoffman & J Williams 'Accountability' in J Williams (ed) *The UNCRC in Wales* (2013) 170.

²⁹¹ Kampala Convention, art 5(4) (n 16 above).

²⁹² (As above).

²⁹³ R Adeola 'Climate Change, Internal Displacement and the Kampala Convention' Policy Briefing: Climate Change and Migration, South African Institute for International Affairs' (2020).

²⁹⁴ (As above) 6.

Framework on Displacement which was established in 2014.²⁹⁵ An example of the influence of article 5(4) can be seen in the Somalia Policy which attempts to respond to consequences of disaster including displacement of people. Also through its Policy Framework, Malawi offers solutions to internally displaced populations affected by floods, such as those who return, resettle or locally integrate.²⁹⁶ This shows that other states can take similar measures in responding to displacement induced by climate change as urged under article 5(4) of the Kampala Convention.

There are other countries with concrete measures that already reflect the expectations of article 5(4) of the Kampala Convention. The Nigerian Policy is very relevant and gives effect to article 5(4) of the Kampala Convention. In its content of policy framework and scope, it is noted that the policy provides a framework for national responsibility towards prevention and protection of citizens and, in some cases, non-citizens, from incidences of arbitrary²⁹⁷ and other forms of internal displacement. Puntland IDPs Policy states that its objective is to deal effectively with the three phases of displacement namely, protection from displacement, during displacement and after displacement.²⁹⁸ These provisions resonate with the position under article 5(4) of Kampala Convention.²⁹⁹

Zambia Guidelines for the Compensation and Resettlement IDPs³⁰⁰ is a policy which stems from Kampala Convention. Its IDPs policy also provides for guidelines relating to protection during displacement. Furthermore, its relevance is on the description of the roles of host communities, humanitarian entity and humanitarian assistance which are the core of the discussion under 4.3.3 below.³⁰¹ African countries such as South Sudan and Niger also have policies and laws on displacement. Niger IDPs Law emphasises the need for durable solutions, the notions of local integration,

²⁹⁵ Policy Framework on Displacement within (2014) (Somalia IDPs Policy).

²⁹⁶ Malawi Durable Solutions Framework for Internally Displaced Persons and Floods Affected Populations (2015) (Malawi IDPs Framework) sec 1.2.1.

²⁹⁷ Federal Republic of Nigeria National Policy on Internally Displaced Persons in Nigeria (2012) (Nigeria IDPs Policy).

²⁹⁸ Puntland Policy Guidelines on Displacement (2014) (Puntland IDPs Policy) sect 1.1.

²⁹⁹ Kampala Convention, article 5(4) (n 16 above).

³⁰⁰ Guidelines for the Compensation and Resettlement of Internally Displaced Persons (Zambian IDPs Policy).

³⁰¹ Zambia IDPs Policy, sec 4-5 (n 300 above).

resettlement and return of internally displaced persons.³⁰² These measures typify what steps states can generally take in responding to climate-induced displacement. The domestication of laws by states means that not only are states bound at national level but they are also reflecting the normative demand of article 5(4) of the Kampala Convention. This means that when a state creates laws based largely on the provision of the Kampala Convention, it can become a tool to hold states accountable for non-compliance or inadequate response to climate-induced displacement.

Other states have failed to give cognisance to the Kampala Convention at national level. This is despite the fact that such states have ratified the Kampala Convention. When a country ratifies a convention, it shows that such country commits to laying down the necessary framework to achieve the goal set out in the convention. States have failed to enforce the Kampala Convention at the domestic level despite ratifying the Kampala Convention. South Africa, for example, has not created any law stemming from any provision of the Kampala Convention. However, the South African Disaster Management Act,³⁰³ which makes provisions on how to manage disasters, was amended to include climate change as one of the factors that can cause disasters.³⁰⁴ The climate change Bill was also passed by the South African Parliament in September 2021. Zimbabwe is one of the first states that showed commitment towards the Kampala Convention by ratifying the Convention in the same month that it was adopted by the AU. Neither has it incorporated or domesticated into law any of the provisions of the Kampala Convention nor has it designated an authority responsible for IDP issues. This puts a restraint on the relevance and importance of the Kampala Convention. More importantly, states that fail to domesticate international laws and in this regard, the Kampala Convention, will not be able give meaning to the intentions of the Kampala Convention. Thus, the provision of article 5(4) will not be given effect to as the obligations of states towards climate-displaced persons in such states will not have been clearly set out. By domesticating a convention, states create an opportunity for the establishment of a framework at domestic level that prevents and responds to internal displacement. States that have not yet translated the provisions of article 5(4) of the Kampala Convention into national legislation can do so

³⁰² (As above).

³⁰³ Act 57 of 2002.

³⁰⁴ Disaster Management Amendment Act 16 of 2015.

in a way that creates a national framework addressing internal displacement in a comprehensive manner. In the context of climate change, it is important for guidelines or regulations of climate change in various states such as, South Africa and Zimbabwe to be amended to fulfil the aspirations of article 5(4) of the Kampala Convention.

4.3.3. Creation of institutions

Institutional formations by African countries established to deal with the issue of internal displacement are the direct impact of article 5(4). An established institution often has methods and equipment to deal with specific aspects for which it was established. As a measure to protect and assist persons who have been displaced by climate change, African countries have engaged in institutional formation. The Conference of State Parties (COSP) to Kampala Convention was held in 2017. Some of the objectives of the COSP were to discuss measures for the effective protection and assistance of internally displaced persons in Africa, and mechanisms for monitoring and reporting on situations of internal displacement.³⁰⁵ The institutional formation of COSP is influenced by the obligation on state parties to take measures to protect and assist persons who have been internally displaced. This is the fundamental aspect of article 5(4).³⁰⁶ In the discussion at the COSP, states parties such as Malawi noted the measures they have taken in their countries to protect persons who have been displaced due to climate change.³⁰⁷ According to Adeola,³⁰⁸ states such as Zimbabwe attach weight to institutional formation, thereby highlighting the existence of a civil protection unit.³⁰⁹ In other African countries, their policies established a national coordination committee required to facilitate the coordination of government decision-making along with national human rights institutions, civil society and international organizations as well as national and international humanitarian agencies.³¹⁰ This is further applicable in other states on the institutional framework,

³⁰⁵ First Session of Conference of State Parties for the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Harare Zimbabwe, 3-5 April 2017, 5.

³⁰⁶ Kampala Convention, art 5(4) (n 16 above).

³⁰⁷ Conference of State Parties (n 305 above).

³⁰⁸ Adeola (n 91 above) 602.

³⁰⁹ (As above).

³¹⁰ Niger Law Relating to the Protection and Assistance of Internally Displaced Persons (Niger NDP Law).

roles and responsibilities and humanitarian assistance which reflect the impact of article 5(4).³¹¹

The institutions are also the foundations from which advocacy, research and campaigns on internal displacement have been advanced.³¹² In the context of climate induced displacement, these institutions can add to their functions by not just being reactive but preventative. To fully align with the expectations under article 5(4), the institutions can advise states on measures to control activities including the execution of climate projects underlying displacement. They can also assist in mobilising funds to cope with displacement associated with climate extreme events. Most of the countries have failed to establish institutions at domestic level as informed by the article 5(4). The UNHCR remains at the centre of addressing displacement. Even though at the institutional level, there are humanitarian human rights organisations that offer protection to the displaced persons, there is no organisation that is globally mandated to assist the internally displaced and many countries have failed to establish institutions that are informed by article 5(4) of the Kampala Convention in their countries. In Mozambique, institutions such as Internal Monitoring Centre (IMC) and the National Institution for Disaster Management and Risk Reduction (NIDMRR) do monitor displacement. In Mauritius, institutions such as the Capacity of Disaster Reduction Initiative (CDRI) has also played a huge role in addressing climate change even though this is not done in the context of displacement. These institutions as informed by article 5(4) of the Kampala Convention help resolve disputes that may arise in areas of displacement. Some of them may monitor states and ensure that government actions conform to their obligations and report on failure to do so.

4.3.4. The urgency and building momentum on climate induced internal displacement affairs

The fundamental element of article 5(4) is the duty required of the state to take measures to protect and assist persons who have been displaced by climate change.³¹³ This provision gives visibility to the issue surrounding internal displacement

³¹¹ Puntland IDPs Policy, sec 4 & 5 (n 298 above).

³¹² Adeola (n 91 above) 6.

³¹³ Kampala Convention, art 5(4) (n 16 above).

due to climate change. Adeola,³¹⁴ states that the Kampala Convention frames perceptions on internal displacement as an urgent concern.³¹⁵ One can argue that this is even more appropriate in the context of climate-induced displacement. Article 5(4) underscores the urgency of responding to climate-induced displacement throughout Africa. This is imperative as Africa states are vulnerable to climate change and are disproportionately affected by the phenomenon. The establishment of the urgency of climate-induced internal displacement is a direct symbolic impact of article 5(4) of the Kampala Convention. It signifies that due to the urgency of climate induced displacement, parties should prioritise the response to climate-induced displacement across all levels of their national life. Options to ensure such prioritisation may include immediate attention to the adverse consequences of climate change linked to displacement, the sensitisation of populations to the reality of climate change and the provision of helpful information to those populations affected by climate-induced displacement. In particular, the role of climate education is key as it enhances the levels of awareness and boost the capacity of all actors to respond to climate-induced displacement.

To signify the urgency of the discussion on internal displacement, yearly anniversaries on internal displacement have become a practice. State Parties are reminded of how, as a legally binding instrument, it frames displacement as a problem that requires comprehensive, structural and long term responses at all levels.³¹⁶ Climate-induced displacement may take central stage at such yearly anniversaries. On such anniversaries, state parties attach weight to the urgency of internal displacement issues.³¹⁷ Hence, there should be nothing that prevents them from focusing on article 5(4) which requires state parties to take measures to protect and assist persons who are displaced by climate change. Such a focus will assist greatly in shaping and influencing states in Africa to recognise the issue surrounding climate-induced internal displacement as an urgent concern. Considering that the process through which article 5(4) of Kampala Convention has built momentum on internal displacement, the issues are not stated in the provision, so, article 5(4) can be useful in mobilising activism by

³¹⁴ Adeola (n 91 above) 602.

³¹⁵ Adeola (n 91 above) 602.

³¹⁶ Adeola (n 91 above) 602.

³¹⁷ See African Union Theme: Year of Refugees, Returnees and Internally Displaced Persons in Africa: Towards durable solutions for forcibly displaced persons in Africa (2019).

the civil society to ensure that climate-induced displacement gains traction at the domestic level. Also, it has the potential for symbolic impact as it can contribute to the works of the states and the civil society as they fulfil their reporting role before the regional treaty-monitoring bodies, namely, the ACHPR and the Committee of Experts on the Rights and Welfare of the Child in Africa (CERWCA).

The process of reporting by states before the ACHPR and CERWCA monitors the extent to which states are implementing the treaty or human rights instruments obligations to which they have ratified. As the enforcement mechanism within the African regional human rights system,³¹⁸ the ACHPR and the CERWCA as established by the AC, protect and promote human rights. Article 62 of the AC³¹⁹ places an obligation on state parties to submit reports before the ACHPR and the CERWCA from time to time. Most of the states, such as Sao Tome and Principe, Somali, South Sudan and Somalia³²⁰ have never submitted any report. Even though other states such as South Africa, Nigeria, Zimbabwe, Tanzania and Mozambique have submitted their reports, none of those reports featured climate-induced displacement. It is argued that due to lack of reporting by states, including on climate-induced displacement, there is urgency to enhance reporting mechanisms, and article 5(4) is useful in changing that trajectory.

4.4. Conclusion

Article 5(4) builds a number of legal frameworks on internally displaced persons in different states. In the development of frameworks and policies, article 5(4) is very influential. Most provisions of states' frameworks and policies are influenced by this provision. The obligation of state to take measures to protect and assist persons who have been internally displaced due to climate change and other natural or human-made disasters, is given implications by article 5(4). Although the provision does not specifically describe what measures states should take, it can guide states to take measures such as developing laws, frameworks and policies, creation of institution,

³¹⁸ S Gumedze 'Bringing Communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Right Law Journal* 118.

³¹⁹ Art 62 of the African Charter on Human and Peoples' Rights of 1981 OAU Doc OAU/CAB/LEG/67/3/Rev 5.

³²⁰ These states ratified the African Charter between 1986 and 2013.

and norm setting, among others. Examples of these are already evident in some legislative environments of certain states, as mentioned in this chapter. There is still a gap on implementation of other measures by states within their different states. However, the chapter has shown that article 5(4) can inform positive development at the domestic and regional levels.

CHAPTER FIVE: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

The study examined the obligation states have towards climate-displaced persons in Africa and critically analysed the nature of the application of states' obligations towards climate-displaced persons under the AHRs. The study addressed the following objectives: examine the concept of displacement and climate induced-displacement under international human rights law; analyse states' obligations towards climate-displaced persons and demonstrate how states' obligations may apply to people displaced by changes in climate under the AHRs; examine the potential implications of article 5(4) of Kampala Convention for states' obligations towards climate-induced displacement in Africa. This chapter provides a brief overview of the research problem, aims and objectives. Thus, it provides the general conclusion and the findings of the study. The chapter also provides recommendations and policies which should be incorporated to protect climate-induced displacement and to enforce and establish application of states' obligations towards climate-displaced persons.

5.2. A brief overview of the research problem, aim and objectives

There is a clear and comprehensive understanding of what climate change entails and its consequences on human population. Displacement due to climate change continues to increase and there has been a range of international instruments on climate change, *inter alia*, those linking climate change and human rights, and those specifying the nature of states' obligations under international human rights law.³²¹ At the African regional level, there is the Kampala Convention which specifically has provisions on climate-induced displacement.³²² However, the lack of clarity on the states' obligations towards climate-displaced persons is problematic for climate-displaced persons who seek to benefit from these obligations, laxity of states in the fulfilment of their obligations, and the judiciary in the enforcement of these

³²¹ Convention on Climate Change (n 8 above); Kyoto Protocol (n 9 above).

³²² Kampala Convention (n 14 above).

obligations.³²³ In light of the above, it was necessary for the researcher to conduct an in-depth assessment and further critically examine the obligations which states have towards climate-displaced persons under the AHRS.

Chapter one revealed the conundrum of the lack of definition of states' obligations towards climate-displaced persons.³²⁴ Furthermore, although states' obligations towards climate-displaced persons may be provided for in certain international treaties, application of such obligations towards climate-displaced persons is not clearly determined.³²⁵ To enable the writer to adequately establish this point of view, there had to be a discussion of the aims of the study. As indicated in chapter one, the aim of the study was to investigate whether states have obligations towards climate-displaced persons due to climate change in Africa, and if so, what nature of their application entails under the AHRS for climate-displaced persons.

International treaties such as the UNFCCC and the Kyoto Protocol specifically have been established to address the issues surrounding climate change. However, although these treaties are at the core of climate change discussion, they fail to determine and provide for the obligations of states towards climate displaced persons. They apply directly to climate change, however, they have legal limitations for dealing with people displaced by climate change.³²⁶ Moreover, UNFCCC primarily concerns state-to-state relations, and does not discuss obligations states have to individuals or communities, such as those laid out in human rights or refugee law.³²⁷ Thus, the study confirms that there is a gap on the provision of states' obligations towards climate-displaced persons under AHRS and international laws, as well lack of clarity on application of the obligations of states towards climate-displaced persons where provision is made.

To achieve the above aims, the study addressed four objectives. The first objective was to examine the concept of displacement and climate-induced displacement under international human rights law. This objective was accomplished in the discussions

³²³ See Chapter 1, sec 1.2.

³²⁴ See Chapter 1, sec 1.2.

³²⁵ Kampala Convention (n 16 above).

³²⁶ Docherty & Giannini (n 27 above) 358.

³²⁷ (As above).

laid out in chapter two. Displacement as a concept under international law was thoroughly examined. It was established that there is no specific definition of displacement under international human rights law.³²⁸ Displacement is defined through distinctions made between and amongst internal and external displacement,³²⁹ voluntary and involuntary (forced or arbitrary) displacement, temporary and permanent displacement.³³⁰ It is apparent from the discussion in this chapter that international human rights law and treaties, do recognise displacement as a concept with distinct categories. Furthermore, the concept of climate-induced displacement was also discussed. Much weight was attached to the distinction between internally displaced and externally displaced persons. On this aspect, the UN Guiding Principles,³³¹ Kampala Convention,³³² amongst others, contain clear definitions of these concepts.

The second objective was to examine states' obligation towards climate-displaced persons under the AHRS. The objective was addressed in chapter three of the study. The obligations which states have to respect, protect, promote and fulfil human rights towards climate-displaced persons are the focal point in this discussion. It was established that states have obligations towards climate-displaced persons under AHRS. The obligations to respect, protect, promote and fulfil human rights towards climate-displaced persons were discussed based on international instruments under the AHRS. The Kampala Convention contains provisions detailing states' obligations to respect human rights of climate-displaced person. The convention provides for this obligation in articles 3, 4(1), and 9(2) (f) of the Kampala Convention,³³³ amongst others. The obligation to protect the human rights of climate-displaced persons was also examined in chapter 3 of this study attaching weight to the Kampala Convention. It was established that the obligation is contained in articles 4 (5), (1) and 9(2) (c) of the Kampala Convention,³³⁴ amongst others. Furthermore, obligations to promote and fulfil human rights of climate-displaced persons under the Kampala Convention were also established and weight was attached to articles 3, 3(2) and 4(2) of the Kampala

³²⁸ See Chapter 2, sec 2.2.

³²⁹ See Chapter 2, sec 2.3.1.

³³⁰ See Chapter 2, sec 2.3.2.

³³¹ Guiding Principles (n 86 above)

³³² Kampala Convention, art 1 (n 16 above).

³³³ Kampala Convention, art 3, 4(1) & 9(2) (f) (n 16 above).

³³⁴ Kampala Convention art 4(5), (1) & 9(2) (c) (n 16 above).

Convention.³³⁵ The Kampala Convention details states' obligations to respect, protect, promote and fulfil human rights of climate-displaced persons. The states' obligations to respect, protect, promote and fulfil human rights of climate displaced persons was established in this discussion. However, the Kampala Convention is a regional instrument on the protection of internally displaced persons and although it is an imperative instrument, it is limited to regional level.

To achieve the objective in Chapter two, other international instruments were also examined. The UNFCCC which applies directly to climate change was also examined as an instrument of international human rights law. It was established that the UNFCCC recognises that climate change has adverse effects, which include displacement of people. However, it does not provide for the human rights of climate-displaced persons. Some authors have even argued that it does not address the issues of displacement. The instrument fails to state the obligations to respect, protect, promote and fulfil human rights of climate-displaced persons. Further discussions were made on other instruments such as the Kyoto Protocol, the Refugee Convention and the Great Lakes Protocol, amongst others. These instruments fail to clearly state the obligations which states have towards climate-displaced persons. Thus, the study established that the Kampala Convention details states' obligations towards climate displaced persons. Chapter three further determined that the Kampala Convention as a regional instrument applies and provides for the recognition of the rights of internally displaced persons. There is a huge gap between obligations at international level and the states' obligations towards climate-displaced persons.

The third objective was to analyse the potential implications of article 5(4) of the Kampala Convention for states' obligations towards climate-induced displacement in Africa. Article 5(4) contains provision of authoritative instructions on states' obligations to take measures to protect and assist persons who are displaced due to natural and human-made disasters, with climate change inclusive.³³⁶ This chapter required a discussion of the actions and measures which state parties have undertaken and which stem from the interpretation of article 5(4). It was established that researches

³³⁵ Kampala Convention, art 3, 3(2) & 4 (2) (n above 16).

³³⁶ Kampala Convention, art 5 (4) (n 16 above).

and campaigns on internal displacement have been advanced which emerged from the Kampala Convention. Laws, policies and frameworks have been developed which mirror the Kampala Convention. African Countries such as Somalia, Malawi, Nigeria, Zambia, South Sudan and Niger have developed laws, policies and frameworks through the guidelines of article 5(4) of the Kampala Convention. This chapter attached weight to the impact of article 5(4) of the Kampala Convention as it influenced laws, policies and frameworks in some African countries.

To achieve the objective under discussion, the chapter further established that most African countries are still reluctant to develop laws and frameworks concerning human rights of climate-displaced persons. Although article 5(4) imposes a duty and a burden on African countries to act within defined boundaries and narrative, the lack of clarity on the enforcement of the article is apparent. Some African countries have developed the laws and frameworks concerning climate induced displacement of people. However, many other African countries do not have any policies, laws or framework on this subject. This chapter further established that the imposition made by article 5(4) of the Kampala Convention fails to detail the mandatory element of the provision. Failure and unwillingness by states to establish the laws, policies and framework do not warrant consequences or any other form of action. This lack of enforcement therefore, undermines the intent of article 5(4) and its general application.

It was also revealed in chapter four that states can rely on article 5(4) to inform urgency on taking steps and guidelines to respond to climate-induced displacement at the regional level which may inspire development at the domestic level. This was further confirmed by a number of states that have domesticated the Kampala Convention. Even though the norm setting cannot be forced on a state, states will be more willing to adopt the normative standard of incorporating, in their frameworks, provisions leveraging from the Kampala Convention. The normative demand of article 5(4) is revealed by the domestication of the Kampala Convention by the states. This creates an opportunity for states to be bound and held accountable for failure to comply or respond to climate-induced displacement beyond the regional level. As such, immediate attention should be taken to deal with the adverse effects of climate-induced displacement. The chapter further revealed that article 5(4) can build a momentum through which climate-induced displacement can gain traction at the

domestic level and that it has the potential symbolic impact in that it can influence states to fulfil their reporting obligation before the regional treaty monitoring bodies.

The last objective of the study was to recommend measures which should be incorporated to advance the protection of the human rights of climate-induced persons and to enforce and establish application of states' obligations towards climate-displaced persons. This objective is discussed in this chapter.

The research question of this study was to determine whether states have obligations towards displaced persons due to climate change, and if so, what are they and how do the obligations apply under the AHRS to climate-displaced persons? This question was answered largely in chapters three and four of the study. In answering the research question, the study achieved the objectives discussed.

The study adopted a desk-based research methodology. The author relied on literature study of relevant instruments in Africa and at international level, text books and case law. The researcher further employed contributions made by other scholars and published at both international and national level with specific reference to Africa. The methodology enabled the researcher to establish the problem statement and determine the objectives of the study. Thus, the selected research methodology was appropriate for the study.

5.3. Recommendations

In the light of the above findings, the study proposes the following recommendations;

5.3.1. Establishment of a body to close the gap between creation of the laws and implementation

Specific efforts are needed to recognise states' obligation to respect, protect, promote and fulfil human rights of those vulnerable as a result of climate change. This can be done through the establishment of a monitoring body at the regional level to specifically focus on the plight of climate induced displaced persons and groups with the purpose of addressing legal deficits in the legislative environment at the domestic

level. It is important that such a body be established that oversees efforts by state parties to comply with it and act within a specific time frame of the provision of article 5(4) of the Kampala Convention. Even though a number of states may ratify instruments, they are not compelled to implement such instruments into laws. This leaves the gap between creating the law and implementing it. It is recommended that this body that can be established to address such a gap may also be of such a nature that failure to comply with its objectives and recommendations will have consequences. This body can be established as informed by the provisions of article 5(4) of the Kampala Convention and can then be the centre for enforcing the objectives of article 5(4). Its mandate may include advising state parties on the application of article 5(4) of the Kampala Convention, how the obligations to respect, protect, promote and fulfil human rights towards climate displaced persons may apply and what the nature of their application means for climate-displaced persons under the AHRS. This body, as it may be informed by the provisions of article 5(4) of the Kampala Convention may, for example, recommend that state parties must develop laws at their level of governance which relates to climate-related displacement and which provides for responsibility towards respecting, promoting, protecting and fulfilling the rights of those displaced by climate change. When a state creates laws based on the provisions of the Kampala Convention, such laws must be binding on such states. This body will make it mandatory for states to implement these laws.

5.3.2 General accountability plan

As already outline, the AC imposes on member states an obligation to report before the regional treaty monitoring bodies. Two of the regional bodies that enforce this reporting obligations are the ACHPR and the CERWCA. There is, however, no accountability for failure to report within the required time frame. This study proposes that State Parties must be held accountable for failure to report before the treaty monitoring bodies. The nature of punishment can be determined by the treaty monitoring body depending on the extent of the failure to report on the part of a State Party. The failure by State Parties to report before the relevant treaty monitoring bodies is influenced by the fact that there are no consequences for failure to do so and that there is no precedent on how to address such failures. This is because the accountability by states towards respecting, protecting, promoting and fulfilling human

rights and in this regard, the rights of those displaced by climate change, is not clearly set out. Therefore, it is recommended that states must be held accountable and the nature of the consequences that follow the failure by the states to comply will be determined by the body responsible for bridging the gap between creations of laws and implementing such laws.

It was further revealed that even though there are states that have complied with the obligation to report, none of them has done so within the context of climate-induced displacement. The study proposes a need for the inclusion of climate-related issues in state reporting and that there is also a need for individuals and member states to bring complaints before the ACHPR and the CERWCA where a state legislative environment is found incompatible with the provisions of article 5(4) of the Kampala Convention. Even though different complaints have been brought before the ACHPR and the CERWCA, none of the relates to climate-induced displacement and as such, there has been no instance where a complaint related to the obligations of states towards climate-displaced persons as informed by article 5(4) of the Kampala Convention.

5.3.3 Policy interventions and resolutions

Efforts have been made through different policies and resolutions which dealt with climate change related displacement. However, none of those policies and resolutions gave meaning on how the obligations under human right law in relations to climate-induced displacement may apply to such persons. The study proposes that it is ideal to intensify the focus on climate-induced displacement through policies and programs that ease adaptation and management of climate-induced displacement. The policy interventions and resolutions can inform emergency response to climate change related displacement through recognising the special needs of climate-induced displacees and support different alliances that give cognisance to the needs of climate-induced displaced persons. These policies and resolutions can also recognise the implications informed by article 5(4) of the Kampala Convention and make the application of such implications practical. The body that closes the gap between creation of laws and implementations can be guided by the policies and resolutions as alluded to above.

5.3.4 Intensify studies and investigations

It is clear from this study that studies have been conducted in relations to climate change and the relevance of climate displacement has gained momentum. However, there is scanty investigations and researches on climate-induced displacement, specifically on how persons displaced by climate change can be protected by states. The study recommends thorough investigations and studies on the need to protect persons displaced by climate change. With sufficient research and studies, the relevance and importance of climate-induced displacement as a fundamental human rights challenge can be established. This will make it possible to establish the gap between creation of law relating to climate change and implementing same. It will further make it possible to close such a gap through a body that would have been established for such purposes and with guidance from the policies and resolutions, it will also be possible to ensure that there is accountability.

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