

**The legal protection of cross-border climate-induced displaced persons in
Southern Africa**

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Speak up for those who cannot speak for themselves, for the rights of all who are destitute.
Speak up and judge fairly; defend the rights of the poor and needy.

Proverbs 31:8-9

List of Abbreviations

AU	African Union
CBD	Convention on Biological Diversity
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
GHG	Greenhouse Gas
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced Persons
IIED	International Institute for Environment Development
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel on Climate Change
LiSER	Living Space for Environmental Refugees
MOU	Memorandum of Understanding
OHCHR	Office of the High Commissioner for Human Rights
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
SIPO	Strategic Indicative Plan for the Organ
SIS	Small Island States
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNEP	United Nations Environment Program
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees

Summary

The purpose of this study is to determine the extent to which existing law could provide a legal basis for the protection of cross-border, climate change displaced persons, with a particular focus on Southern Africa. Before such an analysis can be made, however, it is important first to determine what climate change displacement exactly implies. By means of integrating and refining existing legal terminology and ideas the study attempts to disentangle the international contention on the subject and proposes that individuals who are forced from their countries of habitual residence as a reaction primarily to climatic push factors which pose an existential threat to their right to life are most in need of protection and may be referred to as cross-border climate change displaced persons.

As climate change displacement is expected to occur primarily on the sub-regional geopolitical level of governance, the inclusion of regional, AU, and sub-regional, SADC, elements is important for the practical feasibility of this study. Southern Africa's particular vulnerability to the effects of climate change, making the advent of large numbers of climate change displaced persons in the area a reasonable prediction for the future, further justifies this study's chosen scope.

After analysing the different legal branches of refugee law, human rights law and environmental law for each geopolitical level of governance referred to, this study concludes that: While there are several potential provisions in law that could provide protection to persons displaced by climate change, a sufficient protection framework can be derived only from the composite characteristics of different branches of law. Therefore, it is recommended that a matrix approach is followed when providing legal protection to climate change displaced persons. Because different fields of law provide more prominent protection in different spheres of governance, it is also recommended that the configuration of a legal protection matrix be adjustable to particular circumstances. It is therefore suggested that a legal protection mechanism is developed for each geopolitical sphere, and that different mechanisms are coordinated internationally.

1 Introduction

Even though one function of law is to give stability to institutions and predictability to the results in action, often the strength of law will lie not in immutability but in capacity for change and flexibility in the face of new forces.¹

While the international debate continues over finding the most suitable and equitable ways to mitigate and adapt to the effects of climate change,² an increasingly severe humanitarian disaster is gradually unfolding. Although it is acknowledged that migration is an age-old strategy for adapting to environmental change, and therefore does not necessarily present any reason for major concern, climate change is said to exacerbate the intensity and scale of environmental disruptions and accordingly also human migration and displacement.³ On these unprecedented scales, migration could hold devastating consequences for the living standards and even the continued existence of communities worldwide. For this reason, the role of climate change in causing the displacement of individuals, communities and in some cases entire nations, is deserving of the increased attention it receives *inter alia* in academic discourse.⁴

As early as 1990 the Intergovernmental Panel on Climate Change (IPCC) noted that the greatest impact of climate change may be on human migration.⁵ If this is not already the case, forced environmental migration could give rise to the worst humanitarian disaster yet experienced by mankind. Various scholars have attempted a guess at the total number of environmentally displaced persons in the world

1 Trelease "Climate Change and Water Law" 70-84.

2 UNFCCC 2012 <http://unfccc.int/2860.php>.

3 Williams 2008 *Law and Policy* 502; King 2005 *Georgetown International Environmental Law Review* 556.

4 Scholtz 2011 *South African Yearbook of International Law* 36-55; Williams 2008 *Law and Policy* 502-529; McAdam (ed) 2010 *Climate Change and Displacement*; McCue 1993 *Environmental Law* 154-190; Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 1-19; King 2005 *Georgetown International Environmental Law Review* 543-565; Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement"; Lopez 2007 *Environmental Law* 365-409; Cooper 1997 *New York University Environmental Law Journal* 480-529; Biermann and Boas 2010 *Global Environmental Politics* 60-88; Kibreab 1997 *Disasters* 20-38; Keane 2004 *Georgetown International Environmental Law Review* 209-223.

5 IPCC *First Assessment Report: Working Group II*, 1990 5-9.

today.⁶ While precise figures are lacking, it is estimated that tens of millions of people will be forced to migrate within the next few decades as a result of human induced environmental change.

Africa has a particularly vulnerable environmental disposition.⁷ Unsustainable agricultural practices, the limited availability of and access to resources, and extreme climatic events are among the factors which have contributed to the fact that over half of worldwide environmental migration takes place on this continent.⁸ In this regard, Griffiths states as follows:

From Cape to Cairo, Mozambique to Morocco, Somalia to Senegal, the continent of Africa is beset with life-threatening, large-scale problems. Famine and starvation, civil war and boundary bickering, crippling debt and crumbling infrastructure, plummeting economic performance and soaring population growth, burgeoning human disease and a devastated physical environment are features of everyday life in almost all parts of Africa.⁹

Environmental problems are worsened (and sometimes caused) by a multitude of factors inimical to the African continent. Major factors which have up until now hampered regional environmental governance include: the continent's colonial past;¹⁰ countries' strict adherence to the principle of state sovereignty;¹¹ institutional- and legal fragmentation; poor leadership; and bad governance generally.¹² Furthermore Africa faces many geographic challenges such as: arbitrary state borders;¹³ many landlocked countries;¹⁴ and either very small states which are not economically viable, or some very large states which are generally sparsely populated.¹⁵ These factors contribute towards causing the kind of environmental deterioration which is conducive to large-scale displacement.

6 Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 2; Myers and Kent 1995 *Environmental Exodus*; Williams 2008 *Law and Policy* 506; Keane 2004 *Georgetown International Environmental Law Review* 210.

7 *IPCC Fourth Assessment Report: Working Group II*, 2007 436-460. Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 2.

8 Cooper 1997 *New York University Environmental Law Journal* 504.

9 Griffiths *The African Inheritance* 1.

10 Griffiths *The African Inheritance* 22-59.

11 Duruigbo "Pioneering Models for International Project Finance and Adjudication through Shared Sovereignty" 206.

12 Adibe 2009 *African Renaissance* 38.

13 Abraham "Africa and its Boundaries a Legal Overview" 273.

14 Griffiths *The African Inheritance* 5.

15 Griffiths *The African Inheritance* 75 and 170.

Environmentally displaced persons¹⁶ can be subcategorised into either internally displaced or cross-border displaced persons. Internally displaced persons (IDPs) are broadly defined as those persons who have moved "involuntarily within the borders of a country, irrespective of the cause".¹⁷ Over the last decade, much progress has been made towards addressing the legal protection *lacuna* regarding IDPs. This culminated in the formulation of the *United Nations' Guiding Principles on Internal Displacement* (Guiding Principles).¹⁸ In many African countries two instruments springing from the Guiding Principles are already legally binding.¹⁹ By adopting the *Protocol on the Protection and Assistance of Internally Displaced Persons, 2006*²⁰ (Great Lakes Protocol) and the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009* (Kampala Convention),

16 "Environmentally displaced persons" are those individuals who are forced from their places of habitual residence as a reaction primarily to climatic push factors which pose an existential threat to their right to life (see par 2.4).

17 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 275. See also UNESCO 2012 www.unesco.org/shs/migration/glossary; The *United Nations' Guiding Principles on Internal Displacement* identifies IDPs as: "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border". Par 2; Article 1(k) of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009* (Kampala Convention) contains a word-for-word echo of this definition. According to Scholtz (see Scholtz 2011 *South African Yearbook of International Law* 45), the principal criterion present here is found in the words "involuntary (forced) movement without crossing any borders". Scholtz argues that the use of the words "in particular" is an indication that the list of causes is "illustrative and not exhaustive". This, together with the inclusion of "natural...disasters" as one of the listed causes, brings him to the conclusion that this description does indeed provide for climate-induced migration. Article 5(4) of the Kampala Convention supports this conclusion by adding that state parties will "take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change".

18 The Guiding Principles incorporate elements of international humanitarian law, human rights law and refugee law, which seek to provide protection to all internally displaced persons. The Guiding Principles do not create new legal obligations, but rather package already existing rights into one coherent document. Even though these principles are not binding international law, they provide an important soft law framework for the protection of IDPs. As more states choose to adopt them into their national legislation and policies, the Guiding Principles are becoming increasingly self-enforcing. Some suggest that they could in future possibly become customary international law, which is universally binding (see Kälin 2008 *Forced Migration Review* 5-6; Scholtz 2011 *South African Yearbook of International Law* 46-46).

19 African countries who have already ratified the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* by 17 June 2013 include Angola, Benin, Burkina Faso, Central African Republic, Chad, Gabon, Gambia, Guinea-Bissau, Lesotho, Mali, Malawi, Nigeria, Niger, Rwanda, Sierra Leone, Swaziland, Togo, Uganda and Zambia (see African Union 2013 <http://www.au.int/en/treaties>).

20 This is a Protocol on the *Pact on Peace, Security, Democracy and Development in the Great Lakes Region* (entered into force on 21 June 2008).

Africa is taking the lead with regards to the legal formalisation of the Principles.²¹ The Kampala Convention is the African Union's (AU's) initiative to establish a legal framework for the "protection and assistance" of IDPs.²² This document integrates the Guiding Principles into the legal systems of African states.²³ This is the first legally binding regional instrument to impose the obligation on states to protect and assist IDPs. Therefore, in Africa especially, it seems that significant progress is being made towards addressing the needs of IDPs. The same can, however, not be said of cross-border displaced persons.²⁴

In most cases, cross-border environmentally displaced persons, even though they might for all practical purposes be regarded as "refugees", are afforded no such protection under the current international law framework.²⁵ In terms of the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969, for example, "environmental refugees" can at best be afforded only temporary protection and in terms of the 1951 *Refugee Convention*, they are not even regarded as refugees (and therefore do not qualify for any protection whatsoever).²⁶ This dissertation therefore singles out cross-border environmental displacement as a subject which, rather than environmental displacement in the broad sense (including IDPs as well as persons displaced across borders) should now be afforded special attention by the international community. While it is widely argued that environmental displacement occurs primarily within state borders,²⁷ Williams is of the opinion that

21 Such eagerness might be regarded as a positive indication of African countries' willingness to take the lead in finding cooperative solutions for its many problems, but the continent's poor track record when it comes to the eventual implementation of international and regional treaties such as these leaves one unconvinced by overly optimistic sentiments. In this regard see also Mbondenyei *Investigating the challenges in enforcing international human rights law in Africa* 1-551.

22 Preamble to the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, 2009.

23 As of December 2012, with Swaziland's ratification, the convention has been in force and binds 17 countries together with 39 other African signatories demonstrating their commitment to the convention (see Internal Displacement Monitoring Centre 2013 <http://www.internal-displacement.org/kampala-convention>).

24 Cross-border displaced persons consist of those individuals who have crossed an internationally recognised state-border (see Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 277).

25 Keane 2004 *Georgetown International Environmental Law Review* 217; Lopez 2007 *Environmental Law* 367; McCue 1993 *Environmental Law* 154; Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 1; Williams 2008 *Law and Policy* 502

26 Miranda 1989 *California Western International Law Journal* 323.

27 Scholtz 2011 *South African Yearbook of International Law* 42; Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 8.

"internal displacement may well lead to transborder displacement in the long term" as the state of the environment keeps deteriorating.²⁸ This further emphasises the point that an unbalanced focus on IDPs fails to appreciate the magnitude of the displacement problem.²⁹ Together with this, the IDP and refugee law regimes do not recognise the needs of environmentally displaced persons based on "their own intrinsic value and circumstances".³⁰

In the light of the above, it becomes clear that there are apparent shortcomings from a legal protection perspective to address the plight of cross-border environmentally displaced persons. While some writers argue for a new legal instrument such as a treaty or convention for the specific protection of environmentally displaced persons to be created,³¹ others suggest that existing instruments such as the *Refugee Convention* of 1951 should be amended to incorporate these individuals into its definition of a "refugee".³²

Whichever route is eventually followed, an important question arises around the legal basis for a protection framework. The question which needs asking is to what extent existing legal frameworks provide for the protection of persons displaced by climate change? When searching for answers it is useful also to narrow the focus to a regional and sub-regional geopolitical level. Considering that environmentally displaced individuals seem to generally move over relatively short distances, it is on the sub-regional level that cross-border environmental displacement seems most likely to occur.³³ Therefore closer regional- and especially sub-regional cooperation between bordering states is expected to play an important role in providing for their legal protection.³⁴ Because of the need for such protection in Africa especially (for the reasons highlighted above) and because of the apparent lack of scholarly and

28 Williams 2008 *Law and Policy* 513.

29 Williams 2008 *Law and Policy* 513.

30 Williams 2008 *Law and Policy* 513.

31 Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 10; McCue 1993 *Environmental Law* 177.

32 Cooper 1997 *New York University Environmental Law Journal* 488-501.

33 Kibreab 1997 *Disasters* 28; Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 8.

34 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 284, observe that: "Due to the causes of the existential threat – socio-economic and environmental problems that often lead to poverty – it is likely that survival migration occurs regionally rather than intercontinentally."

policy work in this regard on a sub-regional level, this study seeks to determine to which extent the existing international law, AU- and Southern African Development Community (SADC) law frameworks offer a legal basis for the protection of cross-border climate change displaced individuals.

The study will draw from the fields of human rights law, refugee law and environmental law by means of a literature review and critical analysis of relevant textbooks, academic journals, international instruments, legislation and case law relating to environmentally displaced persons. To gain a better understanding of the issues at hand, section 2 will describe and define the most important notions and concepts related to environmental displacement. Subsequently, section 3 will turn towards an outline and discussion of the international law framework providing for climate change displacement. Sections 4 and 5 will continue along these lines by narrowing down towards the regional and sub-regional scales of the AU's and SADC's respective legal frameworks. The final section will conclude with findings and recommendations.

2 Key concepts and perspectives

2.1 Introduction

Different scholarly works on the subject of environmental migration show a range of terms which alternately refer to more or less the same phenomenon. Some writers refer to "environmental-³⁵ or climate change refugees",³⁶ others to "climate induced migrants",³⁷ "survival migrants",³⁸ "environmentally displaced persons",³⁹ or "ecological refugees".⁴⁰ At first glance one might easily regard these terms as being synonyms. Yet, as one delves deeper, cutting to their definitional core and considering the different normative orientations and methodologies analysts use, it becomes clear that they differ to varying extents.

Even though agreeing on a suitable term appears to be profoundly challenging amidst a playing field of diverse analysts including, amongst others, humanitarians, politicians, government officials and legal specialists, finding such consensus is becoming increasingly important. It has been observed that definitional shortcomings and conceptual disagreements provide "the political opportunity for the securitisation of climate-induced migration and a deeper obsession with border security".⁴¹ Together with the resultant inaction which further draws out human suffering, this makes the speedy formulation of a universally recognised concept all the more necessary. McAdam describes the current definitional malaise as follows:

35 Cooper 1997 *New York University Environmental Law Journal* 480-529; Keane 2004 *Georgetown International Environmental Law Review* 209-223.

36 Williams 2008 *Law and Policy* 502-529.

37 White *Climate Change and Migration* 1-180.

38 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 277.

39 King 2005 *Georgetown International Environmental Law Review* 543-565; Lopez 2007 *Environmental Law* 365-409; Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 1-19.

40 Westra *Environmental Justice and the Rights of Ecological Refugees* 47.

41 White *Climate Change and Migration* 20; Schwartz and Randall hold that military confrontation may be triggered by the effects of climate change, such as a shortage of natural resources including energy, food and water (see Schwartz and Randall 2004 <http://global-warning.org/main/documents/an-abrupt-climate-change-scenario/>). While securitisation is understandable in the sense that it would be in the national interest of States to protect their natural resources by means of stricter entry requirements, these stricter measures would in all likelihood be to the detriment of climate change displaced individuals seeking safety across international borders.

...the fact that there is still no internationally agreed definition of what it means to be an environmental "migrant", "refugee", or "displaced person" makes it difficult to systematically progress deliberations about appropriate multilateral legal and institutional responses. Questions of definition have governance implications, because they inform the appropriate location of climate-related movement institutionally—as an international, regional or local, developed and/or developing State concern/responsibility—as well as normatively—for example, within the existing refugee protection framework or under the UN Framework Convention on Climate Change (UNFCCC).⁴²

The formulation of uniformly used legal terminology on the subject could assist in providing greater legal certainty and clarity. It will serve to refine the concept in such a way as to help indicate who environmental migrants are and in which circumstances they need protection. It will also provide important guidance when determining which branches of the law might be applicable when formulating an eventual legal protection framework. This section will attempt a move in this direction by identifying and explaining key definitions, concepts and perspectives surrounding climate-induced movement. Subsequently, by means of integrating and refining the existing terminology, suggestions will be made of potential terms which could be used uniformly in later writings and discussions on this subject. Before this study analyses the law in search of jurisprudence which could provide protection to climate change displaced persons, it is important to better understand the nature of climate change displacement. Therefore, insights gained by means of this terminological clarification should also be of value to the remainder of this study.

2.2 Terminological clarification

Before turning to the finer terminological aspects contained within the notion of climate change displacement, it must firstly be noted that the idea of "environmental" displacement is contentious to begin with.⁴³ Many writers concur that one of the main challenges with the notion of environmental displacement is that movement is almost

42 McAdam *Forced Migration, and International Law* 7.

43 "Climate change displacement" forms a subcategory of the broader concept of "environmental displacement". In other words, all cases of climate change displacement could be classified as a particular kind of environmental displacement, while all forms of environmental displacement cannot necessarily be seen as climate change displacement. For example, displacement caused by a volcanic eruption or by the poisoning of drinking water cannot be seen as climate change displacement, but as such displacement would essentially be environmentally motivated it could classify as environmental displacement (see McCue 1993 *Environmental Law* 157-163).

never motivated by environmental causes alone.⁴⁴ Establishing a clear link between environmental change and displacement often proves very difficult in practice, because most often the environmental factor forms part of a more complex and interrelated pattern of social, political and economic factors also contributing towards causing this phenomenon.⁴⁵ It is therefore generally "difficult if not impossible to isolate one factor" as the sole cause for displacement.⁴⁶ Even so, in cases of climate change displacement it could be said that the environmental factor is very strong (such as the complete disappearance of an island state as a result of a rise in sea level), while it is possibly much weaker in many other cases of environmental displacement, where social, economic and political factors also motivate individuals' decision to move.⁴⁷ Together with mounting evidence that climate change and its associated effects such as rising sea-levels, the melting of glaciers, droughts, water scarcity, desertification and extreme weather patterns are increasingly leading to forced community relocation and resettlement, this justifies this study's focus on climate change displacement in isolation from the broader and more contentious concept of environmental displacement.⁴⁸ Even though climate change might, in turn, give rise to social, economic and political unrest, the environmental factor will always be a primary catalyst for movement in these instances.

2.2.1 Environmentally displaced persons defined as "environmental refugees"

The term "environmental refugees" was coined by Kibreab in a 1984 International Institute for Environment Development (IIED) briefing document,⁴⁹ yet most authors cite the El-Hinnawi definition as the first attempt at conceptualising the notion. El-Hinnawi, defined environmental refugees as:

Those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or

44 Black 2001 <http://www.unhcr.org/3ae6a0d00.html>; Keane 2004 *Georgetown International Environmental Law Review* 209-223; Scholtz 2011 *South African Yearbook of International Law* 36-37; Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 277; Castles 2002 <http://www.unhcr.org/3de344fd9.html>.

45 Keane 2004 *Georgetown International Environmental Law Review* 211.

46 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 276.

47 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 278.

48 Williams 2008 *Law and Policy* 504.

49 Kibreab 1997 *Disasters* 21.

triggered by people) that jeopardised their existence and/or seriously affected the quality of their life.⁵⁰

With this definition he distinguishes among three broad categories of refugees: "persons who are displaced temporarily and who can return to their habitat once the environmental damage has been remedied; permanently displaced persons; and persons who migrate in search of a better quality of life due to the fact that their original habitat has been degraded to such an extent that it does not meet their basic needs".⁵¹ The definition, however, does not provide one with generic criteria to separate environmental refugees from other types of migrants, nor does it distinguish between different types of environmental migrants.⁵² For this reason one would need to delve deeper, conceptually, when searching for a more suitable legal definition of the notion of environmental displacement. Nevertheless, the El-Hinnawi definition and subsequent writings did serve an important purpose by popularising the notion to such an extent that by the 1990s "environmental refugees" had become a felicitous catch-all term.⁵³

2.2.2 Environmentally displaced persons defined as "environmental migrants"

The International Organisation for Migration (IOM) defines "environmental migrants" as "groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad".⁵⁴ The inclusiveness of this definition can be quite challenging because, in addition to IDPs, it encompasses voluntary as well as forced "migrants" (see below). This is one of the reasons why the UNHCR has criticised this definition as being too broad to be useful and it seems as if the inclusion of IDPs as migrants would risk "clouding international legal terminology that reserves the label for someone living and working in another

50 El-Hinnawi *Environmental Refugees* 4; "Environmental disruption" in this definition means any physical, chemical and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life".

51 Scholtz 2011 *South African Yearbook of International Law* 38.

52 Bates 2002 *Population and the Environment* 469.

53 Kibreab 1997 *Disasters* 21.

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

country".⁵⁵ Even though it does provide some guidance on the matter, as was the case with the El-Hinnawi definition, the IOM's definition of an "environmental migrant" is perhaps too broad to be of use in the legal context.⁵⁶ When searching for legal protection mechanisms "priority setting" is required and it is therefore necessary to further distil the term "forced displacement" in order to find its definitional essence.⁵⁷ During the "distilling process" there are certain key concepts which stand out in importance. McAdam suggests that the three main conceptual factors which "will shape legal and policy responses will be whether movement is perceived as being (a) voluntary or forced; (b) temporary or permanent; and (c) internal or across an international border".⁵⁸ Before turning to the conceptual factor of voluntary- versus forced-; and temporary- versus permanent displacement,⁵⁹ another concept of importance and which strongly relates to voluntary- versus forced displacement is the matter of "displacement" versus "migration".

2.2.3 "Displacement" versus "migration"

King provides a different and possibly more useful definitional approach than that of El-Hinnawi and the IOM, by distinguishing between migration and displacement. According to her, the term "migrant" implies that movement takes place proactively, whereas "displacement" refers to reactive movement.⁶⁰ In other words, migrants are individuals who notice a deteriorating environment, for example, and make a move in anticipation of a better quality of life elsewhere. Such persons are motivated by a range of both push and pull factors.⁶¹ Displacement is much less planned and environmental deterioration much more acute. This, for example, is where an individual escapes from a life-threatening situation to a place of relative safety. Such

55 White *Climate Change and Migration* 29.

56 The IOM does clarify this conceptual dilemma to a certain extent, however, by means of the distinct definitions it provides for "forced migration" and "facilitated migration": IOM 2013 <http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#Facilitated-migration>.

57 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 278.

58 McAdam *Forced Migration, and International Law* 6; The matter of internal versus cross-border displacement has already been covered to some extent in section 1.

59 See par 2.4.

60 King 2005 *Georgetown International Environmental Law Review* 555.

61 Examples of push factors could be the deterioration of agricultural land, the depletion of forests, a rise in sea level or violence resulting from the competition for resources in the country of origin. Pull factors could be connections with relatives in the receiving country, job opportunities, cultural similarities to the country of origin etc.

movement is primarily motivated by push factors.⁶² It is possible, however, that "migrants" in this sense can at a later stage become displaced if the environment deteriorates to such an extent in the country of origin that return becomes impossible. McAdam, again, in a manner reminiscent of King's explanation, reserves the term migration for instances where there exists "a degree of decision-making in the nature, timing, and location of movement", whereas the term "displacement" is used "to denote a response to a sudden extreme weather event, such as a flood, a cyclone, or the collapse of a riverbank, even though people may only move temporarily or over a short distance".⁶³ This view of displacement could be seen as being inconsistent with that of King, as this explanation (a flood, a cyclone or the collapse of a riverbank) seems more indicative of a short-lived and therefore temporary move, while King's explanation of displacement also provides for an element of permanency to such a move.⁶⁴ Another suggestion is that of Morel and Maes. They use the term "migration" when referring to cross-border movement and "displacement" when referring to internal movement.⁶⁵ Even though it could be useful to make such a simple distinction between migration and displacement, it must be noted that this distinction renders the word "Internally" in "IDP" redundant: if the term "displaced" already incorporated the internal nature of the movement, it would be unnecessary to add the adjective "internally" to "Internally Displaced Persons". This would almost certainly further confuse existing legal terminology used for internal displacement. Nevertheless there is no generally accepted definition of a migrant in international law⁶⁶ and writers interchangeably refer to "environmental migration", "climate-induced displacement", "forced migrants", "displaced persons" or "climate change refugees". Because the interpretation of these terms could be a rather

62 King 2005 *Georgetown International Environmental Law Review* 555-556.

63 McAdam *Forced Migration, and International Law* 6.

64 See par 2.4.

65 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 275.

66 Kälin "Conceptualising Climate-Induced Displacement" 89; The only definition to be found in an international treaty is that of a "migrant worker" included in Art 2(1) of the *International Convention on the Protection of Rights of All Migrant Workers and Members of their Families*, 1990 which means "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". This definition does not provide much assistance in the case of climate-induced displaced persons for even if they become employed, these individuals are mainly in need of protection and assistance and their decision to leave was not made on the basis of economic considerations only.

subjective undertaking (possibly resulting in divergent views), it is important to clarify the meaning one gives to these terms.⁶⁷

For the reasons given above and to avoid further confusion it is suggested that King's approach or a similar approach is used uniformly when referring to different cases of environmental movement.⁶⁸ Consequently, King's approach will be followed for the remainder of this dissertation. Thus, "migration" will be used when referring to voluntary movement whereas the term "displacement" is reserved for coerced or forced movement where individuals face an existential threat to their right to life. Another closely related definitional issue which flows from the above is the much discussed issue of "voluntary" versus "forced" displacement.⁶⁹

2.2.4 Voluntary versus forced displacement

The importance of this particular definitional issue lies in the reasoning that "the sense of volition is crucial to how and whether relief or refugee status should be accorded to the person in flight."⁷⁰ In certain instances of climate induced displacement (such as slow-onset environmental degradation) climate change migration is more voluntary than in other cases where it appears to be completely forced (such as some sudden-onset disasters, disappearing SISs or forced removal).⁷¹ When one integrates the above distinction between migration and displacement with King's explanation of voluntary versus forced displacement, it becomes clear that migration will always be more voluntary than forced, whereas displacement will always be forced. One might therefore integrate the respective conceptual factors (of "migration versus displacement" and "voluntary versus forced") by referring to "voluntary migration" and "forced displacement" in these

67 Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 275.

68 Others also share the basic sentiments of King's approach. See also Suhrke & Visentin 1991 *Ecodecision* 73-74.

69 McAdam *Forced Migration, and International Law* 17-18; 1997 *New York University Environmental Law Journal* 498; Kibreab 1997 *Disasters* 20-38; Keane 2004 *Georgetown International Environmental Law Review* 216; Scholtz 2011 *South African Yearbook of International Law* 39; Morel and Maes "The Curious Phenomenon of Environmental Migration/Displacement" 276-278.

70 White *Climate Change and Migration* 26. See also Zetter "Protecting People Displaced by Climate Change" 140-141.

71 See Kälin "Conceptualising Climate-Induced Displacement" 84-86 for an analysis of different scenarios which might possibly lead to climate induced movement.

conjunctive forms. The distinction between voluntary and forced movement can, however, be vague and in most cases it falls somewhere in between the two extremes of either completely voluntary migration or completely forced displacement.⁷² It is important to draw a clear distinction between these two poles in order to determine which of the cases is in most dire need of international protection⁷³ and which protective measures are needed. Integrating respective conceptual factors to form "voluntary migration" and "forced displacement" could provide guidance towards this end. When putting King's approach with regard to migration and displacement to further use, the characteristics given to these terms could assist in distinguishing between voluntary and forced cases of movement. In other words, "voluntary", when connected to the characteristics of "migration" would imply that movement "took place proactively"⁷⁴ or, as McAdam puts it: "there exists a degree of decision-making in the nature, timing, and location of movement".⁷⁵ On the other hand, "forced", when connected to the characteristics of "displacement", would imply that movement was "reactive" (primarily motivated by push-factors), was much less planned than voluntary movement, and that environmental deterioration was much more acute.⁷⁶

In the search for ways of distinguishing between voluntary and forced movement, writers have also made other suggestions: some propose a sliding scale/continuum as a method for distinguishing between forced displacement and voluntary migration.⁷⁷ The one extreme of the scale represents total voluntary movement. As one moves along this sliding continuum, the nature of the movement becomes more involuntary until one reaches the other extreme which represents totally forced movement. Authors argue that a scale of this kind is a useful aid to determine if a person could be regarded as environmentally displaced, whether international protection is required, and if so, what kind of protection would be most appropriate.⁷⁸ Totally forced displacement would have to be afforded the greatest legal protection,

72 King 2005 *Georgetown International Environmental Law Review* 555.

73 King 2005 *Georgetown International Environmental Law Review* 555.

74 See King 2005 *Georgetown International Environmental Law Review* 555 on migration.

75 See McAdam *Forced Migration, and International Law* 6 on migration.

76 See King 2005 *Georgetown International Environmental Law Review* 555-556 on displacement.

77 King 2005 *Georgetown International Environmental Law Review* 555; Williams 2008 *Law and Policy* 523. McAdam *Forced Migration, and International Law* 5.

78 King 2005 *Georgetown International Environmental Law Review* 555; Williams 2008 *Law and Policy* 523.

while totally voluntary migration would receive the least protection.⁷⁹ While one agrees with the reasoning that those with the greatest need should be first in line to receive protection, it is immediately apparent that the main challenge with such a scale would be how to properly classify individuals whose situations fall in the grey areas in between these two extremes. Clearly a more rigid set of qualifying criteria is required in this regard. Kälin describes the matter as follows:

Voluntary and forced movements often cannot be distinguished in real life, but rather constitute two poles of a continuum, with a particularly grey area in the middle where elements of choice and coercion mingle. However, because of its binary, bipolar nature, law must always draw clear lines, and must therefore necessarily qualify movement as either voluntary or forced. Thus, it is necessary to define the criteria relevant for distinguishing between those who voluntarily leave their homes or places of habitual residence because of the effects of climate change, and those who are forced to leave by such effects.⁸⁰

Kälin deviates from traditional reasoning in two important ways: firstly he does not seem to support the use of a sliding scale to determine the degree of volition and secondly (contrary to other writers)⁸¹ he suggests an approach which embraces refugee law in search for a solution.⁸² Scholtz again, draws from international environmental law by suggesting that the principle of sustainable development could provide further guidance as to when persons cannot meet their basic needs.⁸³ He argues that as soon as it becomes "impossible to pursue intra- and intergenerational equity", livelihoods are unsustainable and persons are forced to migrate.⁸⁴ The important insight here is that different suggestions are made by writers who draw

79 King 2005 *Georgetown International Environmental Law Review* 555; Williams 2008 *Law and Policy* 523.

80 Kälin "Conceptualising Climate-Induced Displacement" 95.

81 Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 1; Keane 2004 *Georgetown International Environmental Law Review* 218; King 2005 *Georgetown International Environmental Law Review* 551-554; Lopez 2007 *Environmental Law* 387-392; Williams 2008 *Law and Policy* 502.

82 See par 3.2 for a more detailed discussion. McAdam suggests that one of the "main conceptual factors" which "will shape legal and policy responses" is that of permanent versus temporary displacement (see McAdam *Forced Migration, and International Law* 6). Here Kälin also leans on refugee jurisprudence for guidance with regard to the time period for which protection should be offered (see. Kälin "Conceptualising Climate-Induced Displacement" 97). Being admitted to a country gives rise to secondary questions such as for how long protection should be afforded, and if persons can be obliged to return to their country of origin at a later stage.

83 Scholtz 2011 *South African Yearbook of International Law* 39-40; See par 3.4.2 for a more detailed discussion on sustainability.

84 Scholtz 2011 *South African Yearbook of International Law* 40.

from different branches of law.⁸⁵ Subsequently these different applicable branches of law will receive in depth attention in section 3. Even though different suggestions are made towards an eventual international legal protection framework, there is general agreement that individuals who are forced from their "places of habitual residence" as a reaction to primarily climatic "push factors" which pose "an existential threat to their right to life" are most in need of protection. Arguably, it is this dire state of affairs which is deserving of the "forced displacement" label.

2.3 Summary

Cross-border displacement is caused by many interrelated socio-economic and environmental factors. Even though it would generally be hard to single out an instance where the environmental factor is the main component responsible for displacement, this is not the case with climate change displacement. The environmental factor will always be a primary catalyst for movement during instances of climate change displacement.

When making decisions on affording legal protection, preference should be given to those individuals with the greatest need. This necessitates developing a set of generic criteria to determine when an individual qualifies as climate change displaced, the kind of protection required and the measure of such protection. By means of integrating and refining the existing subject terminology, this section identified individuals who are forced from their places of habitual residence in reaction primarily to climatic push factors which pose an existential threat to their right of life as those persons who are in the most dire need of protection. Due to resource limitations, an international legal protection framework may have to be focussed primarily on the protection of these particular individuals.

It has also briefly been shown that different writers draw from different branches of law in their search for such a legal protection framework. Subsequently section 3 will explore different branches of the international law framework which are expected to provide the legal basis necessary for protecting climate change displaced persons.

⁸⁵ Such as refugee law, human rights law and environmental law in particular.

3 Cross-border, climate change displacement in international law

3.1 Introduction

Even though there exists no formalised legal protection instrument which specifically provides for climate change displaced persons there are different branches of international law from which such protection could possibly be derived. This section will focus on how human rights law, refugee law and environmental law specifically provide a legal basis for the international protection of climate change displaced persons. The section will be structured as follows: firstly refugee law will be dealt with in some detail to determine if climate change displaced persons could be regarded as refugees. Thereafter the focus will shift towards human rights law to determine how complementary protection measures, in particular the human rights extension of the refugee law principle of *non-refoulement*, could apply to climate change displaced persons. This will be followed by an analysis of how the necessity for a safe environment in order to meet the obligation to respect, protect and fulfil human rights (such as the right to life and the right to food, water and adequate housing) could open the door towards incorporating international environmental law principles and the climate change legal regime of the UNFCCC to assist in the international protection of climate change displaced persons.

3.2 Refugee law

Traditional refugee protection is rooted in the 1951 *United Nations Convention Relating to the Status of Refugees* (Refugee Convention), which defines a refugee as:

Any person who owing to a well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear is unwilling to return to it.⁸⁶

⁸⁶ Article 1 of the Refugee Convention.

This restrictive definition was adopted because of its original purpose to regulate escalating refugee flows in post-war Europe. It consequently limits refugee status to a "fairly narrow legal interpretation".⁸⁷ According to Williams the definition embodies two core requirements for acquiring refugee status: first there must be a well-founded fear of being persecuted and second, the grounds for persecution are limited to race, religion, nationality, membership of a particular social group or the holding of a political opinion. While it is possible to argue that socio-economic harms suffered as a consequence of livelihoods negatively affected by the effects of climate change amount to "persecution",⁸⁸ it is harder to characterise climate change itself as such.⁸⁹ While "rising sea-levels, salination, and increasingly frequent storms, earthquakes and floods" could be disastrous, they do not constitute persecution in accordance with the meaning it has been given in international and regional law.⁹⁰ Falstrom remarks the following in this regard:

...acts of persecution are specific acts targeted at specific individuals for specific reasons. For these types of environmental policies or inactions by a government to rise to the level of persecution, the government would have to state, for example, that it is not going to ensure the safe operation of a state-owned nuclear power plant because it hopes the plant explodes and kills the people living within a two-mile radius. This is the kind of causal connection necessary for a person to be considered a refugee under the existing refugee laws.⁹¹

Following Falstrom's reasoning it appears as if there has to be at least some degree of *mens rea* present on the part of government for displacement to constitute an act

87 Williams 2008 *Law and Policy* 507; Conversely the convention originally applied to events occurring before 1 January 1951 only, but the 1967 *Protocol Relating to the Status of Refugees* later extended its scope so that it now also has prospective applicability.

88 Some writers argue that a government which does nothing to prevent environmental events from occurring is somehow persecuting those affected on account of their membership of a particular social group. An often used example of such "persecution" is where the governments of the Sahel region made little effort to respond to the needs of their people who were suffering as a consequence of environmental degradation caused amongst other factors by bad policy decisions and inaction caused as a result of political conflict and instability. It is argued that these governments' negligence in taking measures to halt environmental degradation or providing emergency relief amounted to the persecution of their people (see Cooper 1997 *New York University Environmental Law Journal* 503-504).

89 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 12.

90 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 13; See Goodwin-Gill and McAdam *The Refugee in International Law* 90-134.

91 Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 6.

of persecution.⁹² Lopez underlines the necessity of a causal link between a government's actions and eventual displacement as follows:

...in order to establish persecution, a person has to demonstrate both the persecutory impact and persecutory intent on the part of the governmental entity. The nature of the intent required is more than volition or awareness of consequences. Thus, the governmental entity must have been negligent or inactive "because of," and not merely "in spite of" its adverse effects upon an identifiable group.⁹³

The indiscriminate nature of climate change makes it very difficult to establish this required nexus.⁹⁴ Even in those rare scenarios where it is possible to establish such a nexus, the five required Refugee Convention grounds on which "persecution" should be based (namely race, religion, nationality, membership of a particular social group or political opinion) pose another difficult hurdle standing in the way of classifying climate change displaced persons as refugees. Some argue that climate change displaced persons could collectively be seen as "a particular social group".⁹⁵ However, it seems that such a group would be "defined by nothing more than the harm sought to be remedied".⁹⁶ Since refugee law requires "a particular social group" to be connected by a fundamental, immutable characteristic other than the fear of persecution itself, this argument is not very convincing.⁹⁷

Another suggestion to overcome the abovementioned obstacles is to broaden the definition of a refugee in such a way to include environmentally displaced persons

92 One example where environmental destruction amounted to persecution occurred during the 1990s, when the Iraqi government "systematically destroyed marshes in southern Iraq in response to political rebellion by the Marsh Arabs of the region". This resulted in the displacement of some 350 000 Marsh Arabs who were dependent on the marshes for their livelihoods (see King 2005 *Georgetown International Environmental Law Review* 553).

93 Lopez 2007 *Environmental Law* 380.

94 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 13.

95 Cooper 1997 *New York University Environmental Law Journal* 521-522; The reasoning here is that the fifth category, "membership in a particular social group", was added to the refugee definition with the purpose of being a catch-all term "to fill gaps left by the four more specific grounds for persecution (see Lopez 2007 *Environmental Law* 382-383) and that this category provides for environmentally displaced persons. Cooper argues that these persons form a group characterized by a "common experience" which is a component required to form a "social group" under the refugee definition. She states that this social group "is composed of persons who lack the political power to protect their own environment" (see Cooper 1997 *New York University Environmental Law Journal* 522-523).

96 Lopez 2007 *Environmental Law* 382.

97 Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 7; Lopez 2007 *Environmental Law* 387-382; McAdam 2009 *University of New South Wales Faculty of Law Research Series* 13.

under the Refugee Convention's auspices.⁹⁸ This suggestion is open to criticism. As climate induced displacement rarely occurs as a result of governmental oppression, a definitional expansion could lead to a "devaluation of the current protection for refugees".⁹⁹ Furthermore, Keane argues that only a limited expansion of the definition would be possible given the "enormous amount of environmentally displaced persons". Keane's motivation behind this statement is possibly that the Refugee Convention would offer too much for too many in terms of legal protection to make such a broadening of the definition practically possible. It is therefore conceivable that it would be very challenging to find the necessary consensus amongst states to revise a definition that has "survived without modifications for more than five decades".¹⁰⁰

The above suggests that even though some writers argue to the contrary,¹⁰¹ most concur that when unpacking the definition of a refugee in terms of the Refugee Convention, cross-border environmentally displaced persons are not accepted as legitimate refugee seekers and that there is no really practicable way of broadening

98 In this regard the Living Space for Environmental Refugees network (LiSER) proposes adding to the qualifying characteristics of a refugee "a well-founded fear of life endangerment, harm or loss of life due to severe environmental impact, or due to materials left, existent or being released in the displacement grounds by the state, commercial entities, or both" (see Zetter, Boano and Morris 2008 www.rsc.ox.ac.uk/publications/policy.../RSCP1-Environment.pdf); Cooper proposes adding "any person who owing to...degraded environmental conditions threatening his life, health, means of subsistence, or use of natural resources". Such a definition would thus read as follows: Any person who owing (1) to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, or (2) to degraded environmental conditions threatening his life, health, means of subsistence, or use of natural resources, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (see Cooper 1997 *New York University Environmental Law Journal* 488-494).

99 Keane 2004 *Georgetown International Environmental Law Review* 215. According to Keane, another hindering factor to an expansion of the definition is that most environmentally displaced persons are internally displaced "because they are not fleeing State persecution" but that IDPs "do not meet the definitional requirements of Article 1 of the Refugee Convention" (see Keane 2004 *Georgetown International Environmental Law Review* 215-216). This argument is flawed for three reasons in particular: Firstly it is expected that IDPs could at a later stage become cross-border displaced as it is expected that the extent of environmental deterioration will increase as climate change intensifies over time (see Williams 2008 *Law and Policy* 513). Secondly, cross-border displaced persons are not necessarily displaced for reasons of State persecution as is implied by Keane. And thirdly, there is circular logic in Keane's argument that the definition of a refugee cannot be expanded, as IDPs do not meet the Refugee Convention's Article 1 definitional requirements. This kind of reasoning equates to saying "you cannot expand the definition as the definition is not expanded".

100 Lopez 2007 *Environmental Law* 391; King 2005 *Georgetown International Environmental Law Review* 551-552.

101 Aleinikoff "Protected Characteristics and Social Perceptions" 264-311; Cooper 1997 *New York University Environmental Law Journal* 480-529.

the definition to this end in the future.¹⁰² Therefore, "due to the artificiality in attempting to characterise climate-induced displacement as a form of persecution", refugee law is not strictly applicable to persons displaced as a consequence of climate change.¹⁰³

Rather than attempting to determine how climate change displaced individuals could be classified as refugees under the Refugee Convention, it is more useful to determine how certain protective principles, such as the principle of *non-refoulement*¹⁰⁴ derived from refugee law, could apply in the climate-induced displacement context.¹⁰⁵ Accordingly this section now turns towards complementary protection under international human rights law as a means of extending the *non-refoulement* principle to displaced persons falling outside the Refugee Convention.

3.3 Human rights law

International human rights law is important to climate change displacement for two particular reasons. Firstly, it "sets out minimum standards of treatment that States must afford to individuals within their territory or jurisdiction" and secondly, the legal basis providing for the complementary protection of climate change displaced persons could be derived from this branch of law.¹⁰⁶ The latter is especially important for the purposes of this study.

Complementary protection describes "the protections which states afford people who are at risk of serious human rights violations in their country of origin, but who do not

102 Williams 2008 *Law and Policy* 508; Westra *Environmental Justice and the Rights of Ecological Refugees* 11; Falstrom 2001 *Colorado Journal of International Environmental Law and Policy* 6; McCue 1993 *Environmental Law* 177; Keane 2004 *Georgetown International Environmental Law Review* 215; Lopez 2007 *Environmental Law* 387-388; King 2005 *Georgetown International Environmental Law Review* 551.

103 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 11-12.

104 This principle, stemming from article 33(1) of the Refugee Convention, prohibits states from returning people to "the frontiers of territories where their life or freedom would be threatened".

105 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 14; in this regard, Kälin proposes an approach where refugee jurisprudence could assist in providing a set of criteria by which to differentiate between voluntary migration and forced displacement. Kälin also leans on refugee law to determine if a person will be able to return to his or her country of origin at a later stage, which he refers to as "the returnability test". See Kälin "Conceptualising Climate-Induced Displacement" 96-101 for an in depth discussion of how refugee law jurisprudence could assist in providing a legal protection framework for climate change displaced individuals.

106 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 14.

qualify as refugees" under the Refugee Convention.¹⁰⁷ To this definition, McAdam adds that in contemporary practice, complementary protection "describes the engagement of states' legal protection obligations that are complementary to those assumed under the 1951 Refugee Convention, whether derived from treaty or customary international law," and that these obligations stem from other legal commitments preventing the return to serious harm.¹⁰⁸ Thus, complementary protection could either be derived from a specific human rights treaty (international or regional) or from more general principles of international humanitarian law, such as the principle of providing assistance to persons fleeing from situations of armed conflict.¹⁰⁹ In this sense it "does not mandate a lesser duration or quality of status, but simply assesses international protection needs on a wider basis" than the Refugee Convention.¹¹⁰

Even though the legal principle of preventing the return of individuals to serious harm or "*non-refoulement*" has its origin in refugee law,¹¹¹ human rights law has extended the principle further than its original scope. Today, stemming from its inclusion in various international human rights law instruments, one could argue that this principle enjoys international customary law status.¹¹² Therefore the *non-refoulement* principle forms the central feature of complementary protection.

107 UNHCR 2012 www.unhcr.org/4fc872719.pdf.

108 McAdam 2007 *Complementary Protection in International Refugee Law* 2-3.

109 UNHCR 2012 www.unhcr.org/4fc872719.pdf; McAdam 2009 *University of New South Wales Faculty of Law Research Series* 14; ICRC 2004 www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

110 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 11.

111 In terms of Article 33 of the Refugee Convention "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

112 See Lauterpacht and Bethlehem "The Scope and Content of the Principle of Non-refoulement: Opinion" 61-70; Dicker and Mansfield 2012 *UNHCR: New Issues in Refugee Research Paper* No 238 1-45. The required *opinio juris* and State practice reflecting broad consensus across the international community for the general applicability of the non-refoulement principle in terms of human rights law is derived from various international law instruments containing a *non-refoulement* component. These include: Article 33(1-2) of the Refugee Convention; article 3 of the *European Convention on Human Rights*, 1950 (ECHR); article 7 of the *International Covenant on Civil and Political Rights*, 1966 (ICCPR); article 3(1-3) of General Assembly Resolution 2132 (XXII) *Declaration on Territorial Asylum*, 1967; article 2(3) of the *Organisation for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969; articles 5(2) and 22(6-9) of the *American Convention on Human Rights*, 1969; articles 5 and 12(3-5) of the *African Charter on Human and Peoples' Rights*, 1981 (African Charter); article 3(4) and (5) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984.

In the opinion of Lauterpacht and Bethlehem for the UNHCR, the content of the principle of *non-refoulement* in customary law may be stated as follows:

1. No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. This principle allows for no limitation or exception.
2. In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned or expelled in any manner whatsoever where this would compel them to remain in or to return to a territory where they may face a threat of persecution or to life, physical integrity or liberty. Save as provided in paragraph 3, this principle allows for no limitation or exception.
3. Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 2 in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture, cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.¹¹³

From the above it follows that the principle of *non-refoulement* is strongly linked to the human right to be protected from torture, cruel, inhuman or degrading treatment or punishment¹¹⁴ and the right not to be arbitrarily deprived of life.¹¹⁵ Both of these rights are regarded as non-derogable customary principles of human rights upon

113 Lauterpacht and Bethlehem "The Scope and Content of the Principle of Non-refoulement: Opinion" 87.

114 This customary law principle is found in a range of international human rights treaties, declarations and conventions which include *inter alia*: article 5 of the *Universal Declaration of Human Rights*, 1948 (UDHR); article 7 of the *International Covenant on Civil and Political Rights*, 1966; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1975; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984; *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 2002; article 37 of the *Convention on the Rights of the Child*, 1989; article 5 of the African Charter; article 3 of the ECHR; *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1987; article 5 of the *American Convention on Human Rights*, 1978.

115 The right to life is guaranteed under a range of international law instruments including: Article 3 of the UDHR; articles 4 and 6 of the *International Covenant on Civil and Political Rights*, 1966; article 33 of the Refugee Convention; article 4 of the African Charter; article 5 of the *African Charter on the Rights and Welfare of the Child*, 1990; articles 2 and 15 of the ECHR, 1950; article 2 of the *Charter of Fundamental Rights of the European Union*, 2000; article 4 of the *American Convention on Human Rights*, 1978.

which the effects of climate change could possibly impinge.¹¹⁶ It has either already been observed, or it is anticipated, that the effects of climate change will threaten the right to life both directly and indirectly.¹¹⁷ Furthermore, the protection of the right to life is closely related to measures for the fulfilment of other rights which might be impacted by the effects of climate change, such as those related to food, water, health and housing.¹¹⁸

The above suggests that the refugee law principle of *non-refoulement* may be expanded along human rights lines in order to protect the right to life or the right to be protected from torture, cruel, inhuman or degrading treatment or punishment. Furthermore it has been shown that climate change and the process of climate change displacement might impinge upon these non-derogable rights either in a direct or an indirect manner. However, seeing as the extended principle of *non-refoulement* seems to find application only in cases of non-return to persecution, torture, cruel, inhuman, or degrading treatment or punishment, and arbitrary threats to life, this protection would be available only "in the most exceptional circumstances".¹¹⁹ Even though McAdam holds this inherent limitation to the extended applicability of the *non-refoulement* principle in negative regard by suggesting that "it may...be necessary to re-characterise the violated human right, such as the right to health, as a form of inhuman treatment, which is a

116 See UN 2004 <http://www.un.org/esa/socdev/enable/comp210.htm#top>; *UNHCR 33rd Standing Committee meeting EC/55/SC/CRP 16*, 2005; The Human Rights Committee has described the right to life as the "supreme right", "basic to all human rights", and it is a right from which no derogation is permitted even in time of public emergency (see *Human Rights Committee General Comments* No 6, 1982 on article 6 (Right to life), par 1 and No 14, 1984 on article 6 (Right to life), par 1); Whereas climate change will potentially have implications for the full range of human rights, some examples which seem to relate most directly to the effects of climate change as identified by the IPCC include the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing, and the right to self-determination (see Office of the High Commissioner for Human Rights (OHCHR) *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights* UN Doc A/HRC/10/61, 2009).

117 The IPCC, with a high level of confidence, projects an increase in people suffering from death, disease and injury from climate change-related heat-waves, floods, storms, fires and droughts. Ways in which climate change could indirectly affect the right to life include, amongst others, an increase in hunger and malnutrition-related disorders, cardio-respiratory morbidity, increased rates of malaria and diarrhoeal disease (see *IPCC Fourth Assessment Report: Working Group II*, 2007).

118 OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights* UN Doc A/HRC/10/61, 2009

119 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 18.

complementary protection ground",¹²⁰ this study contends that the limitation could in fact be a blessing in disguise. This limitation may assist in providing some rudimentary form of criteria when establishing which individuals are in most dire need of legal protection.¹²¹ The limited applicability of the principle of *non-refoulement* for complementary protection purposes also corresponds to the conclusion reached in section 2 of this dissertation, namely that individuals who are forced from their places of habitual residence as a reaction primarily to climatic push factors which pose an existential threat to their right to life are most in need of protection, and that it is this dire state of affairs which is deserving of the forced displacement label.

There is, however, little state practice regarding the application of *non-refoulement* prohibitions under human rights law.¹²² Currently, in the absence of any binding international agreement on complementary protection, one of the main grievances with the application of complementary protection measures is that there is no harmonised international approach prescribing how such protection measures should be enforced.¹²³ Therefore "complementary protection practice continues to be *ad hoc* and varied among states, largely decided on the basis of executive discretion rather than any unified international approach".¹²⁴ Current complementary protection regimes "are subject to national legislation, which specifies the eligibility criteria as well as the rights and entitlements of complementary protection beneficiaries." Nevertheless, there seems to be growing recognition of international protection obligations arising outside of the Refugee Convention, which is resulting in increasing domestic codification of complementary protection mechanisms.¹²⁵

While a human rights alternative, leaning on the principle of *non-refoulement* seems promising, it might be hard to establish the required nexus between climate change and human rights violations. Even though the effects of climate change could possibly infringe on human rights, Bodansky points out the difficulty with legally

120 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 18.

121 See par 2.2.4 where it was suggested that a set of qualifying criteria is necessary to assist when determining which individuals are in the greatest need of legal protection.

122 UNHCR 33rd Standing Committee meeting EC/55/SC/CRP 16, 2005.

123 UNHCR 18th Standing Committee meeting EC/50/SC/CRP 18, 2000.

124 Dicker and Mansfield 2012 *UNHCR: New Issues in Refugee Research* Paper No 238 4.

125 Dicker and Mansfield 2012 *UNHCR: New Issues in Refugee Research* Paper No 238 4.

establishing that climate change "violates" these rights, as is required by human rights law in the following terms:

Human rights are "human" by virtue of not only their victims but also their perpetrators. And they represent human rights "violations" only if there is some identifiable duty that some identifiable duty-holder has breached.¹²⁶

Therefore, even though applying human rights law to situations of climate change displacement might seem a likely fit, such an approach is all but problem free. Yet again, like refugee law's required *nexus* between persecution and climate change, it could be challenging to establish the required *nexus* showing that climate change is responsible for the "violation" of certain non-derogable human rights. In order to do so it would be necessary to indicate how a state has breached its duty to "respect, protect, and fulfil" these rights through either a positive act or an omission on its part.¹²⁷ A state has a duty to protect and to fulfil the right to life and the other rights associated with the right to life, such as the right to food, water and adequate housing, which is especially relevant in the climate change displacement context. In this context, the obligation to protect "could include a duty to regulate...emissions that contribute to climate change as well as a duty to undertake adaptation measures to limit the harms caused by global warming".¹²⁸ One might contend that one such adaptation measure would include making legal provision for climate change displaced persons.¹²⁹ This is a train of thought which finds its most appropriate legal basis in international environmental law.

126 Bodansky 2010 *Georgia Journal of International and Comparative Law* 519.

127 The Committee on Economic, Social and Cultural Rights (CESCR) has identified these three core obligations with regard to environmental degradation (specifically concerning the right to food, the right to water and the right to health): The obligation to "respect" implies that States will not take any measures which would prevent individuals from accessing their rights; the obligation to "protect" requires of States to prevent private actors from depriving individuals of their rights as well as to prevent the harms; and the obligation to "fulfil" requires states to adopt appropriate measures towards the full realisation of a right" (see Knox 2009 *Virginia Journal of International Law* 17-18).

128 Bodansky 2010 *Georgia Journal of International and Comparative Law* 520.

129 Furthermore, the obligation to fulfil stresses the duty on States to take positive steps towards the realisation of individuals' rights, amongst other climate change displaced persons' rights.

3.4 Environmental law

The relationship between the fulfilment of human rights and a safe environment has already been formally recognised with the adoption of the *Declaration of the United Nations Conference on the Human Environment* of 1972 (Stockholm Declaration).¹³⁰ However, the exact link between the two concepts in terms of the legal obligations this might create, still remains "in the early developmental stages" and there is currently no "individual or collective right to the environment in international law".¹³¹ Nevertheless, there are many identifiable rules and principles of international law concerned with the protection of the environment which are also relevant to persons whose livelihoods depend on the state of the environment.¹³² International environmental law principles which seem particularly relevant to the legal protection of cross-border climate change displaced persons include the principle of sustainable development, the principle of the environment as a common concern, the duty to cooperate, the principle of common but differentiated responsibility, and the duty to prevent, reduce and control environmental harm.

3.4.1 *The environment as a common concern and the duty to cooperate*

Knox states that "the most feasible basis for extending current environmental human rights jurisprudence to climate change is the duty to cooperate".¹³³ In the current context, the duty to cooperate essentially requires that the international community acts as a single polity with regard to "the global threat posed to human rights by

130 *Declaration of the United Nations Conference on the Human Environment* UN Doc A/CONF/48/14/Rev 1, 1972.

131 McAdam 2009 *University of New South Wales Faculty of Law Research Series* 19.

132 Birnie, Boyle and Redgwell *International Law and the Environment* 106.

133 Knox 2009 *Virginia Journal of International Law* 52; the duty to cooperate is grounded in both article 2(1) of the *International Covenant on Economic, Social and Cultural Rights*, 1966 (ICESR) and articles 55 and 56 of the *Charter of the United Nations and Statute of the International Court of Justice*, 1945 (UN Charter). Article 2(1) of the ICESR requires each state party to take steps not only individually, but also "through international...cooperation" toward the progressive realisation of the rights recognised in the Covenant; Article 55 of the UN Charter requires that the UN promote, *inter alia*, "universal respect for, and observance of, human rights and fundamental freedoms for all," and in Article 56, "...all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". The duty to cooperate is also found in many other environmental law agreements such as principles 7 and 27 of the Rio Declaration; and principle 24 of the Stockholm Declaration.

climate change".¹³⁴ In accordance with the duty to cooperate, the *Rio Declaration on Environment and Development*, 1992 (Rio Declaration) sets out a framework of global environmental responsibilities which transcends national, regional or transboundary obligations.¹³⁵ In this regard, climate change is expressly denominated as a "common concern of mankind" and has subsequently become the subject of a global treaty, in the UNFCCC.¹³⁶ As will be shown through the remainder of this study, human rights and environmental law treaties as mentioned here could provide guidance and assistance for the legal protection of cross-border climate change displaced persons. Following from sections 1 and 2, climate change displacement may be seen as a human rights concern which is inherently global, and it would in all likelihood require coordinated action on a global scale to address this common concern of mankind.

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

The duty to prevent, reduce and control transboundary environmental harm is a well established, obligatory rule of customary international law.¹³⁷ This obligation entails that states have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction".¹³⁸ The duty to prevent, reduce and control environmental harm does not, however, create an absolute prohibition on environmental damage, but it also does not provide for unchecked freedom to exploit natural resources. Similar to the concept of sustainable development, the duty requires a balancing act of sorts between economic development and environmental protection.¹³⁹ The duty to prevent, reduce and control environmental harm promotes sustainable development in that it provides further specificity to this responsibility.

134 Knox 2009 *Virginia Journal of International Law* 52

135 *Rio Declaration on Environment and Development* UN Doc A/CONF/151/26/Rev 1, 1992. See also UN General Assembly Resolution 43/53, 1988 on the protection of global climate for present and future generations of mankind; UNEP Governing Council Resolution 15/36, 1989.

136 See the preamble of the UNFCCC.

137 See *Trail Smelter Arbitration (United States v Canada)* 1938-41 3 RIAA 1905; Principle 21 of the Stockholm Declaration; Principle 2 of the Rio Declaration; Birnie, Boyle and Redgwell *International Law and the Environment* 143.

138 Principle 2 of the Rio Declaration.

139 Birnie, Boyle and Redgwell *International Law and the Environment* 146.

The "Brundtland Report" defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". The Report's "triple bottom line" approach was derived from this definition and expresses the belief that social equity, economic growth and environmental sustainability are simultaneously attainable.¹⁴⁰ Even though Principle 3 of the Rio Declaration endorses the right to development, this right is qualified by the emphasis that "it should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations". Therefore the sustainability concept implies that national and international economic development should not proceed in disregard of its associated social and ecological cost. This is particularly relevant in the context of climate change, because the extent of climate change (and of the environmental deterioration linked to climate change) could be seen as directly proportional to the increase in greenhouse gas (GHG) emissions associated with economic development.¹⁴¹ In the light of the above, one could interpret the concept of sustainable development in such a way that that it imposes a moral obligation on states to limit their GHG emissions (through various mitigation measures) and to provide assistance to vulnerable displaced individuals (through climate change adaptation measures).¹⁴² Even though it seems unlikely that sustainable development creates direct legal obligations "it does represent a policy which can influence the outcome of cases, the interpretation of treaties, and the practice of states and international organisations, and may lead to significant changes and developments in the existing law".¹⁴³ While they are binding on signatory states only, the inclusion of various provisions for climate change mitigation and adaptation contained in the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 1998 (Kyoto Protocol) and subsequent

140 See *Report of the World Commission on Environment and Development* Annex to General Assembly Doc A/42/427.

141 See *IPCC Fourth Assessment Report: Working Group II*, 2007.

142 The UNFCCC describes "mitigation" as all activities related to the reduction of GHG emissions and enhancing "sinks" (see UNFCCC 2012 <http://unfccc.int/focus/mitigation/items/7171.php>); Climate change adaptation "refers to changes in processes, practices, and structures to moderate potential damages or to benefit from opportunities associated with climate change" (see UNFCCC 2013 <http://unfccc.int/focus/adaptation/items/6999.php>).

143 Birnie, Boyle and Redgwell *International Law and the Environment* 127.

agreements under the UNFCCC is an example of how the moral obligation of sustainability could influence legally binding law.¹⁴⁴

3.4.3 *The principle of common but differentiated responsibility*

The UNFCCC, the *Vienna Convention for the Protection of the Ozone Layer*, 1985 and the *Convention on Biological Diversity*, 1992 (CBD) were found on a range of international law principles amongst which the principle of common but differentiated responsibility for global environmental change strongly features.¹⁴⁵ The principle is elaborated in the following terms:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.¹⁴⁶

While there remain different views on its implications, the common but differentiated responsibilities principle now enjoys almost universal acceptance.¹⁴⁷ Scholtz recognises two main elements contained within the principle: on the one hand it "concerns the common responsibility of states for the protection of the environment" and on the other, the principle "concerns the acknowledgement of different circumstances, such as the contribution of states to an environmental problem and the ability to address the threat".¹⁴⁸ As the developing world's contribution to climate change through GHG emissions is significantly less than that of developed countries, climate change displacement could be seen as an effect of these GHG emissions of

144 See Articles 2,10,11 and 12 of the Kyoto Protocol; Article 14(f) of the *Cancun Adaptation Framework* FCCC/CP/2010/7/Add1, 2010 invites all signatory parties, while taking into account their common but differentiated responsibilities, to enhance action on adaptation by undertaking "measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national regional and international levels".

145 Birnie, Boyle and Redgwell *International Law and the Environment* 132.

146 Principle 7 of the Rio Declaration.

147 Birnie, Boyle and Redgwell *International Law and the Environment* 132; See Scholtz 2008 *South African Yearbook of International Law* 119-136 for a discussion on different scholarly views regarding the principle of common but differentiated responsibilities.

148 Scholtz 2008 *South African Yearbook of International Law* 120.

the developed world in particular,¹⁴⁹ it follows that developed states possibly have a responsibility towards developing countries to rectify this imbalance by providing a certain measure of assistance for developing countries' climate change mitigation and adaptation measures and more specifically to provide support in dealing with climate change displaced individuals hailing from these countries.

Furthermore, in accordance with the principle of common but differentiated responsibility and respective capabilities set out by the UNFCCC and Kyoto Protocol, developed country parties (Annex II Parties) are to provide financial resources to assist developing country parties in implementing the objectives of the UNFCCC.¹⁵⁰ One such objective includes climate change adaptation. In this regard article 12(8) of the Kyoto Protocol holds that "The Conference of the Parties...shall ensure that a share of the proceeds from certified project activities is used to...assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation". Consequently, the Adaptation Fund which provides funding for projects and programmes that "address the adverse effects of climate change" was established under the UNFCCC to assist these countries.¹⁵¹ It could be argued that assisting climate change displaced individuals is one such adaptation programme aiming to address the adverse effects of climate change. The adaptation fund could therefore be a potential source of financial support for governments having to bear the cost of providing temporary food and shelter to climate change displaced persons for example. More generally, whichever route is eventually followed to provide legal protection to climate change displaced persons, it could be expected that the principle of common but differentiated responsibilities

149 In 2004, developed countries, while having only 20 per cent of the world's population, contributed 46 per cent of global GHG emissions. Africa for example, having 13 per cent of the world's population, contributed only 7.8 per cent of global GHG emissions. At the same time, the average *per capita* emission level of developing countries (including China and India) amounted to only 25 per cent of developed countries' levels (see Wewerinke and Doebbler 2011 *Chinese Journal of International Law* 146).

150 See articles 4(3) of the UNFCCC and 10(c) of the Kyoto Protocol.

151 See UNFCCC 2013
http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php;
See *Adaptation Fund Operational Policies and Guidelines* 2013 https://www.adaptation-fund.org/policies_guidelines.

will continue to play an important role during international climate change negotiations.¹⁵²

Following from the above, international environmental law can assist in providing for climate change displaced persons both in a theoretical (by developing useful principles which could apply to climate change displacement) and substantive manner (by means of the UNFCCC legal regime). Firstly by establishing that climate change displacement, as part of the effects of climate change, is a common concern of mankind, international environmental law could provide the theoretical basis for coordinating action to provide legal protection for climate change displaced persons on a global scale. Secondly, the duties to cooperate and to prevent, reduce and control environmental harm, together with the principle of sustainable development takes the theory one step further by potentially creating positive moral obligations on states to conduct their activities in such a way that will not detrimentally impact on other states' territories and to mitigate any environmental harm by assisting climate change displaced individuals to adapt to climate change. The legal regime of the UNFCCC is particularly useful in this regard, as its existing climate change adaptation framework (including the Adaptation Fund) could provide the necessary means by which international assistance with climate change displaced persons could be regulated and coordinated.

3.5 Summary

After analysing the different fields of refugee-, human rights- and environmental law which could apply to climate change displacement, it appears that while each separate field regards the issue from a unique angle, closer scrutiny shows that they largely complement each other rather than providing a different legal protection approach. Human rights law seems to act as a prominent binding factor among the three.

152 In this regard, Scholtz states that the principle of common but differentiated responsibilities "may guide international actors to negotiate future treaties in order to address global environmental degradation on the basis of equity" and that "developing countries may expect that negotiations will take place on the basis of this principle" (see Scholtz 2008 *South African Yearbook of International Law* 124).

While it appears that refugee law is not applicable to climate change displacement in the strict sense, refugee law jurisprudence such as the *non-refoulement* principle could be particularly useful when formulating a legal protection framework. The *non-refoulement* principle also functions as the juncture between refugee- and human rights law. Even though *non-refoulement* is essentially a refugee law principle, it forms part of customary international law in instances where there is a serious danger that non-derogable human rights might be infringed upon. Of these non-derogable customary rights, the right to life and the right not to be subjected to torture, cruel, inhuman or degrading treatment seems especially relevant in the climate change displacement context. The extended principle of *non-refoulement* could therefore provide legal protection to displaced persons whose lives are threatened by the effects of climate change. The extended application of the *non-refoulement* principle is, however, not free of problems: presently there is no harmonised international approach to offer complementary protection and it is afforded on an *ad hoc* basis which is subject to the executive discretion of receiving states. Furthermore, it could also be challenging to establish a nexus between climate change and human rights "violations". Nevertheless, both these issues could potentially be addressed by international environmental law.

There are a few international environmental law rules and principles which seem evidently applicable in the climate change displacement context. With regard to the issue of providing internationally harmonised protection, the principles of "the environment as a common concern" and "the duty to cooperate" could provide the theoretical basis towards harmonisation. Furthermore, a nexus between climate change and human rights violations could be established on the basis of states' "duty to prevent, reduce and control environmental harm" and the principle of sustainable development. These moral obligations could influence states to agree on limiting their GHG emissions (which cause climate change) and to provide assistance to vulnerable climate change displaced individuals (who are displaced as an indirect consequence of these emissions). Following this reasoning it could then be possible to show that in cases where states fail to address climate change by means of adaptation (providing legal protection for climate change displaced individuals could be seen as an adaptation measure) and mitigation measures, they are contributing

to the violation of non-derogable human rights. In such a way, environmental law could assist in eliminating the nexus issue when applying human rights law to climate change displacement, by placing an identifiable moral obligation (the duty to prevent, reduce and control environmental harm) on an identifiable duty holder (a sovereign state).

Lastly the legal regime of the UNFCCC could provide a substantive framework by which to internationally harmonise and coordinate a legal protection framework. Furthermore, the moral obligation to assist developing countries with their climate change adaptation measures, which assistance is required by the principle of common but differentiated responsibilities, could further strengthen the legal basis for formulating an international legal framework protecting climate change displaced persons.

4 Cross-border, climate change displacement in AU law

4.1 Introduction

Many African countries are "unable to enhance their adaptive capacity" through international climate change negotiations.¹⁵³ As stated earlier, the African continent faces a myriad of challenges: amongst others, arbitrary state borders, many landlocked countries, and either very small states which are not economically viable or some very large states which are generally sparsely populated contribute towards a setting where regional cooperation is of the utmost importance.¹⁵⁴ Accordingly, Scholtz argues that "regional integration can facilitate the strengthening" of Africa's "bargaining power, which may offer greater voting power to African states" during international negotiations on the formulation of an international legal protection framework assisting climate change displaced persons for example.¹⁵⁵ Furthermore, as will be shown below, African jurisprudence has unique legal instruments possibly providing for cross-border climate change displacement. Therefore, the objective of this section is to determine which branches of regional law could guide the formulation of such a protection framework. This section focuses on refugee law, then shifts to human rights law, where after it turns to environmental law and more general legal principles to determine which areas of AU law are particularly relevant to climate change displaced persons in Africa.

4.2 Refugee law in the African Union

The *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Convention)¹⁵⁶ forms the principal regional instrument relating to refugees in the African Union. The OAU Convention contains a broader definition of a refugee than the 1951 Refugee Convention and is the first of its kind to "steer away from persecutory conduct towards more generalised...forms of violence" perpetrated against individuals to have them classify as refugees.¹⁵⁷ Expanding on a duplication

153 Scholtz 2010 *African Human Rights Law Journal* 7.

154 See par 1.

155 Scholtz 2010 *African Human Rights Law Journal* 8.

156 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969.

157 Edwards 2006 *African Journal of International and Comparative Law* 211.

of the 1951 Refugee Convention's definition, the OAU Convention also defines a refugee as:

Any person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in the whole of his country of origin or nationality, was compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹⁵⁸

Some writers contend that the wording "events seriously disturbing public order" implicitly provides for climate change displaced persons.¹⁵⁹ However, Edwards notes that although such an interpretation is theoretically possible, and notwithstanding the existing practice that persons fleeing environmental catastrophes are frequently given refuge on the territory of neighbouring states, "receiving States rarely declare that they are acting pursuant to their OAU Convention obligations" when affording such protection.¹⁶⁰ The significance of declarations like these lies in their relevance to determining whether a state supports or rejects a liberal interpretation of the OAU Convention.¹⁶¹ Therefore, even though the necessary state practice could be present to suggest that cross-border climate change displaced persons are protected by the OAU Convention, this does not seem to be supported by current *opinio juris*.¹⁶² Furthermore, there exists some contention over whether "events seriously disturbing public order" could also be interpreted to refer to events caused by nature and not only to events of social and political unrest caused by human activities.¹⁶³ However, in the light of overwhelming evidence indicating that climate change is largely caused

158 Article 1(2) of the OAU Convention; Accordingly, this addition to the Refugee Convention's definition is used as an example by writers to indicate that its scope should be broadened to allow for climate change displaced persons (see Cooper 1997 *New York University Environmental Law Journal* 499; Miranda 1989 *California Western International Law Journal* 326-327).

159 Cooper 1997 *New York University Environmental Law Journal* 497; Lopez 2007 *Environmental Law* 389-390; McCue 1993 *Environmental Law* 173-175.

160 Edwards 2006 *African Journal of International and Comparative Law* 227.

161 Edwards 2006 *African Journal of International and Comparative Law* 227.

162 Edwards 2006 *African Journal of International and Comparative Law* 228.

163 On the one hand writers such as Rankin argue that natural disasters should be excluded as these events are "probably best described as *force majeure*" and thus fall "outside of the responsibility of a state" (see Rankin 2005 UNHCR: New Issues in Refugee Research Working Paper No 113 20). On the other hand "public order" may be defined as the sum of rules that ensure the peaceful and effective functioning of society. Natural disasters are often associated with social unrest and at times a total collapse of law and order. Accordingly, Edwards argues that "it seems a little absurd...for an individual to receive international protection from associated civil disobedience, but not from the precipitating event" (see Edwards 2006 *African Journal of International and Comparative Law* 226).

by human activities, this debate should not influence the applicability of the OAU Convention to climate change displaced persons.¹⁶⁴

Another observation is that it seems as if only temporary protection is offered to refugees who meet the article 1(2) OAU Convention requirements (and not the requirements set out by both article 1(1) of the OAU Convention and article 1 of the 1951 Refugee Convention).¹⁶⁵ While the *non-refoulement* principle contained in article 2(3) of the OAU Convention prohibits the forceful return of individuals to their countries of origin, they would not necessarily qualify for asylum and resettlement in the receiving state either.¹⁶⁶ Even though such temporary protection could be adequate for short-lived environmental disasters (often associated with sudden extreme weather events), it would not suffice in cases where climate change has led to the irreparable deterioration of an environment causing human livelihoods to become permanently unsustainable. While Kälin supports the view that sudden-onset disasters *per se* seriously disturb public order, he remains sceptical as to whether states "would be ready to accept such an expansion of the concept beyond its conventional meaning of public disturbances resulting in violence".¹⁶⁷

Therefore, while the OAU Convention could potentially provide temporary protection to climate change displaced persons, and while there appears to be some *ad hoc* state practice indicating that temporary protection is indeed afforded to persons fleeing from serious environmental disruptions, such protection seems to be based on humanitarian grounds and not on any considerations made under refugee law. Accordingly, even though future developments might show otherwise, it does not seem as if regional refugee law in the African Union currently provides for the

164 See *IPCC Fourth Assessment Report: Working Group II, 2007*.

165 See Miranda 1989 *California Western International Law Journal* 323; Cooper 1997 *New York University Environmental Law Journal* 498.

166 See article 2(1) of the OAU Convention; Miranda 1989 *California Western International Law Journal* 323; Cooper 1997 *New York University Environmental Law Journal* 423.

167 Kälin "Conceptualising Climate-Induced Displacement" 88; Further insight as to the reasons behind the original expansion of the definition is provided by Okoth-Obbo, who contends that this expansion is centred on the distinction which should be made between attributing refugee status to "ordinary refugees fleeing their country of origin for fear of persecution" and attributing such status to "freedom fighters". The definition was therefore expanded "to deal specifically with the situation of refugees from territories still under colonial or minority racist rule" (see Okoth-Obbo 2001 *Refugee Survey Quarterly* 111-112). This supports Kälin's contention that the wording "events seriously disturbing public order" relate only to public disturbances resulting in violence.

continent's cross-border climate change displaced. This analysis concurs with Edwards' comment that the general practice of hosting persons displaced by climatic events "may be seen as contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty" law.¹⁶⁸

4.3 Human rights law in the African Union

Human rights law on the African continent is principally governed by the African Charter. Article 12(3) provides that "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions". Furthermore, a *non-refoulement* clause is to be found in article 12(4) which provides that "a non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law". The OAU Convention's definition of a refugee discussed above therefore seems more generous than the one included here, seeing as it does not apply only to persons fearing persecution. Moreover, article 12(4) of the African Charter does not prohibit the expulsion of "legally admitted" "non-nationals", but merely makes the expulsion of such persons subject to the decision being made "in accordance with the law".¹⁶⁹ The African Charter does, however, prohibit "the mass expulsion of non-nationals", but only where such an expulsion is aimed at "national, racial, ethnic or religious groups".¹⁷⁰ It is hard to see how climate change displaced persons could fall into any one of these categories and therefore the African Charter does not seem to extend the *non-refoulement* principle further than its original scope in the 1951 Refugee Convention. As stated previously, the inclusion of the *non-refoulement* principle in a human rights instrument such as the African Charter does, however, contribute towards the general acceptance of the existence of an international customary law extension of the *non-refoulement* principle to human rights law.¹⁷¹ Furthermore, the African Charter and other regional human rights law instruments also contribute

168 Edwards 2006 *African Journal of International and Comparative Law* 227.

169 Ougergouz *The African Charter on Human and Peoples' Rights* 128.

170 Article 12(5) of the African Charter.

171 See par 3.3 above.

towards the development of non-derogable human rights associated with the extended *non-refoulement* principle, more specifically the human right to be protected from torture, cruel, inhuman or degrading treatment or punishment¹⁷² and the right not to be arbitrarily deprived of life.¹⁷³

4.4 Environmental law in the African Union

The African Charter was also the first human rights instrument to recognise a right to the environment.¹⁷⁴ Article 24 provides that "All peoples shall have the right to a general satisfactory environment favourable to their development". Even though article 24 assigns no precise content to the right it proclaims,¹⁷⁵ it has been interpreted by the African Commission on Human and Peoples' Rights (African Commission) pursuant to a complaint brought against the government of Nigeria, as obliging states to "take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources".¹⁷⁶ The African Commission ruled that the Nigerian government had violated the Ogoni people's right to dispose freely of their own natural resources together with their right to "ecologically sustainable development". This decision seems to emphasise people's dependence on a generally satisfactory environment for the realisation of sustainable development. Amechi states that article 24 is "a composite right and thus, measures taken to protect the environment in terms of this right must also promote socio-economic development".¹⁷⁷ Accordingly one could assume that an environment which classifies as "satisfactory" should be conducive- and not deterrent to sustainable development. In circumstances where the achievement of sustainable

172 This customary law right is found in a range of regional human rights instruments including: article 5 of the African Charter; 1987; article 4(1) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2003; and article 16(1) of the *African Charter on the Rights and Welfare of the Child*, 1990.

173 The right to life is guaranteed under a range of regional law instruments including: article 4 of the African Charter; article 5 of the *African Charter on the Rights and Welfare of the Child*, 1990; and article 4(1) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

174 Van der Linde and Louw 2003 *African Human Rights Law Journal* 169-170.

175 Ougoungouz *The African Charter on Human and Peoples' Rights* 361.

176 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 2001 par 54 (SERAC communication).

177 Amechi 2009 *Law, Environment and Development Journal* 69.

development has become an improbability due to severe human-induced environmental degradation, such degradation could be seen as a violation of the right to a generally satisfactory environment. Climate change, again, could be seen as a form of human-induced environmental degradation leading to livelihoods being unsustainable and consequently to displacement, in which view climate change is arguably indicative of an article 24 environmental right violation. This reasoning is in harmony with Amechi's argument that the environmental degradation which states are obliged to prevent in accordance with article 24 of the African Charter should be of such "significant level, severity or persistence" as to render the enjoyment of an environment that is favourable to health and well-being impossible.¹⁷⁸

From the above it seems clear that article 24 relates narrowly to and further entrenches the previously mentioned international environmental law rules and principles which could provide for climate change displaced persons, especially the principles of sustainable development and the duty to prevent, reduce and control environmental harm. Even though article 24 of the African Charter places no precise obligations on state parties it could, however, be thought that the implementation of the right to a satisfactory environment "would consist above all in compliance by states with the more precise obligations they have undertaken through their participation in certain international legal instruments...and regional ones".¹⁷⁹ Furthermore it has been suggested that the best way of dealing with the textual vagueness of article 24 is "to allow supervisory institutions and courts to develop their own interpretations, as they have done for many other human rights".¹⁸⁰ One foresees that this openness to interpretation could be either negative or beneficial to climate change displaced persons, depending on the identity and agenda of the interpreter.

Nonetheless the OAU (and later the AU) has only gradually become concerned with the protection of the environment and this continues to be the case.¹⁸¹ Therefore,

178 Amechi came to this conclusion after analysing different regional and national court decisions on the interpretation of a right to the environment (see Amechi 2009 *Law, Environment and Development Journal* 68).

179 Ouguerouz *The African Charter on Human and Peoples' Rights* 365.

180 Amechi 2009 *Law, Environment and Development Journal* 64.

181 Ouguerouz *The African Charter on Human and Peoples' Rights* 365.

except for the Kampala Convention, there appear to be no other AU-wide legal instruments specifically providing for the effects of climate change.¹⁸²

4.4.1 The Kampala Convention

The Kampala Convention "seeks to prevent and mitigate displacement; provides for the protection and assistance of persons displaced as a result of natural disasters and climate change" and "provides for the establishment of national and regional mechanisms for early warning, disaster risk reduction and for coordination of humanitarian assistance".¹⁸³ Even though the Kampala Convention exclusively provides protection and assistance to IDPs, many of its provisions could also hold "indirect but important consequences for cross border displacement".¹⁸⁴ These provisions include *inter alia* the respect for and conduct of state parties in accordance with their human rights obligations under international law;¹⁸⁵ providing displaced persons with adequate humanitarian assistance including food, water, shelter, medical care and other health services, sanitation, education and any other necessary social services;¹⁸⁶ cooperation amongst state parties upon request for assistance with displaced persons;¹⁸⁷ and state parties' cooperation in seeking assistance from international organisations and humanitarian agencies, civil society organisations and other relevant actors where the state's available resources are inadequate to provide sufficient protection.¹⁸⁸ The Kampala Convention also makes special provision for climate change displacement in providing that "States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change".¹⁸⁹ Furthermore it provides for the establishment of early warning systems in areas of

182 Such as measures for climate change adaptation and mitigation; There remain only two regional legal instruments of an exclusively environmental protection nature in force on the African continent, namely the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 1991 and the outdated *African Convention on the Conservation of Nature and Natural Resources*, 1968 (African Nature Convention).

183 Abebe "The Kampala Convention and environmentally induced displacement in Africa" 1.

184 Abebe "The Kampala Convention and environmentally induced displacement in Africa" 1.

185 Article 4(1).

186 Article 9(2)(b).

187 Article 5(2).

188 Article 5(6).

189 Article 5(4).

potential displacement, the establishment and implementation of disaster risk reduction strategies, emergency and disaster preparedness and where necessary, providing immediate protection and assistance to displaced persons.¹⁹⁰ Article 3(1) also adds a punitive element to the Kampala Convention.

Those provisions most relevant to the climate change context include: ensuring "the accountability of non-state actors concerned, including multinational companies...for acts of arbitrary displacement or complicity in such acts"; and ensuring "the accountability of non-state actors involved in the exploration and exploitation of economic and natural resources leading to displacement".¹⁹¹ These provisions could be interpreted to include the involvement in activities associated with increased GHG emissions which lead to climate change, such as the burning of fossil fuels, for example.¹⁹² Scholtz also argues that ensuring the accountability of non-state actors could create an obligation on states to "establish a regulatory framework that may ensure the liability of multinational companies".¹⁹³ It might, however, be challenging to establish the necessary causal connection between such activities and the eventual displacement of specific individuals. Nevertheless, certain provisions of the Kampala Convention could guide the development of a future legal protection mechanism providing for cross-border climate change displacement.¹⁹⁴

4.4.2 Pan-Africanism as an embodiment of solidarity

An emerging international law principle which seems particularly relevant in the African context is the principle of solidarity.¹⁹⁵ Williams defines the principle as follows:

In its broadest sense, solidarity describes the relationship or dynamics within a community, and the commitment towards cooperation, support and (re)distribution

190 Article 4(2).

191 Article 3(1)(h-i).

192 European Environment Agency 2013 <http://www.eea.europa.eu/themes/climate/faq/how-do-human-activities-contribute-to-climate-change-and-how-do-they-compare-with-natural-influences>.

193 Scholtz 2011 *South African Yearbook of International Law* 47.

194 See Scholtz 2011 *South African Yearbook of International Law* 47-55 for a more in depth evaluation of the Kampala Convention in a climate change displacement context.

195 It is suggested that solidarity "potentially offers greater depth and maturity than principles such as cooperation" which have previously been the main focus in international discourse (see Williams 2009 *Melbourne Journal of International Law* 493).

so as to ensure that less fortunate members of the community are provided for. In this way, solidarity might be viewed as the principle that the strength of a society is measured by the extent that its rich members support their vulnerable fellow citizens.

Solidarity "may be becoming a general principle, with a common core meaning shared across areas of public international law".¹⁹⁶ McDonough and Tsourdi add that "even if it falls short of generality", the principle "may operate in particular areas" of the law.¹⁹⁷ Accordingly, Hilpold links the principle to international environmental law in the following way:

Das Solidaritätsprinzip ist für das Umweltvölkerrecht als Ganzes prägend. Dies kommt bereits in dem generellen Erfordernis der nachhaltigen Entwicklung zum Ausdruck. Eine besonders plastische Ausprägung dieses Grundsatzes ist bspw. die Verpflichtung der Industriestaaten zur Reduktion von Schadstoffemissionen im Kyoto-Protokoll von 1997.¹⁹⁸

Hilpold describes the principle as formative to international environmental law in its entirety. Both Hilpold and Williams concur that the principle "clearly resonates with the problem presented by climate change where there exists vast inequity in terms of capacity to adapt to and mitigate climate change, along with disparate contributions in terms of greenhouse gas emissions".¹⁹⁹ Accordingly, "the concept of solidarity presents a potential mechanism for the redistribution of resources and responsibilities within the global community so as to achieve a more equitable and justice-orientated response to climate change".²⁰⁰ Williams contends that the legal regime of the UNFCCC already includes "solidaristic measures in the form of the principle of common but differentiated responsibilities, flexible mechanisms such as the clean development mechanism and the introduction of funding initiatives".²⁰¹ Therefore the solidarity principle could be used as a means of further developing the UNFCCC legal regime so that it is of assistance to climate change displaced persons too.

196 McDonough and Tsourdi 2012 www.unhcr.org/4f269d5f9.pdf.

197 McDonough and Tsourdi 2012 www.unhcr.org/4f269d5f9.pdf.

198 Hilpold 2007 *Jahrbuch des Öffentlichen Rechts* 203.

199 Williams 2009 *Melbourne Journal of International Law* 497.

200 Williams 2009 *Melbourne Journal of International Law* 497.

201 Williams 2009 *Melbourne Journal of International Law* 493.

Furthermore, it is contended that the principle of solidarity finds particular applicability in an African context when linked to the principle of pan-Africanism.²⁰² The African continent's unique colonial and pre-colonial history has "influenced heavily the development and focus of its regional human rights law and enforcement mechanisms" and "in the wake of colonialism, the "African preference" as pronounced by African leaders, has generally been not for individual rights, but rather for collective rights focused on self-determination, equality of all people, liberation, international peace, as well as the rights of minorities, the environment and especially development".²⁰³ Pan-Africanism has been described as "the African cult of solidarity", which prioritises the interests of the community above those of individuals.²⁰⁴ Touré agrees that "Africa is essentially a country of community government" in which collective life and social solidarity "gives its habits a fund of humanism which many peoples might envy".²⁰⁵ It was in this same spirit that the African Union's Common Position on Climate Change came into being and which led to the AU Assembly's decision that a single delegation would represent African states in the UNFCCC negotiation process.²⁰⁶ This united African front on climate change matters in general could therefore also serve as a platform to propagate the necessity for an international legal protection framework for climate change displaced persons. Furthermore, pan-Africanism, as an African embodiment of the solidarity principle, could contribute towards the formulation of a coordinated regional approach in dealing with climate change displacement. The growing international recognition for the emergence of the solidarity principle in an environmental law context could further strengthen the legitimacy of pan-African initiatives incorporating the principle of common but differentiated responsibilities in their proposed legal response measures such as requests for international funding, technology transfer and other forms of assistance.

202 The Oxford English Dictionary defines pan-Africanism as "the principle or advocacy of the political union of all the indigenous inhabitants of Africa" (see Oxford Dictionaries 2013 <http://oxforddictionaries.com/definition/english/pan—Africanism>).

203 Coleman 2008 *Berkeley Journal of Gender, Law & Justice* 187-188.

204 The words of Senegal's first Prime Minister, Mamadou Dia, as quoted in Alam 2012 *The Journal of Modern African Studies* 189.

205 The words of Ahmed Sékou Touré, liberator and former president of Guinea, as quoted in Alam 2012 *The Journal of Modern African Studies* 189.

206 *Decision on the African Common Position on Climate Change* Doc Assembly/AU/8 (XII) Add 6, 2009 (see item 3); See Scholtz 2010 *African Human Rights Law Journal* 1-25 for a detailed analysis of the African Common Position on Climate Change.

4.5 Summary

At face value the OAU Convention seems to be more promising than international refugee law in that its refugee definition could be interpreted to provide for instances of climate change displacement. However, while the OAU Convention could potentially provide for climate change displacement, this does not seem currently to be the case. Even though there are instances where states have provided temporary protection to environmentally displaced persons, this protection seems to have been based on humanitarian grounds under customary international law and not on the provisions of the OAU Convention. Furthermore, while African human rights law is progressive in the sense that it includes a right to the environment in the African Charter, the Charter itself does not seem to extend the *non-refoulement* provision beyond its initial scope contained in the 1951 Refugee Convention. Therefore the African Charter does not in itself seem to provide for the *non-refoulement* of climate change displaced persons. Nevertheless its value lies in the contribution it makes towards establishing the existence of an international customary law extension of the *non-refoulement* principle to human rights law. Furthermore it also contributes towards the development of those non-derogable human rights linked to climate change displacement, namely the right to life and the right to be protected from torture, cruel, inhuman or degrading treatment or punishment. Even though the African Charter itself gives no precise content to its article 24 right to the environment, the interpretation attributed to the right by the SERAC communication seems to further entrench the acceptance of international environmental law principles in Africa. These include *inter alia* the concept of sustainable development and the duty to prevent, reduce and control environmental harm. The fact that the African Commission has accepted the right to a generally satisfactory environment and the right to sustainable development as justiciable human rights could create a precedent in favour of the legal protection of climate change displaced Africans, as these same "rights" will quite likely be threatened in their circumstances also.

Even though the AU is only gradually becoming concerned with environmental protection, the Kampala Convention has made some pioneering progress towards the development of a binding legal instrument that provides for climate change

displacement. Although the Convention only makes provision for IDPs, many of its provisions could guide the development of a future legal protection mechanism providing for cross-border climate change displaced persons. Another emerging international environmental law principle which could be of particular worth in developing such a legal protection mechanism is the principle of solidarity. This principle could be especially relevant to the African context when linked to its African manifestation, namely the principle of pan-Africanism. Pan-Africanism could be the necessary catalyst to spark the political will for a coordinated legal response dealing with climate change displacement in the African region. Furthermore it could strengthen the cause of climate change displaced persons by consolidating the African voice calling for international commitments in the spirit of the principle of common but differentiated responsibilities.

5 Cross-border, climate change displacement in SADC law

5.1 Introduction

Twenty years ago environmental degradation was already seen as a serious problem in "virtually every SADC nation".²⁰⁷ To make matters worse, the SADC, as part of sub-Saharan Africa, is regarded as one of the world's most vulnerable sub-regions regarding climate change.²⁰⁸ A recent study shows that "weather anomalies" associated with climate change in sub-Saharan Africa are expected to lead to an increase in cross-border migration.²⁰⁹ Coming back to the SADC, it is therefore not difficult to imagine that "environmental scarcity" in the sub-region could lead to "cross-border migration" into more affluent neighbouring countries such as South Africa.²¹⁰ In this regard it is also predicted that migration patterns in some SADC member states such as Angola, Botswana, Mozambique, Tanzania and Madagascar's will be seriously affected by "coastal flight" as a consequence of changing weather patterns attributable to climate change.²¹¹ This suggests that the SADC could experience large-scale cross-border climate change displacement in the future. Therefore, as in the two preceding sections, this section is aimed at determining which legal instruments could assist in the development of a legal protection framework providing for climate change displaced persons in the sub-region. Accordingly, section 5 will analyse different SADC legal instruments to determine which branches of sub-regional law could contribute towards the formulation of a protection framework. In doing so, refugee-, human rights- and environmental law will be examined in turn.

207 McDonald 1999 *Geoforum* 21.

208 See *IPCC Fourth Assessment Report: Working Group II*, 2007 436-460.

209 Marchiori, Maystadt and Schumacher 2012 *Journal of Environmental Economics and Management* 369-371.

210 McDonald 1999 *Geoforum* 21; It has been stated that the majority of SADC migrants target countries with better economies such as Botswana, South Africa and Namibia. Furthermore, evidence suggests that most migration in the sub-region takes place to other SADC countries and "intra-SADC movement is therefore the prevailing characteristic of migration" (see Olivier 2009 *World Bank Social Protection Discussion Paper* No 0908 11).

211 Marchiori, Maystadt and Schumacher 2012 *Journal of Environmental Economics and Management* 369-371.

5.2 Refugee law in the SADC

Except for the 1998 *Declaration on Refugee Protection within Southern Africa*, there is currently no "refugee-specific protocol or harmonization policy" in place in the SADC.²¹² The declaration seems to adopt a definition of a refugee similar to that of the AOU Convention in that it includes individuals "fleeing the effects of the policy of apartheid as well as external aggression, occupation, foreign domination and other events seriously disturbing public order in the countries of origin".²¹³ The same argument made in the previous section is also applicable here, namely that "events seriously disturbing public order" could possibly include climate change. Furthermore, paragraph B(iii) of the declaration states that becoming a refugee is "a symptom of crisis which afflicts many societies, in particular conflicts and civil strife, economic and social imbalances, ethnic and other forms of intolerance, lack of respect for human rights and good governance". Accordingly it is argued that displacement caused by climate change could be a consequence of "the lack of...good governance". It seems therefore that the *Declaration on Refugee Protection within Southern Africa* possibly includes cross-border climate change-displaced persons in its definition of a refugee. The declaration, however, does not seem to make any meaningful contribution to refugee protection in the sub-region. Except for reaffirming member states' commitments made under the 1951 Refugee Convention and the OAU Convention, with specific reference to the principle of *non-refoulement*, the declaration appears not to provide any additional guidance on the matter.²¹⁴ It does, however, repeatedly appeal to "the international community and co-operating partners" to provide different forms of assistance to host countries in dealing with refugee matters.²¹⁵ Nevertheless, even if the declaration made a more meaningful substantive contribution towards providing legal protection for climate change displaced persons, the generally questionable legal standing of international declarations renders it an unlikely source of assistance.

212 Makhema 2009 *World Bank Social Protection Discussion Paper* No 0906 19.

213 Par B(i) of the *Declaration on Refugee Protection in Southern Africa*, 1998.

214 Par H(1).

215 See par H(4), H(6) and H(13).

The only other SADC provision regarding refugee protection is "a very general" clause contained within the *SADC Protocol on the Facilitated Movement of Persons*, 2005.²¹⁶ Article 28 holds that member states "reaffirm their commitment to their obligations under international agreements to which they are parties, and which relate to refugees".²¹⁷ Furthermore, it provides that "the management of refugees in the region shall be regulated by a specific Memorandum of Understanding (MOU) between State Parties".²¹⁸ Such an MOU has not yet been drafted and would, according to a World Bank discussion paper, "have a relatively weak legal purchase".²¹⁹ It therefore appears as if the seemingly inconsequential sub-regional refugee law of the SADC gives little meaningful additional guidance on the legal protection of climate change displaced persons.

5.3 Human rights law in the SADC

The *Charter of Fundamental Social Rights in SADC*, 2003 (Social Charter) seems to be the only sub-regional instrument providing a somewhat detailed coverage of rights issues. The Social Charter is, however, explicitly aimed at providing social security benefits to workers in the SADC and makes no mention of asylum seekers or refugees.²²⁰ In addition, one of the guiding principles of the *Treaty of the Southern African Development Community*, 1992 (SADC Treaty) calls on the SADC and its member states to "act in accordance with...human rights, democracy, and the rule of law".²²¹ The SADC, however, does not seem to directly contribute towards a human rights approach in protecting cross-border, climate change displaced persons.²²²

Furthermore, the protection of human rights (and by implication one could add the possible protection of climate change displaced persons) in the sub-region received a major setback following the fairly recent disbandment of the Southern African

216 Makhema 2009 *World Bank Social Protection Discussion Paper No 0906* 19.

217 Article 28(1) of the *Protocol on the Facilitated Movement of Persons*, 2005.

218 Article 28(2) of the *Protocol on the Facilitated Movement of Persons*, 2005.

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

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

221 Article 4(c).

222 Such as the extension of the *non-refoulement* principle to individuals fearing serious infringements on their non-derogable human rights.

Development Community Tribunal (Tribunal).²²³ It has been said that "one of the vital components for sustainability of regional integration processes is the legitimacy and effectiveness of the dispute settlement mechanisms".²²⁴ Current developments do not bode well for the effective functioning of the SADC as a force providing legal protection in Southern Africa.

5.4 Environmental law in the SADC

According to Richards, SADC structures are "increasingly paying attention" to "climate change and environmental issues...as this has become an urgent threat for the whole region".²²⁵ Seven of the SADC's twenty or so protocols deal directly with environmental concerns.²²⁶ Many of these instruments could be indirectly relevant to climate change displacement in that they address some of the root causes of displacement such as water scarcity and other aspects of environmental degradation.²²⁷ Those instruments seemingly most applicable to already displaced

223 The Tribunal is the main dispute settlement organ of the SADC. Article 16(1) of the SADC Treaty provides that "The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it". This provision gave the Tribunal a wide mandate with the aim of protecting the interests and rights of member states and their citizens "and to develop the community jurisprudence also with regard to applicable treaties, general principles and rules of public international law" (see Ruppel and Bangamwabo 2008 <http://www.tralac.org/2009/08/25/monitoring-regional-integration-in-southern-africa-yearbook-2008/>). At the Extraordinary Summit of the SADC Heads of State and Government held in Windhoek, Namibia on 20 May 2011 it was, however, contentiously decided that the Tribunal would be dissolved in its present form and that it would be expressly barred from hearing any new or pending cases. Thereafter, at the 32nd Summit of SADC Heads of State held in Maputo, Mozambique on August 18, 2012 it was decided that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States (see par 24). This development effectively dissolved the SADC Tribunal and could hold "dire consequences for the rule of law and human rights in the Southern African Region" (see speech of the former President of the SADC Tribunal, Judge Ariranga Govindasamy Pillay 2011 <http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf>.)

224 As held by the workshop on Specific Aspects of the Experiences of the European Union and the Andean Community held in São Paulo, Brazil in October 2004 (see Ruppel and Bangamwabo 2008 <http://www.tralac.org/2009/08/25/monitoring-regional-integration-in-southern-africa-yearbook-2008/>).

225 Richards 2008 www.cps.org.za/cps%20pdf/pia21_1.pdf.

226 See SADC Protocols 2012 http://www.sadc.int/index.php/documents-publications/protocols?sortBy=34&pageSize=4&doc_q_0=&sortOrder=desc&filterByKey=&filterByVal=&page=1.

227 See for instance the *Revised Protocol on Shared Watercourses in the Southern African Development Community*, 2002; the *Protocol on Forestry*, 2002; the *Protocol on Fisheries*, 2001; and the *Dar es Salaam Declaration on Agriculture and Food Security in the SADC Region*, 2004.

individuals include the *SADC Declaration on Poverty Eradication and Sustainable Development*, 2008 (Declaration on Poverty Eradication); the *Protocol on Health*, 1999 (Health Protocol); and the *Windhoek Declaration on SADC and International Cooperating Partners*, 2006 (Windhoek Declaration).

The Declaration on Poverty Eradication *inter alia* lists "Addressing the adverse impact of climate change in the fight against poverty" as a priority which requires the urgent attention of SADC member states in the light of "new challenges".²²⁸ One of the measures by which member states intend to address this issue is to increase climate change resilience "by preparing and implementing national and regional adaptation and mitigation plans".²²⁹ Furthermore, the declaration also calls on the international community to assist in these areas by providing "predictable, additional and dedicated resources", encouraging Foreign Direct Investment in the SADC Region, "substantially increasing their financial and technical assistance", "reducing unnecessary procedural impediments" and implementing "existing initiatives and commitments".²³⁰ This Declaration could be especially useful in the sense that the formulation of a legal protection framework addressing climate change displacement, could be seen as a method of climate change adaptation.²³¹ In this regard it also further articulates the call for international assistance to provide for climate change displacement in the spirit of solidarity, common but differentiated responsibility, the duty to cooperate and the environment as a common concern.

Furthermore article 25 of the the Health Protocol requires that state parties:

- a) co-operate and assist each other in the co-ordination and management of disaster and emergency situations;
- b) collaborate and facilitate regional efforts in developing awareness, risk reduction, preparedness and management plans for natural and man-made disasters; and
- c) develop mechanisms for co-operation and assistance with emergency services.

It could be understood that "disasters", as referred to above, include incidents of large-scale climate change displacement and therefore article 25 could possibly

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

229 Article 2(vi).

230 Article 4(iv).

231 As contended in par 3.3 of this study.

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

Furthermore, the Windhoek Declaration refers to the "SADC Common Agenda", which includes the Regional Indicative Strategic Development Plan (RISDP) and the Strategic Indicative Plan for the Organ (SIPO).²³² The priority areas for cooperation as outlined in the RISDP include *inter alia*: "Environment and Sustainable Development"; and "Sustainable Food Security".²³³ Together with this, the SIPO includes Peace Support and Humanitarian Operations;²³⁴ Disaster Management;²³⁵ and Food Security²³⁶ as areas of cooperation between member states. Even though plans such as these are not in themselves legally binding, they are indicative of SADC member states' awareness of the necessity to cooperate in preparing for the anticipated effects of environmental degradation in the sub-region.

Other sub-regional instruments which could be applicable when formulating a legal protection framework include the *Protocol on Legal Affairs, 2000* and the *Protocol on Politics Defence and Security, 2001*. The *Protocol on Legal Affairs* sets objectives for the SADC Legal Sector. These objectives include *inter alia*: Providing "legal assistance to SADC and all its institutions and member states in matters relating to the interpretation and implementation of the Treaty, Protocols and subsidiary legal instruments made thereunder";²³⁷ Providing "legal advice and related legal services to other SADC sectors";²³⁸ Assisting "State Parties in developing legal capacities and expertise in specific legal areas of concern" and;²³⁹ Assisting with "the development, within State Parties, of facilities to enhance information sharing, and to undertake and promote research on legal issues of common concern within the mandate of

232 See Par 8 of the Windhoek Declaration.

233 See Par 41(a)(v) and (b)(iii).

234 Par 42(a).

235 Par 42(c).

236 Par 42(k).

237 Article 2(a) of the *Protocol on Legal Affairs, 2000*.

238 Article 2(b).

239 Article 2(c).

SADC".²⁴⁰ Since the drafting of the *Protocol on Legal Affairs*, however, The SADC Legal Sector has been phased out as a result of the rationalisation of SADC institutions and the Legal Sector appears to have been replaced by the SADC Secretariat Legal Affairs Unit (Legal Affairs Unit).²⁴¹ Nevertheless, the SADC's insistence that SADC member states should continue to ratify the *Protocol on Legal Affairs*, and the similarity of the Legal Affairs Unit's mandate to that of the SADC Legal Sector creates the impression that the Protocol remains in force. The Legal Affairs Unit could therefore take the lead in the development of a legal protection mechanism for climate change displaced persons in the SADC sub-region. The *Protocol on Politics, Defence and Security* sets objectives for the Organ on Politics, Defence and Security (Organ). These objectives include *inter alia* to: "protect the people and safeguard the development of the Region against instability arising from the breakdown of law and order, intra-state conflict, inter-state conflict and aggression" and to,²⁴² "enhance regional capacity in respect of disaster management and co-ordination of international humanitarian assistance".²⁴³ The Organ could therefore play an important role in the coordination and enforcement of an eventual sub-regional legal protection framework by enhancing the regional capacity to do so.

5.5 Summary

Even though the definition of a refugee found in the Refugee Declaration could be interpreted to include climate change displaced individuals, the Declaration itself does not seem to make any meaningful contribution to their protection. The only other reference made to refugees in terms of SADC law, namely article 28 of the *SADC Protocol on the Facilitated Movement of Persons*, seems inconsequential in

240 Article 2(j).

241 See Parliamentary Monitoring Group 2004 <http://www.pmg.org.za/docs/2004/appendices/041006sadc.htm>; The Legal Affairs Unit is responsible for: Rendering legal services to the SADC; Drafting legal documents and; Litigation. Its objectives are amongst others to: Develop, propose and evaluate draft legal instruments for the implementation and monitoring of the SADC Treaty and SADC Protocols; Provide legal advice to the SADC Secretariat; Provide legal advice to the SADC Summit and Council meetings; Facilitate the implementation of SADC Summit and Council decisions and; Facilitate the notification of the status of ratification, accession and entry into force of SADC Protocols (see SADC 2012 <http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-finance-administration/legal-affairs/>).

242 Article 2(2)(a) of the *Protocol on Politics, Defence and Security*, 2001.

243 Article 2(2)(l).

the absence of an MOU providing further guidance on the treatment of refugees in the region. It must also be noted that the legal nature of declarations and MOUs is such that they are expected to have a relatively weak legal purchase. SADC refugee law therefore seems to fall short when one searches for legal provisions which could provide protection to climate change displaced persons in the SADC sub-region. The same could be said of SADC human rights law. Sub-regional human rights law does not explicitly provide for the protection of climate change displaced persons. Furthermore, even though the SADC Treaty calls on member states to "act in accordance with...human rights", the current state of the Tribunal leaves the sub-region wanting of any organ which could adjudicate on human rights disputes. Environmental law seems more promising in that the Declaration on Poverty Eradication could provide for climate change persons by addressing the matter as a climate change adaptation measure. By calling for international assistance the declaration further emphasises the importance of the principles of solidarity, common but differentiated responsibility, the duty to cooperate and the environment as a common concern. The Health Protocol could also provide further assistance in coordinating sub-regional efforts of managing "natural and man-made disasters" associated with climate change. Another platform for cooperation exists in the SADC Common Agenda, as contained in the Windhoek Declaration. The RISDP and SIPO (of the SADC Common Agenda) could coordinate regional initiatives regarding *inter alia* humanitarian operations, disaster management and initiatives aimed at sustainable development.

Furthermore, the SADC Legal Affairs Unit could play a leading role in formulating a coordinated sub-regional legal protection framework for climate change displaced persons. In this regard the Legal Affairs Unit could undertake and promote research and provide assistance to different role players in developing their legal capacities to deal with climate change displacement. The Legal Affairs Unit could therefore play a predominantly legislative role in addressing the matter. The Organ on Politics, Defence and Security, on the other hand, could play more of an executive role, seeing as it is mandated to maintain law and order through the enhancement of the SADC's capacity for disaster-management and humanitarian assistance.

6 Conclusion and recommendations

6.1 General

As significant progress has already been made in providing legal assistance to IDPs, the time has now arrived to shift the international, regional and sub-regional focus towards the plight of those cross-border displaced persons still remaining unprotected by law. Providing legal protection for cross-border displaced persons is, however, much more complex than protecting internally displaced persons, as this becomes a matter of international law. Currently different international legal instruments provide for different kinds of cross-border displacement governance. None of these instruments, however, explicitly provides for cross-border "environmental" displacement. While this legal *lacuna* should be addressed, the concept of environmental displacement remains contentious, as there is much disagreement, internationally, over how to establish the precise reason for such displacement. Many are of the opinion that it is difficult, if not impossible to isolate the environmental factor as a primary reason for displacement.²⁴⁴ The displacement effects of increasing environmental deterioration due to climate change, however, cannot be overlooked and establishing a direct link between displacement and climate change (such as the complete disappearance of an island state due to sea level rise) seems less challenging. It is therefore recommended that climate change displacement is treated in isolation of the broader, all-inclusive concept of environmental displacement. The motivation behind this proposal is that addressing climate change displacement under the umbrella of environmental displacement, threatens to indefinitely stall efforts aimed at the establishment of a legal protection framework for climate change displaced persons, who could at this stage be regarded as those in most urgent need of legal protection. Furthermore, the applicability of the UNFCCC legal regime to climate change displacement also motivates such a move.

Given the practical impossibility of providing legal protection to all people whose livelihoods are negatively affected by climate change, it is recommended that a set of

244 See par 2.2.

generic criteria is developed to determine which persons are in the greatest need of such protection.²⁴⁵ To this end, and because of the current definitional confusion concerning the concept of environmental displacement, it is recommended that uniform terminology is used on the matter in international discourse. This could increase legal certainty as to whom environmentally displaced persons are, in which circumstances they need protection, and which branches of the law could be applicable to their protection. By means of refining and integrating current terminology and ideas on the subject, this study concludes that individuals who are forced from their countries of habitual residence as a reaction primarily to climatic push factors which pose an existential threat to their right to life are most in need of protection and may be referred to as cross-border climate change displaced persons.²⁴⁶ Accordingly it is also recommended that this term is used in subsequent writings on the matter.

Furthermore, climate change displacement is expected to occur primarily on the sub-regional geopolitical level of governance.²⁴⁷ Therefore the inclusion of regional and sub-regional elements was important to the practical feasibility the recommendations in this study. Because of Africa's particular vulnerability to the effects of climate change and because of the apparent lack of scholarly and policy work to address climate change displacement on a sub-regional level, this study has sought to determine the extent to which the AU and SADC law frameworks (in addition to international law) offer a legal basis for the protection of climate change displaced persons. In this light, the fields of refugee-, human rights-, and environmental law were analysed, in the international-, the AU- and thereafter the SADC geopolitical sphere. Here follows a brief conclusion with recommendations on the legal protection of cross-border, climate change displacement for each of these spheres.

245 This implies that the idea of a sliding continuum for determining the measure of volition in a person's decision to move is abandoned, as it gives no clear parameters as to when movement is forced rather than voluntary (see par 2.2.2).

246 See par 2.2.4.

247 See par 1.

6.2 International legal protection

While there is general acceptance that climate change displaced persons cannot be classified as refugees in terms of the 1951 Refugee Convention, refugee law jurisprudence such as the *non-refoulement* principle could be particularly useful for the protection of these individuals. Complementary protection in the form of a customary law extension of the *non-refoulement* principle in cases where non-derogable human rights (especially the right to life and the right not to be subjected to torture, cruel, inhuman or degrading treatment) are threatened seems especially relevant in the climate change displacement context. As such complementary protection is currently offered only on an *ad hoc* basis and at the discretion of the receiving state, it is recommended that an internationally harmonised approach is developed. Such harmonisation could for instance be achieved through the drafting of clear international guidelines containing best practice requirements for complementary protection. While it could be challenging to establish a nexus between climate change and human rights "violations" (as it could be hard to single out a specific perpetrator)²⁴⁸ for the purposes of activating a complementary protection mechanism, international environmental law could provide assistance in this regard.

Some principles of international environmental law seem particularly relevant to climate change displacement. Regarding the necessity for a harmonised approach towards protection (such as internationally harmonising complementary protection measures), it is recommended that the principles of solidarity, the duty to cooperate and the environment as a common concern are used as a legal basis for international harmonisation. It is also recommended that the principles of sustainable development and the duty to prevent, reduce and control environmental harm are used when arguing that there is a nexus between climate change and human rights violations. Such an argument could be used towards persuading states emitting a disproportionate amount of GHG emissions (indirectly leading to climate change displacement) for instance either to reduce these emissions or to assist persons displaced as an indirect consequence of such emissions. The principles of

248 See par 3.3.

environmental law could therefore be used to establish a nexus between climate change and human rights violations, by placing a moral obligation upon states proportionate to their GHG emissions to assist climate change displaced persons. If such assistance is not provided, it could be shown that these states are contributing towards the violation of the non-derogable human rights, as stated above.

Lastly it is recommended that the legal regime of the UNFCCC is utilised towards the substantive harmonisation and coordination of an international legal protection framework providing for climate change displacement. The principle of common but differentiated responsibilities could also be used to strengthen the legal basis for the moral obligation of developed countries to assist with the climate change adaptation measures of developing countries (such as assisting with the formulation of an international legal protection framework for climate change displaced persons).

6.3 Legal protection in the AU

The OAU Convention, with its broader definition of a refugee than that to be found in the 1951 Refugee Convention, could possibly provide for climate change displacement. Nevertheless it has not been established that the practice amongst African states of affording *ad hoc* temporary protection to environmentally displaced persons stems from their obligations in terms of refugee law. Writers have argued that such protection is rather based on humanitarian grounds.²⁴⁹ Nevertheless it is recommended that more in-depth studies are undertaken to validate this assessment. It is foreseen that the temporary nature of this *ad hoc* protection will also not be adequate in cases where individuals require longer or permanent protection due to irreversible environmental deterioration in their countries of origin. Therefore, even though it seems more promising than its international counterpart, regional refugee law does not seem to provide adequate protection to climate change displaced persons on its own merits alone.

African human rights law does not seem to extend the scope of the *non-refoulement* principle further than was initially intended by the 1951 Refugee Convention.

²⁴⁹ See par 4.2.

Nevertheless the inclusion of the *non-refoulement* principle in the African Charter, as well as the inclusion in it and in other regional human rights instruments of the right to be protected from torture, cruel, inhuman or degrading treatment or punishment and the right not to be arbitrarily deprived of life contributes towards the development of complementary protection in terms of customary international law.²⁵⁰ The African Charter was also the first regional instrument to include a right to the environment.²⁵¹ While the precise content of this right is unclear due to its vague wording, it is both justiciable and was willingly developed, as was shown by the SERAC communication's interpretation thereof. The SERAC communication seems to narrowly associate this right with other international environmental law principles, especially the principles of sustainable development and the duty to prevent, reduce and control environmental harm. The decision also seems to emphasise people's dependence on a generally satisfactory environment for the realisation of sustainable development.²⁵² The textual vagueness of article 24 could be seen as either a drawback or a boon, seeing as its interpretation is left open to the subjective motives of the interpreter. Therefore, while it does not provide definite and clear assistance to the cause of climate change displaced persons, it does have the potential to be interpreted and developed as such.

The Kampala Convention, however, provides much more direct guidance concerning the legal protection of climate change displaced persons. While it exclusively provides for the legal protection of IDPs, there are many provisions of the convention which could guide the formulation of a possible future legal mechanism providing for cross-border climate change displacement. The adoption of the Kampala Convention has also set an international precedent as the first legally binding regional instrument providing legal protection for climate change displaced persons. Therefore, should a decision be reached that a new legal instrument is to be drafted which specifically provides for cross-border climate change displacement, it is recommended that those relevant provisions of the Kampala Convention are used as a guiding blueprint around which to work.

250 See par 4.3.

251 Article 24 of the African Charter.

252 See par 4.4.

Furthermore, especially in Africa, where state sovereignty is jealously guarded,²⁵³ the emerging international environmental law principle of solidarity could serve as a means to consolidate and coordinate the efforts of states to provide legal protection to climate-change displaced persons in the region. In this regard it is recommended that the usefulness of Pan-Africanism, as the African manifestation of the principle of solidarity, is explored, as this could serve to motivate closer regional cooperation amongst states.

6.4 Legal protection in the SADC

While the *Declaration on Refugee Protection within Southern Africa* possibly includes cross-border climate change refugees in its definition of a refugee, the declaration does not seem to make any additional contribution towards the legal protection of such persons in the sub-region. Even though the Declaration repeatedly calls on the international community to provide assistance to host countries in refugee matters, the generally questionable legal standing of international declarations renders it an unlikely source of refuge. The only other SADC legal instrument providing for refugees, namely article 28 of the *SADC Protocol on the Facilitated Movement of Persons*, also seems rather worthless to the cause of climate change displaced persons, as there is still no MOU (as required by article 28), providing further guidance on the treatment of refugees in the region. Therefore there appears to be no sub-regional refugee law on which the legal the protection of the SADC's climate-change displaced persons could be based.²⁵⁴

The content of the Social Charter and the SADC Treaty as the embodiment of human rights law in the sub-region also appears to be of little assistance to climate change displaced persons. Furthermore, sub-regional human rights law has also suffered a major setback following the dissolution of the Southern African Development Community Tribunal. Even though the SADC Treaty broadly calls on states to act in accordance with human rights, democracy and the rule of law, the absence of an adjudicating body to facilitate the enforcement of such provisions make them of little practical use. At any rate, SADC human rights law seems to lack

253 Samkange 2002 *African Security Review* 75.

254 See par 5.2.

any provisions which could clearly assist in the protection of climate change displaced persons.

Sub-regional environmental law, however, seems more likely to provide for climate change displacement, as there are at least three legal instruments which could be applicable to the matter. The Declaration on Poverty Eradication provides for increasing climate change resilience through adaptation and mitigation measures. Making legal provision for climate change displacement could be seen as such an adaptation measure.²⁵⁵ The declaration's call for international assistance in the undertaking of such adaptation measures is also in harmony with, and provides a voice to the principles of solidarity, common but differentiated responsibilities, the duty to cooperate and the environment as a common concern in the sub-region. Together with this, the Health Protocol could be interpreted as providing for cooperation, coordination and disaster management during incidents of large-scale climate change displacement. The Windhoek Declaration, again, is another environmental law instrument which could provide a platform for sub-regional cooperation regarding the offering of legal assistance to climate change displaced persons. The Windhoek Declaration's RISDP and the SIPO could serve to coordinate *inter alia* sub-regional humanitarian operations, -disaster management and -initiatives aimed at sustainable development. In the light of the above, it is recommended that providing legal protection for climate change displacement is treated as an adaptation measure in accordance with the Declaration on Poverty Eradication. This would make it possible to secure international assistance for providing legal protection to climate change displaced persons. During instances of large-scale climate change displacement it is recommended that provisions of the Health Protocol are implemented to guide the cooperation and coordination of SADC member states' efforts to manage flows of displaced persons. The Windhoek Declaration could also be of use to coordinate such cooperation.

Furthermore, when searching for possible sub-regional bodies that could play a leading role in the legal protection of climate change displaced persons it was found that the SADC Legal Affairs Unit and the Organ on Politics Defence and Security

²⁵⁵ See par 3.3.

could be important. It is recommended that the Legal Affairs Unit acts in a predominantly legislative capacity and takes the lead in promoting research and providing assistance to different role players (particularly the national governments of member states) in developing their legal capacities to deal with climate change displacement. It is also recommended that the Organ on Politics Defence and Security takes the lead on practical logistical matters related to climate change displacement through enhancing the SADC's capacity for disaster management and humanitarian assistance.

6.5 Concluding observations

This study has shown that different branches of law on different geopolitical levels of governance could be drawn from when searching for a framework on which to base the legal protection of climate change displaced persons. The study has also shown that the degree of importance of these different branches of law to the protection of such persons varies. In the AU, refugee law for example, could be applied in a stricter sense than in the international context, as climate change displaced persons could possibly be afforded refugee status in terms of the OAU Convention but not in terms of the 1951 Refugee Convention. However, the possibility of applying the principles of international refugee law to the protection of climate change displaced persons makes international refugee law more relevant than sub-regional SADC refugee law, where no provisions were found which could assist in such protection. In the SADC, again, environmental law seems to be the most relevant branch of law, while this is not necessarily the case in terms of AU environmental law. On all geopolitical levels it was found that no branch of law could singly provide sufficient protection to climate change displaced persons. In answer to this study's initial research question, namely to what extent existing legal frameworks provide for the protection of cross-border climate change displaced persons, it must be said that while several provisions in law could potentially provide such protection, a sufficient protection framework can be derived only from the composite characteristics of different branches of law. It is therefore recommended that a matrix approach is followed when providing legal protection to climate change displaced persons. The configuration of such a legal protection matrix should be flexible, as its precise form

would depend on the unique legal characteristics of each geopolitical sphere. In the AU, for example, a protection matrix would lean more towards refugee law, while environmental law would feature strongly in the SADC context, for example. Therefore a legal protection mechanism should be adjustable to the particular circumstances of the environment it serves. While a coordinated international approach would be valuable in providing legal protection to climate change displaced persons, the importance of a sub-regional protection mechanism cannot be over-emphasised. It is expected that climate change displacement will mainly occur on this level, which makes sub-regional bodies best positioned to assist in cases of climate change displacement. The SADC could therefore be regarded as the most plausible governing body through which to coordinate the legal protection of climate change displaced persons in Southern Africa. Building consensus for the adoption of an eventual protection mechanism should also be easier on the sub-regional level than on regional- and international levels. Nevertheless the importance of the international community in providing international assistance cannot be overlooked and is expected to be a conclusive factor to the success of a legal protection mechanism. In this sense the development of an international (and regional) legal protection mechanism with which to coordinate international assistance in the spirit of the principle of common but differentiated responsibilities would also benefit climate change displaced persons in Southern Africa.

As the scope of this dissertation is limited, the study could not fully analyse the national legislation of member states of the SADC for instance. It is therefore recommended that future studies are extended to the national level, as it is on this level where the actual expression (by means of enactment and enforcement in dualist states) of a protection mechanism would eventually take place. Further studies should also focus on the precise form that such a protection mechanism should take in each geopolitical sphere (for example a new treaty, the extension of existing treaties, or something else). Once general agreement is reached on the design of a protection mechanism, actual proposals could be drafted.

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