

An analysis of the normative framework providing for human environmentally induced migration in SADC

CA MAAS
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Mini-dissertation submitted in fulfillment of the requirements for
the degree *Magister Legum* in *Enironmental Law and
Governance* at the Potchefstroom Campus of the North-West
University

Supervisor: Mr WD Lubbe

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List of abbreviations

ACPMD	African Common Position on Migration and Development
AEO	Africa Environmental Outlook
AU	African Union
CC Resolution	Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa
DRP	Declaration on Refugee Protection within Southern Africa
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
MOU	Memorandum of Incorporation
MPFA	Migration Policy Framework for Africa
NEPAD	New Partnership for Africa's Development
OAU	Organization of African Unity
OAU Convention	Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa
REC	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
UNHCR	United Nations High Commissioner for Refugees

Abstract

Environmentally induced migration has been a contentious topic over the last two decades. Estimates show that over 30 million people worldwide are annually forced to migrate due to serious environmental degradation, natural disasters and depletion of natural resources. Thus the environment is irrefutably changing, and clear linkages can be drawn between environmental change and human mobility. Africa's developing status and its vulnerability in the context of environmental shocks compels research on prospective impacts and outcomes in order to develop proper mitigation and adaptation strategies, especially in Southern African Development Community (SADC) where the likelihood of protection measures being successfully implemented is relatively low. This dissertation is aimed at providing the reader with a detailed analysis of the regional normative framework regulating the issue of environmentally induced migration in SADC. Because environmental migrants are not considered to be "refugees" in international law and on account of the fact that many policy makers and practitioners have their reservations as regards even acknowledging the existence of environmental migrants, protection and regulation in this regard is understandably lacking. A comprehensive framework is nonetheless required to regulate this phenomenon as it prompts serious security and sovereignty concerns. Until quite recently, most African countries had not even put in place national migration policies. Although many states have policies in place now, most have not yet been fully and effectively implemented. The normative framework governing specifically environmentally induced migration in SADC similarly renders rather disappointing results. Most of the applicable instruments do not directly raise the issue and the provisions indirectly touching upon the subject matter are subject to interpretation. A binding protocol must therefore be adopted by SADC Member States embracing elements contained in the instruments comprising the current framework. Such a protocol will however have to be liberal enough to acknowledge and provide for environmentally induced migration in its entirety whilst conservative enough so as not to undermine protection regimes for refugees in the true sense of the word. Conflicting interests and sovereignty considerations will, however, undoubtedly continue to hinder progress in this regard. The way forward is therefore away from ultimate sovereignty preservation and toward a regionalised approach where human rights no longer take a backseat.

Key words: Environmentally induced migration, environmental migrants, population displacement, climate change, climate change refugees, migration, migration regulation, SADC, sovereignty.

Opsomming

Omgewings geïnduseerde migrasie is die afgelope twee dekades 'n omstrede onderwerp, met beramings wat toon dat meer as 30 miljoen mense wêreldwyd jaarliks gedwing word om te migreer as gevolg van ernstige omgewingsagteruitgang, natuurlike rampe en die uitputting van natuurlike hulpbronne. Die omgewing is onteenseglik besig om te verander, en duidelike verbande kan gekarteer word tussen omgewingsveranderinge en menslike mobiliteit. Afrika se ontwikkelende status en die kontinent se kwesbaarheid in die konteks van omgewingsveranderinge en soortgelyke “skokke” noodsaak navorsing oor potensiële impakte en uitkomstes ten einde behoorlike mitigasie en aanpassing strategieë te ontwikkel, veral in die Suid-Afrikaanse Ontwikkelingsgemeenskap (SADC) waar beskermende maatreëls selde sukselsvol implementeer word. Hierdie verhandeling poog om die leser te voorsien van 'n omvattende analise van die regionale normatiewe raamwerk wat tans die kwessie van omgewings geïnduseerde migrasie in SADC reguleer. Omdat omgewingsmigrante nie beskou word as “vlugteling” in internasionale reg nie en as gevolg van die feit dat menigte beleidvormers en praktisyns die hoegenaamde bestaan van omgewingsmigrante in twyfel trek, is dit verstaanbaar waarom beskerming en regulering in hierdie verband ontbreek. 'n Omvattende raamwerk is nietemin nodig omrede omgewingsmigrasie oor internasionale grense ernstige sekuriteit en soewereiniteit implikasies inhou. Tot redelik onlangs het die meerderheid van Afrika-lande nog nie eers nasionale migrasie beleide aangeneem nie. Alhoewel baie state tans sodanige beleide in plek het is meeste daarvan nog nie ten volle en doeltreffend geïmplementeer nie. Die normatiewe raamwerk wat spesifiek die kwessie van omgewings geïnduseerde migrasie in SADC aanspreek lewer soortgelyk teleurstellende resultate. Meeste relevante instrumente raak nie die onderwerp direk aan nie en bepalings wat wel indirek toepassing vind is ongelukkig onderhewig aan interpretasie. 'n Nuwe bindende protokol moet dus deur SADC Lidstate aangeneem word wat toepaslike elemente reeds vervat in bestaande instrumente insluit. So 'n protokol moet egter liberaal genoeg wees om omgewings geïnduseerde migrasie as 'n tipe migrasie te erken en omvattend daarvoor voorsiening te maak terwyl dit steeds konserwatief genoeg moet wees om nie reeds bestaande beskermings regimes vir vlugteling in die ware sin van die woord te ondermyn nie.

Trefwoorde: Omgewings geïnduseerde migrasie, omgewings migrante, populasie verskuiwing / verplasing, klimaatsverandering, migrasie, migrasie regulering, vlugteling, SADC, soewereiniteit.

1 Introduction

Migration is one of the oldest coping strategies for dealing with a degradation of environmental conditions. However, the increase in the magnitude and geographical scale of environmental change caused or exacerbated by both climate change and human activity have led many ... to refer to environmentally induced migration as a new type of phenomenon, and a new challenge for the 21st century.¹

Environmentally induced migration has been a contentious topic over the last two decades. It has been estimated that over 30 million people worldwide are annually forced to migrate due to serious environmental degradation, natural disasters and depletion of natural resources.² Significant environmental changes over the last century include storm activity, a global temperature rise of 0.1 °C per decade and global sea-level rise of 20cm.³ Additionally, according to the UN International Strategy for Disaster Reduction, natural disasters, storms and floods have increased threefold over the past 30 years. Furthermore, the earth is becoming increasingly uninhabitable due to desertification, deterioration of agricultural resources, water pollution and exploitation of natural resources.⁴ Without effective adaptation strategies and substantial reductions in global carbon dioxide emissions, it has been predicted that sea-level rise will wipe out entire countries by 2100.⁵

According to the 2013 *Africa Environment Outlook 3: Summary for Policy Makers*,⁶ the past 30 years have brought about unrelenting environmental deterioration and degradation in Africa leading to significant environmental change and in turn increased vulnerability for an increasing number of African people. Africa's vulnerability to environmental change is intensified by poverty, inadequate coping capabilities and especially the continent's heightened dependence on natural resources for subsistence.⁷ The AEO describes Africa as a continent characterized

1 Acketoft "Environmentally induced migration and displacement".

2 Acketoft "Environmentally induced migration and displacement".

3 O'Brien 2008 *Global Environmental Change and Human Security* 7-9 & Reuveny 2007 *Political Geography* 657.

4 International Organization for Migration 2009.

5 Tol 2007 *Mitigation and Adaptation Strategies for Global Change* 741

6 2013: *UNEP – Africa Environment Outlook 3: Summary for Policy Makers* (Hereafter: AEO). The AEO is a tool of the African Ministerial Conference designed for monitoring environmental management in Africa. It aims to do so at the national and sub-regional levels and in so doing enable member countries to institute environmental management policies and programmes striving to ensure a sustainable future for the African continent.

7 Reuveny 2007 *Political Geography* 657.

by extreme climatic events and particularly vulnerable to climate variability and climate change. In addition, the AEO as well as the fourth Assessment of the Intergovernmental Panel on Climate Change⁸ have revealed Africa to be warming faster than the global average, and that a temperature rise of 3°C to 4°C is likely to occur in this century.

Floods, droughts and sea-level rise are argued to be the most prominent environmental processes which will influence migration trends in the uncertain future affecting poorer and developing countries most severely.⁹ Small islands, Africa and parts of Asia are said to be most vulnerable as these regions are either dry, arid parts of the world or “most likely to see coastal abandonment”.¹⁰ Africa’s developing status (and the fact that it is a region considered extremely vulnerable to climate change induced sea-level rise and droughts) compels research on prospective impacts and outcomes in order to develop proper mitigation and adaptation strategies, especially in Southern African Development Community (SADC) where the likelihood of protection measures being successfully implemented is low due to general poverty and consequential restricted adaptation and coping capabilities.¹¹ According to Aderolili:¹²

[e]very country in the SADC region has seen a dramatic increase in the number of people crossing borders, with the majority of them engaging in migration as a livelihood strategy.

Thus lower technological advancement and higher economic dependence on climate-sensitive sectors render SADC member states especially vulnerable to environmentally induced migration.¹³ The environment is irrefutably changing, and clear linkages can be drawn between environmental change and human mobility.¹⁴ According to the Migration Policy Framework for Africa:

8 Hereafter: IPCC.

9 Chapter 3 will elaborate on this statement as it deals almost exclusively with the aspect of vulnerability in the SADC context.

10 Nicholls 2011 *Philosophical Transactions* 1.

11 Warner 2010 *Global Environmental Change* 402 & Nicholls 2011 *Philosophical Transactions* 1.

12 Aderolili 2010 *Africa’s Social Development Review* 12

13 Reuveny 2007 *Political Geography*.

14 International Organization for Migration 2009.

The movement of people—voluntary or forced, legal or undocumented, within or beyond borders—constitutes today a complex process presenting some of the most intricate inter-relationships of policy concerns for governments. Given that the number of migrants is rising and that this trend is likely to persist in the foreseeable future, the management of migration has necessarily become one of the critical challenges for States in the new millennium.¹⁵

Without an effective regulatory framework to control forced human migration, violent conflict, interstate wars and insurgency is likely to ensue.¹⁶ The only thing which could prove more devastating than forcible population displacement in SADC is an unpreparedness to deal with such a natural calamity. Therefore an evaluation of the current regional normative framework regulating the issue is necessary as existing gaps in legal provisions for “resettlement and sovereign resettlement” renders the potential displacement of millions of people attributable to environmental change an international security concern. Hence, a comprehensive legal framework is required to regulate the possibility of environmental migrants, as such a phenomenon will not only constitute an environmental problem but a legal issue with security and sovereignty implications. This renders it a truly cross-cutting issue needful of proactive regulation and possibly intervention.¹⁷

In consideration of the above, the question now arises: To what extent does the existing framework in SADC provide for environmentally induced human migration or to what extent is this phenomenon currently regulated by law? This dissertation aims to answer the question stated above by critically evaluating the regional normative framework governing the subject matter in the applicable region. Chapter 1 is devoted to discussing a few key concepts and processes, starting with the notion of environmentally induced migration and the definitional and accountability debates surrounding the concept. A new definition for environmentally induced migration is formulated thereafter, isolating four key elements for which regulatory provisions must be present if the existing framework is to be deemed adequate. Climate change as a catalyst of migration and several environmental processes responsible for environmentally induced migration are also discussed, in each instance keeping the regional scope of the overall analysis in mind. Lastly implications on state sovereignty are briefly touched upon. Chapter 3 elaborates on the SADC context and

15 The Migration Policy Framework for Africa EX.CL/276 (IX) pg 3.

16 Reuveny 2007 *Political Geography* 656.

17 Morton “Human security policy challenges” 5.

the concept of vulnerability; key vulnerabilities characteristic of the SADC region are therefore discussed in detail, including among others poverty, climate variability and food insecurity. Hereafter Chapter 4 provides an in depth analysis of the normative framework currently governing the issue of environmentally induced migration in the region. African Union¹⁸ and SADC instruments and initiatives relevant to the subject matter are analysed at length, focussing in particular on binding instruments like the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* and the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*. Hereafter weaknesses in and challenges posed by the existing framework are identified and elaborated upon in Chapter 5 by an evaluation of all applicable instruments against the backdrop of the definitional elements referred to above. The significance of binding versus non-binding instruments in the SADC context is briefly expounded upon where after Chapter 6 concludes the dissertation, providing a short summary and recommendations.

2 Key concepts

2.1 Environmentally induced human migration

2.1.1 Introductory remarks

All evidence points towards climate- and environmentally induced migration becoming one of the major policy challenges of this century.¹⁹

Environmentally induced human migration (EIM) refers to the movement of people within or across borders as a result of severe changes in the environment or other environmental processes.²⁰ This usually happens when an area becomes uninhabitable or living conditions deteriorate due to some or other environmental process or occurrence for example a drought, a flood or sea-level rise. Warner *et al*²¹ points out that EIM takes place when ecological tipping points are exceeded, in other

18 Hereafter: AU.

19 Morton *et al* "Human security policy challenges" 5.

20 International Organization for Migration 2001 1. Note that although the definition of environmentally induced migration generally makes provision for the movement of persons within and between borders, this dissertation mainly focuses on migration of persons across borders in the SADC context.

21 Warner *et al* "Field observations and empirical research"13.

words when “environmental pressures mount and so threaten human security that people begin to factor environmental conditions into their migration decisions”.²² Three key aspects of debate surrounding environmentally induced human migration can be distinguished namely: 1) the debate over whether there is such a thing as EIM; 2) the definitional debate or terminology; and 3) the debate over who should provide protection for environmental migrants.²³ These aspects are discussed below.

Regarding these aspects, history bears witness to episodic migration and displacement owing to environmental changes and research testifies of a causal link between environmental changes (including climate change) and human migration.²⁴ In 1999 the International Federation of the Red Cross issued a report which stated that environmental migrants displaced or relocated by drought, floods, deforestation, and degraded land amounted to approximately 25 million worldwide in 1998, for the first time outnumbering refugees displaced by war.²⁵ Likewise back in the 1990s the IPCC cited migration as one of the major effects of climate change,²⁶ and more recent estimates show that 150 to 200 million people may become permanently displaced due to the effects of climate change by 2050.²⁷ Thus it is clear that EIM is a serious reality, not only in SADC but worldwide.

Displacement or migration is triggered by various factors and a combination of factors “whose permutations keep changing”,²⁸ environmental factors forming part of this combination. Research shows that more unpredictable weather, rising sea-levels and other environmental impacts “will motivate resettlement, forced migration, or other forms of human mobility”.²⁹ The IPCC have published certain findings which,

22 Warner et al “Field observations and empirical research” 13

23 Dun 2008 http://www.danishwaterforum.dk/activities/Transboundary_2008/Migration%20as%20potential%20CC%20adaptation%20-%20Vietnam%20Case%20Study%20Olivia.pdf.

24 Laczko & Aghazarm *Migration, Environment and Climate Change* 13, Warner 2010 *Global Environmental Change* 402, O’Brien et al 2008 *Global Environmental Change and Human Security Project* 23, Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 4, and Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 48.

25 Smith 2007 *Orbis* 624 and Brown *The Guardian (London)* 16.

26 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 11.

27 Stern 2006 *The Stern Review* 77. See also Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 11.

28 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 1.

29 Reveuny 2007 *Political Geography* 662 and Warner 2010 *Global Environmental Change* 402.

according to Kälin & Schrepfer,³⁰ speak to the issue of population movement or migration. These include the fact that water availability increasing in parts of the world while decreasing in other parts will affect hundreds of millions, especially in Africa and Asia. Furthermore a decrease in crop yields, territories at increased risk of floods, storms and disasters, sea-level rise and negative impacts on health due to climate variability will also impact millions worldwide.³¹

Although these effects all have the potential to trigger the movement of persons,³² it must be borne in mind that the relationship between migration and the environment is a complex one.³³ An accurate determination of migratory responses to environmental changes and occurrences (including climate change) is almost impossible

due to uncertainties in the extent and magnitude of climatic signals responsible for pushing and pulling migrants, and to the variation in the contexts and perception of climate threats and, thus, the behaviour of people upon whom they have an impact.³⁴

Thus how affected populations react to environmental shocks is informed by many considerations.³⁵ Still migration is likely to form an option especially in developing countries in Africa and parts of Asia due to the underdeveloped societies in these areas usually being more dependent on the environment for livelihood or subsistence.³⁶

2.1.2 *The definitional debate*

Concerning the definitional debate (the second aspect) mentioned above, isolating a universally recognised definition for EIM is exasperated by the fact that

30 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series 5*.

31 IPCC, *Climate Change 2007: Synthesis Report*. See also Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series 5*.

32 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series 6*.

33 Kniveton et al "Challenges and approaches to measuring the migration-environment nexus" 72.

34 Black *Environmental Refugees: Myth of reality?* Kniveton et al "Challenges and approaches to measuring the migration-environment nexus" 43.

35 Reuveny states that people have a choice between staying and doing nothing, staying in place and mitigating the problems or leaving the affected areas. Their choices will be informed by the severity of the problems and their mitigating capabilities. Reuveny 2007 *Political Geography* 656.

36 Reuveny 2007 *Political Geography* 656 and 658.

environmental factors or changes are usually not solely responsible for human migration as there is always one or more underlying economic, political or other social factor rendering environmental change more of a “proximate trigger” than a driver of migration.³⁷ Laczko & Aghazarm³⁸ refers to this characteristic as the multi-causal nature of migration.

As of yet there is still no consensus on definitions in this field of study or accord regarding whether or not environmental migration is a distinct form of migration worthy of special study.³⁹ Many terms and definitions have been formulated in attempts to capture all the elements applicable to persons displaced on account of environmental reasons. Whether they should be referred to as “environmental refugees”, “environmentally displaced”, “climate change migrants”, “environmentally-induced forced migrants” or simply “environmental migrants” has been a contentious topic in research over the last few years.⁴⁰ Thus due to this uncertainty, a short overview of the definitional debate in this regard follows so as to facilitate the formulation of a new definition to be applied throughout the rest of this dissertation.

To start, one of the most controversial expressions used to describe persons displaced on account of environmental reasons is the term “environmental refugees”, defined in 1985 by UNEP researcher El-Hinnawi⁴¹ as:

people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By ‘environmental disruption’ in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.

Bates, Black and many others⁴² have also written extensively on the subject, commendably addressing the different classifications of such persons as well as the

37 O'Brien et al 2008 *Global Environmental Change and Human Security Project* 24 and Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 7.

38 Laczko & Aghazarm *Migration, Environment and Climate Change* 17.

39 Dun & Gemenne “*Defining ‘environmental migration’*” 10; Laczko & Aghazarm *Migration, Environment and Climate Change* 14.

40 Dun & Gemenne “*Defining ‘environmental migration’*” 10 and Laczko & Aghazarm *Migration, Environment and Climate Change* 18. Many experts and international agencies have taken up this terminology and definitional issue.

41 See El-Hinnawi *Environmental Refugees* 4.

benefits and inadequacies of using the term. Many writers and experts advocate for the term “refugee” and argue that the 1951 Refugee Convention should be expanded to include those displaced as a result of environmental change or occurrences.⁴³ As an example, Stavropoulou⁴⁴ states that:

even though the term ‘environmental refugee’ is legally inaccurate, it is more compelling than the term ‘environmental migrant’ because it evokes a sense of global responsibility and accountability, as well as a sense of urgency for impending disasters.

However, others support the view that new instruments similar to the 1951 *Refugee Convention* should be adopted so as to provide assistance for these people. There are also those who dismiss the very existence of “environmental refugees” or argue that it is at best an exaggerated and at worst a politically motivated and dangerous notion.⁴⁵ The usefulness of the “environmental refugee” concept is moreover regarded as questionable due to its general inclusiveness and the fact that scholars inclined toward international law, broader questions of migration and security concerns tend to resist the use thereof.⁴⁶ It has also been argued to be simplistic, one-sided and misleading.⁴⁷ Castles⁴⁸ for instance states that “it implies a mono-causality which very rarely exists in practice” since the bulk of environmental migration usually occurs within countries or within borders and not between countries.⁴⁹ In contrast “refugee” is a concept implying cross-border movement and although this does happen and will continue to do so in future, EIM tends to produce more internally displaced persons than refugees.⁵⁰ Thus, according to Laczko and Aghazarm,⁵¹ the term “is not sufficiently precise to describe all the various types of

42 Among others see Bates 2002 *Population and Environment*, Stavropoulou “Drowned in definitions?”, Williams 2008 *Law & Policy* and El-Hinnawi *Environmental Refugees*.

43 Stavropoulou “Drowned in definitions?” 11.

44 Stavropoulou “Drowned in definitions?” 12.

45 Stavropoulou “Drowned in definitions?” 11.

46 Bates 2002 *Population and Environment* 466. This is because referring to persons forced to migrate on account of environmental reasons as “refugees” implies that they qualify for protection under the 1951 *Refugee Convention*, a state of affairs which the UNHCR argue could undermine the legal regime as there is no basis for this terminology in international refugee law. See Kàlin & Schrepfer 2012 *Legal and Protection Policy Research Series* 28.

47 Laczko & Aghazarm *Migration, Environment and Climate Change* 18.

48 Castles *Environmental change and forced migration* 8.

49 Laczko & Aghazarm *Migration, Environment and Climate Change* 18.

50 Laczko & Aghazarm *Migration, Environment and Climate Change* 18.

51 Laczko & Aghazarm *Migration, Environment and Climate Change* 19.

movements which may be linked to environmental factors”. Landau⁵² also argues that referring to people who lose their livelihoods on account of environmental reasons as “environmental refugees” consequently “risks drawing the humanitarian project into areas where it should not go” especially because forced displacement on account of environmental factors is almost completely predictable (unlike for example war or persecution).

Hence other possible terminologies have also been investigated⁵³ with Castles⁵⁴ distinguishing between eight different classes or categories of international migrants namely: 1) temporary labour migrants; 2) highly skilled and business migrants; 3) irregular migrants; 4) refugees; 5) asylum-seekers; 6) forced migration; 7) family reunification migrants and 8) return migrants. Individuals or groups who are forced to relocate due to environmental catastrophes are subcategorized under 6), namely forced migration. This classification supports the notion that terms like “environmental-” or “climate change refugees” should be avoided as they have no legal basis in international refugee law and could potentially undermine the international legal regime for the protection of refugees.⁵⁵

From the above it is clear that the manner in which persons who migrate on account of environmental reasons are defined has important repercussions for both research purposes and legal frameworks. Consequently and in agreement with Castles and Smith,⁵⁶ this dissertation favours the terms “environmental migrants” and “environmentally displaced persons” as they are more suitable when dealing with EIM.⁵⁷ The term “environmental migrant” is defined by the International Organization of Migration⁵⁸ as follows:

persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are

52 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 77.

53 Among others see Bates 2002 *Population and Environment*, Stavropoulou “Drowned in definitions?”, Williams 2008 *Law & Policy* and El-Hinnawi *Environmental Refugees*.

54 Castles 2000 *Global Trends and Issues* 269-271.

55 Observatory on Migration 2011 “South-South Migration Development” 75.

56 Smith 2007 *Orbis* 618 Footnote 3.

57 Castles 2000 *Global Trends and Issues* 271.

58 Hereafter: IOM.

obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.⁵⁹

Kälin & Schrepfer⁶⁰ criticize this definition on account of the fact that it does not adequately distinguish between internal and cross-border movements of persons, the implication thereof being that it “risks undermining existing protection frameworks, particularly for internally displaced persons”.⁶¹ It also obscures the distinction between forced and voluntary movements of persons, one of which is very important from a legal protection perspective.⁶² What is more, international law prefers the use of the terms “displaced persons” or “refugees” in the context of forced population movements, and not “migrants”.⁶³ The latter term is alternatively used as a sub-category of voluntary movement and should therefore not be used when referring to persons who are forcibly displaced because of environmental migration drivers.⁶⁴ Thus although these two groups share many common characteristics as regards their “social needs and cultural impacts in their place of settlement”, a clear distinction between refugees and migrants should be maintained.⁶⁵ Taking these shortcomings into account, it is nonetheless clear that the purpose of the most recent definition above is to attempt to encompass all relevant considerations.⁶⁶ Therefore, although it does not adequately distinguish between several key aspects, this definition is satisfactory in that it is wide enough to include all persons who could possibly be displaced on account of environmental processes or occurrences.

Before moving on to a new definition set, the debate over who should provide protection for environmental migrants requires brief contextualisation as it correlates strongly with the definitional debate at hand. This is evident from the following statement by Kälin & Schrepfer:⁶⁷

59 International Organization for Migration 2001 1.

60 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 29.

61 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 29.

62 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 29.

63 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 29.

64 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 29.

65 Castles 2000 *Global Trends and Issues* 271.

66 Laczko & Aghazarm *Migration, Environment and Climate Change* 18.

67 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 30.

The terminological debate amongst humanitarian, migration management and development actors and the difficulties to achieve consensus is to a considerable extent related to mandate issues and responsibilities of the respective institutions, who are trying to defend their own position.

2.1.3 The responsibility / accountability debate

The issue concerning who should be held responsible for environmental migrants to a great extent revolves around the issues of social assistance and refugee protection / asylum. The debate mainly fixates on differences of opinion as to the following: what the current status is on social protection for environmentally displaced populations / persons; if indeed they are to be awarded protection and assistance, what the basis for this would be as they cannot technically be classified as refugees; and which institutions should be responsible for the provision of such assistance / protection. The issue of social protection is especially significant in the SADC context because as will become evident from the chapter below elaborating upon vulnerability, most African countries (and especially certain SADC states) have limited social protection to offer even in terms of their own citizens. This is why social protection for citizens often comes from external agents like international or non-governmental organizations, and the same is true for non-citizens or migrants.⁶⁸

It is often argued that social protection should be based on a universal right to life, basic physical welfare and dignity. The responsibility for the provision thereof thus “goes beyond any particular state”.⁶⁹ Yet most social protection provisions are grounded on an understanding of common responsibility between an individual and particular state; thus in return for loyalty to the state, potential future votes and the payment of taxes the state provides social protection to individuals. It is understandable that international migrants who are essentially non-citizens are therefore “outside such a national ‘social contract’” and therefore not automatically entitled to social protection.⁷⁰

68 Makhema 2009 “Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community (SADC)” 5.

69 Makhema 2009 “Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community (SADC)” 5.

70 Makhema 2009 “Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community (SADC)” 5.

As already touched upon above, extensive literature has been published speaking to the reasons as to why environmental migrants are not eligible for refugee protection under international Refugee Law. It is because they do not qualify as “refugees” under the 1951 *Refugee Convention* which defines refugees as persons who

owing to well-founded fear of being persecuted 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.⁷¹

According to Kàlin and Schrepfer,⁷² the three key elements enshrined in this definition are the following: 1) the person’s presence outside the country or origin, 2) due to persecution on certain grounds (for example race, religion, political opinion) and 3) “inability of unwillingness to avail oneself of the protection of one’s country”. Environmentally displaced persons unfortunately do not fulfil all these criteria, hence they cannot be defined as refugees and hence the term “environmental migrants” is preferred as clarified above. For example in cases of cross-border migration triggered by floods or droughts threatening the inhabitants’ survival, it is clear that international borders are being crossed and that the migrants find themselves outside their countries of origin. Also, very often these migrants are unwilling or unable to return home on account of the lack of protection or social assistance available in their respective countries. Regarding the second requirement however, environmental migrants are generally not forced or inclined to flee or seek refuge across borders due to persecution on account of the grounds included in the refugee definition.⁷³ Environmental changes or occurrences are the main triggers for this type of displacement in contrast to wars, conflicts, persecution and so forth. Thus we are confronted with the debate as to who should be held responsible or accountable to provide protection and assistance to environmental migrants, as international Refugee Law and convention apparently does not apply. Williams⁷⁴ conceptualizes the problem of migration in the SADC context as follows:

71 Article 1A(2) of the RC.

72 Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 31.

73 Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 31.

74 Williams “An overview of migration in the SADC region” 66.

In terms of current institutional arrangements in most SADC member states, cross-border migration inevitably creates a “dilemma of jurisdiction”. At its most basic, it becomes a tug-of-war between the Ministry / Department of Home Affairs / Immigration and the Ministry / Department of Labour. In its extended form, it also involves Foreign Affairs, Social and Welfare Services and so on. The question is-who decides on the numbers of people who should be allowed into a country and the purpose and conditions under which they will be allowed; and once they’ve been granted access, what social and welfare services they are entitled to? And how does the movement of citizens from one country to another impact on the relationship between the governments of the host and source countries?

Irrespective of the above, *International human rights law*⁷⁵ will fortunately always be available to protect the rights and interests of migrants in SADC as everyone is protected “by virtue of being a human being”.⁷⁶ Therefore even environmental migrants or persons finding themselves on foreign soil on account of other reasons than war and persecution are protected by this body of law. For example and according to Kàlien & Schrepfer,⁷⁷ the importance of human rights and particularly provisions as regards the prohibition on non-refoulement emphasized at the 2011 Nansen Conference can be highlighted as “a possible protection framework for those displaced across borders not falling under the refugee protection regime”.

Human rights protection is nonetheless a very “minimalist protection system” and therefore insufficient to regulate the problem at hand.⁷⁸ For example on account of sovereignty considerations it does not regulate admission into a foreign state and provides no clear answers concerning the status persons should be awarded whilst they stay abroad.⁷⁹ Another example is the *Universal Declaration of Human Rights* which provides for the right to seek and enjoy asylum but not the right to receive it, as this is a sovereign decision of the receiving state which it cannot be forced to take.⁸⁰ The *EU Charter of Fundamental Rights* on the other hand does guarantee the right to asylum, albeit only in cases of persecution as defined by the *Refugee Convention* and its 1967 *Protocol*, once again excluding environmental migrants from the list of “recipients”.⁸¹ Even the *International Convention on Protection of the*

75 The body of law applicable in times of peace and of armed conflict.

76 Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 25.

77 Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 25.

78 Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 25.

79 Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 25.

80 Article 14 of the Universal Declaration of Human Rights. See Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 25.

81 Article 18 of the EU Charter of Fundamental Rights.

*Rights of All Migrant Workers and Members of their Families*⁸² provides very limited protection and does not provide for any specific right to be admitted or to remain in another country. It also has a very low ratification status (especially by receiving states)⁸³ and only applies to a specific class of individuals (migrant workers and their families); hence it is very exclusive in awarding protection to migrants in general.⁸⁴

Thus, the question maintained is who is to be held responsible for the victims of EIM? Should the country of origin be forced to implement damage control and employ their resources in an effort to make the “disaster areas” fit for human habitation whilst the receiving state awards only temporary protection and assistance? Who is to fund such assistance and protection? How long can the receiving state be expected to carry such a burden, and what is to happen if the country of origin is unable to admit its nationals back or if said migrants are unwilling to return? Some argue that the international community should be forced to intervene as these people find themselves in similar conditions / circumstances to that of refugees, albeit for different reasons. However as discussed above, concerns have been risen that expanding refugee protection to environmental migrants will undermine the entire system and open a type of Pandora’s box. This accountability debate should therefore be kept in mind as throughout this dissertation, especially when discussing the specific conventions and instruments relevant to the regulation of environmental migrants in SADC which will follow in Chapter 4.

2.1.4 A new definition set

As already stated above,⁸⁵ this dissertation aims to answer the following question: To what extent does the prevailing normative framework provide for protection, assistance and regulation as regards EIM in SADC? Hence what we understand under the concept of “human environmentally induced migration” is very important. Based on the foregoing paras, the following definition is put forward as the working definition of this dissertation:

82 Adopted on 18 December 1990.

83 Warner 2010 *Global Environmental Change* 404.

84 Kàlien & Schrepfer 2012 *Legal and Protection Policy Research Series* 34.

85 See Chapter 1 para 1 above.

Human environmentally induced migration connotes the forced or voluntary movement of people within and between borders on account of environmental changes or occurrences—sudden or slow-onset in nature—which negatively impact upon their lives or livelihoods and therefore compel a temporal or permanent exodus of varying magnitudes, ranging from small groups or individuals to mass migrations.⁸⁶

In considering the various elements embodied in this definition it should be noted that both internal and cross-border migration is provided for in addition to population movements of varying magnitudes. This is because migration varies in terms of magnitude from displacement of individuals or small groups to mass migrations.⁸⁷ Mass EIM has overwhelmingly negative impacts, which include: escalating human crises; rapid urbanisation and accompanied slum growth; stalled development; and in some instances a continuation of unavoidable economic and social decline.⁸⁸ However it has also been argued that migration in this context can be viewed as a form of adaptation to changes in the environment.⁸⁹ Warner⁹⁰ nonetheless states that only certain forms of EIM are adaptive while forms of forced migration and displacement “may indicate a failure of the social-ecological system to adapt.”

In continuing it is also important to distinguish between temporal and permanent migration as well as the circumstances under which people migrate; In other words whether the migration is forced or voluntary.⁹¹ Bates⁹² points out that the decision or resolution to move which is made at the individual or household level denotes voluntary migration. These people predominantly migrate in search of economic opportunities or improvement.⁹³ Forced migration occurs on account of external

86 Own definition formulated from several other working definitions making provision for all relevant components. Once again it must be noted that although the definition provides for both migration within and across borders, cross border migration will be the main focus given the fact that the research relates to the SADC context and therefore migration of people across borders.

87 Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 45.

88 Morton “Human security policy challenges” 6.

89 Morton et al “Human security policy challenges” 6. For example migration away from an affected area may help slow the process of environmental degradation and allow those who remain behind to adjust by perhaps altering their “livelihood strategies”. See Morton “Human security policy challenges” 6. Laczko and Aghazarm (*Migration, Environment and Climate Change* 35) also argue that it is important not to frame environmental migration as only a negative phenomenon or problem as it can also be an opportunity for contributing to adaptation and hence form part of the solution.

90 Warner 2010 *Global Environmental Change* 403.

91 Warner 2010 *Global Environmental Change* 403.

92 Bates 2002 *Population and Environment* 467.

93 There are however many other push/pull factors which motivate people to relocate including factors related to the region or country of origin, factors related to the region or country of

factors compelling people to relocate rendering it more of an involuntary action or compulsion than an actual choice.⁹⁴ In this light the above definition adequately provides for three subcategories of environmental migrants, namely 1) environmental emergency migrants, 2) environmentally forced migrants and 3) environmentally motivated migrants.⁹⁵ In agreement Bates⁹⁶ suggests that the decision to migrate can be conceptualized as a continuum with those who have absolutely no control over their decision to migrate on the far right and moving toward the left people with increasing control over their migratory movements. Hugo⁹⁷ agrees in arguing that the continuum ranges from totally voluntary to totally forced migration, with reality somewhere in the middle.

When evaluating the existing international and regional architecture addressing EIM in SADC, all components of the working definition must be borne in mind as the said framework can only be regarded as adequate if provision is made for EIM in its entirety, in other words if all the components of the definition are covered or provided for. Accordingly there must be regulatory or protective measures or provisions in place addressing all of the following elements:

- forced and voluntary migration or resettlement;⁹⁸
- internal and cross-border migration;⁹⁹
- migration caused by sudden environmental occurrences such as storms or floods as well as population movements caused by slow onset events such as sea-level rise and desertification;
- temporal and permanent migration.

destination and intervening factors that facilitate or restrict migration. See Bates 2002 *Population and Environment* 467. Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 48 and 69 and Black et al *Demographics and climate change*.

94 Bates 2002 *Population and Environment* 467.

95 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 29.

96 Bates 2002 *Population and Environment* 468.

97 Hugo 1996 *International Migration Review* 105-131.

98 It should be noted here that whilst migration is a wide term referring to both within and cross-border movements of people, its use in this dissertation predominantly points toward cross-border movements and not internal migration.

99 As already mentioned above we will only be focussing on cross-border migration given the fact that we are working within the SADC context undertaking an analysis of the regional framework.

In light of these elements it is clear that EIM has “significant political ramifications in addition to humanitarian and development implications”.¹⁰⁰ However in order to better understand the inner workings and effects of this environmental phenomenon a brief discussion of a few other key concepts is necessary. Hence the notion of climate change will now be elaborated upon where after the environmental processes responsible for EIM in the SADC region will be discussed in detail. The concept of state sovereignty also enjoys brief consideration as it is extremely relevant in light of the “political ramifications” which any type of cross-border human migration brings to the table.

2.2 Climate change as a catalyst of migration

Climate change is a complex, cross-cutting issue and has been described as “one of the most difficult environmental, economic and social issues of our time”.¹⁰¹ Not only does it have the potential to jeopardise economies around the world, it holds consequences for all spheres of existence on our planet. It is therefore no wonder that this phenomenon has of late been “catapulted” to the pole position of scientific and policy agendas.¹⁰² According to Bonyhady,¹⁰³ 2006 marked the year wherein climate change matured into a significant public concern. The 1992 *United Nations Framework Convention on Climate Change* (UNFCCC) and its 1997 *Kyoto Protocol* can be viewed as the most significant instruments of progress made towards addressing the problem of climate change.¹⁰⁴ The UNFCCC defines climate change as

a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.¹⁰⁵

Research shows that if it continues at a “business as usual pace” climate change is expected to cause, among others things, increased rainfall in some areas and droughts in others, more frequent and intensive storms and natural disasters, a

100 Morton “Human security policy challenges” 5.

101 Moncel 2012 *Sustainable Development Law & Policy* 11.

102 Peel 2008 *Melbourne University Law Review* 925.

103 Bonyhady & Christoff “Introduction” 1.

104 Lempert 2001 *Italian Journal of International Affairs* 77.

105 Article 1 of the UNFCCC.

significant rise in sea-levels and biodiversity loss.¹⁰⁶ Climate change's relevance in this context is therefore attributed to the fact that it impacts land-use by causing or intensifying storms, floods, droughts and sea level rise, all processes linked to EIM or population displacement as will be discussed below. Many writers have been successful in establishing a linkage between climate change and human mobility.¹⁰⁷ For instance, Smith¹⁰⁸ argues that historically climate change and human migration have been "inextricably linked". Peel¹⁰⁹ contends and argues international peace and security are threatened if climate change continues to cause sea level-rise and more intense storm activity, in so doing increasing the prospect of possible "climate change refugees". Wamukonya & Rukato¹¹⁰ in turn point out that where violent conflict used to be the main factor influencing migration (especially in Southern Africa), economic and especially environmental factors are starting to play a more significant role. The Stern-Report emphasizes that forced migration due to environmental factors could become even more substantial due to climate change.¹¹¹ According to Wamukonya & Rukato,¹¹² it has been estimated that climate change

will increase the number of environmental refugees six fold over the next 50 years to 150 million. The IPCC has also suggested that 150 million environmental refugees would exist by 2050. In addition, there will be problems of global warming. Due largely to a sea-level rise and flooding of coastal-zone communities, but also due to increased droughts and disruptions of rainfall regimes such as monsoonal systems, global warming could threaten large numbers of people with displacement by 2050 or earlier. At least 50 million people could be at severe risk through increased droughts and other climate dislocations.

Thus there seems to be widespread agreement that climate change and its related processes will spur on large-scale population movements posing serious security challenges for the international community.¹¹³ This is because mismanaged migration has the potential to lead to tensions between host communities and migrants and to give rise to xenophobia, discrimination and other social pathologies.¹¹⁴

106 Healy and Tapick 2004 *Columbia Journal of Environmental Law* 90.

107 See for example Perch Nielsen et al 2008 *Climate Change*.

108 Smith 2007 *Orbis* 618.

109 Peel 2008 *Melbourne University Law Review* 938.

110 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 24.

111 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 24.

112 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 31.

113 Smith 2007 *Orbis* 619.

114 Migration Policy Framework for Africa EX.CL/276 (IX) pg. 4.

As briefly stated above, the Fourth Assessment of the IPCC revealed Africa to be warming faster than the global average, and states that a temperature rise of 3°C to 4°C is likely to occur this century. The AEO report also describes Africa as a continent characterized by extreme climatic events and that is particularly vulnerable to climate variability and climate change. According to Lesolle,¹¹⁵ the impact of climate change in the SADC region already contributes to “inside-country migration”. For example more than a million people in southern Africa were displaced in 2007 as a result of unexpected heavy floods in those areas.¹¹⁶ Also, more frequent and intensive droughts have recently become a greater cause for concern as clear linkages can be drawn between climate change induced drought and mass migration. Crop failures connected to recurrent droughts also force more and more people (especially farmers) to abandon their land and migrate to urban areas in search of alternative income generating opportunities.¹¹⁷ According to Nicholls et al,¹¹⁸ the flood risk for people living on islands will be about 200 times greater by 2080 in comparison to a situation where there was no global warming.¹¹⁹

Hence, in light of above it is clear that climate change plays an important role in the occurrence and escalation of the environmental processes responsible for EIM. These processes are discussed in more detail below and in consideration of the above it should be clear that climate change functions as a catalyst in these processes.

2.3 Environmental processes in SADC triggering environmentally induced migration

2.3.1 Classification

As already mentioned, floods, droughts and sea-level rise are argued to be the most prominent environmental process which will influence migration trends in the uncertain future. Additionally storms and natural disasters are also known for their

115 Lesolle 2012 *SADC Research and Policy Paper Series* 13.

116 Lesolle 2012 *SADC Research and Policy Paper Series* 13.

117 Lesolle 2012 *SADC Research and Policy Paper Series* 13.

118 Nicholls et al *Global Environmental Change* 69-87.

119 Barnett 2001 *Tyndall Centre for Climate Change Research* 8.

destructive capacity and their ability to cause human displacement. Oucho¹²⁰ distinguishes between sudden disasters (cyclones, floods, volcanic eruptions) and slow-onset disasters (droughts, desertification, deforestation) while Reuveny¹²¹ draws a parallel between extreme weather events (storms, floods, natural disasters) and accumulating changes (rising sea-levels, land degradation, declining water resources). O'Brien *et al*¹²² on the other hand includes drought, desertification, floods, and sea-level rise under the heading “storms and disasters” but distinguishes between slow onset disasters such as drought and desertification, rapid onset disasters such as floods and cyclones and incremental changes driven by sea-level rise.¹²³ Sudden onset disasters tend to produce internally displaced persons and the migration is usually temporal, although in some instances recovery may not be possible rendering the displacement permanent.¹²⁴ Slow onset disasters on the other hand usually cause migration movements which are more voluntary in nature, moving toward involuntary migration as environmental degradation worsens.¹²⁵ This type of migration also tends to produce more internal migrants although serious droughts and complete desertification have been known to force persons and groups across borders when the areas they previously occupied became uninhabitable.¹²⁶ Regarding sea-level rise, Kälin & Schrepfer¹²⁷ explain that although migration caused by this environmental process will initially be internal and voluntary, with inundations progressing and the remainder of the territory no longer being sufficient to accommodate the whole population, the migration will “turn into forced [and permanent] movements”.

Over the last decade many SADC countries have been victim to EIM, a state of affairs which only exasperates other environmental problems such as soil erosion, water scarcity and deforestation.¹²⁸ Thousands living in low-lying river areas have been forced to relocate and according to Kniveton,¹²⁹ what at first seemed to be

120 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 4.

121 Reuveny 2007 *Political Geography* 658.

122 See O'Brien et al 2008 *Global Environmental Change and Human Security Project* 23.

123 O'Brien et al 2008 *Global Environmental Change and Human Security Project* 23

124 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 40.

125 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 41.

126 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 41.

127 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 41.

128 Warner 2010 *Global Environmental Change* 406.

129 Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 214.

mostly temporary mass displacement “has been observed to take on the characteristics of permanence”. Climate change will no doubt exasperate the problem even further, with the IPCC predicting that territories are now at an increased risk of floods, storms and coastal flooding with the potential to impact tens of millions.¹³⁰ The environmental processes which trigger EIM will now be discussed below, as understanding how these processes and occurrences influence population movements is imperative before moving on to the SADC context. In accord with O’Brien’s approach these processes will be discussed by dividing them into the following categories: 1) rapid onset disasters; 2) slow onset disasters and 3) incremental changes.

2.3.2 Rapid onset disasters: Floods, storms, cyclones and volcanic eruptions

Floods are caused by a number of environmental factors including heavy rainfall and sea-level rise, causing higher levels of storm surges and tropical cyclones.¹³¹ They are a major hazard worldwide and also have the greatest damage potential of all natural hazards.¹³² In the SADC context flooding occurs mostly along the southern and eastern parts of the subcontinent and is also the most frequent natural disaster in both South Africa and Mozambique.¹³³ Between 1996 and 2003 floods have increased to a total of 59 in SADC, more than doubling the meagre 26 which occurred between 1994 and 1998.¹³⁴ The number of people affected has also increased from 4 000 between 1984 and 1988 to 13 000 between 1998 and 2003.¹³⁵ This trend has only increased in the last decade. Between 2007 and 2008, dozens were killed and thousands displaced in more than five SADC countries due to the intense flooding following the rainy season between December 2007 and February 2008.¹³⁶ In 2009, over 1 000 families were displaced by flooding in the Western Province of Zambia, with many others affected in the Eastern, Lusaka, central and

130 Findings by the IPCC. See Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 5

131 Perch-Nielsen et al 2008 *Climate Change* 377.

132 Poolman South African Weather Service Unkown www.pmg.org.za/docs/2007/070821flood.ppt.

133 Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 55 and Poolman South African Weather Service Unkown www.pmg.org.za/docs/2007/070821flood.ppt.

134 Poolman South African Weather Service Unkown www.pmg.org.za/docs/2007/070821flood.ppt.

135 Poolman South African Weather Service Unkown www.pmg.org.za/docs/2007/070821flood.ppt.

136 These include Malawi, Mozambique, Namibia, Zambia and Zimbabwe, together with Botswana to a lesser extent. See The African Magazine 2008 <http://www.theafricanmagazin.org/flooding.htm>.

Northern Provinces.¹³⁷ Since 2001 heavy rains have continued to cause floods along the Zambezi River in central Mozambique. 2007 alone showed 100 000 displaced persons, a number which increased after Cyclone Favio struck that same year.¹³⁸ In January 2013 small-scale flooding affected over 18 000 people across the country and in February 2013 more than 185 000 people were temporarily displaced on account of these floods.¹³⁹

According to Perch-Nielsen,¹⁴⁰ floods are assumed to cause migration in a simple manner as it is a natural hazard “displacing people by destroying their land, houses and other tangible goods and assets”.¹⁴¹ Thus floods result in farmland being engulfed while livestock and houses are swept away, leaving inhabitants without homes or livelihood; diseases also spread more quickly and injuries are sustained leading to fewer work opportunities and reduced income.¹⁴² The most dramatic impacts of natural hazards like floods therefore typically fall disproportionately on the most vulnerable rendering “return, recovery and reintegration” not always possible.¹⁴³ For example Mozambique’s vulnerability lies in the fact that 80% of its population work in agriculture and fisheries, sectors which are especially susceptible to extreme weather events and climate variability.¹⁴⁴ Perch-Nielsen¹⁴⁵ points out that “it is the overall vulnerability of the society in question that strongly influences whether...effects take place or not”. In other words, whether or not a flood will produce environmental migrants will depend largely on how the society is structured and its financial resources and knowledge in this regard.¹⁴⁶ Reuveny¹⁴⁷ argues that regions more dependent on the environment for livelihood (like SADC) are more likely to resort to migration in the wake of natural disasters like floods.

137 SADC Disaster Emergency Response 2009 <http://www.sadc.int/fanr/floods.php>.

138 Warner 2010 *Global Environmental Change* 405.

139 Reliefweb 2013 <http://reliefweb.int/disaster/fl-2013-000008-moz>. The country’s high incidence of flooding is explained by the tropical cyclones forming in the south-western Indian Ocean which sweep towards the coast, and also by the fact that Mozambique is a downstream country with nine major river system draining vast areas of south eastern Africa finding their way to the Ocean by crossing Mozambique. See Lucio et al “Flood management in Mozambique” 15.

140 Perch-Nielsen 2008 *Climate Change* 377.

141 Haque & Zaman 1989 *Disasters* 300-314.

142 Haque & Zaman 1989 *Disasters* 300-314

143 Morton et al “Human security policy challenges” 6.

144 Lucio et al “Flood management in Mozambique” 16.

145 Perch-Nielsen 2008 *Climate Change* 384.

146 Perch-Nielsen 2008 *Climate Change* 384.

147 Reuveny 2007 *Political Geography* 661.

Natural disasters, storms and floods have increased up to threefold over the last 30 years.¹⁴⁸ For purposes of this dissertation, storms include cyclones, hurricanes, earthquakes, tornadoes amongst other types of storms. It is a well-known fact that these types of natural disasters have the potential to render a place previously inhabited unfit for habitation, either permanently or temporarily.¹⁴⁹ Thus disasters linked to extreme events often lead to “displaced people, refugees, relocated communities, and temporary or permanent migration”.¹⁵⁰ The IPCC stresses that

[i]f disasters occur more frequently and/or with greater magnitude, some local areas will become increasingly marginal as places to live or in which to maintain livelihoods. In such cases, migration and displacement could become permanent and could introduce new pressures in areas of relocation.¹⁵¹

Smith¹⁵² states that a trend of displacement due to natural disasters is manifesting throughout the world.¹⁵³ Hurricane Katrina which struck the Gulf of the United States in 2005 for example displaced between 100 000 to 300 000 Louisiana residents alone,¹⁵⁴ and the Indian Ocean tsunami of 2004 claimed 200,000 lives not to mention the displacement of more than 150 000 people.¹⁵⁵ According to Basher,¹⁵⁶ the social and economic stresses created by disasters also often result in displacement or migration. Poor or developing countries or regions like SADC are, needless to say, disproportionately affected given their “intrinsically greater vulnerability...and comparatively low capacities for risk reduction measures”.¹⁵⁷ Tropical cyclones in Mauritius and Mozambique and volcanic eruptions in the Democratic Republic of the Congo are but a few examples of storms or disasters which have caused internal

148 UN International Strategy for Risk Reduction; Basher “Disasters and what to do about them” 35,

149 Bates 2002 *Population and Environment* 471.

150 O'Brien et al 2008 *Global Environmental Change and Human Security Project* 23. Williams also states that displacement and forced migration occurs due to one-off natural disaster events. See Williams 2008 *Law & Policy* 507.

151 Summary for Policymakers, in: IPCC Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, 2011; draft, p. 13, available at: http://www.ipcc-wg2.gov/SREX/images/uploads/SREX-SPM_Approved-HiRes_opt.pdf.

152 Smith 2007 *Orbis* 617-618.

153 A few examples of storms over the last decade include Hurricane Katrina (which struck the USA in 2005), Cyclone Nagris (which struck Burma in 2008 and Storm Xynthia (which impacted France in 2010), all causing extreme permanent and temporal population displacement. See Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 10.

154 See Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 10.

155 Williams 2008 *Law & Policy* 507.

156 Basher “Disasters and what to do about them” 35.

157 Basher “Disasters and what to do about them” 35.

displacement or migration in the SADC region.¹⁵⁸ In 2002 Mount Nyarigong in the Goma region of the Congo erupted forcing thousands of already war stricken displaced people to flee yet again in the face of this disaster.¹⁵⁹ In 2007 six major cyclones hit Mozambique affecting 435 000 people.¹⁶⁰ The accompanying floods, heavy rains and subsequent discharge of water from dams displaced approximately 120 000 people.¹⁶¹ Although migration in these instances was mostly of a temporary nature, some disasters have the strength to permanently destroy an affected area, rendering it uninhabitable for those who wish to return.

It is perhaps worthy to mention that available estimates suggest that as many as 8.1 million people were displaced by sudden-onset disasters in Africa in 2012 alone, proving that these types of events are extremely potent migration drivers.¹⁶²

2.3.3 *Slow onset disasters: Drought and desertification*

Drought remains the most complex and least understood natural hazard influencing EIM.¹⁶³ It has no universal definition and is a slow-onset, “creeping phenomenon”; its duration may range from months to years and no single indicator or index is able to establish precisely “the onset and severity of the event and its potential impacts”. A drought’s spatial extent is also usually much greater than that of other natural hazards, complicating assessment and response actions.¹⁶⁴ Drought is defined as

a deficit of rainfall in respect to the long term mean, affecting a large area for one or several seasons or years, that drastically reduces primary production in natural ecosystems and rainfed agriculture.¹⁶⁵

The International Strategy for Disaster Reduction points out that droughts’ impacts are generally non-structural, hard to quantify and cumulative with magnifying effects

158 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 5.

159 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 4.

160 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 32.

161 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 32.

162 The Kampala Convention One year on: Progress and prospects 6.

163 Perch-Nielsen 2008 *Climate Change* 377.

164 ISDR Ad Hoc Discussion Group on Drought “Living With Risk: An Integrated Approach to Reducing Societal Vulnerability to Drought” 5.

165 WMO 1975 definition. See Le Houerou 1996 *Journal of Arid Environments* 137.

when events carry on from one season or year to the next.¹⁶⁶ Although it has been linked to migration in the past,¹⁶⁷ drought by itself does not trigger an emergency or certain migration. Whether an emergency situation will develop depends on the drought's impact on local people which is in turn informed by their vulnerability to such a "shock".¹⁶⁸ Desertification results from various factors including climate variation and human activities and is defined as "arid, semi-arid and dry-subhumid degradation", or "a reduction of the land production potential in arid, semi-arid and dry sub-humid zones, that may ultimately lead to desert-like conditions".¹⁶⁹

One third of the earth's surface area is covered with hyperarid, arid and semi-arid climates and if dry sub-humid zones are included it adds up to 47%.¹⁷⁰ Droughts have also become more intense and have been occurring over wider areas since the 1970s.¹⁷¹ According to Cronin *et al*,¹⁷² recent estimations show that 250 million Africans will suffer increased water stress by 2020.¹⁷³ This will lead to drought and desertification, the impacts of which will be significantly detrimental in terms of rain-fed cropping and in turn agriculture and food security.¹⁷⁴ Also, if drought leads to famine in areas where staple crops are concerned society collapse could be the end result. Desertification is even worse as it may result in people having to relocate if the land deteriorates to such an extent that it is unable to sustain them.¹⁷⁵ Thus in this context migration occurs when slow-onset environmental change alters "the ability of people to maintain their livelihood and a certain quality of life".¹⁷⁶ Thus, "if the impacted area ceases to fulfil its function" or when no alternative livelihoods are possible, people are essentially forced to migrate.¹⁷⁷ An example of this is the devastating drought Kenya suffered in the 1996-1997 period, an environmental

166 ISDR Ad Hoc Discussion Group on Drought "Living With Risk: An Integrated Approach to Reducing Societal Vulnerability to Drought" 5.

167 Findley 1994 *International Migration Review*, Mahran "The displaced, food production and food aid" 63-74, and Warrick "Drought in the Great Plains" 93-123.

168 ISDR Ad Hoc Discussion Group on Drought "Living With Risk: An Integrated Approach to Reducing Societal Vulnerability to Drought" 2.

169 Le Houerou 1996 *Journal of Arid Environments* 133.

170 Le Houerou 1996 *Journal of Arid Environments* 134.

171 IPCC, 2007. Smith 2007 *Orbis* 625.

172 Cronin *et al* "Water – new challenges" 27.

173 UNDP Human Development Report 2007/2008.

174 Le Houerou 1996 *Journal of Arid Environments* 159.

175 Le Houerou 1996 *Journal of Arid Environments* 159.

176 Like case studies of Niger, the Nile Delta, and the Mekong Delta point out. See Warner 2010 *Global Environmental Change* 411.

177 Warner 2010 *Global Environmental Change* 409.

change which caused mass migration of people and livestock to the neighbouring countries of Somalia and Ethiopia.¹⁷⁸

Drought is a major concern in most SADC countries with reports claiming that most states in the region suffered total crop failure recently.¹⁷⁹ Mozambique for example is plagued by not only major floods but also serious droughts in some regions.¹⁸⁰ In 2012 some parts of Angola received 60% less rainfall than average and 1.8 million (roughly 10% of Angola's population) were affected by food shortages and crop failures.¹⁸¹ This drought presently raging in Angola has already affected between 500,000 and 800,000 people, having destroyed thousands of hectares of agriculture and livestock pastures.¹⁸² According to reports Botswana also seems to be one of the worst affected areas¹⁸³ and Namibia's Deputy Prime Minister claims the whole of Namibia to be affected, with drought relief food being readied for distribution in the direst areas.¹⁸⁴ Even South Africa is experiencing dry spells in key areas, north-eastern Limpopo according to media currently facing "the worst drought since 1983".¹⁸⁵ Malawi, the Congo, Zimbabwe and Zambia are no exception with Malawi struggling with persistent drought for over four years now, its number of food insecure having grown from 2% to 11%, adding up to approximately 1.63 million.¹⁸⁶

According to the Lesolle,¹⁸⁷ drought is already taking its toll as a side-effect of climate change, raising human security issues due to increased water stress, food security and environmental migration. In his Policy paper, *SADC Policy Paper on Climate*

178 In 2000, a cruel drought in Afghanistan also caused the displacement of thousands of Afghan citizens to refugee camps within the country as well as in neighbouring Pakistan. See Smith 2007 *Orbis* 624.

179 Tebele 2013 http://www.southerntimesafrica.com/news_article.php?id=8244&title=SADC%20Faces%20Severe%20Drought&type=83.

180 Lucio et al "Flood management in Mozambique" 15.

181 Redvers 2013 <http://www.ipsnews.net/2013/06/angola-slow-on-drought-response-as-people-die-of-hunger/>.

182 Redvers 2013 <http://www.ipsnews.net/2013/06/angola-slow-on-drought-response-as-people-die-of-hunger/>.

183 Tebele 2013 http://www.southerntimesafrica.com/news_article.php?id=8244&title=SADC%20Faces%20Severe%20Drought&type=83.

184 Tebele 2013 http://www.southerntimesafrica.com/news_article.php?id=8244&title=SADC%20Faces%20Severe%20Drought&type=83.

185 Tebele 2013 http://www.southerntimesafrica.com/news_article.php?id=8244&title=SADC%20Faces%20Severe%20Drought&type=83.

186 USAID 2012 <http://www.usaid.gov/what-we-do/working-crises-and-conflict/building-resilience/malawi-2012>.

187 Lesolle 2012 *SADC Research and Policy Paper Series* 13.

Change: Assessing the Policy Options for SADC Member States, Lesolle¹⁸⁸ states that

[t]he impact of global warming and climate change on the SADC region already contributes to inside--country migration. With more crop failure associated with recurrence of droughts, more and more people, especially the subsistence farmers abandon their land and migrate into towns and cities to seek alternative income generating opportunities.

2.3.4 Incremental changes: Sea-level rise

Sea-level rise in its anticipated rate is a fairly new phenomenon for most world regions, occurring at the mega-scale and global in its effect.¹⁸⁹ Research testifies of a sea-level rise of 20 cm since the 1950s and according to Reuveny,¹⁹⁰ it represents one of the “consistent patterns indicative of climate change”. Climate change causes sea-level rise when seas warm and the water expands, otherwise known as “thermal expansion”.¹⁹¹ It has been estimated that this thermal expansion will contribute to about 50% of the expected sea level rise while glacier melt will make up the remainder.¹⁹² Terrestrial storage has also been cited as a contributing factor in this regard.¹⁹³ A range of impacts can be ascribed to sea level rise including submergence / increased flooding, ecosystem changes, increased erosion and increased salinization.¹⁹⁴ Tol¹⁹⁵ states that overall, without proper adaptation, sea level-rise will wipe out entire countries by 2100. The IPCC has also expressed similar concerns especially related to security issues expected to arise from sea-level rise or “other large-scale biophysical, ecological or social disruptions”.¹⁹⁶ Thus as sea level is expected to continue to rise over the next few decades,¹⁹⁷ the link between this environmental phenomenon and migration has increasingly been under the spotlight. Myers¹⁹⁸ argues that sea-level rise causes the most migration and

188 Lesolle 2012 *SADC Research and Policy Paper Series* 13.

189 Perch-Nielsen et al 2008 *Climate Change* 384.

190 Reuveny 2007 *Political Geography* 657. See also Smith 2007 *Orbis* 618.

191 Smith 2007 *Orbis* 626. Smith 2007 *Orbis* 626.

192 See also Ballou 2006 *Fire Engineering* 210 and Williams 2008 *Law & Policy* 504.

193 Dasgupta et al 2007 *World Bank Policy Research Working Paper* 3.

194 Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 2.

195 Tol 2007 *Mitigation and Adaptation Strategies for Global Change* 741.

196 O'Brien et al 2008 *Global Environmental Change and Human Security* 5.

197 IPCC WG 1.

198 Myers *Ultimate security: the environmental basis of political stability* 308.

according to the IPCC it is also the mechanism with the most direct linkage to population movements.¹⁹⁹ According to O'Brien et al:²⁰⁰

Most studies agree that the most important climate change-related driver of migration will be sea-level rise, with the more careful assessments recognizing that the severity of migration will depend critically on the rate of localized changes in sea-level, and the degree to which adaptation takes place and is successful. These studies also recognize that the rate of migration driven by sea-level rise is likely to be slow, but steady.

A 2007 World Bank study showed that a one meter rise in sea-levels will displace 56 million people in 84 developing countries.²⁰¹ It has also been estimated that without adaptation sea-level rise will erode or flood and submerge extensive low-lying coastal areas causing the displacement of tens of millions of people by 2100.²⁰² This strong link between sea-level rise and migration is attributed to the fact that the former “directly clashes with one of the prevailing demographic trends in much of the developing world: human settlement and urbanization in and around coastal zones”.²⁰³ Considering the fact that about two-thirds of the world’s population live within 100 kilometres of the coast, it is safe to conclude together with Hugo²⁰⁴ that “the potential for population displacement from a significant rise in sea-level is considerable”.²⁰⁵ The drivers of migration in this context are, in many respects, similar to the ones prevalent in terms of floods: people will tend to relocate due to loss of income or damage to and loss of their homes or other infrastructure.²⁰⁶

Sea-level rise is a slow-onset, incremental event influencing migration which means that “the urgency for flight” is initially less pressing because of the slow rate of the environmental change taking place.²⁰⁷ Research on the Holland Island by Arenstam

199 Perch-Nielsen et al 2008 *Climate Change* 377. IPCC 2007: Summary for Policymakers,” in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: IPCC, 2007) pages 4 and 12. See also Smith 2007 *Orbis* 625.

200 O'Brien et al 2008 *Global Environmental Change and Human Security* 24.

201 Naik “Migration and Natural Disaster” 248. See also Ferris http://www.brookings.edu/speeches/2008/1017_natural_disasters_ferris.aspx?p=1.

202 Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 14.

203 Smith 2007 *Orbis* 626.

204 Hugo 1996 *International Migration Review* 119.

205 Smith 2007 *Orbis* 626 and Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 2.

206 Perch-Nielsen et al 2008 *Climate Change* 386.

207 Warner 2010 *Global Environmental Change* 409.

Gibbons and Nicholls²⁰⁸ shows how a 20 cm rise over an extended period of 70 years caused such extensive erosion and loss of land that the island was eventually abandoned in the early 1990s with the last house finally collapsing in 2010.²⁰⁹ Other victims of sea-level rise include the Islanders from Vanuatu and the Bay of Bengal who were also eventually forced to relocate due to slow-onset sea-level rise.²¹⁰ Thus although protection measures to combat sea level rise do exist, in some cases permanent displacement has proven to be the only viable long-term option.²¹¹ The Pacific island state of Tuvalu has for example already appealed to other states for resettlement of its entire population in case evacuation becomes necessary.²¹²

Thus it is clear that a strong correlation exists between the loss of land and migration, so much so that there is a strong argument in favour of abandonment (and with it migration) as an adaptation strategy as opposed to other measures.²¹³ Research shows that low-lying coastal systems, Asian and African mega-deltas and small islands are at the highest exposure to sea-level rise, making these areas the most vulnerable to sea-level rise induced migration.²¹⁴ The high concentrations of population and economic activity in these coastal regions also increase the vulnerability of the areas.²¹⁵ According to Nicholls,²¹⁶ coastal zones collectively contain “a significant proportion of potential environmental refugees”.²¹⁷ In the SADC region, Mozambique is said to be particularly vulnerable due to a combination of tropical storm landfalls, floods, and large projected population growth in addition to sea-level rise.²¹⁸ In terms of small islands, the IPCC reports that

208 Arenstam Gibbons & Nicholls 2006 *Global Environmental Change* 40-47.

209 Perch-Nielsen et al 2008 *Climate Change* 386.

210 Kelman “Island evacuation” 20.

211 Kelman “Island evacuation” 20.

212 See Smith 2007 *Orbis* 626 and Kelman “Island evacuation” 20.

213 Perch-Nielsen et al 2008 *Climate Change* 390.

214 Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 47 and 83, Woodward 1998 et al *Climate Research* and Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 15.

215 Dasgupta et al 2007 *World Bank Policy Research Working Paper* 3. According to Nicholls

216 Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 15.

217 It has for example been estimated that a mere 1m rise will displace more than 10% of the populations of Egypt and Vietnam due to flooding in the Nile and Mekong Deltas (Warner 2010 *Global Environmental Change* 412). Also a 45 cm sea level rise may result in a 10.9% loss of Bangladesh’s territory causing the displacement of about 5.5 million people. There has been a considerable amount of research on the vulnerability of this specific area to sea level rise (IPCC 2001 & Barnett 2001 *Tyndall Centre for Climate Change Research*).

218 Mozambique is also one of the poorest economies in the world and according to research, poorer countries will suffer the most devastating consequences of sea level rise. See Kniveton et al

[s]ea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities”.²¹⁹

According to Lesolle,²²⁰ some SADC Member States have already experienced the impact of sea-level rise. The Seychelles for example have reported that climate change has left the island in danger of losing its protective reef barrier and that a rise in sea-level could further threaten its survival.²²¹ The SADC states of Mauritius and Madagascar are also particularly vulnerable as, like most island states, they will not only suffer disproportionate consequences in terms of land loss²²² but also have small populations rendering the implementation of protection measures more problematic and costly.²²³ Additionally, sea-level rise combined with its resulting sudden onset disasters like floods will furthermore reduce adaptation options possibly leaving migration as the only option.²²⁴ Thus because sea level rise threatens the long-term ability of people to remain living on their islands,²²⁵ “forced abandonment seems a feasible outcome for small changes in sea-level”.²²⁶

2.4 Implications on state sovereignty

According to Guiraudon and Lahav,²²⁷ the extent to which developments included under globalization have “eroded” national sovereignty has remained one of the most prominent ongoing debates in international relations and comparative politics, with international migration featuring at the crossroads of these debates. EIM is more than an environmental problem. It presents a unique legal issue with serious implications for international security and state sovereignty,²²⁸ as international

“Challenges and approaches to measuring the migration-environment nexus” 55; Nicholls et al *Climatic Change* 171-191 and Smith 2007 *Orbis* 626.

219 IPCC 2007b: 13.

220 Lesolle 2012 *SADC Research and Policy Paper Series* 13.

221 Lesolle 2012 *SADC Research and Policy Paper Series* 13.

222 IPCC 2007a: 413-14. See also IPCC 2008b.

223 Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 15

224 Warner 2010 *Global Environmental Change* 407.

225 Barnett 2001 *Tyndall Centre for Climate Change Research* 2.

226 Nicholls et al 2011 *Philosophical Transactions of The Royal Society* 15.

227 Guiraudon & Lahav 2000 *Comparative Political Studies* 163.

228 Williams 2008 *Law & Policy* 512.

migration influences national security by challenging state autonomy and sovereignty.²²⁹ Barnett²³⁰ agrees and states that

[b]ecause sovereignty over delineated territory is the material substrata of national security,...physical processes such as sea-level rise may undermine national security in serious ways.

Sovereignty constitutes the central pillar of international law and forms the fundamental basis of international relations.²³¹ It implies that states are autonomous and independent and entitled in their internal affairs to be free from acts of interference, force or coercion committed by other states.²³² According to Rostow,²³³ this is the very principle upon which the formal structure of international law is built. Every state therefore has the right to exercise supreme, independent authority or jurisdiction over its territory, albeit curbed by certain limitations.²³⁴ Human rights and sovereignty, for example, have often been seen as conflicting principles as realizing or respecting the former sometimes results in an assault on the latter.²³⁵ This also holds true in the case of EIM as a delicate balance must be struck between the rights of environmental migrants crossing internationally recognized borders on the one hand and the sovereignty of the receiving state on the other. If, however, environmental processes in SADC starts fuelling cross-border migration it is safe to assume that sovereignty will continue to weigh heavily compared to human rights as the former concept remains basic to the possibility of international law.

Any type of immigration²³⁶ (and accompanying cultural difference) is generally viewed as a potential threat to national sovereignty and identity, persuading

229 Werz & Conley 2012 *Climate Change, Migration, and Conflict* 17.

230 Barnett 2001 *Tyndall Centre for Climate Change Research* 4.

231 Brownlie *Principles of Public International Law* 287.

232 Rostow 1971 *The Round Table: The Commonwealth Journal of International Affairs* 242.

233 Rostow 1971 *The Round Table: The Commonwealth Journal of International Affairs* 242.

234 According to Rayfuse & Crawford, the international law regarding human rights, the conduct of hostilities and diplomatic, consular and head-of-state immunities all serve to limit the acts of states within their territories, causing sovereignty to no longer be absolute. See Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 2-3.

235 See for example Kahler 2011 *Politics Philosophy Economics* 20 regarding humanitarian intervention where the principles of human rights and justice as opposed to sovereignty and peace are explained. See also Guiraudon & Lahav 2000 *Comparative Political Studies*.

236 In general terms immigration refers to an influx of people (immigrants) into another country or region to which they are not native in order to settle there. Migration on the other hand is a wider term which includes the within and cross-border movements of people (and animals). In other words whilst migration also refers to the crossing of specified boundaries, they need not necessarily be international borders. Immigration however infers cross-border movement and

governments and political movements to rather opt for the restriction of such cross-border movements.²³⁷ According to the IOM, issues of state sovereignty in applying protection instruments and therefore the responsibility to protect notion “takes on unique meaning in the context of environmentally induced migration”²³⁸ Barnett²³⁹ further expounds on this topic by referring to “the porous nature of sovereignty in the face of environmental change”. Williams²⁴⁰ goes on to explain how ascribing rights and responsibilities in relation to climate change displacement is problematic and how the latter conflicts with state sovereignty. The same can be said for the broader issue of environmentally induced displacement. He argues that

the notion of attributing international rights and responsibilities in respect of displaced persons cuts to the very heart of state sovereignty and thus would likely prove a contentious issue upon which to achieve universal (or as close to universal so as to make it worthwhile) agreement.²⁴¹

In the past, global governance of international migration was seen as “an intrusion of national sovereignty”.²⁴² Today, notions of state sovereignty regarding admissions of voluntary migrants still curb the improvement of legal and political frameworks to deal with environmental displacement. This is because border security remains “an essential aspect of state sovereignty”²⁴³ and because migration has the potential to threaten the sovereignty of a host country with unrestrained mass migration violating border control and sovereign territory, state security is also threatened.²⁴⁴ Thus if mass migration fuelled by environmental processes deprives a state of deciding who comes in and who is excluded from crossing its borders, state sovereignty will inevitably be compromised. This is bound to happen as

state sovereignty in the area of admission and removal of foreigners is more limited where displaced people are concerned, as compared to the situation of people who migrate voluntarily.²⁴⁵

also movement *into* a foreign country as opposed to emigration which refers to *leaving* of one’s own country to settle in another country. For purposes of this dissertation the term “migration” should be seen as encompassing “immigration”, especially on account of the fact that cross-border migration is our main focus.

237 Castles 2000 *Global Trends and Issues* 269.

238 International Organization for Migration 2009.

239 Barnett 2001 *Tyndall Centre for Climate Change Research* 11.

240 Williams 2008 *Law & Policy* 517.

241 Williams 2008 *Law & Policy* 517.

242 Newland “The governance of international migration”.

243 Smith 2007 *Orbis* 621 & Castles 2000 *Global Trends and Issues* 278.

244 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 7.

245 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 61.

Consequently, the challenge which states are faced with is finding a balance which will enable them to meet their humanitarian obligations whilst still effectively managing their borders (and regulating the increasing pressure exerted from larger and larger flows of persons moving across borders) in a way that will preserve state sovereignty. Understandably this is easier said than done, especially in cases of mass migration brought on by sudden catastrophic events like floods or other natural disasters.

Sovereignty is particularly relevant in the context of small island states facing inexorable sea-level rise as their very existence is threatened by this slow onset event.²⁴⁶ According to Barnett,²⁴⁷ in a worst-case scenario “nothing less than their sovereignty is at risk.” This is because the exercise of sovereignty and sovereign rights is “contingent on statehood”, a status attributable to a state only if it has a defined territory and permanent population.²⁴⁸ Rayfuse & Crawford²⁴⁹ argue that the above discussed environmental processes (including climate change) threaten to deprive some states of the key criteria necessary to qualify as a sovereign state. Thus if entire islands or coastal areas are wiped out by sea level-rise or rendered uninhabitable due to extreme weather events, does this mean that they will cease to exist as sovereign states under international law? In other words can states exist separate from their territory?²⁵⁰ According to Rayfuse & Crawford,²⁵¹ “as much as states can be created under international law, so too can they cease to exist”. Grant²⁵² conversely argues that:

Territory is not necessary to statehood, at least after statehood has been established... [it] appears to be the case that once an entity has established itself in international society as a state, it does not lose statehood by losing its territory or effective control over that territory.

But what of cases of permanent, total population displacement? According to Rayfuse and Crawford,²⁵³ there is little precedent on this matter. New land is

246 Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 6.

247 Barnett 2001 *Tyndall Centre for Climate Change Research* 2.

248 Article 1 of the Montevideo Convention on the Rights and Duties of States. See Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 4.

249 Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 5.

250 Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 7.

251 Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 5.

252 Grant 1999 *Columbia Journal of Transnational Law* 435.

253 Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 10.

evidently going to be needed for resettlement and decisions will have to be made regarding levels of sovereignty or autonomy.²⁵⁴ For example should sovereign states and non-sovereign territories be recreated or should governance regimes merely adapt to fit new circumstances?²⁵⁵ Kelman²⁵⁶ states that different options are available including joint access to an island's resources, a level of autonomy involving parallel and complementary justice systems or a level of autonomy involving parallel currency systems. A population can therefore either be relocated to the territory of another sovereign state and form citizens of that new state or they can be given a portion of territory within another state with a degree of jurisdictional control and sovereignty.²⁵⁷ The population can also be moved to "an artificially created island".²⁵⁸ Kelman²⁵⁹ however points out that even if a governance model is approved by all parties, many questions and practicalities remain unanswered, for example how territorial or jurisdictional disputes will be resolved or who should pay for the move and construction of new communities or land. Together with all these questions and uncertainties there are also numerous security concerns pertaining to where migrating islanders are to be resettled. Kelman²⁶⁰ for example questions whether a country will be able to "claim a security threat from potential future sovereignty demands" if it were to happen that an entire island state population is relocated to said country. Thus the consequences of EIM in this regard are far-reaching with the potential to, by compromising state sovereignty, threaten "the very notion of statehood itself".²⁶¹

2.5 Concluding remarks

In conclusion, the preceding chapter makes it clear that EIM is a serious reality worldwide, SADC being no exception. Almost every SADC Member State is privy to

254 Kelman "Island evacuation" 21.

255 Kelman "Island evacuation" 21.

256 Kelman "Island evacuation" 21.

257 Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 10.

258 Like "The World", an artificial archipelago of 300 islands off the coast of Dubai. Rayfuse & Crawford however point out that current international law does not provide for artificial islands to have their own territorial waters or exclusive economic zones, and therefore the coastal state within 200 nautical miles will have to authorise the construction of and exercise jurisdiction over the newly created territory. See Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 11.

259 Kelman "Island evacuation" 21.

260 Kelman "Island evacuation" 21.

261 Rayfuse & Crawford *Sydney Law School Legal Studies Research Papers* 1.

one or more of the above discussed environmental processes or occurrences triggering EIM, a state of affairs which will only be exasperated by the effects of climate change. The numbers and statistics provided above serve as further proof of the veracity and seriousness of the dilemmas posed by EIM. In addition to environmental concerns and human rights predicaments, EIM poses significant threats in terms of general peace, security and state sovereignty. Thus its prominence and relevance cannot be denied and its impact within the SADC region merits further discussion. Sequentially, Chapter 3 elaborates on the SADC context and elucidates on why the particular region is so susceptible or vulnerable to EIM.

3 The SADC context and the notion of vulnerability

3.1 The SADC context

On account of its low adaptive capacity and predicted climate change impacts, Africa (and therefore SADC) is extremely vulnerable to EIM.²⁶² It is expected that the bulk of migration in African countries will occur on account of increased pressures on livelihoods caused by environmental factors coupled with numerous other migration drivers. According to Oucho,²⁶³

virtually every SADC member state has experienced some form of internal displacement of population, the so-called “exodus within borders”.

Cross-border migration is similarly not unheard of within the SADC context. The Southern African Development Community (SADC) was established in 1980 as the Southern African Development Co-ordination Conference (SADCC) and operated without a legal framework, treaty or protocol for the first 12 years of its existence up until 1992.²⁶⁴ When its name changed through signage of *The Declaration and Treaty of the SADC* in Windhoek in 1992 the true vision of SADC became one of “regional trade liberalisation and the eventual full economic integration of the Southern African countries”.²⁶⁵ SADC was therefore only formally established in

262 Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 47.

263 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 1.

264 Malan 1998 “SADC and Sub-Regional Security”.

265 Malan 1998 “SADC and Sub-Regional Security”.

1992 and today forms a Regional Economic Community²⁶⁶ comprising of the following 15 Member States: Anglo, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. These states are committed to the developmental goals of regional integration and poverty eradication within Southern Africa through economic development and the preservation of peace and security.²⁶⁷ SADC therefore complements the role of the AU and its aims and goals can be found in a number of different sources including the SADC treaty, various protocols, development and cooperation plans and certain declarations.²⁶⁸

SADC has a total population of 277 million, containing 3.2% of the world's population while accounting for only 0.64% of world production.²⁶⁹ Furthermore the region has an average GDP growth of 5.2% and a 12.6% HIV prevalence rate.²⁷⁰ Average life expectancy was calculated in 2009 to be 55.1, with significant variations across the region.²⁷¹ Services contribute about 51% to the regional GDP, with industry contributing 32% and agriculture 17%.²⁷² The region's fiscal balance (calculated as revenue minus total expenditure) was calculated in 2012 to be -3.6% with almost half of the member states ending this period with a substantial fiscal deficit.²⁷³ SADC also has government debt of 40.4%, calculated as a percentage of its GDP. In terms of trade, intra SADC trade export products include mainly petroleum oils, agricultural products and clothing and textile products. Its main exports comprises of resources such as coal, manganese ores, platinum, precious metals and diamonds as well as resource intensive manufactured goods, clothing and textiles and tobacco.²⁷⁴

266 Hereafter: REC.

267 South African Development Community "About SADC" 2013 <http://www.sadc.int/about-sadc/>.

268 It is not the aim of this dissertation to provide a detailed discussion on the evolution of SADC, the region's aims, its vision and mission or its main bodies, plans, protocols or declarations. Its purpose is rather to give a broad overview of SADC and its main features so as to enable me to contextualize the region's vulnerabilities in terms of EIM. This section will therefore not delve into too much detail but merely give a brief overview of the region's main features.

269 According to World Bank studies 2000. See Leichenko & O'Brien 2002 *Mitigation and Adaptation Strategies for Global Change* 10.

270 South African Development Community "About SADC" 2013 <http://www.sadc.int/about-sadc/>.

271 South African Development Community "About SADC" 2013 <http://www.sadc.int/about-sadc/>.

272 These figures were obtained from the World Development Indicators and reflect contributions between 2000 and 2010. See South African Development Community "About SADC" 2013 <http://www.sadc.int/about-sadc/>.

273 These figures were obtained from Macroeconomic Policies and Convergence TIFI Directorate: Regional Economic Performance 2011 and Medium Term Prospects. See South African Development Community "About SADC" 2013 <http://www.sadc.int/about-sadc/>.

274 South African Development Community "About SADC" 2013 <http://www.sadc.int/about-sadc/>.

Above and beyond the challenges imposed upon SADC by its obvious financial handicap (as the region is comprised of a variety of only middle income and least developed countries), member countries face many other social, economic, health, education, development, diplomatic, defence, security and political challenges.²⁷⁵ Some of these include gender dynamics and gender-based violence, illiteracy, civil conflict and war as well as income inequalities.²⁷⁶ The region is also rife with organised-crime gangs, wars which penetrate borders and damage neighbouring economies, different product standards and tariff regimes, weak customs and road infrastructure as well as wide-ranging socio-economic, political and security cooperation aims. Other challenges include the political crises in Zimbabwe which influences not only the lives of Zimbabweans but the SADC region in general, as the problems in Zimbabwe have exposed important differences in the opinions of some of the SADC leaders.²⁷⁷ The internal political and social pressure accompanying the inflow of Zimbabweans into among others South Africa, Zambia and Botswana has also proven to be a major challenge as is evident from the xenophobic attacks that took place in South Africa in early 2008.²⁷⁸ Other challenges include the situation in the eastern DRC and the stalled situation in Madagascar.²⁷⁹ SADC's natural resources are also being exploited and used unsustainably, leading to ecosystem degradation and increased vulnerability to extreme events.²⁸⁰

3.2 SADC and vulnerability

3.2.1 Understanding vulnerability

The magnitude, scope or strength of a disaster or environmental occurrence is not the key determinant in migration inclination but rather the strength or severity of the disaster in relation to the ability of those affected by it to withstand its impacts.²⁸¹ According to the AEO, the past 30 years have brought about unrelenting environmental deterioration and degradation in Africa leading to significant

275 Reports on International Organizations 2010 <http://www.asil.org/rio/sadc.html>.

276 South African Development Community 2012 <http://www.sadc.int/issues/hiv-aids/>.

277 Reports on International Organizations 2010 <http://www.asil.org/rio/sadc.html>.

278 For more see Reports on International Organizations 2010 <http://www.asil.org/rio/sadc.html>.

279 Zambara 2013 <http://mg.co.za/article/2013-01-04-00-sadcs-peace-plan-faces-challenges>.

280 Malzbender & Earle 2007 *African Centre for Water Research*.

281 Reuveny 2007 *Political Geography* 661.

environmental change and in turn increased vulnerability for more and more African people. According to O'Brien,²⁸²

Vulnerability is a concept that captures the changing nature of risks, and variable capacity to cope with both risk and change.

The notions of vulnerability, adaptation and resilience first became widely used in several assessments of environmental change and more recently in discussions linked to global environmental change.²⁸³ The concept of vulnerability is used to concentrate on the factors that influence exposure and the capacity to respond to change and it is used to understand why events or changes impact some groups more severely than others.²⁸⁴ It is also used to explain why stressors or shocks affect different groups in different ways, and why various groups respond differently to the same event. Thus it is the vulnerability and the coping capacity of a specific group or community which will ultimately determine the devastation of an event or occurrence. A "disaster" is in fact defined as an event which overwhelms local capacity to cope with said occurrence.²⁸⁵ Hence Adger's²⁸⁶ definition:

Vulnerability is the state of susceptibility to harm from exposure to stresses associated with environmental and social change and from the absence of capacity to adapt.

Liverman²⁸⁷ distinguishes between biophysical and social vulnerability, the former referring to the physical conditions of the landscape and how humans and biological diversity are impacted by it while the latter defines vulnerability according to the political, social and economic conditions of a society.²⁸⁸ Warner²⁸⁹ also differentiates between physical and social vulnerability, the former implying for example weak infrastructure whilst the latter denotes aspects like poverty or power structures that undermine certain groups. O'Brien and Leichenko²⁹⁰ agree and argue that both biophysical and social vulnerability must be taken into account when determining a

282 O'Brien et al 2009 *Environmental Science & Policy* 23.

283 Vogel et al 2007 *Global Environmental Change* 350.

284 O'Brien et al 2009 *Environmental Science & Policy* 23.

285 Kaperson & Dow "Vulnerable Peoples and Places" 151.

286 Adger 2006 *Global Environmental Change* 268.

287 Liverman "Vulnerability to global environmental change".

288 O'Brien & Leichenko 2000 *Global Environmental Change* 224.

289 Warner 2010 *Global Environmental Change* 403.

290 O'Brien & Leichenko 2000 *Global Environmental Change* 224.

group or region's vulnerability, as the most vulnerable groups or individuals are not necessarily located in the most vulnerable places. For example:

poor people can live in productive biophysical environments and be vulnerable, and wealthy people can live in fragile physical environments and live relatively well.²⁹¹

Thus the right combination of all relevant physical and social vulnerabilities must be considered. The following indicators are often used to map regions of ecological stress and human vulnerability: food import dependency ratio, water scarcity, percentage land managed and unmanaged, energy imports as percentage of consumption, cereals production, access to safe water, human freedoms, urban population growth, population density, child and maternal mortality, income per capita, literacy, expenditures on defence versus health and education, degree of democratization, rainfall index, per capita livestock units, share of drought resistant crops, agro-climatic zones and fertility rates.²⁹² Kaperson & Dow²⁹³ point out that environmental change produces varied effects which interact with other stresses and multiple vulnerabilities, taking their toll "particularly among the most exposed and poorest people of the world". As already stated above, SADC together with the rest of Africa, Asia and the small islands states are regarded as the world regions most vulnerable to climate change and associated environmental processes linked to EIM. Myers²⁹⁴ describes Sub-Saharan Africa as "the prime locus of environmental migration" and Landau²⁹⁵ refers to the region as "a world leader in human displacement".

SADC's vulnerability can be attributed to many different drivers or inherent conditions such as population growth, poverty, poor nutrition, accumulating contamination of the atmosphere as well as of land and water, HIV / AIDS, government corruption, a growing dependence on distant global markets, growing gender and class inequalities and civil and interstate wars and their

291 Liverman "Vulnerability to global environmental change" 332.

292 Eriksen & Kelly 2007 *Mitigation and Adaptation Strategies for Global Change* 501, Kaperson & Dow "Vulnerable Peoples and Places" 150 and Leichenko & O'Brien 2002 *Mitigation and Adaptation Strategies for Global Change* 4.

293 Kaperson & Dow "Vulnerable Peoples and Places" 147.

294 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 31 and Myers 2001 *Biological Sciences* 609-613.

295 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 75.

consequences.²⁹⁶ Also due to prevailing poverty in many SADC states, existing adaptive capacity is much lower than in the more developed world regions and is being increasingly eroded and undermined by the above factors and conditions.²⁹⁷ Water shortages in several SADC states have already contributed to cross-border and internal migration, and as climate change persists this trend will only increase in severity.²⁹⁸ Furthermore, vulnerability to climate change and its associated processes is not only rampant in the SADC region but also varies extensively between regions, sectors and social groups. Leichenko and O'Brien²⁹⁹ point out that the drier Member States of Botswana, Namibia and Zimbabwe are more likely to be vulnerable to climate change than for example the more humid Tanzania or Zambia. Mozambique on the other hand is vulnerable to floods while the island Member States are more likely to experience tropical cyclones, other storms and the negative effects of sea-level rise. The Member States of Lesotho and Mauritius are also reckoned to be both environmentally and economically vulnerable to migration.³⁰⁰

As pointed out above, environmental factors or changes are usually not solely responsible for human migration as there is always one or more underlying factor rendering environmental change more of a “proximate trigger” than a driver of migration.³⁰¹ Thus above and beyond the environmental triggers discussed above, certain social, economic and political factors are instrumental in increasing a state’s vulnerability to human migration. Therefore although SADC countries all struggle with their own unique array of problems and susceptibilities, they are all in one or more ways vulnerable to this phenomenon. The most prominent vulnerabilities in the SADC context are discussed shortly below.

3.2.2 Key vulnerabilities

3.2.2.1 Poverty and HIV / AIDS

296 Kaperson & Dow “Vulnerable Peoples and Places” 146.

297 Kaperson & Dow “Vulnerable Peoples and Places” 159.

298 Kaperson & Dow “Vulnerable Peoples and Places” 147.

299 Leichenko & O'Brien 2002 *Mitigation and Adaptation Strategies for Global Change* 8.

300 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 22.

301 O'Brien et al 2008 *Global Environmental Change and Human Security Project* 24 and Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 7.

According to Winterstein,³⁰² “the link between poverty and migration remains a contentious and debated issue in academic and migration management spheres”. Yet poverty has been recognized as a source of migration by various authors,³⁰³ and migration is often viewed as a cause of and solution to poverty.³⁰⁴ Winterstein³⁰⁵ for example points out how impoverished communities in Mozambique have been increasingly pushed to migrant labour as a means of sustaining their families after the recent floods and droughts ravaged the region. Thus poverty definitely serves as an additional push factor or driver associated with the environmental processes causing human displacement. SADC and southern Africa in general is well-known for being comprised of some of the poorest, least developed countries in the world. Statistics show that 41% of the sub-Saharan Africa population lived in extreme poverty in 2004.³⁰⁶ Malawi for example is regarded as one of the poorest countries in world with accompanying high levels of inequality.³⁰⁷ Because of this prevalent poverty many Malawians are highly vulnerable and unable to cope with even moderate shocks or changes to their living conditions.³⁰⁸ Fairly recent estimates show that the number of people in absolute poverty in sub-Saharan Africa exceeds 1.3 billion,³⁰⁹ a substantial number of these being SADC Member State citizens. Grote³¹⁰ establishes a clear link between the growing numbers of impoverished people and the increased number of migrants or “refugees” that can be seen in southern Africa and argues that the “environment and poverty are the two interlinked concerns of any country in Africa”. Thus in addition to wide-spread poverty, associated poor socio-economic conditions, and unemployment added to the already vulnerable status of these countries, further fuelling out-migration by breaking down the little resilience inhabitants have left to cope with assaults on their livelihoods.

302 Winterstein “Human security, Migration and Children in SADC” 1.

303 Crisp & Boswell C 2004 *UNU World Institute for Development Economic Research* 9 and Waddington & Sabates-Wheeler 2003 *Development Research Centre on Migration, Globalisation and Poverty*.

304 Winterstein “Human security, Migration and Children in SADC” 1 and Usher 2005 *International Organization for Migration* 14.

305 Winterstein “Human security, Migration and Children in SADC” 5.

306 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 29.

307 Kyegombe & Cromwell 2005 “Food security options in Malawi: good neighbours make good friends?” 14.

308 Kyegombe & Cromwell 2005 “Food security options in Malawi: good neighbours make good friends?” 14.

309 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 30.

310 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 31.

According to Kaperson and Dow,³¹¹ the role of HIV / AIDS in aggravating already vulnerably households is emerging as a strong and negative factor in the vulnerability context. The high levels of adult deaths caused by HIV / AIDS are leading to increasing numbers of orphans and it has been estimated that as much as 20% of children in some countries have lost one or both of their parents to AIDS.³¹² HIV / AIDS has the potential to cause decreased or complete loss of income and leads to disintegration of affected households. This increases and intensifies the rampant poverty and destitution which is characteristic of millions of households in the SADC region, rendering affected families even more vulnerable and often incapable of absorbing further “shocks” to their living conditions. SADC Member States are all severely affected by the HIV / AIDS pandemic, with countries like Zimbabwe, Zambia and Lesotho showing very high percentages of prevalence. Thus this disease definitely plays a significant role in increasing these states’ vulnerability to EIM by further lowering the resilience of affected households, especially when it leads to impoverishment and a state of deprivation.

3.2.2.2 Food insecurity

According to Bauer,³¹³ the most potent drivers of climate-induced migration or the “ensuing proliferation of people displaced by the consequences of climate change” are occurrences like sea-level rise, storm and flood disasters and scarcity of freshwater and arable land, as these are all occurrences which undermine food security. Food security in SADC is a long standing problem as the region is comprised of countries which experience food insecurity either on account of natural disasters or due to insistent conflict and wars which impede agricultural activity.³¹⁴ Statistics show that between 2001-2003, 31% of the sub-Saharan African population were living with insufficient food.³¹⁵ For example between February and April 2002 the governments of Lesotho, Malawi and Zimbabwe declared emergencies in this regard while Mozambique was forced to implement an emergency plan to combat

311 Kaperson & Dow “Vulnerable Peoples and Places” 159.

312 South African Development Community 2012 <http://www.sadc.int/issues/hiv-aids/>.

313 Bauer 2010 “Climate Refugees” beyond Copenhagen” 7.

314 Most SADC Member States fall within the former category, while the DRC and Angola fall within the latter. See Oucho “Internal Displacement of Population in the SADC Region: An Overview” 7.

315 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 29.

the effect of drought in the country.³¹⁶ Oucho³¹⁷ states that Zimbabwe has been “languishing in food insecurity since the fast-track land reform showed its ugly head several years ago”. In 2002 the UN issued a consolidated appeal for US\$611 million to alleviate the crises in the most severely affected states of Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe.³¹⁸ In late 2002 and early 2003 nearly 15 million people in Southern Africa (25% of the population of the above six countries) were considered to be food insecure.³¹⁹ In Malawi alone over 3.5 million people were affected by this predicament.³²⁰

Food insecurity in SADC is caused by among others political turmoil, conflict, changing markets and land issues.³²¹ According to Leichenko and O’Brien,³²² climate change is affecting farmers in different ways and although some are able to take advantage of these changes, many are facing increased vulnerability especially in the developing world. For example the whole of sub-Saharan Africa is at serious exposure, with the IPCC estimating that some 20 countries (440 million people) are expected to experience up to 25% shortfall in food supplies.³²³ The 2013 SADC National Vulnerability Assessment’s key findings furthermore point out that the food insecure population in SADC has increased in almost all countries.³²⁴ Winterstein³²⁵ links this phenomenon of food security (or rather food insecurity) to migration due to the fact that being food insecure leaves communities in situations wherein “their self-sustainability is compromised”. This ultimately leads to individuals or groups feeling insecure and considering alternatives such as relocating in search of greener pastures. Thus when an already food insecure community is “shocked” by a natural hazard or when such a community starts noticing the warning signs of an impending drought, they are more prone to resort to migration than for example a food secure community as the former’s vulnerability is already that much more compromised.

316 Kyegombe & Cromwell 2005 “Food security options in Malawi?” 1.

317 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 7.

318 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 7.

319 Kyegombe & Cromwell 2005 “Food security options in Malawi?” 1.

320 Kyegombe & Cromwell 2005 “Food security options in Malawi?” 4.

321 Winterstein “Human security, Migration and Children in SADC” 5.

322 Leichenko & O’Brien 2002 *Mitigation and Adaptation Strategies for Global Change* 1.

323 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 30.

324 Recommendations in this regard include immediate humanitarian assistance for some areas as well as safety nets and social protection programmes to address chronic vulnerability to hunger, malnutrition and poverty.

325 Winterstein “Human security, Migration and Children in SADC” 5.

3.2.2.3 Low adaptive and technological capacities and a lack of basic infrastructure and services

In addition to the fact that most African countries are plagued by poverty and unemployment, government corruption and HIV / AIDS, their developing statuses make them particularly vulnerable to climate change induced sea-level rise, droughts and other environmental processes. Also according to Warner,³²⁶ the likelihood of protection measures being successfully implemented in such areas is low due to general poverty and consequential restricted adaptation and coping capability, especially when compared to western countries equipped with advanced technology and the necessary capital enabling them to implement protection and regulation measures successfully. In other words mitigation and adaptation strategies and plans to combat natural processes and events are less sophisticated and far less effective in regions like SADC.³²⁷ Furthermore, Africa has a long history of having its resources exploited and even today lands are still being degraded by poorly planned activities related to agriculture, industry, forestry as well as by urban slums and infrastructure development.³²⁸ Poor practices like overgrazing, deforestation and agricultural mismanagement add to the region's low adaptive capacity, a setup which is only intensified by natural hazards which cause further land degradation.³²⁹

Leichenko and O'Brien³³⁰ lists access to infrastructure as one of the many traditional indicators used to calculate a specific group or region's vulnerability. Winterstein³³¹ agrees and states that socio-economic insecurity has been found to be a migration driver in that the lack of basic infrastructure and services often compel people to migrate in search of these amenities. It is therefore understandable why the most vulnerable groups or regions are those who possess a limited coping capacity or those who are least resilient to recovery. Access to infrastructure in this sense should therefore be seen as an asset which adds to a region or group's coping capacity and in so doing lowering the region's vulnerability. Conversely, limited access to infrastructure (which is typical and even characteristic in / of most SADC

326 Warner 2010 *Global Environmental Change*.

327 Reuveny 2007 *Political Geography*.

328 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 29.

329 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 29.

330 Leichenko & O'Brien 2002 *Mitigation and Adaptation Strategies for Global Change* 4.

331 Winterstein "Human security, Migration and Children in SADC" 6.

Member States) is indicative of higher vulnerability. The Migration Policy Framework for Africa for example argues that a low level of requisite technology and lack of opportunities in African countries create fertile grounds for migration.

3.2.2.4 Climate variability

Because most of SADC's population is directly dependent on the climate and weather conditions for their livelihoods, they are extremely vulnerable to the consequences of climate change and environmental occurrences in general. The term "climate variability" refers to variations of the climate system which includes oceans, the land surface as well as the atmosphere over months, years and decades³³² and has progressively been acknowledged as one of the many processes which influence vulnerability.³³³ About two-thirds of the African continent is comprised of drylands which are extremely vulnerable to this phenomenon.³³⁴ Southern Africa in particular is susceptible to inter-annual climate variation with a long history of countries in the region appealing for international disaster assistance to "offset climatic impacts on water supplies, food production and human health".³³⁵ The SADC region also features among the most drought-vulnerable areas in the world, rendering its inter- and intra-annual variability of rainfall "key climatic elements that determine the success of agriculture".³³⁶ Variability in rainfall has serious repercussions for most SADC Member States and increases vulnerability to other shocks, environmental or otherwise. Especially in countries like Malawi where approximately 85% of the labour force is employed in the agriculture sector and 40% of the GDP is generated through agricultural activities, domestic food availability and the economy as a whole is highly susceptible to this particular vulnerability.³³⁷

According to Grote,³³⁸ environmental changes are "especially pronounced in Africa", and sub-Saharan Africa experiences considerable climate variability. The El-Nino-

332 Hellmuth et al 2007 *International Research Institute for Climate and Society* 4.

333 O'Brien & Leichenko 2000 *Global Environmental Change* 224.

334 Leichenko & O'Brien 2002 *Mitigation and Adaptation Strategies for Global Change* 5.

335 Dilley 2000 *Climate Change* 63.

336 For example two severe droughts which occurred during the 1990s cut cereal production in the region in half in 1992 and by one-third in 1995. See Leichenko & O'Brien 2002 *Mitigation and Adaptation Strategies for Global Change* 5.

337 Kyegombe & Cromwell 2005 "Food security options in Malawi?" 8.

338 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 29.

Southern Oscillation affects Southern Africa in bringing either heavy rains (often accompanied by severe floods) or drought.³³⁹ Even without the effects of climate change the environments of Southern Africa are characterized by “variations in rainfall, hydrology, natural resources and agricultural potential”.³⁴⁰ Examples of this include the floods which ravaged Mozambique in 1999 / 2000 and the 1982/1983 droughts which affected much of southern Africa. Additionally due to economic and population growth several of the SADC Member States are predicted to become “water stressed” by 2025.³⁴¹ Over 300 million people in sub-Saharan Africa already suffer water scarcity, and these figures are expected to increase by almost one-third by 2050.³⁴² According to 2001 UNDP estimates more than 100 million people in southern Africa alone are severely threatened by drought and desertification.³⁴³

3.3 Concluding remarks

In light of the above it is understandable why SADC is considered a region particularly vulnerable to EIM, as a variety of factors contribute to each Member State’s vulnerability level, with widespread poverty and climate variability probably being the most daunting common influences. The irony of it all (especially as regards climate variability and climate change) lies in the fact that the developing countries who have contributed negligibly to the problem of climate change are now suffering the bulk of the consequences and experiencing the retribution deserved by the developed world. SADC’s exposure and vulnerability to EIM is already a very real problem which will undoubtedly worsen on account of climate change. Thus the time has now come to evaluate the existing normative framework addressing the subject matter in SADC. In light of the preceding chapters it should be clear that a comprehensive framework is required to regulate this phenomenon as it constitutes more than a mere environmental concern. Chapter 4 will therefore be devoted to investigating the continental and regional architecture whilst keeping in mind the components of the working definition formulated in Chapter 2.

339 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 30.

340 Vogel “A preliminary Assessment of Environmental Vulnerability in Southern Africa” 1.

341 Malzbender & Earle 2007 *African Centre for Water Research*.

342 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 29.

343 Wamukonya & Rukato 2001 *Minerals & Energy Policy Centre* 4.

4 African and SADC instruments and initiatives relevant to environmentally induced human migration

Border control between SADC member states can be described as rather rigid, with all the member countries functioning on the basis of immigration laws and policies based on three fundamental principles: 1) the sovereignty of the nation-state; 2) the integrity of national boundaries; and 3) the right to regulate who may enter its national territory and to enact any conditions and obligations upon those entering.³⁴⁴ Given these principles it is understandable why migration laws and policies in general are “protectionist” and basically discourage migration of persons across borders.³⁴⁵ As of yet there is still no specific regional protocol or agreement on cross-border migration in SADC. Therefore it is necessary to investigate and attempt a detailed analysis of other regional instruments, policies and initiatives which have the potential to (directly or indirectly) address the issue.³⁴⁶

4.1 African Union law and policy

4.1.1 *The 1981 African Charter on Human and Peoples’ Rights*

The *African Charter on Human and Peoples’ Rights*³⁴⁷ provides for the establishment of bodies to promote and protect human and people’s rights in Africa.³⁴⁸ In the context of EIM it is important to note that the right to asylum and the environmental right is enshrined in this *Charter* together with all the other key human rights. Article

344 Williams “An overview of migration in the SADC region” 65. This situation can be largely attributed to the phase of colonialism in Africa and the footprints it left on the region. During this time land legislation and taxations regimes often compelled Africans to labour in mines and plantations, for example the mines in South Africa and Zambia. Adult males were forced to stay in certain territories to work while women, children and the elderly were left behind in other territories. This eventually led to the establishment of borders on the African Continent which were, back then, “overtly coercive”. Fernandez *Borders and Boundaries: Containing African International Migration* 134-136.

345 Williams “An overview of migration in the SADC region” 65.

346 An in-depth analysis of every relevant instrument goes beyond the scope of this study; hence only the most applicable ones will be scrutinized in detail, in particular those pronouncing upon the regulation of displaced persons, issues of migration and human rights aspects. A few others dealing with the status and protection of refugees and internally displaced persons in Africa will also be analysed briefly as they arguably have the potential to influence the position of migrants as well.

347 Adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986. (Hereafter: the *African Charter* or *Charter*).

348 The Preamble to the *African Charter*.

2 of the *Charter* entitles every individual to the enjoyment of the rights and freedoms recognized in the *Charter* without distinction on grounds of for example race, ethnic group, *national and social origin*, fortune, birth or other status.³⁴⁹ Article 3 in turn provides that every individual shall be entitled to equal protection under the law. The right to life and integrity of person is also recognized and protected, as well as the right to security of one's person.³⁵⁰ Article 12(2), is also relevant and determines that

Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.³⁵¹

Thus the article provides people with the right to leave their countries of origin and by implication the right to be received into another country. This right may only be taken away or restricted in the above limited circumstances. It can therefore be argued that if an environmental occurrence moves people to cross borders and such a movement would not jeopardize national security, law and order, public health or morality, restrictions imposed on these people would in effect be irreconcilable with the *Charter*.

In continuing article 20 guarantees all peoples the right to existence, and article 23 determines that all peoples shall have the right to national and international peace and security; the principles of solidarity and friendly relations must govern relations between member states. Article 24 is also significant as it provides all people with "the right to a general satisfactory environment favourable to their development". Article 60 should also be regarded as relevant as it determines that the Commission³⁵² established under article 30 shall draw inspiration from international law on human and peoples' rights and in particular consider African instruments in this regard in addition to the *Charter of the United Nations* and instruments adopted by the latter, the *Charter of the Organization of African Unity*, the *Universal Declaration of Human Rights* and other instruments adopted by African countries relating to human and peoples' rights.

349 Own emphasis added.

350 Articles 4 and 6 of the *Charter*.

351 Article 12(2) of the *Charter*.

352 African Commission on Human and People's Rights, a body established in terms of article 30 of the *Charter* responsible for promoting human and people's rights in Africa.

The *African Charter* cannot be viewed as a source directly addressing the issue of EIM. It is however essential by virtue of its binding nature and its provisions concerning human rights. To illustrate, if everyone is guaranteed the right to a general satisfactory environment favourable to their development, then prohibiting a person who was forced to leave their home and country (on account of an environmental occurrence which destroyed their living environment) from entering a neighbouring country can be interpreted as irreconcilable with the *Charter*. Similarly if everyone is entitled to the right to life and security of one's person, how can an environmental migrant be forced to return home if the environmental conditions in his country is threatening his life and security? How can environmental migrants be refused refuge if the *Charter* guarantees everyone the right to asylum and equal protection under the law, regardless of nationality or origin?

It is transparent that this *Charter* is undoubtedly useful in elevating human rights and guarantees everyone, including environmental migrants, basic protection under the law. It is however of little use when it comes to in particular regulating the issue of EIM or migration in general, with no provisions designating responsibilities to or providing for duties or plans of action for individual states or the international community.

The *Charter* therefore provides general protection to all persons and guarantees them enjoyment of basic human rights. However, sovereignty continues to weigh heavy when compared to human rights and government obligations as regards non-citizens. States are autonomous and independent, and are entitled in their internal affairs to be free from acts of force or coercion committed by other states or pressure from the regional or international community as such. In effect the usefulness of a charter even such as this one, which binds states in their observance of basic human rights and freedoms, becomes somewhat diluted without specific provisions creating responsibilities in this regard, which would include establishing accountability and providing for regulatory measures.

4.1.2 *The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*

The *Organization of African Unity*³⁵³ *Convention Governing the Specific Aspects of Refugee Problems in Africa*³⁵⁴ is a legally binding instrument motivated into existence by the increasing number of refugees in Africa and parties recognising the need for “an essentially humanitarian approach towards solving the problem”.³⁵⁵ Moreover it is the first regionally binding instrument on refugees and was intended to compliment the 1951 *United Nations Refugee Convention*. “Refugee” is defined in article I of the *OAU Convention* as a person who

owing to well-founded fear of being persecuted 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.

This definition is similar to the refugee definition enshrined in the 1951 *Refugee Convention* and its related 1967 *Protocol*. The *OAU Convention* is significant for our purposes however as its definition does not stop there, but expands in paragraph 2 of article I by providing that the term “refugee” shall also apply to persons who, on account of “events seriously disturbing public order” in either part or the whole of their country of origin or nationality, are compelled or forced to leave their place of habitual residence in order to seek refuge in another place outside their country of origin or nationality.³⁵⁶ Consequently this definition does not require “a well-founded fear of persecution” as is stipulated in the 1951 *Refugee Convention*, but rather opts for an examination of the facts of a particular situation and whether they fit within the definition’s specified causes of flight.

The inclusion of this category of persons is important as it broadens the application of the *OAU Convention* significantly in that “events seriously disturbing public order” covers an extremely wide spectrum of events / occurrences. When considering the

353 Hereafter: OAU.

354 Adopted by the Assembly of Heads of State and Government on 10 September 1969 and entered into force on 20 June 1974. Hereafter: *OAU Convention*.

355 Preamble to the *OAU Convention*.

356 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

working definition of environmental migrants formulated in chapter 2 above it becomes apparent that it is a category of persons who can easily be brought home under this second part of the definition, especially in the case of forced migrants who cross borders on account of sudden-onset environmental events like for example floods, earthquakes and storms.³⁵⁷ According to Abebe,³⁵⁸ it has often been argued that the *OAU Convention* may provide protection to persons fleeing their countries on account of at least some forms of natural disasters or environmental occurrences. Thus although this Convention mentions nothing of environmental migrants or environmental shocks generating refugees, article 1 phrased broadly as it is might be applicable to this category of persons and hence the whole *Convention* could hypothetically be used to regulate the issue of EIM. Thus in continuing it should be borne in mind that we are approaching the provisions of this instrument from the assumption that the term “refugee” might in fact be inclusive of environmental migrants.³⁵⁹

Article II of the *Convention* deals with Asylum and the gist of it comes down to Member States pledging to employ their respective legislation in receiving refugees and in some instances in securing settlement for those who are unable or unwilling to return to their countries of origin. Rejection and expulsion of refugees by any Member State is furthermore strictly forbidden in instances where the person’s life, physical integrity or liberty would be threatened.³⁶⁰ Needless to say an environmental occurrence like a flood, earthquake or storm has the potential to jeopardise a person’s life and physical integrity; even sea-level rise and droughts can escalate to a point where people’s lives are threatened to such an extent that migrating or fleeing is no longer merely an option. Furthermore, where one Member State is overloaded with refugees such a State may appeal directly to other Member States who must then take appropriate measures to lighten the burden. Temporary residence may also be granted to refugees in the first country of asylum in which they presented themselves as refugees pending arrangement for their re-

357 As discussed in Chapter 2 above these types of occurrences have the potential to seriously disturb and even destroy the public order and social surroundings of an area forcing inhabitants to seek a home and safety elsewhere.

358 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

359 It should however be noted that as discussed in Chapter 1 above, these terms are not synonymous and we wish to preserve the distinction throughout this dissertation.

360 Article II of the *OAU Convention*.

settlement.³⁶¹ Article III provides for the prohibition of insurrectionary activities by refugees and article IV determines that the provisions of the *Convention* be applied to all refugees without discrimination.³⁶² No refugee shall be repatriated against his will and the country of asylum must work together with the country of origin to make adequate arrangements for the safe return of refugees who wish to return home.³⁶³ In addition to these arrangements any possible assistance by the respective countries, voluntary agencies and international and intergovernmental organisations shall be given to facilitate refugees' return home.³⁶⁴ Article VII provides that Member States must provide the Secretariat with information and statistical data concerning the condition of refugees, the implementation of the *Convention* and laws and regulations and decrees which relate to refugees in their respective countries. Article VIII provides that Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees³⁶⁵ and that the *OAU Convention* shall serve as a regional complement in Africa to the 1951 *United Refugee Convention*.

All in all it is a very "to the point" *Convention* phrased rather generally without any specific guidelines or action plans on how to regulate refugees on ground level. Thus although some provisions are included which regulate aspects of for example travelling documents and the location where refugees must be settled in the asylum country,³⁶⁶ it is more of a declaration regarding the status of refugees aimed at ensuring that Member States are unable to refuse / repatriate them from their countries. Yet in broadening its refugee definition the *Convention* provides protection to a wider group of forced migrants who would not normally qualify for protection under the 1951 *Convention*. Whether or not the *OAU Convention* should be interpreted so as to include specifically environmental migrants, however, is another question. Even so, it can be safely concluded that the drafters of the *Convention* tried to, in their definition, encompass all the various circumstances specific to Africa that lead to displacement of individuals or groups across borders and that it is therefore wide enough to include environmental migrants.

361 Article II of the *OAU Convention*.

362 Article III and IV of the *OAU Convention*.

363 Article V of the *OAU Convention*.

364 Article V of the *OAU Convention*.

365 Hereafter: UNHCR.

366 Article VI of the *OAU Convention*.

The *Tunis Declaration on the OAU Convention* (AHG/Decl. 216 (XXX) 1994)³⁶⁷ celebrated the 20th year anniversary since the latter entered into force and highlighted the contributions which it made over the previous two decades. The *Declaration* for example acknowledges that the *Convention*

ensured the very survival of the institution of asylum itself and its humanitarian character where the character of refugee flows has sometimes threatened the very fabric of brotherhood and peaceful coexistence between states.³⁶⁸

It carries on to include that the *OAU Convention* continues to provide a solid cornerstone for refugee policy and state practice in the reception of asylum seekers and refugees and has provided positive inspiration for legal documents elsewhere.³⁶⁹ In considering this declaration it is perhaps significant to note that nothing is mentioned about migrants or displaced persons benefitting from the *Convention*. Could this indicate that the *OAU Convention* should in fact not be interpreted so widely as to include environmental migrants? Or is a wider interpretation still tolerable irrespective of no real contribution or regulation in this regard having been perpetrated by the Convention, at least nothing of which is acknowledged in the *Tunis Declaration*? According to Kälin & Schrepfer,³⁷⁰ while such an interpretation is possible it is not supported by the *opinio juris* of African states. They argue that:

although regional practice has been to permit people who cross an international border to flee a natural disaster to remain temporarily (e.g. Congolese fleeing eruption of Mount Nyiragongo in 2002 and crossing into Rwanda), African governments have never characterized this as an obligation arising under the OAU Convention'. Likewise, the Cartagena Declaration does not seem to have been understood as covering natural disasters. However, it cannot be excluded that a process leading to an expanded interpretation of these instruments could be set in motion, even though there is currently no indication that this is happening. In any case, an expansive interpretation of the two instruments risks overstressing their meaning and would run contrary to the drafters' intention which did not mean to include natural disasters in their broader notions.

Thus in light of the above, the question of the OAU's scope or applicability remains an issue of debate and an interpretation predicament. Writers continue to disagree as to the drafter's intention and the liberties which will be taken if the wider

367 Hereafter: *Tunis Declaration*.

368 *Tunis Declaration*.

369 *Tunis Declaration*.

370 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series 29*

interpretation is formally accepted cannot be ignored. Of the 15 SADC Member States, almost all have signed and ratified this *Convention*, with the exceptions of Madagascar, Mauritius and Namibia which have only signed it.³⁷¹ This at least gives us an indication of SADC's position as regards the status of refugees and presents almost a unanimous front "desirous of finding ways...of alleviating their misery and suffering as well as providing them with a better life".³⁷² Thus the *Convention* is an example of regional law binding almost the whole SADC region and its relevance should not be undervalued as it forms the regional foundation for providing protection and finding solutions for refugees (possibly including environmental migrants) and problems of forced population displacement in Africa. Nonetheless, its usefulness as regards the regulation of EIM is probably inconsequential given its declaratory and general nature. Oloka-Onyango³⁷³ for example states that

there is no monitoring mechanism established by OAU (save for the limping Bureau for Refugees), that can effectively pursue the matter of adherence to the principles of the Convention, or indeed monitor the laws and practices of member States in this regard.

The *OAU Convention* furthermore never established any "self-sustaining institutional mechanism, such as a treaty body, for its implementation, nor was any oversight authority designated".³⁷⁴ According to Nyanduga³⁷⁵ the implementation of the *Convention* in general fell to the OAU's political organs.³⁷⁶ Thus the OAU disbanding in 2001 and being replaced by the AU creates additional problems as regards who exactly is responsible for implementing or enforcing this instrument.³⁷⁷ Sharpe³⁷⁸ states that

371 African Commission on Human and People's Rights 2014 <http://www.achpr.org/instruments/refugee-convention/ratification/>.

372 Preamble to the OAU Convention.

373 Oloka-Onyango 1991 *IJRL* 453, 459.

374 Sharpe 2011 *New Issues in Refugee Research* 18.

375 Sharpe 2011 *New Issues in Refugee Research* 18

376 The African Commission and the Bureau for the Placement and Education of African Refugees (later renamed the Bureau for Refugees, Displaced Persons and Humanitarian Assistance) were two of the bodies initially concerned with implementing the *OAU Convention*, doing research and communicating with relevant role players. The former survived the OAU's transition into the AU but with little success as regards implementation of the *Convention*; the latter's work in this regard is similarly viewed a failure and the body was demised when the OAU transitioned over to the AU. See Sharpe 2011 *New Issues in Refugee Research*.

377 An Extraordinary Summit of the OAU was held in Sirte, Libya on 9 September 1999 which called for the establishment of an African Union. The Constitutive Act of the African Union was thereafter adopted on 11 July 2000, setting out the objectives of the AU. The Act entered into force on 26

Instead of building one effective AU organ for refugees, a number of bodies with obscure and possibly overlapping mandates were formed in an ad hoc fashion reminiscent of the OAU approach.

Thus there is no one AU body currently embracing the *OAU Convention's* mandate and although there are several AU organs concerned with refugee initiatives pursuant to the *Convention*, Sharpe³⁷⁹ makes a good point in arguing that the AU should start focussing on the quality of their initiatives over the quantity, and that it is time “for rhetoric to give way to reality”.

4.1.3 *The 1994 Addis Ababa Document on Refugees and Forced Population Displacement in Africa*

The *Addis Ababa Document on Refugees and Forced Displacement in Africa*³⁸⁰ is mainly devoted to the provision of certain recommendations concerning the refugee and displacement issue in Africa. It acknowledges environmental degradation and competition over scarce resources as two of the root causes of forced population displacement and then goes on to list a few recommendations. Because the document is essentially just a declaration furnishing states and policy makers with helpful recommendations, it will not be elaborated upon in much detail. It is sufficient to say it derived its inspiration from the *OAU Convention* which it views as the “regional foundation for providing protection and finding solutions for refugees in Africa”.³⁸¹ Relevant in the context of this dissertation is Recommendation Six where the *OAU Convention's* broad definition of a refugee is highlighted and other regions of the world are urged to consider this definition as well as the non-rejection of refugees at borders and the prohibition of refoulement of refugees.³⁸² In Recommendation Seven, African countries are urged to abide by the letter of the *OAU Convention* and that refugees seeking admission into the territory of another

May 2001. See International relations & cooperation 2004 www.dfa.gov.za/foreign/Multilateral/africa/oau.htm.

378 Sharpe 2011 *New Issues in Refugee Research* 37.

379 Sharpe 2011 *New Issues in Refugee Research* 37

380 The OAU / UNHCR Commemorative Symposium on Refugees and Forced Population Displacements in Africa took place in September 1994 in Addis Ababa, Ethiopia, in commemoration of the 25th anniversary of the adoption of the 1969 *OAU Convention* discussed above and the 20th year anniversary of its entry into force on 20 June 1974. It is here where this Document was drafted and accepted. Hereafter: *Addis Ababa Document*.

381 *Addis Ababa Document* Part One: Introduction.

382 *Addis Ababa Document* Part II: Recommendations.

state should not be rejected at the border or returned to areas where their lives may be endangered. Governments should furthermore ensure the safety of refugees and relocate them in accessible areas which are safe and where basic services can be provided.³⁸³ Finally Recommendation 10 points out that the refugee crises cannot be addressed effectively through rigid and regionalised approaches. Global and comprehensive approaches are recommended and nations are warned against an excessively restrictive interpretation of the refugee definition in the 1951 *Convention* which has had the effect of deterring “genuine refugees” from being able to seek and enjoy asylum.³⁸⁴ What exactly is meant by “genuine refugees” is uncertain although Recommendation 6 may point towards it being inclusive of a wider class of persons as provided for in the *OAU Convention*.

The document contains 34 recommendations in total which were to be presented to the relevant organs of the OAU, the United Nations, the UNHCR and other appropriate intergovernmental and non-governmental bodies for evaluation and approval. It can be concluded that the Document’s recommendations are helpful and definitely welcome in the context of the refugee and displacement problem in Africa, but apart from the Document highlighting the broader definition of “refugees” as set out in the *OAU Convention* and its reference to “genuine refugees”, it is not very useful for the purposes of this dissertation. Even if “genuine refugees” is to be interpreted as including environmental migrants, the recommendations comprising the Document text are merely that, recommendations. Thus the proposals or ideas put forth therein are not binding upon any state and as such they lack in providing regulation and fail to place specific duties on Member States.

4.1.4 *New Partnership for Arica’s Development 2001*

The *New Partnership for Africa’s Development*³⁸⁵ is a regional initiative aimed at among others poverty reduction, arguing that “the hopes of Africa’s peoples for a

383 *Addis Adaba Document* Part II: Recommendations.

384 *Addis Adaba Document* Part II: Recommendations.

385 Adopted on October 23, 2001, in Abuja, Nigeria, and derived from an earlier document, *A New African Initiative (NAI)*. The NAI is itself a merger of two parent documents namely “The Millennium Partnership for the African Recovery Programme (MAP) and the “Omega Plan”. Hereafter: NEPAD.

better life can no longer rest on the magnanimity of others”.³⁸⁶ The document prioritizes between key issues by elevating conflict prevention, democracy and governance as issues of primary importance. The Member States commit to “the deepening of the culture of human rights” by mentioning and recommitting to several other instruments which are mainly aimed at ensuring stability, peace and security, supporting of human rights and upholding the rule of law and good governance.³⁸⁷ The Member States additionally reaffirm their full and continuing commitment to other international obligations and undertakings entered into in the context of the United Nations, in particular the *Charter of the United Nations* and the *United Nations Universal Declaration on Human Rights* and all conventions relating thereto.³⁸⁸ They also express their determination in the context of restoring stability, peace and security in the African continent and in advancing the cause of human rights in Africa generally. In so doing the document declares that African leaders will take joint responsibility for, among other things,³⁸⁹

Strengthening mechanisms for conflict prevention, management and resolution at the sub-regional and continental levels, and to ensure that these mechanisms are used to restore and maintain peace...

In light of the topic at hand it is important to note that *NEPAD* embraces as two of its major priorities the issues of human development and gender equality. According to Aderolili,³⁹⁰ there is a link to be found between these priorities and migration (including EIM) as the latter has the ability to “foster regional integration, reduce poverty, and to contribute positively to both gender equality and human development”.³⁹¹ She defines migrants so as to include refugees, the internally displaced, people in search of economic opportunities and “nomads migrating in

386 Preamble of *NEPAD*.

387 Some of these include the following: the *African (Banjul) Charter on Human and Peoples Rights* (1981); the *Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World* (1990); the *African Charter on the Rights and Welfare of the Child* (1990); the 1993 *Cairo Declaration Establishing the Mechanism for Conflict Prevention, Management and Resolution*; the *Protocol on the Establishment of an African Court on Human and Peoples' Rights* (1998); the 1999 *Grand Bay (Mauritius) Declaration and Plan of Action for the Promotion and Protection of Human Rights*; and the *Conference on Security, Stability, Development and Cooperation (CSSDCA) Solemn Declaration* (2000).

388 Preamble of *NEPAD*.

389 Only the commitments relevant to this dissertation will be touched upon.

390 Aderolili 2010 *Africa's Social Development Review* 7.

391 Aderolili 2010 *Africa's Social Development Review* 7.

search of pastures”.³⁹² It is thus safe to conclude that environmental migrants are also included in this definition and because SADC is one of the RECs already battling with environmental migration as pointed out above it is important to ascertain whether *NEPAD*’s agenda in some way provides for addressing the issue of EIM. To start with, Aderolili³⁹³ points out that a well-managed migration flow is integral in achieving the social and human development goals contained in the *NEPAD*. Thus although migration is not considered to be a sectoral priority in terms of the policy, the latter has the ability to

contribute to the resolution of many of the root causes of migration by promoting socio-economic and political development. Investing in the development of human resources (including reversing the brain drain is one of the priority areas), and an essential requirement for African development through partnerships between government, civil society and the international community.³⁹⁴

Rutinwa³⁹⁵ agrees and argues that although the measures contained in *NEPAD* have a broader aim of creating conditions for development in African, “they can, incidentally, also stem or minimise the flow of refugees [possible also migrants] and create conditions for return of those who have already fled”. *NEPAD* does however not address the issue of migration directly and nothing is provided for pertaining to regulation of persons migrating across borders on account of environmental triggers. Thus although the document’s programmes and action plans may indirectly influence the issue of EIM and *vice versa*, the level of generality with which these actions are discussed dilutes its usefulness.³⁹⁶ In other words *NEPAD* covers a broad spread of issues but fails to clearly show how its priorities are to be developed and how to evaluate actions within priority areas.³⁹⁷ On the other hand and according to Kanbur,³⁹⁸ the *NEPAD* does at least prioritize certain issues and given Africa’s interlinked problems it is understandable that “a African-wide program such as *NEPAD* is bound to be general in nature”. Hence he argues that the actions set out therein should be viewed more as initial statements meant to be followed by further

392 Aderolili 2010 *Africa’s Social Development Review* 7.

393 Aderolili 2010 *Africa’s Social Development Review* 7.

394 The *MPFA* pg 6.

395 Rutinwa “Asylum refugee policies in Southern Africa: A historical perspective” 62.

396 Kanbur 2001 “The New Partnership for Africa’s Development (NEPAD):” 6.

397 Kanbur 2001 “The New Partnership for Africa’s Development (NEPAD)” 7

398 Kanbur 2001 “The New Partnership for Africa’s Development (NEPAD)” 6-7.

elaboration and discussion. Olukoshi³⁹⁹ is less enthusiastic about the *NEPAD's* potential and argues that:

the democracy and governance initiative of the NEPAD raises more questions than it answers and, on a more critical examination, seems designed more to pander to a donor audience than responding to or representing the concerns of the domestic political forces in the vanguard of the struggle for the reform of the African political space and developmental agenda.

In conclusion it is submitted that there is definitely a link to be found between migration and the developmental goals of the *NEPAD*. Regulating migration effectively and mitigating the negative consequences associated therewith is vital to achieving the priorities and goals set out therein. However the purpose of the *NEPAD* is not to address the issue of EIM and it does not even indirectly refer to the problem. As such it is inadequate for the current intended purposes and if used to regulate the problem it will only be employed as a means to an end. *NEPAD* is about development, sustainability and poverty reduction. It is not about regulating cross-border displacement, for whatever reason.

4.1.5 *The Migration Policy Framework for Africa 2006*

In its introductory section, the *Migration Policy Framework for Africa*⁴⁰⁰ identifies environmental degradation as one of the root causes of migration in Africa. Environmental degradation in Africa is largely caused by social pressures, conflict and political upheaval, and increasing pressure on infrastructure and natural resources.⁴⁰¹ These conditions coupled with climate change in the form of longer term shifts like higher temperatures and drought and shorter changes like extreme weather events is sometimes enough to finally push people to follow the migration route.⁴⁰² This is why climate change is seen as the “threat multiplier” and migration as “a multi-factorial phenomenon”. Climate change impacts environmental degradation which, according to Ionesco, influences migration movements.⁴⁰³

399 Olukoshi 2002 “Governing the African Political Space for Sustainable Development: A Reflection on NEPAD” 6.

400 Hereafter: the *MPFA*.

401 Smith 2012 <http://www.rtcc.org/2012/04/27/climate-change-desertification-and-migration-connecting-the-dots/>.

402 Smith 2012 <http://www.rtcc.org/2012/04/27/climate-change-desertification-and-migration-connecting-the-dots/>.

403 Smith 2012 <http://www.rtcc.org/2012/04/27/climate-change-desertification-and-migration-connecting-the-dots/>.

The *MPFA* identifies 9 key thematic migration issues and makes policy recommendations for consideration by AU Member States and RECs. Of special significance for our purposes are the issues of Border Management, Forced Displacement and Inter-State Co-operation and Partnerships. The framework is basically aimed at providing guidelines and principles which are meant to assist governments and their RECs in the formulation of national and regional migration policies and the implementation thereof in accordance with their respective priorities and resources. It is however a non-binding document and merely provides a wide range of recommendations on various migration issues.⁴⁰⁴

A specific section headed “Protracted Displacement Situations” provides for instances where displacement becomes prolonged when causes of displacement are not addressed or remain unresolved. In this regard equitable burden sharing among States is recommended although only “refugees” and “IDPs” are mentioned as beneficiaries of the assistance which states are supposed to provide. The issue of human rights of migrants is also addressed and several recommendations are made including that migrants should be provided with adequate and free administrative support and other services, accommodation, adequate food and clothing upon arrival and access to basic health care.

In a section termed “Migration and the Environment”, the following recommendations are made: States should incorporate environmental considerations in the formulation of migration management policies so as to more effectively address environment related causes of migratory movements. In this way the impact which migratory movements have on the environment can also be addressed. Collaboration with appropriate international agencies must also increase and research and data gathering initiatives on the relationship between migration and the environment must be strengthened and enhanced. Additionally, further environmental degradation caused by large numbers of displaced persons must be countered or minimised by for example implementing environmental protection programmes and conducting ecosystem impact reviews. Priority areas for settlement must be identified in instances of protracted refugee situations by taking into account the degree of

404 The Draft Framework was adopted by the Executive Council of the African Union in July 2006 at the Banjul Summit in DOC.EX.CL/276 (IX).

potential environmental degradation which will be caused and the need to protect ecosystems in given area.⁴⁰⁵ The more former recommendations contain proactive steps which states are urged to implement in the interest of inhibiting or preventing EIM. The more latter ones are measures to be taken after migration has taken place in order to limit further environmental degradation and destruction. Thus nothing is provided for in terms of the actual regulation of EIM, for example border control, admittance of migrants, social assistance and protection, status aspects and so forth. A few recommendations are made in terms of border management and security but nothing concrete pertaining to the regulation of a mass migration triggered by an environmental change or occurrence. It is however recommended that national laws regulating migration should be strengthened by the creation of clear and transparent categories of admission / expulsion and clear eligibility criteria for protection.⁴⁰⁶

As stated above the *MPFA* was adopted as a basic guideline and reference document to assist Member States and RECs in developing their own national and regional migration policies. It is, however, unfortunately a non-binding document and therefore of little use in providing a regulatory framework in terms of EIM. It also sheds little light on the position of environmental migrants or their status as per the framework. Thus as it now stands it is merely a guideline which member states and RECs can use to borrow elements from as they deem appropriate and applicable to their specific migration challenges and situations.

4.1.6 African Common Position on Migration and Development

The *African Common Position on Migration and Development*⁴⁰⁷ covers a wide range of issues including among others Migration and Development, Human Resources and the Brain Drain, Remittances, Trade, Migration and Peace, Security and Stability, Migration and Human Rights, Gender, Regional Initiatives and Access to Social Services. In the document's introduction, "environmental factors" is specifically listed as a factor inducing migration. In the preamble the Ministers

405 *MPFA* pg 37.

406 *MPFA* pg 14. This aspect will be elaborated upon in more detail in Chapter 5 below.

407 Endorsed by the Executive Council of the AU and adopted at the Banjul Summit in July 2006. Hereafter: the *ACPMD*.

responsible for migration in Member States admit that environmental factors are one of the underlying causes of migration in Africa and accept that the root causes of migration must be addressed in order to manage the problem.⁴⁰⁸ Article 3 elevates migration and development to a priority policy issue and focusses on, among other things, migrant flows as a national and international stability and security threat. Thus the *ACPMD* states that

establishing comprehensive migration and management systems can contribute to enhancing national and international security and stability.⁴⁰⁹

Furthermore, article 3.7 argues that comprehensive and balanced migration management systems are necessary which ensure the effective economic, social and cultural rights of migrants. Thus human rights instruments must be ratified and enforced, especially those relevant to the treatment of migrants; human rights and human dignity must also be observed continuously even when dealing with illegal or irregular migration.⁴¹⁰ Backtracking now to the SADC context, the *ACPMD*'s provisions on regional initiatives reads as follows:

There is need to ensure coordination in the development of common regional policies for the management of migration within the RECs taking into account national and regional specificities and facilitate ownership of migration processes by African countries through the promotion of capacity building initiatives at national, regional and continental level. A concerted effort that should sustain regional programmes and assistance that would enable transit/destination countries cope with the problem of migration management should be developed.

Article 4.7 expands on the role which environmental factors play in causing population movements and conversely it elucidates on how migration impacts on the environment. It specifically highlights the environmental problems which the presence of large numbers of displaced persons cause in hosting countries and areas, for example refugee camps. Article 5 is also significant as it provides for recommendations for action to address the migration issue at national, continental and international level. It argues that common strategy is essential which "associates countries of origin, transit and destination, in order to find balanced solutions" which contemplates the interests of all countries involved. It furthermore provides that

408 Preamble of the *ACPMD*.

409 Article 3.6 of the *ACPMD*.

410 Article 3.7 of *ACPMD*.

It would be indeed illusory to try to treat the problems of migration by recourse only to security measures; hence the need for a comprehensive, integrated, concerted and balanced solution, whose objectives, policies and measures will be long-lasting.⁴¹¹

As we are dealing with the SADC context, only the actions to be taken on continental level will be elaborated upon at this stage. Firstly, the Member States agree that the Strategic Framework for Migration Policies must be finalized so as to provide guidelines on effective management of migration;⁴¹² secondly, due process measures including legal frameworks must be introduced which combat illegal migration; thirdly, cooperation agreements by African States which manage migrations must be concluded by developing bilateral and regional legal instruments;⁴¹³ fourthly, the management of migration flows must be improved and a balance must be found between “effective security for legal immigrants, freedom of the legal movement of persons and the humanitarian obligation towards those who need protection”;⁴¹⁴ also, adherence of States to Regional and International instruments protecting migrants must be promoted and cooperation between security services must be encouraged; lastly, the possibility of coordinating studies and research on migration and development must be explored by existing institutions in order to place current and reliable information on migration at the disposal of States, sub-regional organizations and other users.⁴¹⁵ In the Decision on African Common Position on Migration and Development⁴¹⁶ where the Executive Council formally adopted the *ACPMD*, Member States are urged to “mainstream migration in development and implementation” and to allocate adequate resources for the implementation of the recommendations contained in article 5.⁴¹⁷

From the above it can be concluded that the *ACPMD* is a promising initiative which is very clear on Member State’s view or perspective as regards migrants. It contains helpful recommendations and ideas for adequate plans of action in combatting migration and managing the problem in a way which promotes development and

411 Article 5 of the *ACPMD*.

412 Article 5 of the *ACPMD*.

413 Article 5 of the *ACPMD*.

414 *ACMPD*.

415 Article 5.2 of the *ACPMD*.

416 DOC. EX. CL/277(IX).

417 The Chairperson of the Commission is furthermore requested to collaborate with the IOM in coordinating and advocating for the implementation of the *ACPMD* itself.

maintains peace and security. To what extent Member States are however bound to these recommendations and strategies or at least implementing them is another question. Thus if not included in a binding resolution or protocol the recommendations will remain exactly that – recommendations.

4.1.7 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa 2009

The African Commission on Human Rights and People's Rights⁴¹⁸ adopted the *Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa* in late 2009.⁴¹⁹ In this resolution the African Commission refers to the right of peoples to a satisfactory environment favourable to their development which is enshrined in the *African Charter*.⁴²⁰ They also rely on the provisions of the *United Nations Declarations on the Rights of Indigenous Peoples* which recognizes the rights of indigenous peoples and communities to their ancestral lands, lifestyles and a safe satisfactory environment.⁴²¹ Article II of the *African Convention on the Conservation of Nature and Natural Resources* of 11 July 2003 is also noted which provides for the right of all peoples to a satisfactory environment favourable to their development. Concerned that the lack of human rights safeguards in various draft texts of conventions which were then under negotiation would put at risk the “life, physical integrity and livelihood of the most vulnerable members of society...”, the African Commission adopted the *CC Resolution* and provided therein for the following: 1) the Assembly of Heads of State and Government of the African Union are urged to ensure that human rights standards and safeguards are included in any adopted legal text to be made on climate change as preventative measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations; 2) they are also urged to ensure that special protective measures for the vulnerable are included in any international agreement or instruments on climate change, for example measures protecting and regulating children, women, indigenous communities and victims of natural disasters; 3) the

418 A body established in terms of article 30 of the *African Charter* responsible for promoting human and people's rights in Africa.

419 It was adopted at a meeting held by the Commission from 11 to 25 November in Banjul, Gambia. Hereafter: *CC Resolution*.

420 Article 24 of the *African Charter*.

421 *CC Resolution*.

Assembly is called upon to take all necessary measures to ensure that the African Commission is included in the African Union's negotiating team on climate change; and lastly 4) the Commission decided to carry out a study on the impact of climate change on human rights in Africa.⁴²²

This is a very brief and foundational resolution and basically prescribes what states or policy makers structuring climate change adaptation initiatives should keep in mind when considering the contents of such initiatives. Vulnerable people and groups should be awarded special protection and human rights standards and safeguards should be included in any policy or legal text to be adopted. Regulation in terms of EIM is not provided for as the resolution deals explicitly with climate change and is more of a pre-emptive or anticipatory resolution, pointing out the need to adopt further policies or texts to address the problem.

4.1.8 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2012

The *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*⁴²³ provides an elaborate accountability and monitoring mechanism to regulate the issue on internally displaced persons in Africa.⁴²⁴ It entered into force in the year 2012 after its ratification by 15 states and represents the first binding regional instrument governing the problem of internal displacement in Africa.⁴²⁵ Adebé⁴²⁶ states that the *Kampala Convention* is an outcome

of a regional search for solutions for challenges including forced migration, environmental degradation, conflicts and human rights violations. It thus brings together...elements from regional approaches including on conflict prevention, management and resolution, human rights protection, environmental rehabilitation.

422 *CC Resolution*.

423 Adopted by the special summit of the African Union held in Kampala, Uganda, on 23 October 2009. Hereafter: the *Kampala Convention*.

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

425 It should be noted however that not all SADC countries have ratified this Convention up to date, and in fact only 19 AU members had done so by 2013. See The Kampala Convention One year on: Progress and Prospects 6.

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

The *Convention* was however drafted specifically to provide a legal framework aimed at ensuring adequate protection and assistance to *internally displaced persons* and as such focusses solely on migration within borders.⁴²⁷ Internally displaced persons are defined in article 1 as

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and *who have not crossed an internationally recognized State border*.⁴²⁸

Thus the *Kampala Convention* aims to, among other things: provide solutions for the issue internal displacement in Africa; establish a legal framework for preventing internal displacement and for assisting internally displaced persons in Africa; establish a legal framework for solidarity, cooperation, promotion of durable solutions and mutual support between States Parties in order to combat displacement and address its consequences; and provide for the obligations and responsibilities of States Parties as relates to internally displaced persons.⁴²⁹ It also provides for the establishment of national and regional mechanisms for early warning, coordination of humanitarian assistance and disaster risk reduction. Save for certain general references to refugees in the preamble and article 20 of the *Convention* (the Saving Clause), the *Convention* does not in any way provide for the management or regulation of cross-border migration.⁴³⁰ As stated repeatedly above, the focus of this dissertation is predominantly on cross border migration and therefore any further scrutiny of this *Convention* seems of negligible value to the analysis at hand. It is however appropriate to briefly acknowledge its existence as almost every SADC member state has experienced some form of internal displacement or “exodus within borders”.⁴³¹ Additionally, it has been argued that the *Convention’s* strong focus on the prevention of displacement and its pursuit for durable solutions means that

427 Preamble to the *Kampala Convention*.

428 Own emphasis added.

429 Article 2 of the *Kampala Convention: Objectives*. Abebe argues that the *Kampala Convention* not only focusses on the needs and rights of IDPs but also focusses on elaborating state responsibility in this regard. See Abebe “The *Kampala Convention* and environmentally induced displacement in Africa”.

430 Article 20 merely states that the *Convention* itself should in no way be interpreted so as to undermine or prejudice internally displaced persons’ rights in terms of applicable Refugee Conventions and Protocols and therefore does nothing to amplify the rights of cross-border migrants or further regulate the issue of persons crossing internationally recognized borders.

431 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 1.

“many of its provisions will also have indirect but important consequences for cross border displacement”.⁴³² Also in the *Kampala Declaration* States commit themselves

to deal with challenges of climate change, increased pressure on natural resources, issues of land management, water and sanitation, rural infrastructure in our efforts to find durable solutions to the problem of refugees and internally displaced persons.⁴³³

Therefore in mentioning “refugees” the *Convention* does refer to cross-border movements of persons, albeit as a kind of afterthought. Abebe,⁴³⁴ states that the *Convention’s* relevance to cross-border displacement is merely indirect. Yet although it directly focusses on the internally displaced, its provisions as regards prevention, risk reduction strategies and early warning systems will serve to prevent and reduce the impact of internal displacement outside boundaries of the specific state.⁴³⁵ According to Abebe,⁴³⁶ the *Convention’s* applicability to cross-border migration is shortly as follows:

The Convention recognizes resettlement and relocation as an aspect of durable solution for situations where return is not viable. It also recognizes the right of displaced persons to seek and be granted protection including under the 1969 OAU Refugee Convention (Art 20(1)). It is provided that upon the request by the state concerned or by the Conference of Parties, states may be required to cooperate (Art. 5(1)). Regional approaches can also provide a forum for the search for pragmatic solutions for the challenge of cross-border displacement as a result of environmentally induced displacement. Both binding and non-binding norms on internal displacement may also serve as analogous normative standards for the protection of those displaced cross international boundaries.

The *Convention* was therefore an attempt by the regional community to “fill the vacuum” with regard to protecting persons displaced on account of for example climate change, natural disasters and environmental change and degradation.⁴³⁷ Thus it is the first binding instrument which directly acknowledges environmental occurrences and factors as root causes of migration and provides mechanisms and action plans to regulate the problem. Taking this into account it cannot rightfully be argued that the *Kampala Convention* has no usefulness in the context of regulating

432 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

433 The *Kampala Convention* para 22.

434 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

435 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

436 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

437 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

environmental cross-border migration as initially assumed above. Although its focus is on migration within borders its binding and non-binding norms have the potential to influence standards for the protection of environmental migrants crossing borders. Therefore it is entirely possible that the mechanisms and solutions contained in the *Kampala Convention* could in the future be applied to regulate cross-border migration on a normative basis, in other words by states consenting to and applying them because they are able to function as “analogous normative standards”.⁴³⁸ This is after all how the law operates. International (and regional) law is not limited to treaty texts or conventions, but includes customary international law.⁴³⁹ Settled state practice and widespread acceptance can eventually cause practice to evolve into customary law. Therefore in conclusion, although the contents of the *Kampala Convention* may have to be tailored or adapted a bit, scope definitely exists wherein it can be expanded to address the issue of EIM as defined in Chapter 2. Even if it cannot be applied directly it has the potential to impact the regulation of cross-border migration and if utilized correctly could definitely be useful tool in addressing the problem.

4.2 SADC law and policy

4.2.1 Declaration on Refugee Protection within Southern Africa 1998

The *Declaration on Refugee Protection within Southern Africa*⁴⁴⁰ calls for the “harmonisation of Member States’ national policies, laws, and procedures for refugees”. In the introductory section of the *DRP* the members recall that a Memorandum of Understanding between SADC and UNHCR was concluded in 1996 which directs the parties to co-operate in the area of refugees *and* forced population movements into and within the region.⁴⁴¹ Directly thereafter several root causes for refugee movements are noted, among others external aggression, occupation and foreign domination. What is interesting to note here is that after these causes are listed, “other events seriously disturbing public order in the countries of origin” is also

438 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

439 Article 38(1) of the Statute of the International Court of Justice.

440 Signed on 1 January 1998 by the Heads of State of all 14 SADC member states. Hereafter: *DRP*.

441 *DRP* pg 1.

added.⁴⁴² This is significant because in adding this phrase the DRP seems to follow the *OAU Convention's* understanding of “refugee” or a wider interpretation of the word. In moving on it is pointed out that the right to seek asylum is a right enshrined in Article 14 of the *Universal Declaration of Human Rights* and Article 12(3) of the *African Charter*.⁴⁴³ The guiding authority of the 1951 *Convention*, its 1967 *Protocol* and the *OAU Convention* is also referred to and the latter’s continuing validity as the regional foundation in this regard is affirmed.⁴⁴⁴ Hereafter the importance and benefits of approaching the challenges of refugee protection from a regional perspective is highlighted. Lastly the heads of states reaffirm their commitment to the principles enshrined in the above named instruments and undertake to respect and give effect to these principles. They also commit themselves to address the root causes of refugee movement and internal displacement within SADC through the establishment of a firm foundation for democratic institutions and good governance.⁴⁴⁵ Another interesting commitment reads as follows:

To undertake to put in place modalities to determine refugee status of persons seeking asylum in a fair and efficient manner, and to ensure that those who do not need or deserve international protection do not abuse the humanitarian institution of asylum.

This commitment speaks to determining refugee status and is noteworthy because it gives the idea that environmental migrants might in fact qualify for asylum if their status is determined “in a fair and efficient manner”. How could a government following a fair procedure refuse sanctuary or entry to a person who was forced to flee his home following for example a sudden onset natural disaster? This would hardly constitute fairness and be irreconcilable with ideals of the SADC Member States, being among others the improvement of the standards and quality of life, freedom and social justice.⁴⁴⁶ There is however nothing concrete in the declaration text which supports this assumption, except the reference to “other events seriously disturbing public order”. This reference can also not be seen in the same light as its inclusion in the *OAU Convention* as the *DRP* only includes it as one of the events or causes of refugees. In continuing, the states also commit to

442 *DRP* pg 1.

443 *DRP* pg 2.

444 *DRP* pg 2.

445 *DRP* pg 3.

446 *DRP* pg 1.

Encouraging voluntary repatriation of refugees to their countries of origin whenever feasible, as the best solution to the problem of refugees, in keeping with the 1969 OAU Convention, which calls upon Governments of asylum and Governments of origin to create conducive conditions for the return home of refugees in safety and dignity.⁴⁴⁷

This commitment is, personal observance, relevant because it reminds policy makers to keep with the *OAU Convention* and to encourage *voluntary* repatriation of refugees to their countries of origin where *conducive conditions* must be created by those governments. Thus a refugee should never be coerced into returning to his country of origin, especially not if conditions in said country are not favourable or sustainable.

Notwithstanding the above rather weak points of reference, the *DRP* is only a declaration and thus not suitable in providing a mechanism to regulate the issue of refugee protection, let alone the problem of EIM. The issue of migration is never referred to in the declaration text and the commitments in effect only speak to refugees in the true sense of the word. The expanded definition in the *OAU Convention* is also not directly endorsed and therefore it is safe to conclude that the *DRP* cannot be used to regulate the issue at hand.

4.2.2 Protocol on Politics, Defence and Security Cooperation 2001 & the Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation

In January 1996 the SADC Ministers of Foreign Affairs, Defence and Security recommended the establishment of a SADC organ for Politics, Defence and Security.⁴⁴⁸ The Organ operated without a legal framework until the Protocol on Politics, Defence and Security Cooperation⁴⁴⁹ entered into force in 2004.⁴⁵⁰ The Protocol establishes the objectives of

447 *DRP* pg 4.

448 Southern African Development Community 2012 <http://www.sadc.int/documentspublications/show/809>.

449 Hereafter: the *PPDS*.

450 It was revised on 8th September 2009 to include a structure providing for regional policing cooperation activities, namely the Southern African Regional Police Chiefs Co-operation Organisation. See Southern African Development Community 2012 <http://www.sadc.int/documents-publications/show/809>.

promoting peace and security across Southern Africa, protecting the region's people from instability due to the breakdown of law and order, developing a common foreign policy throughout the region, and cooperating on matters related to security and defence.⁴⁵¹

Interesting about this *Protocol* is its vehement recognition and re-affirmation of the principles of strict respect for sovereignty, sovereign equality, territorial integrity and non-interference with the internal affairs of other States.⁴⁵² It goes on to state that all Member States “pledge to respect the borders existing on their achievement of national independence”.⁴⁵³ However in addition to the above objectives which relate mainly to ensuring peace and security, another specific objective of the *PPDS* is to enhance regional capacity in respect of disaster management and co-ordination of international humanitarian assistance.⁴⁵⁴ Once again the balancing act between national interests and sovereignty and regional development and humanitarian considerations is clearly visible.

In continuing, article 11 defines a “significant inter-state conflict” as a conflict over territorial boundaries or natural resources or a conflict which threatens peace and security in the region of in the territory of a Member State which is not a party to the conflict. The reason for mentioning this is merely to indicate that a mass environmental migration has the potential to cause these types of conflicts, and therefore this Protocol will definitely become relevant in such circumstances. The methods prescribed in order to prevent and manage these types of conflicts include preventative diplomacy, negotiations, conciliation, mediation, good offices, arbitration and adjudication by an international tribunal.⁴⁵⁵ Early warning systems must also be established and utilized and enforcement action may only be used as a matter of last resort.⁴⁵⁶

In conclusion, although this *Protocol* might be employed in addressing a conflict spurred on by EIM, its purpose is to maintain peace and security and resolve conflicts peacefully and in cooperation with other Member States. It has in essence

451 Article 2 of the *PPDS*; Southern African Development Community 2012 <http://www.sadc.int/documents-publications/show/809>.

452 Preamble of the *PPDS*.

453 Preamble of the *PPDS*.

454 Article 2 of the *PPDS*.

455 Article 11 of the *PPDS*.

456 Article 11 of the *PPDS*.

nothing to do with EIM or the regulation of migrants, refugees or any type of cross-border movement of people. Its aim is rather to address the consequence or effect of an event, the effect being conflict and the event being almost anything from war, persecution, occupation and maybe even EIM. Thus it treats the symptom (conflict) but is not designed to address the infection (migration) causing the symptom. Its firm affirmation of sovereignty and territorial integrity also points toward the *PPDS* not being ideal to address the facilitation of migration across borders.

The *Strategic Indicative Plan for the Organ on Politics, Defence and Security*⁴⁵⁷ was signed in 2004 and has the core objective of creating a peaceful and stable political and security environment which will aid the region in meeting its socio-economic objectives.⁴⁵⁸ It was amended after five years and *SIPO II* was approved in August 2010.⁴⁵⁹ The Plan provides general guidelines for certain activities in line with the *PPDS* and strategies for their realisation and public security.⁴⁶⁰ It lists a couple of challenges to peace and stability in the region and the ones relevant for our purposes are climate change, the growing vulnerability of national borders and illegal migration.⁴⁶¹ The *SIPO* seeks to identify strategies and activities to achieve the objectives contained in the *PPDS* and to in the end maintain peace and security through all sectors of the *SIPO*.⁴⁶² Objective 5 of the *PPDS* is co-operation between law enforcement agencies and state security services among Member States. The expected outcome which *SIPO II* wishes to achieve by tackling this objective is to improve security in the region through the effective monitoring of threats, particularly cross-border illegal migration.⁴⁶³ Migration and refugees are mentioned a few more times in the text but the context wherein these concepts are used proves inadequate for the purposes at hand. The same conclusion can be made as above concerning the *PPDS* – the *SIPO II* cannot be used to address the issue of EIM directly, only the conflict which may ensue as a result of such migration. However, what is needed

457 Hereafter: the *SIPO*.

458 Southern African Development Community 2012 <http://www.sadc.int/documents-publications/show/1947>.

459 By the SADC Summit of heads of State and Government held in Windhoek, Namibia.

460 Southern African Development Community 2012 <http://www.sadc.int/documents-publications/show/1947>.

461 *SIPO* pg 17.

462 *SIPO II*. The sectors are the following: the Political Sector, the Defence Sector, the State Security Sector, the Public Security Sector and the Police Sector.

463 Van Nieuwkerk 2012 *Africa Peace and Security Series no 6* 13.

here is an instrument or framework which will aid in regulating cross-border migration and protecting environmental migrants who fail to qualify for refugee protection, not a plan regulating peace and conflict resolution.

4.2.3 Draft Protocol on the Facilitation of Movement of Persons in SADC 2005

Given the fact that migration is a regional or continental issue it is understandable why a regional or continental approach to its management is necessary. Since its inauguration, SADC Member States have ratified and signed a number of protocols and documents recognising the desirability of increased economic co-operation and increased movement of capital and goods between member states.⁴⁶⁴ In this context of regional economic development and integration it has therefore been recognized that regional cross-border migration is a very important issue, and that it cannot be adequately regulated unilaterally or on the basis of national legislation of individual Member States.⁴⁶⁵ Recognizing this and attempting a regional approach inevitably has some serious implications for state sovereignty, as a state's right to exercise supreme, independent authority or jurisdiction over its territory becomes somewhat curbed when it cooperates with other states in dispensing with the supremacy of national immigration legislation and adopting regional law to regulate who enters and who does not. As stated in Chapter 2, global governance of international migration was in the past perceived to be an intrusion of state autonomy because border control is seen as "an essential aspect of state sovereignty".⁴⁶⁶ This remains the case and is the reason why progress in this regard has been so slow. Thus relinquishing supreme authority over one's borders and approaching cross-border migration from a regional platform is still no small sacrifice.

Nonetheless countries in SADC have come to accept that they need to co-operate in order to develop operative policies, legislation and instruments so as to establish an effective regional migration regime.⁴⁶⁷ In 1993 a SADC workshop on the free movement of people was held and a team of consultants was appointed to prepare a SADC protocol on free movement of people. The *Draft Protocol on the Free*

464 Williams "An overview of migration in the SADC region" 63.

465 Williams "An overview of migration in the SADC region" 63.

466 Smith 2007 Orbis 621 & Castles 2000 Global Trends and Issues 278.

467 Williams "An overview of migration in the SADC region" 63.

Movement of Persons in the Southern African Development Community was submitted in 1995 which proposed “a phased-in approach to eventual free movement of persons between SADC Member States, including the right to be employed or seek employment and to reside in any member state”.⁴⁶⁸ Needless to say the *Protocol* was subjected to some serious criticism, especially emanating from the countries with the strongest economies in the region (South Africa, Namibia and Botswana)⁴⁶⁹. Several years later the *Draft Protocol on the Facilitation of Movement of Persons in SADC 2005*⁴⁷⁰ was adopted which represented a watershed decision to facilitate easier movement of people in the region. It embodied a revised version of the 1998 Protocol and was signed by half of the 14 member states, yet ratified by only one third of them. The *DPFM*'s objective is to

develop policies that are aimed at the progressive elimination of obstacles to the movement of people in the SADC region. It will facilitate visa-free entry, residence and establishment by individuals or families in territories of member states.

The *DPFM* provides for a maximum 90 days visa-free entry per year into any other Member State and furthermore enables the visitor to apply for an extension subject to the laws of the Member State. It also aims to facilitate permanent and temporary residence in the territory of another member state and also working in another Member State. The protocol has to be ratified by at least nine member states before implementation thereof can begin, and ratification usually only follows after some form of national consultation which may often takes several years.⁴⁷¹ The protocol will however become a legally binding document as soon as two-thirds of the SADC states ratify it.⁴⁷² Almost a decade has passed, though, and as long as the individual political and economic interests of Member States continue to outweigh the combined interests of closer economic ties being woven between Member States, progress in this regard will continue to be handicapped. Williams⁴⁷³ argues that because of this balancing act, legislative instruments, policies and institutions structured to manage cross-border migration “are inevitably couched in protectionist

468 Williams “An overview of migration in the SADC region” 63

469 Solomon 2000 Centre for International Political Studies; Fioramonti 2013 <http://www.afdb.org/en/blogs/integrating-africa/post/is-it-time-to-take-free-movement-of-people-in-southern-africa-seriously-11975/>.

470 Adopted in Botswana in August 2005. Hereafter: *DPFM*.

471 Madakufamba 2005 <http://www.sardc.net/editorial/sadctoday/view.asp?vol=220&pubno=v8n4>.

472 Madakufamba 2005 <http://www.sardc.net/editorial/sadctoday/view.asp?vol=220&pubno=v8n4>.

473 Williams “An overview of migration in the SADC region” 64.

language". Ngandwe⁴⁷⁴ refers to this as "the paradox of nationalism and regionalism". He argues that

whereas there is a plethora of legislation both regionally and internationally crystallising the ostensible common goal of regional integration especially in the area of the movement of people, the interests of the nation-states prove to be at variance with this objective. The interests of the nation-states...tend to militate against the free movement of people as envisioned by the African Union (AU), the New Partnership for Africa's Development (NEPAD) and the Southern African Development Community (SADC). This paradox is largely due to the reluctance of the African states *in casu* to embrace and incorporate international instruments into their domestic and municipal legislation and policy. This is a typical case of the flourishing of nationalist tendencies among the nation-states as opposed to global frames of thought.

In addition to the competing interests of nation states in an economical or socialist sense, the issue of sovereignty as discussed above also plays a significant role in member states' reluctance to sign and ratify a protocol of this nature. Thus a "free movement" type protocol's implication on state sovereignty should be kept in mind when trying to understand the current deadlock on passing such a document.

In continuing it is important to note that while the short term objective of the *DPFM* is to facilitate free movement of people in the SADC region, the long term aim thereof has a developmental character. It aims to promote inter-dependence and integration of Member States' economies for the "harmonious...and equitable development of the region".⁴⁷⁵ Thus it is regarded as a "stepping stone" towards the movement of persons in an eventual African Economic Community; thus it aims to develop policies which will eliminate obstacles to the movement of persons of the region.⁴⁷⁶ It was not intended to be a legal framework facilitating mass migrations or refugee flows between Member States, but to serve as more of a facilitator easing the movement of capital, goods and services, workers and tourists across borders. Nonetheless through this protocol SADC Member States also re-affirm their commitment to international agreements relating to asylum seekers and refugees and they commit to cooperation with for example the UNHCR and the IOM.⁴⁷⁷ In this regard it is

474 Ngandwe 2013 *PER* 440.

475 The *DPFM*; Madakufamba 2005. <http://www.sardc.net/editorial/sadctoday/view.asp?vol=220&pubno=v8n4>.

476 Article 2 of the *DPFM*; Madakufamba 2005. <http://www.sardc.net/editorial/sadctoday/view.asp?vol=220&pubno=v8n4>.

477 Madakufamba 2005 <http://www.sardc.net/editorial/sadctoday/view.asp?vol=220&pubno=v8n4>.

relevant to the discussion at hand, although it is not yet a binding document. Similarly it is because of this “re-affirmation” that the protocol is approached with such reluctance, as it is in this context where the “cons” seem to outweigh the “pros”.

4.2.4 *Code on Social Security in SADC 2007*

The non-binding *Code on Social Security in SADC*⁴⁷⁸ was adopted in 2007 with article 17 thereof dealing specifically with Migrants, Foreign Workers and Refugees. The article contains a clause wherein member states are urged to work toward free movement of persons and progressively reduce immigration controls.⁴⁷⁹ Thereafter three categories of migrants and principles for each are set out; for example the article provides that illegal residents and undocumented migrants must be provided with the basic minimum protection.⁴⁸⁰ As regards refugees, article 17.3 determines that Member States must honour their obligations to refugees “in accordance with the provisions of international and regional instruments”.⁴⁸¹ Nothing more is mentioned in relation to migrants or environmental migrants and the *Code* continues with “Special and Collective Contingencies” in Article 18.

According to Van der Vleuten & Hulse,⁴⁸² the *Code*’s usefulness as regards the regulation of migration is “problematic” especially given its non-binding nature. They do however note the following:

On the positive side, it does at least acknowledge that the rights of migrants require explicit attention, and that migrants are variously and unequally protected by other legal instruments, depending on their particular migration status. Its advocacy for freer movement within SADC is also positive from a rights perspective, although this stands in contrast to the seeming reluctance of SADC member states to ratify or implement provisions for the facilitation of movement.

Save for assenting to the above, it will do no good to elaborate any further on this instrument. Although it can be considered a step forward by SADC policy makers in that they acknowledge the lack of protection currently awarded to migrants

478 Hereafter: the *Code*.

479 Article 17.1 of the *Code*.

480 Article 17.2 of the *Code*.

481 Van der Vleuten & Hulse 2013 *SFB – Governance Working Paper Series 8*.

482 Van der Vleuten & Hulse 2013 *SFB – Governance Working Paper Series 8*.

(especially undocumented migrants), its non-binding nature and lack as regards regulatory provisions render it unusable in the context of regulating EIM.

4.3 Concluding remarks

The above chapter attempted to provide the reader with a detailed overview of the normative framework currently governing cross border migration in SADC. Most if not all of the above discussed instruments have very little to do with issue of EIM and almost none of the texts directly address the subject matter. Although some implicit and indirect provisions were highlighted which could possibly have bearing on the issue, nothing concrete is provided for in terms of regulation or the status of specifically environmental migrants. Additionally most of these instruments are soft-law texts, impractical in this context and non-binding; states can therefore not be compelled to implement any of the provisions and can in no way be punished if they fail to align themselves with the content.⁴⁸³ It is therefore safe to conclude that the current legal framework provides very scarcely and renders little protection or regulation in terms of EIM. Chapter 5 will be devoted to identifying the weaknesses and gaps in the above existing framework by evaluating the discussed instruments against the backdrop of the definition of EIM as put forth in Chapter 2.

5 Weaknesses / challenges

Chapter 4 dealt with the existing continental and regional architecture addressing EIM in SADC. Relevant charters, protocols, declarations and other policies were duly analysed. As stated in Chapter 2, when evaluating the existing legal framework in this regard, all the components of the working definition must be borne in mind as the framework can only be regarded as adequate if it accommodates EIM in its entirety. In other words regulatory provisions and protective measures must be present within these instruments addressing all the following elements:

- forced and voluntary migration or resettlement;⁴⁸⁴

483 This aspect will be discussed in more detail below.

484 It should be noted here that whilst migration is a wide term referring to both within and cross-border movements of people, its use in this definition predominantly points toward cross-border movements and not internal migration.

- internal and cross-border migration;⁴⁸⁵
- migration caused by sudden environmental occurrences such as storms or floods as well as population movements caused by slow onset events such as sea-level rise and desertification;
- temporal and permanent migration.

The implication of whether an instrument is binding or non-binding in the SADC context is firstly touched upon where after the elements listed above are considered individually in conjunction with the instruments discussed in Chapter 4, in each instance indicating whether current regulation in terms of said element can be regarded as adequate.

5.1 Binding versus non-binding instruments in the SADC context

“SADC law” refers to the body of principles, rules and instruments adopted and created by SADC aimed at fostering regional integration and development within the states party to the SADC Treaty.⁴⁸⁶ Article 6(5) of the SADC Treaty places a duty on all Member States to award the SADC Treaty the force of national law. SADC legislation is however binding only on the states that are party thereto.⁴⁸⁷ SADC law is comprised of both binding and non-binding legal instruments. Treaties and protocols are binding instruments and form the two primary formal sources of SADC law.⁴⁸⁸ SADC Memoranda of understanding,⁴⁸⁹ declarations, standards and model laws normally constitute non-binding instruments or non-binding SADC law.⁴⁹⁰ Another important source of SADC law is the Regional Indicative Strategic Development Plan⁴⁹¹ which forms the framework for the regional integration of

485 As already mentioned above we will only be focussing on cross-border migration given the fact that we are working within the SADC context undertaking an analysis of the regional framework.

486 Zongwe 2011 http://www.nyulawglobal.org/globalex/Southern_African_Development_Community.htm#_Toc284108400.

487 Zongwe 2011 http://www.nyulawglobal.org/globalex/Southern_African_Development_Community.htm#_Toc284108400.

488 Zongwe 2011 http://www.nyulawglobal.org/globalex/Southern_African_Development_Community.htm#_Toc284108400.

489 Hereafter: an MOU.

490 Zongwe 2011 http://www.nyulawglobal.org/globalex/Southern_African_Development_Community.htm#_Toc284108400.

491 Hereafter: RISDP.

SADC. Although it is not legally binding in nature, Zongwe⁴⁹² argues that it is “highly persuasive and enjoys considerable political legitimacy”. It should furthermore be noted that the language of an agreement, document or instrument “conveys the binding nature of the understanding”.⁴⁹³ Thus the words used by the policy makers “connote the peremptory or obligatory nature of the agreement”.⁴⁹⁴ Other sources of SADC law include international law and SADC resolutions.

Article 2 of the SADC Treaty provides for protocols to be entered into in the areas of cooperation of SADC and these protocols should be seen as the “legislation or legislative acts of SADC”.⁴⁹⁵ For a protocol to enter into force, it must be ratified and signed by two thirds of the Member States, in so doing giving formal consent and making the document officially valid.⁴⁹⁶ Because the SADC Treaty and protocols meet the requirements of an international agreement, once ratified by member states they must be “domesticated” in accordance with the constitutional provisions of each Member State.⁴⁹⁷ When an instrument is legally binding in nature, undertakings therein consequently become legally binding with the effect that states are entitled to insist on compliance. If a state fails to comply with a legally binding instrument, such a breach constitutes a breach of international law.

A MOU is a SADC instrument typically entered into as a statement of intent from parties which can later be used in interpreting the resulting Treaty. It should therefore be seen as a preliminary document providing a framework for cooperation prior to adopting a binding protocol.⁴⁹⁸ Declarations are similar to MOU’s in this respect. As such these instruments are merely pilot or foundational documents paving the way to the conclusion of a binding instrument.⁴⁹⁹ Undertakings under a MOU and declaration are like “soft law” in that they are merely persuasive and not subject to

492 Zongwe 2011 http://www.nyulawglobal.org/globalex/Southern_African_Development_Community.htm#_Toc284108400.

493 Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 11.

494 Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 11.

495 Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 11.

496 Van der Vleuten & Hulse 2013 *SFB – Governance Working Paper Series* 12.

497 Anon date unknown http://dialogue2012.fanrpan.org/sites/default/files/publications/Legal_status_of_SADC_technical_agreements_and_implications.pps.

498 Anon date unknown http://dialogue2012.fanrpan.org/sites/default/files/publications/Legal_status_of_SADC_technical_agreements_and_implications.pps.

499 Anon date unknown http://dialogue2012.fanrpan.org/sites/default/files/publications/Legal_status_of_SADC_technical_agreements_and_implications.pps. An example of this is the *SADC Declaration on Gender* which led to the *SADC Protocol on Gender*.

ratification by Member States.⁵⁰⁰ However the importance of these types of instruments lies therein that they have the potential to influence domestic policy.⁵⁰¹ These must however be designed to appeal more to reason than to legal compulsion or obligation, as states cannot be legally obliged to align or punished if they fail to align.⁵⁰² States allow themselves to be influenced by non-binding instruments which make sense and which can be reconciled with their national interests.⁵⁰³ Thus in order for a policy or model law to be effective or “persuasive” it must shift emphasis toward arousing the interest of states by highlighting the benefits of the system.⁵⁰⁴ A good example is the *SIPO II*. It was not meant to be a binding policy document or legal framework for decision-makers but rather “a guide to collective behaviour”.⁵⁰⁵

Thus in continuing the above differentiation between binding and non-binding instruments in the SADC context must be borne in mind. Regulation provided for in terms of a non-binding instrument does not impose legally binding obligations on Member States or confer rights on their own.⁵⁰⁶ Therefore given the notion of state sovereignty and the fact that national interests more often than not outweigh regional objectives and cooperation, it is understandable why only a binding instrument will be effective in regulating an issue like cross-border EIM. Furthermore it should be noted that the only legally binding instruments that can be made under the SADC Treaty are protocols.⁵⁰⁷ All other instruments at best carry political weight and persuasive value and if communicated correctly have the power to persuade governments to “embrace” them in national policies.⁵⁰⁸

500 Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 13.

501 Anon date unknown http://dialogue2012.fanrpan.org/sites/default/files/publications/Legal_status_of_SADC_technical_agreements_and_implications.pps.

502 Anon date unknown http://dialogue2012.fanrpan.org/sites/default/files/publications/Legal_status_of_SADC_technical_agreements_and_implications.pps. See also Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 13.

503 For example the SADC model law on HIV and AIDS has shaped the nature of HIV / AIDS management legislation and the SADC principles on Democratic Elections have shaped election management legislation. Anon date unknown http://dialogue2012.fanrpan.org/sites/default/files/publications/Legal_status_of_SADC_technical_agreements_and_implications.pps.

504 Anon date unknown http://dialogue2012.fanrpan.org/sites/default/files/publications/Legal_status_of_SADC_technical_agreements_and_implications.pps.

505 Van Nieuwkerk 2012 *Africa Peach and Security Series* 18.

506 Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 11.

507 MOUs are also considered legal instruments but “of a subsidiary nature” as they are entered into by Ministers and not by the Summit of the Heads of States or Government. Thus only the latter can make legally binding decisions and instruments in the SADC context. Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 12.

508 Centre for Applied Research 2012 “The SADC Harmonized Seed Regulatory System” 13.

5.2 *Environmentally induced migration – an elements analysis*

5.2.1 *Forced and voluntary migration or resettlement*

The difference between forced and voluntary migration has already been touched upon in Chapter 2 above and as attested to throughout this dissertation, both these forms of migration are already serious realities in the SADC region.⁵⁰⁹ Sudden-onset disasters like floods (mostly in Mozambique, Zambia and South Africa) and storms (mostly in Mauritius and Mozambique) force or compel people to migrate while desertification, drought and other slow-onset environmental processes (mostly in Angola, Botswana, the Congo, Malawi, Mozambique, Namibia, Zambia and Zimbabwe) cause more voluntary migrations. Some migrations can however be classified under both voluntary and forced migration and it is therefore important to determine which factors had the strongest influence, the “push” or “pull” factors.⁵¹⁰ In order to effectively regulate both these types of migrations, SADC law and policy must distinguish between the two and provide mechanisms or regulatory provisions which are designed to address the different situations and consequences brought about by both. Forced migration is understandably more serious as the migrant is in essence compelled to relocate as his / her livelihood or life is genuinely threatened. Both forms of migration do however transpire in SADC and for this reason both form part of our definition set. The only question remaining is whether or not current law and policy are adequate in this regard.

If we consider AU law and policy, the most important instruments are undoubtedly the *Charter* and the *OAU Convention*. The former provides every individual with the right to leave any country including his / her own and to return to his / her country.⁵¹¹ This is the closest that the *Charter* comes to even hinting towards the movement of people across borders (other than its provisions concerning refugees and asylum). The *OAU Convention* broadens the 1951 *Refugee Convention* definition to include people who are “compelled or forced” to leave their place of habitual residence in

509 See para 2.1.4.

510 Perez Unknown <https://suite.io/jaclyna-perez/4r7b20f>.

511 Article 12(2) of the *Charter*.

order to seek sanctuary in another place outside their country of origin.⁵¹² As discussed in detail above, this definition broadens the *Convention's* application and as such might be inclusive of forced migrants who cross borders on account of sudden-onset environmental events like floods and storms.⁵¹³ If we therefore accept that this definition is wide enough to include environmental migrants, the *OAU Convention's* provisions discussed in Chapter 4 all become applicable here in the case of forced migration.⁵¹⁴ Nothing is however provided for in terms of voluntary migrants as they can never be classified as “refugees”, not even under this *Convention*.⁵¹⁵

Furthermore, the *Convention* does not provide much in terms of migration regulation, and might at best be helpful in ensuring that Member States are unable to refuse / repatriate forced migrants from their countries (in some circumstances).⁵¹⁶ However, a voluntary migrant attempting to cross a border on account of for example persistent drought in his country will probably not be protected in terms of this *Convention*.⁵¹⁷ The receiving country will also probably not be obligated to allow this migrant to cross its borders, unless perhaps in terms of the right enshrined Article 12(2) of the *Charter*.⁵¹⁸ This article will however only find application if the migrant's entry will not jeopardize national security, law and order, public health or morality in the receiving country.⁵¹⁹ In the event of a mass voluntary migration, however, it will be extremely difficult (if not impossible) to succeed in invoking this right, and for obvious reasons. A mass cross-border migration will most certainly impact a

512 Article 1 paragraph 2 of the *OAU Convention*.

513 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

514 See para 4.1.2.

515 Please refer to Chapter 2, in particular paras 2.1.2 and 2.1.4 where the term “refugee” is comprehensively defined and the issue is explained in detail. See also Chapter 4, para 4.1.2 where the scope of the *OAU Convention's* refugee definition is discussed in detail.

516 Article II of the *OAU Convention*.

517 This will of course depend on the meaning of the phrase “event seriously disturbing public order”. What exactly qualifies as an event seriously disturbing public order? Could a drought qualify if it has the effect of disrupting a community to such an extent that said community is unable to stay? Or must it be a specific event like an earthquake or flood which physically destroys a community? In my opinion, even though droughts and sea-level rise can escalate to such an extent so as to threaten a person's life and living environment, when this happens the person becomes a forced migrant. As soon as the migrant is effectively forced to relocate, for whatever reason, it is no longer a voluntary move. Therefore if the person is only looking for better economic opportunities or better weather conditions for his / her crops, he she will not be awarded protection under the *OAU Convention*. An event like a flood leaving the farmer homeless and his fields flooded, well that is another story.

518 See para 4,1,1.

519 Article 12(2) of the *Charter*.

receiving country negatively, especially in terms of security, law and order and health considerations.

The *Tunis Declaration*, the *NEPAD* and the *Addis Ababa Document* do not warrant much discussion. They are not binding instruments and were not drafted or created with the purpose of addressing the issue of EIM, be it forced or voluntary. The latter document endorses the broadened refugee definition formulated in the *OAU Convention*, urges countries not to reject refugees at their borders and recommends that governments should ensure the safety of refugees and relocate them in accessible areas where basic services can be provided.⁵²⁰ Nothing more is however included which either differentiates between forced and voluntary migration or mentions anything further in this regard (in either instrument).

The *MPFA* is similarly provides nothing in terms of the actual regulation of EIM; aspects like border control, assistance and protection, the status of migrants and so forth are not addressed in this policy. It is however recommended that domestic laws regulating migration should be strengthened by the formulation of clear and transparent categories of admission / expulsion and clear eligibility criteria for protection and assistance.⁵²¹ This might point toward the *MPFA* propagating or supporting a distinction between different situations and different types of migrants. For example one of the “eligibility criterion” might be that the person must have been forced to migrate or flee his home. A voluntary / economic migrant merely in search of greener pastures will therefore not satisfy this criterion. This is however mere speculation and the *MPFA* is also not a binding document. As such it has no real force or regulatory power save for its ability to shape future policy.

Neither the *ACPMD* nor *CC Resolution* distinguishes between forced and voluntary migration. The former is non-binding and contains recommendations which would be very helpful if they were contained in a binding resolution or protocol conferring obligations upon its signatories. The *CC Resolution* does nothing except confirm climate change’s impact in causing and intensifying environmental occurrences

520 *Addis Adaba Document* Part II: Recommendations.

521 *MPFA* pg 14.

which often result in migration.⁵²² It addresses the issue of climate change adaptation initiatives and, as explained above, is more of an anticipatory resolution pointing out the need for further policies or texts to regulate the issue. The *Kampala Convention* on the other hand does imply a distinction and is mainly fixated on forced migration, referring to

persons or groups...who have been forced or obliged to flee or leave their home ...in order to avoid the effects of...natural or human-made disasters..⁵²³

It provides an elaborate accountability and monitoring mechanism to regulate the issue of internally displaced persons by focussing on the prevention of displacement and assisting the displaced in Africa.⁵²⁴ It is furthermore the first binding regional instrument governing this issue in Africa. Unfortunately very few SADC Member States have ratified this *Convention* and although it could be used as a guide in addressing aspects of cross-border migration,⁵²⁵ the *Convention* was drafted specifically to provide a legal framework aimed at ensuring protection for internally displaced persons.⁵²⁶ As such it focusses on migration within borders which is not the focus of this dissertation.

SADC law and policy was also investigated in Chapter 4 and rendered rather disappointing results. Firstly, although the DRP seems to, albeit indirectly, follow the *OUA Convention's* definition of "refugee" (thus possibly awarding protection for forced migrants),⁵²⁷ the broader definition is never directly endorsed and its non-binding nature renders it unusable in this context. The *PPDS*, the *SIPO II*, the *DPFM* and the *Code* are also not very helpful in distinguishing between or regulating either forced or voluntary migration. The former two in essence address issues of security, peace and conflict resolution.⁵²⁸ The *DPFM's* main purpose is facilitating goods, capital and services across borders in the interest of regional development. It is not intended to function as a legal framework facilitating either forced or voluntary

522 AEO3 pg 14-15.

523 Article 1 of the *Kampala Convention*.

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

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

526 Preamble to the *Kampala Convention*.

527 *DRP* pg 1.

528 Article 2 of the *PPDS*; Southern African Development Community 2012
<http://www.sadc.int/documents-publications/show/809>.

migration in SADC.⁵²⁹ The *Code* is merely useful in that it acknowledges the lack of protection and assistance currently available to certain migrants, especially undocumented migrants.⁵³⁰ It is however non-binding and additionally lacks the regulatory provisions which could, if they had any persuasive power, award it some potential.

5.2.2 *Internal and cross-border migration*

As regards the element of internal and cross-border migration, it must be remembered that the focus of this dissertation is mainly on cross-border migration. In considering the *African Charter*, Article 12(2) is once again relevant as “leaving one’s country” denotes cross-border movement. Although the right to be received into another country is not provided for in the *Charter*, it is implied by the fact that people are awarded the right to leave their own countries. The *Charter* however never directly addresses the issue of migration and therefore fails in providing responsibilities and regulatory measures in this regard. The *OAU Convention* can once again only be deemed applicable if we accept that the drafter’s intention was to include environmental migrants in its “refugee definition”. If this is accepted to be the case, Article II dealing with Asylum has Member States pledging to employ their relevant legislation in receiving refugees and in some instances in securing settlement for those who are unable or unwilling to return to their countries of origin. Article V provides that no refugee shall be repatriated against his will and that the country of asylum and country of origin must work together in order to make adequate arrangements for the safe return of refugees who want to return home. The entire *Convention* is discussed in more detail above and all in all is a very broadly phrased instrument mainly contributing in elevating the refugee’s status in Africa. It fails to provide specific provisions and mechanisms which will effectively monitor refugees / migrants on ground level. For argument’s sake it can be compared to framework legislation which requires subsidiary legislation to “fill in the gaps”.

529 Article 2 of the DPFM; Madakufamba 2005. <http://www.sardc.net/editorial/sadctoday/view.asp?vol=220&pubno=v8n4>.

530 Van der Vleuten & Hulse 2013 *SFB – Governance Working Paper Series* 8.

The *Addis Ababa Document* provides solely for recommendations meant to help in solving the refugee and forced population displacement problem in Africa. The document is non-binding and as such cannot confer obligations on Member States. The *NEPAD* is also inadequate for our purposes and does not even indirectly refer to the problem of cross-border migration. The *MPFA* on the other hand deals solely with the issue of migration in Africa but only makes policy recommendations for consideration by African Union Member States and RECs. Concerning some of its recommendations, only “refugees” and “IDPs” are mentioned as beneficiaries of the assistance which states are supposed to provide.⁵³¹ This once again strengthens the approach of a strong distinction being drawn between refugees on the one hand and cross-border migrants on the other. There are nevertheless many other recommendations providing for different aspects and needs of migrants in Africa.⁵³² The whole policy is however non-binding and fails to clearly indicate the position of an environmental migrant as per the framework. It is merely a guideline and states cannot be obliged to conform or to align their laws or policies with its recommendations.

The *ACPMD* specifically lists “environmental factors” as one of the underlying causes of migration in Africa and argues that common strategy is necessary which “associates countries of origin, transit and destination” in order to obtain balanced solutions.⁵³³ It is a promising initiative and if included in a binding protocol or convention it could certainly contribute to the current framework governing migration in Africa. However as is, it is merely a long list of recommendations. The *CC Resolution* never refers to cross-border migration and thus will not be elaborated upon further. The *Kampala Convention* on the other hand exclusively deals with migration, albeit only within border migration. Its relevance to cross-border displacement is merely indirect and at best it has the potential to influence the regulation of cross-border migration on a normative basis.

As regards SADC law and policy, the *DRP* is only a declaration and has no binding power. The issue of migration is furthermore never mentioned in the declaration text

531 The *MPFA* “Protracted Displacement Situations”.

532 Refer to Chapter 4 above.

533 Article 5 of the *ACPDM*.

and in essence applies only to refugees in the true sense of the word. The *DFMA* is similarly impractical as its purpose is to facilitate movement across borders in an effort at promoting inter-dependence and integration between Member States' economies. Its provisions are not workable in regulating a mass cross-border EIM or even a migration of a smaller magnitude. Its long term goal is equitable economic development and "the free movement of people across borders" is only a means to achieve this goal. The *Code*, in article 17, urges states to work toward the free movement of persons and progressively reduce immigration controls. Nothing else as regards migrants or environmental migrants is mentioned. Thus it can be concluded in agreement with Olivier:⁵³⁴ SADC has yet to develop a policy or instrument which "streamlines cross border movement".

5.2.3 Migration caused by sudden environmental occurrences such as storms or floods as well as population movements caused by slow onset events such as sea-level rise and desertification

EIM is a serious reality triggered by various environmental occurrences / processes or a combination of events / circumstances. Most SADC Member States are extremely vulnerable to slow onset events like drought and desertification.⁵³⁵ The significant increase in the prevalence of floods, natural disasters and other sudden onset events in the region has also been attested to above.⁵³⁶ In light of the gravity of the provided numbers and statistics and grim forecasts for the future, a comprehensive legal framework is required which caters for both migration caused by sudden environmental occurrences and migration brought on by slow onset events.

The AU Law and policy instruments discussed above do not categorically distinguish between migration caused by sudden onset events and migration triggered by slow onset occurrences. Most instruments do not even mention EIM and find applicability only indirectly or from a normative perspective. The *OAU Convention* is an exception in that it categorises persons who, on account of "events seriously disturbing public

534 Olivier 2013 "Social protection for migrant workers from Malawi" 4.

535 See para 2.3.3 above.

536 See para 2.3.2 above.

order” are compelled to leave their place of habitual residence in order to seek refuge across borders, as refugees. This, as analysed above in detail, might indicate that the *Convention* provides protection to persons fleeing across borders on account of some forms of sudden onset environmental occurrences.⁵³⁷ Regulation in terms of such an event is not provided for but the migrants or “refugees” do at least acquire refugee status via this instrument, meaning that they have the right to asylum and other essential services usually only afforded to refugees in the true sense of the word. Thus in terms of this *Convention* they are no longer “undocumented migrants” but refugees, entitled to the full protection and assistance provided for under refugee law. Whether or not this was the drafter’s intention, however, remains an unsettled question of interpretation.

The *Kampala Convention* is another noteworthy exception as it includes in its definition of “internally displaced persons” persons or groups forced or obliged to flee or leave their homes as a result of or in order to avoid the effects of natural disasters.⁵³⁸ Therefore this is a very direct reference to sudden onset events triggering migration and thus leading to displacement. Abebe⁵³⁹ for example argues that this *Convention* was an endeavour by the regional community to “fill the vacuum” with regards to protecting persons displaced on account of climate change, natural disasters, environmental change and degradation. As it is only directly applicable to within border migration, however, it has, at best, persuasive influence and can perhaps be useful on a normative basis.

In terms of SADC law and policy, the *DRP* lists “other events seriously disturbing public order in the countries of origin” as one of the root causes of migration.⁵⁴⁰ This may once again imply sudden onset environmental occurrences, although its inclusion in this manner does not carry the same weight as its inclusion in the *OAU Convention*. None of the other SADC instruments find application in this context and will therefore not be discussed again.

537 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

538 Article 1 of the *Kampala Convention*.

539 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

540 *DRP* pg 1.

5.2.4 Temporal and permanent migration

Research shows that migration following single catastrophic events is usually of a temporary nature while long term environmental changes like drought and sea-level rise typically cause more permanent migration.⁵⁴¹ Migration caused by a sudden onset events is a type of adaptation strategy and as such tends to be (or starts out as) temporal. The reality however is that, in some instances, recovery may not be possible rendering the displacement permanent.⁵⁴² Regarding incremental changes, Tol⁵⁴³ states that overall, without proper adaptation, sea-level rise will wipe out entire countries by 2100. In the case of small island states like SADCs own Madagascar, Mauritius and Seychelles, this may very well mean permanent migration because even though protection measures to combat sea-level rise exist, permanent displacement has in some cases proven to be the only viable long-term option.⁵⁴⁴

Over the last decade many SADC countries have been victim to EIM,⁵⁴⁵ both temporal and permanent in nature. Thousands living in low-lying river areas have been forced to relocate due to sea-level rise and floods.⁵⁴⁶ According to Kniveton,⁵⁴⁷ what at first seemed to be mostly temporary mass displacement “has been observed to take on the characteristics of permanence”. The AU and SADC instruments applicable to EIM have been methodically analysed above. This particular definitional element is almost never directly addressed in either one of them and none of the instruments draw a clear distinction between temporal and permanent migration. The only exception is the *MPFA* which speaks of “Protracted Displacement Situations”, in other words instances where displacement becomes prolonged because the causes of such displacement are not resolved. The *OAU Convention* also hints towards this element in providing that temporary residence may be granted to refugees pending arrangement for their resettlement.⁵⁴⁸ Additionally, no refugee may be repatriated against his will which means that if a refugee does not wish to return to his country of origin, they may not be forced to do

541 O'Brien et al 2008 *Global Environmental Change and Human Security Project* 23.

542 Kälin & Schrepfer 2012 *UNHCR Legal and Protection Policy Research Series* 40.

543 Tol 2007 *Mitigation and Adaptation Strategies for Global Change* 741.

544 Kelman “Island evacuation” 20.

545 Warner 2010 *Global Environmental Change* 406.

546 Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 214.

547 Kniveton et al “Challenges and approaches to measuring the migration-environment nexus” 214.

548 Article II of the *OAU Convention*.

so, rendering their migration permanent.⁵⁴⁹ If refugees wish to return home (as is the case with temporal migration), assistance by the asylum countries, voluntary agencies and international and intergovernmental organisations must also be given in order to facilitate such return.⁵⁵⁰ Abebe⁵⁵¹ argues that the *Kampala Convention* “recognizes resettlement and relocation as an aspect of durable solution for situations where return is not viable” and as such definitely speaks to both temporal and permanent migration. Unfortunately the *Convention* is in essence only applicable to persons “who have *not* crossed an internationally recognized State border”.⁵⁵² The *DRP* is also irrelevant save for its commitment that governments must create conducive conditions for refugees safe return home. Nothing further is however mentioned in terms of regulating EIM, permanent or temporal.

6 Conclusion and recommendations

Myers,⁵⁵³ one of the “most prolific” writers on the topic of environmental refugees (or more accurately environmental migrants) estimates that this category of migrants will soon grow into the largest existing group of involuntary migrants.⁵⁵⁴ Morton *et al*⁵⁵⁵ agrees and states that “all evidence points toward climate- and environmentally induced migration becoming one of the major policy challenges of this century”. The reasoning behind this last statement has to do with the current status of environmental migrants; they cannot be awarded refugee status as they do not qualify as refugees under the *1951 United Nations Refugee Convention* or its *1967 Protocol*.⁵⁵⁶ Thus what we struggle with here is a situation where practitioners and policymakers are unable to formulate plans and achieve progress on account of definitional and accountability debates surrounding EIM.⁵⁵⁷ Only migrants who meet the criteria set out in the above instruments are protected by international Refugee

549 Article V of the *OAU Convention*.

550 Article III of the *OAU Convention*.

551 Abebe “The Kampala Convention and environmentally induced displacement in Africa”.

552 Article 1 of the *Kampala Convention*.

553 See Myers *Ultimate security: the environmental basis of political stability*; Myers 2002 *Philosophical Transactions of the Royal Society*; Myers 1993 *Bioscience*.

554 Bates 2002 *Population and Environment* 465.

555 Morton *et al* 2008 “Human security policy challenges” 5.

556 Disturbingly enough there is also a lack of official recognition on the part of governments and agencies as regards whether there is in fact an “environmental refugee” problem at all.

557 Dun & Gemenne *Climate Change and Displacement*.

Law and are referred to as Convention refugees.⁵⁵⁸ According to Bates,⁵⁵⁹ all other types or classes of migrants are deemed to be voluntary migrants, despite the fact that EIM often takes on the form of forced migration. In the latter instance, an environmental migrant finds themselves in more or less the same situation as that of a refugee, except for the fact that they “do not fear persecution”. Hence Van der Vleuten & Hulse⁵⁶⁰ rightly argue that

As in many other regional contexts, the rights of refugees are more strongly internationally protected than those of other categories of migrant, with undocumented migrants the least protected of all.

Stavropoulou⁵⁶¹ argues that most “environmental refugee” situations do not seem to warrant new international legal regimes. She does however isolate two exceptions: 1) the “disappearing states scenario” implying the impact of sea-level rise on island states and 2) natural disasters generating migrants who do not qualify as refugees under the 1951 *Convention*.⁵⁶² In the latter case, she proposes that a prohibition on deportation of people from these countries should be instituted as they should not be returned to their countries of origin for humanitarian reasons.⁵⁶³ Dun & Gemenne⁵⁶⁴ are however sceptical and warn that couching EIM too broadly will be “damaging for those in need of the most protection”. Bauer⁵⁶⁵ also states that environmental migrants are not considered to be “refugees” in international law and that this perspective is not likely to change.

This dissertation attempted to answer the following question: To what extent does the regional normative framework provide for EIM in SADC? The concept of EIM was discussed in detail with specific reference to the definitional and accountability debates mentioned yet again above. A new definition set for EIM was formulated, highlighting four key elements intrinsic to EIM as a whole. The environmental processes and occurrences triggering EIM in SADC were also elaborated upon, a discussion uncovering some alarming statistics and forecasts pertaining to both

558 Bates 2002 *Population and Environment* 467.

559 Bates 2002 *Population and Environment* 467.

560 Stavropoulou “Drowned in definitions?” 11

561 Stavropoulou “Drowned in definitions?” 12.

562 Stavropoulou “Drowned in definitions?” 12.

563 Dun & Gemenne “Defining ‘environmental migration’” 10-11.

564 Dun & Gemenne “Defining ‘environmental migration’” 10-11.

565 Bauer 2010 “Climate Refugees” beyond Copenhagen” 12.

forced and voluntary EIM in the region. Sudden onset events like floods and storms, slow onset events like droughts and desertification and incremental changes like sea level-rise have by no means left southern Africa unaffected. The manner in which climate change acts as a catalyst of migration was also duly investigated, and a clear link was established between this phenomenon and human mobility.⁵⁶⁶

Because this dissertation focussed specifically on the stance of SADC's regulatory framework pertaining to EIM, a comprehensive overview of the region was provided. A bit of SADC history and background was therefore in order where after SADC's vulnerability to EIM was investigated. Certain key vulnerabilities unique to the region were individually examined, among others poverty, HIV / AIDS, food insecurity and climate variability. These were found to be the most significant common influences lowering SADC Member States' resilience in the wake of additional "shocks" (for example natural disasters, floods, droughts and so forth).⁵⁶⁷ Chapter 4 was devoted to providing the reader with a detailed analysis of the continental and regional instruments comprising the normative framework currently governing EIM in SADC. AU and SADC law and policy were therefore discussed at length, focussing more acutely on the instruments most applicable in this regard. The overall framework rendered rather disappointing results in that most of the instruments never directly raise the issue of EIM. Although some may find indirect application, uncertainties as regards interpretation and scope complicate the situation. The drafter's intention vis-à-vis the *OAU Convention's* refugee definition for instance is a prime example of this. The non-binding nature of almost all the discussed instruments is another daunting aspect adding to the impracticality and inadequacy of the framework.

Chapter 5 drew a distinction between binding and non-binding instruments in the SADC context, briefly pointing out how the latter merely have persuasive power and the potential to influence policy and the interpretation of binding documents. Only the SADC Treaty and protocols have binding power in SADC, and therefore only these instruments have the power to bind states in their actions (and conversely hold them accountable for their inactions). Very few of the instruments discussed in Chapter 4 are protocols and thus Member States are in no way obliged to align themselves with

566 Laczko & Aghazarm 2009 *Migration, Environment and Climate Change* 9.

567 See para 3.2.

their contents. Chapter 5 additionally provided for a brief analysis of the definitional elements of EIM put forth in Chapter 2. Chapter 4's instruments were once again scrutinized but this time whilst evaluating them in light of the individual elements comprising the definition set. The framework, in respect of each element, was unfortunately found below par.⁵⁶⁸ Very few instruments for example even distinguish between "forced and voluntary migration" and "temporal and permanent migration". Making the former distinction is critical as it is an important element in allocating protection in the current international framework. Yet nothing is provided for in terms of regulation for either of these movements, at least not in the form of a binding document or protocol. The possible regulatory provisions which were highlighted unfortunately all have their origins in non-binding instruments, for example the *Addis Ababa Document* and the *ACPMD*. These texts have no power to bind states and the recommendations therein are by no means enforceable against Member States.

Concerning the element "migration caused by sudden environmental occurrences as well as population movements caused by slow onset events", the current framework was likewise found lacking. A few provisions touching upon this element were highlighted above,⁵⁶⁹ but they are flimsy at best; even if the instruments wherein they are found can be deemed applicable, they do not provide suitable regulatory mechanisms or actions plans adequate to control the issue at hand. The framework especially fails in providing protection and regulation (and even recognition) in terms of migrants crossing borders on account of slow onset events and incremental changes. The *Kampala Convention* and the *OAU Convention* at least acknowledge individuals who are forced to migrate on account of the "effects of natural disasters" and "events seriously disturbing public order". Similarly the *DRP* lists the latter as one of the root causes of migration. Nothing is however provided for in terms of migrations spurred on by for example droughts, desertification or sea-level rise. Thus individuals who migrate across borders on account of these three environmental processes are not recognized anywhere and nothing is provided for them in terms of their protection or regulation. This is a critical oversight especially as regards sea-level rise which has the very definite potential to generate forced migrants.⁵⁷⁰

568 See para 5.2.

569 See para 5.2.2.

570 See para 2.3.4.

Concerning “temporal and permanent migration”, very little was found in the current framework speaking to specifically the regulation of either. A clear distinction is never drawn between the two and except for rather weak points of reference in the *MPFA*, the *OAU Convention*, the *Kampala Convention* and the *DRP*, the framework fails to provide anything useful in terms of this element.

In light of the above it is clear that the current framework governing EIM in SADC is inadequate. If a major flood is to strike for example SADC Member State Mozambique, the impact on the already poverty stricken country will be disastrous. Because of the state’s low resilience and intense vulnerability as attested to in Chapter 3 above, mass migration might be the affected population’s only option or coping strategy. It is furthermore likely that many threatened individuals will try to cross internationally recognized borders by for example fleeing to South Africa, Zambia or Zimbabwe. A tropical cyclone in Mauritius or another volcanic eruption in the DRC may very well also generate environmental migrants, of course depending on the scale of or devastation caused by the event. According to Schwartz and Randall,⁵⁷¹ weather-related events impact societies in numerous ways in that they influence food supply (already a key vulnerability in the SADC context), access to clean water (definitely a problem in most SADC countries) and energy (also an existing crisis in South Africa). They particularly affirm that “less prosperous regions” lacking the resources and capabilities required to adapt to more austere conditions will be in even more trouble as regards political, economic and social stability.⁵⁷²

If either of these scenarios is to take place, how are Member States going to react? In what way will these mass migrations be regulated? What is to keep one Member State from refusing entry and what is to keep another from repatriating migrants who manage to cross borders? Even if the *African Charter* or International Human Rights Law is capable of being invoked in order to keep States from deporting environmental migrants (or to force them to receive the migrants), how will these situations be regulated on ground level? To what degree will border control of the receiving State be relinquished or compromised and will this not constitute a very

571 Schwartz & Randall 2003 “Abrupt Climate Change Scenario” 4.

572 Schwartz & Randall 2003 “Abrupt Climate Change Scenario”5.

real assault on state sovereignty?⁵⁷³ Also, what of the financial implications likely to accompany a mass migration? Will the receiving country be expected to provide food, water, camps or accommodation and social security for these migrants out of their own treasuries? Or will the country of origin be footing the bill? What if the latter State is unable to come up with the necessary capital? Thousands of similar questions arise when one considers the implications or consequences of a mass migration in SADC. The *OAU Convention* for example has been criticized by some as “far less liberal” than the 1951 *Refugee Convention* as regards regulatory measures despite its more inclusive refugee definition. Jahn,⁵⁷⁴ states that

there are omissions which, from the point of view of the international protection of refugees, are undesirable. The Draft does not contain any provision on such elementary rights as wage-earning employment, elementary education, public relief, labour legislation and social security. It does not stipulate freedom of movement and it makes the issuance of travel documents merely optional and gives less protection against expulsion.⁵⁷⁵

Until quite recently, most African countries had not even put in place national migration policies.⁵⁷⁶ Although many states have policies in place now, most have not as of yet been fully and effectively implemented. The ACPMF and AMPF can be regarded as steps in the right direction as SADC Member States are encouraged to adopt their provisions in their policy formulation. Yet a lot still needs to be done in order to “translate rhetoric into action”.⁵⁷⁷ According to Oucho,⁵⁷⁸

A cursory review of the OAU/AU Conventions and SADC recommendations on matters pertaining to displacement still leaves a lot to be desired. Rhetoric has been long and practical implementation too short to yield the desired results. The time to treat the two as compatible is now rather than later.

It is therefore recommended that a protocol be adopted by SADC Member States which can thereafter be “domesticated” or embraced in national legislation. Such a protocol should borrow elements from some of the above discussed instruments for

573 As already stated above, sovereignty continues to weigh heavy when compared to human rights and governments’ “responsibility to protect”.

574 Jahn 1966 *Association for the Study of the World Refugee Problems Bulletin* 82.

575 Although Jahn was referring to one of the Draft documents preceding the *OAU Convention*, his statement holds true as regards the latter.

576 A 2006 UNECA study concluded that African governments’ response to international migration was very limited on account of the limited adoption of migration policies.

577 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 11.

578 Oucho “Internal Displacement of Population in the SADC Region: An Overview” 11.

example the MPFA and the ACPMD. The *Addis Ababa Document* and the *Kampala Convention* will also be helpful in guiding Member States in formulating a workable, adequate protocol. Such an instrument will have to be comprehensive enough so as to include all the elements of the working definition as formulated in Chapter 2. A protocol only protecting forced migrants or only regulating the issue of forced displacement will not be sufficient. Similarly, a text limiting protection or regulation to only migrants crossing borders on account of sudden-onset events will be inadequate. What of incremental changes like sea-level rise? This might very well be one of most serious forms of EIM and definitely warrants attention and pre-emptive action. Drought and desertification are also serious realities in most SADC States.

Adopting a protocol liberal enough to acknowledge and provide for EIM in its entirety and yet conservative enough so as to not undermine protection regimes for refugees in the true sense of the word will needless to say be very difficult. Conflicting interests and sovereignty considerations will undoubtedly hinder progress in this regard and less vulnerable States will continue to veto or reject even promising proposals and solutions. The way forward is therefore away from ultimate sovereignty preservation and toward a regionalised approach where human rights no longer take a backseat. According to Ngandwe:⁵⁷⁹

In order to reconcile the rather paradoxical objectives of the nation-states and those of regional integration and globalisation with regard to migration and refugee laws and policies, nation-states have to adopt a rights based approach to migration and refugee laws and policies. This will mean that domestic laws and policies should embrace the universality of human rights protection regardless of nationality, creed or the status of the person. This will entail a review of the national domestic legislations and the expeditious incorporation and domestication of international instruments into national laws and policy.

Thus it cannot be refuted that EIM is a serious reality posing a problem that the current normative framework is inadequate to address. SADC law and policy makers must bridge this regulation gap by drafting a suitable, binding protocol which will do more than treat EIM as a mere law-and-order issue.

579 Ngandwe 2013 *PER* 444.

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