
**African Journal of
Climate Law
and Justice**
(AJCLJ) 2024

C Kabaseke, CT Odaghara & JCN Ashukem 'The interface between loss and damage, vulnerability and human rights in Africa' (2024) 1

African Journal of Climate Law and Justice 75-91
<https://doi.org/10.29053/ajclj.v1i1.0004>

The interface between loss and damage, vulnerability and human rights in Africa

*Charlotte Kabaseke**

Lecturer, Faculty of Law, Kabale University, Kabale, Uganda
<https://orcid.org/0009-0001-0760-9826>

*Chidinma Therese Odaghara***

Senior Lecturer, Faculty of Law, Cavendish University Uganda
<https://orcid.org/0000-0001-8880-0464>

*Jean-Claude N Ashukem****

Senior Lecturer, Faculty of Law, University of Witwatersrand, South Africa
<https://orcid.org/0000-0003-1993-6258>

Abstract: This article assesses the intersectionality between vulnerability and impact that arise from losses and damages during climate change, in order to highlight the impact that climate change has on human rights in the context of loss and damage in Africa. It further interrogates the adequacy of climate change law in providing solutions to losses and damages and proposes the application of a human rights-based approach as the solution. The article concludes with possible recommendations on how best to improve ways of ensuring that human rights are placed at the centre of seeking solutions to climate change induced losses and damages.

Key words: climate change; human rights; loss and damage; vulnerability

* LLB (UCU) PGD LP (LDC) LLM (Makerere) PhD (Wuhan); ckabaseke@kab.ac.ug

** BL LLB LLM PhD (Abuja); codaghara@cavendish.ac.ug

*** LLM LLD (North West) Maîtrise en Droit (Yaoundé) Licence en Droit (Yaoundé); jean-claude.ashukem@wits.ac.za/jcnashukem@gmail.com

1 Introduction

There is no gainsaying that Africa is highly susceptible to the adverse unavoidable climate change impacts. These impacts, which constitute a variegated bag of human-induced activities and natural factors, suggest that increased climate change resilience will only result in further losses and damages to the continent. As captured by Schaeffer, these impacts fluctuate across multiple sectors and include, for example, rising sea-levels and over-flooding, agriculture, loss of ecosystem and biodiversity, among others.¹ Indeed, the 2022 Inter-governmental Panel on Climate Change (IPCC) Report has unequivocally confirmed Africa's vulnerability and pointed out that the region will remain highly susceptible to, and negatively impacted by, climate change and that there is an urgent need to address the situation. This should not be taken to suggest that current mitigation and adaptation measures are inadequate to salvage the climate change impact. Rather, in our view, it should be rightly understood as suggesting that there is an apparent potential for Africa to continue experiencing residual losses and damages and the costs incurred will be contingent on the global mitigation actions ambition level as well as the adaptation investment level at the domestic level.²

In as much as it seemingly is difficult to reverse many of the consequential climate change impacts and extreme weather conditions that are more likely in the future, there is a fundamental need in the loss and damage (L&D) debate to consider key issues in the fight against climate change. At the international level, a funding of US \$100 billion was set aside to address losses and damages, but today, states, and particularly developed countries, have been reluctant or, more appropriately, hesitant to contribute to the fund. The concept of climate liability and reparations in the L&D debate is not unprecedented,³ but an apparent late comer that only emerged in 2007 at the Bali Action Plan⁴ when adaptation was introduced as a pillar to climate change.⁵ We need to point out here that L&D is increasingly becoming an emerging and topical issue in climate change discourse and negotiation.⁶ It rests on the premise and understanding that any genuine commitment to effectively address the dire impact of climate change on human

1 M Schaeffer 'Loss and damage in Africa' (2014) 3 *ACPC*, *United Nations Economic Commission for Africa* 13, https://archive.uneca.org/sites/default/files/PublicationFiles/acpc-loss-and-damage-report_final_en.pdf (accessed 31 March 2023).

2 Schaeffer (n 1) 4.

3 J Liselotte & P Jabczyńska 'Understanding loss and damage: Addressing the unavoidable impacts of climate change' (2022) *European Parliamentary Research Service* 1, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733598/EPRS_BRI\(2022\)733598_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733598/EPRS_BRI(2022)733598_EN.pdf) (accessed 3 March 2024).

4 United Nations Framework Convention on Climate Change Decision 1/CP.13, Bali Action Plan UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008) para 1(c)(iii).

5 P Toussaint 'Loss and damage and climate litigation: The case for greater interlinkages' (2021) 30 *Review of European, Comparative and International Environmental Law* 18.

6 Art 8 Paris Agreement' K van der Geest & M Schindler Report: *Handbook for assessing loss and damage in vulnerable communities* UNU-EHS (2017) 19; K van der Geest & K Warner 'Vulnerability, coping and loss and damage from climate event' in AE Collins (ed) *Hazard, risk and disaster in society* (2015) 121, 139; R Mechler and others 'Science for law and damage:

rights, and especially on the vulnerable segment of populations in Africa, must in principle address the unavoidable L&D that, in part, is an inherent feature of the vulnerability of Africa to climate change. Therein lies the inescapable nexus between vulnerability, L&D and climate change.

In Africa, as elsewhere, vulnerable communities lack sufficient resources to mitigate or adapt to climate change harms and hence their human rights are immensely affected because of the L&D they suffer during climate change. In this article, we advocate the human rights-based approach (HRBA) to L&D in the context of climate change. We specifically demonstrate that adopting a HRBA solution to minimise L&D is crucial to seek the envisaged solutions to the impact of climate change, hence L&D, contained in the international law on climate change. Our argument is premised on the fact that there currently is no finance within the United Nations Framework on Climate Change (UNFCCC) to address L&D, and we propose that the human rights obligations of states could be used as a compelling tool to assist developing countries in this regard. This does not, however, prevent states from seeking solutions for L&D from other avenues, including holding states accountable, under the international law on human rights.⁷ Article 8 of the Paris Agreement⁸ establishes L&D as an international pillar of climate change, alongside adaptation and mitigation. Article 8 further encourages states to seek cooperative and facilitative methods to enhance, among other factors, support for L&D.⁹ The Warsaw International Mechanism (WIM) as one of the proposed mechanisms is also encouraged to seek collaborative opportunities from bodies other than the UNFCCC.¹⁰ It is implied that these bodies include human rights bodies. This is especially so, considering that many vulnerable countries, especially in Africa, are still grappling with L&D because of the failure of WIM to garner additional funding.¹¹

Although we acknowledge that 'L&D were almost kicked to the curb'¹² in the 26th Conference of the Parties (COP26) in Glasgow, Scotland, there is ongoing delaying, derailing and stalling of L&D by the developed countries to bear the responsibility and liability for past, present and future climate disasters. The HRBA provides headway in the middle of some political debate over liability and compensation, by proposing policy consideration on L&D, especially under the

Findings and propositions' in R Mechler and others (eds) *Loss and damage from climate change: Concepts, methods and policy options* (2019) 3.

7 AM Blanco & P Toussaint 'Climate change and human rights: A safe climate' Submission on loss and damage and human rights, <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/SafeClimate/NonState/Climate4Change.docx> (accessed 25 April 2023).

8 Paris Agreement (2015).

9 Art 8(3) Paris Agreement.

10 Art 8(5) Paris Agreement.

11 Blanco & Toussaint (n 7).

12 T Phillips 'COP27 will be a failure if reparations for loss and damage are not properly addressed' 17 November 2022, <https://mg.co.za/environment/2022-11-17-cop27-will-be-a-failure-if-reparations-for-loss-and-damage-are-not-properly-addressed/> (accessed 12 February 2023).

climate change regime.¹³ Under the HRBA, human rights can be integrated into policy designs, implementations and evaluation because the HRBA advocates an approach that is tailored and strategically designed to address L&D within the international law on climate change.¹⁴ This approach goes beyond the traditional mainstreaming of human rights language into texts. The HRBA, therefore, seeks to strengthen the international law on climate change by anchoring it into the human rights regime, therefore, strengthening its response to L&D.¹⁵ Adopting the HRBA requires that the linkages between L&D and international human rights obligations be established, especially because the HRBA focuses on placing human beings at the centre of seeking solutions and decision-making concerning L&D.¹⁶

Against this background, this article explores the effect of L&D on the human rights of vulnerable communities in the context of climate change in Africa. It then analyses the legal framework for addressing L&D in Africa and builds on this to examine the actual rights-based solutions to mitigate L&D during climate change.

2 Losses and damages and human rights of vulnerable communities

With the increasing interest in the connection between human rights and climate change, interest has grown in the role of human rights law in addressing the climate change dilemma. It is no longer disputable that the losses and damages caused by climate change have had a significantly negative impact on the enjoyment of internationally-recognised human rights.¹⁷ Both civil and political rights (for example, the right to life, liberty and property) and socio-economic rights (for example, the right to work, to education, social security, the highest attainable standard of physical and mental health, adequate food, clothing and housing) have been compromised globally and in Africa. We argue that these disruptive impacts of climate change have thoroughly undermined the provisions of many human rights instruments in our time. Such is the case with, for instance, article 28 of the Universal Declaration of Human Rights (Universal Declaration) which provides for the entitlement of all human beings to a social international order in which human rights of all human beings can be fully realised.¹⁸ Climate change has had significant effects on key dimensions of life. These effects

13 E Lees 'Responsibility and liability for climate loss and damage after Paris' (2017) 17 *Climate Policy* 59-70.

14 P Toussaint 'Voices unheard – Affected communities and the climate negotiations on loss and damage' (2019) 3 *Third World Thematics: A TWQ Journal* 1-20, <https://www.tandfonline.com/doi/full/10.1080/23802014.2018.1597640> (accessed 10 May 2023).

15 As above.

16 As above.

17 United Nations Human Rights Council 'The slow onset effects of climate change and human rights protection for cross-border migrants' A/HRC/37/CRP.4 (2018) paras 2-5.

18 Universal Declaration of Human Rights (1948).

include economic stability, access and affordability of clean energy, peace, and food security.¹⁹ Although it would be disingenuous for us not to acknowledge and accept that climate change has a multifaceted impact, it is also important to reckon that communities with already existing vulnerabilities suffer the most from these impacts. Africa contains some of the most vulnerable segments of communities exposed to the brunt of climate change across the globe, despite registering the lowest greenhouse gas (GHG) emissions since 1960.²⁰

Despite various mitigation and adaptation efforts proffered at the international, regional and domestic levels, we take for granted to clarify, and rightly so, that not all impacts of climate change can be avoided. Climate-related L&D continue to affect many human rights, but for this special issue on ‘Loss and damage in Africa: Legal and policy aspects’ in the *African Journal of Climate Change and Justice*, the focus will be limited to the right to life, the right food, the right to work and the right to health, as will be elaborated in the paragraphs below. This is because most of the effects of climate change that have resulted in L&D debate in Africa rotate around these rights as the most significantly affected. For instance, the right to life is one of the most violated rights because of climate change. The right to life guaranteed under article 6 of the International Covenant on Civil and Political Rights (ICCPR)²¹ provides that ‘[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ Similarly, the right to life is guaranteed under article 4 of the African Charter on Human and Peoples’ Rights (African Charter).²² Climate change has had and continues to have an adverse impact on human lives in Africa which, as mentioned above, is highly vulnerable to these impacts. It is reported that there will be an increase in the number of deaths from the impact of climate change.²³ This has largely been attributed to climate-related disasters including, but not limited to, food, water, vector-borne diseases, floods, droughts, heat waves, hurricanes, landslides and droughts. For instance, between 2000 and 2004, it is reported that approximately 262 million people across the globe were affected by climate-related disasters, and it has further been reported that approximately 250 000 people were killed by cyclones between 1980 to 2000.²⁴ It is further estimated that by 2050, there will be an exponential increase from 1,2 billion to 1,6 billion in the number of people whose lives will be at risk because of floods.²⁵ Furthermore, approximately 12 000 refugees are climate change refugees due to

19 HO Pörtne and others (eds) *Climate change 2022: Impacts, adaptation and vulnerability* (2022), <https://www.ipcc.ch/report/ar6/wg2/> (accessed 11 May 2023).

20 Mo Ibrahim Foundation ‘The road to COP27 making Africa’s case in the global climate debate’ (2022) *Forum Report* 12.

21 International Covenant on Civil and Political Rights (ICCPR) (1966).

22 African Charter on Human and Peoples’ Rights (1981).

23 Refer, eg, to the IPCC Synthesis Report of the IPCC 6th Assessment Report (AR6) (2023), <https://www.ipcc.ch/report/ar6/syr/> and the IPCC AR4 report on ‘Climate change 2007: The physical science basis’ (2007), <https://www.ipcc.ch/report/ar4/wg1/> (accessed 10 May 2023).

24 IPCC AR4 report (n 23).

25 United Nations General Assembly (UNGA) ‘Promotion and protection of human rights in the context of climate change’ A/77/226 77th session held on 26 July 2022, paras 32-33.

heavy rainfall which has destroyed their shelter, hence forcing them to move in search of safer areas across the globe. In more severe cases in other parts of Africa, over 43 000 people were displaced in Madagascar and two were reportedly killed during the cyclones that occurred between 2020 and 2021. In South Africa, 461 people were reportedly killed as a result of flooding in KwaZulu-Natal province between April and May 2022.²⁶ Similarly, 61 people were reported to have died during Cyclone Idai in 2019 in Rwanda, killing 130 people.²⁷ It seems logical to infer from the foregoing that the right to life will inevitably be affected, especially if other related rights, such as the right to food and the right to health, among others, are affected.

Climate change has also had and continues to have a significant effect on the right to food.²⁸ The right to food together with the right to be free from hunger is guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.²⁹ Although the African Charter does not expressly provide for the right to food, the African Commission on Human and Peoples' Rights (African Commission) adopted a resolution on the right to food in 2019. The resolution requires African states and governments to take appropriate measures to ensure that the right to food is enjoyed.³⁰ As the African continent continues to become hotter, however, there are unpredictable rainfall patterns causing droughts across different parts of the continent. The annual temperatures of the African continent are expected to continue to rise above 2 degrees Celsius to about 6 degrees Celsius before the end of the twenty-first century.³¹ The effect and implication of this is that about 29 countries in Africa have experienced drought at least once every year between 2010 and 2022, and that an estimated 17,3 million people have been affected by drought in the same period.³² Similarly, desertification, which is a non-reversible dryland productivity and, hence, soil degradation until plants cannot grow, has led to failed growth of plants. Over 45 per cent of Africa's land is affected by desertification and about one billion hectares of land are drylands.³³ These conditions make food production close to impossible especially because the soils are unproductive with about 34 per cent of agricultural productivity in Africa having been reduced since 1961. Furthermore, food growth and production seasons have been shortened and there is increased water stress and plagues.³⁴ Low food production has led to food insecurity, leading to high food prices. In Africa, food insecurity has affected approximately

26 As above.

27 As above.

28 P Toussaint & A M Blanco 'A human rights-based approach to loss and damage under the climate change regime' (2020) 20 *Climate Policy* 743-757.

29 Art 11 ICESCR.

30 African Commission 'Resolution on the Right to Food and Nutrition in Africa – ACHPR/Res.431(LXV)' (2019).

31 Mo Ibrahim Foundation (n 20) 12-13.

32 Mo Ibrahim Foundation (n 20) 15.

33 Mo Ibrahim Foundation (n 20) 17.

34 Mo Ibrahim Foundation (n 20) 22.

800 million people, about 281,6 million people are undernourished and about 10 million are unable to afford a balanced diet as of 2020.³⁵

Climate change impacts resulting in L&D have significantly impacted the right to work in Africa. The right to work is provided for under article 6(1) of ICESCR and article 15 of the African Charter. It is important to note here that an estimated 60 per cent of the population in 10 of the most vulnerable countries on the African continent work and are employed in the agricultural sector. For instance, Niger and Somalia are countries most vulnerable to climate change, yet 72,5 and 80,3 per cent of their population respectively work in the agricultural sector.³⁶ In the face of climate-related disasters, many people have been left unemployed, hence an increase in the vulnerability of those populations in the face of climate change. This is especially so in the absence of insurance to aid them to bounce back after their livelihoods have been destroyed by climate-related disasters.³⁷ Based on this, we argue that a substantial percentage of Africans, especially those working in the agricultural sector, are left unemployed and are left counting their losses in the face of climate change. The International Labour Organisation (ILO) has rightly observed that more than 83 per cent of working hours globally are in the agricultural sector, but they have been lost to heat stress and over 60 per cent of the global working hours in the agricultural sector will similarly be lost by 2030.³⁸ The rise in temperature has the potential to render agricultural areas unproductive and force many African agricultural workers to migrate. This is aggravated by the fact that the agricultural sector is largely informal and, therefore, is significantly affected by heat stress, hence loss in labour productivity.³⁹ Considering that work in the agricultural sector is largely performed outdoors and involves the use of a lot of energy for prolonged hours, it is apparent that heat waves induced by climate change greatly affect the workers. Heat stress has driven some agricultural workers from rural areas to urban centres in search of more favourable working conditions.⁴⁰ There is therefore a significant impact on the right to work that arises from the losses and damages caused by the effects of climate change on livelihoods, and a HRBA that places states under obligation to fulfil human rights will go a long way towards safeguarding human rights of affected persons in the face of climate change-induced losses and damages.

The right to health is equally significantly affected because of climate change. The right to health under article 12 of ICESCR and article 16 of the African

35 Mo Ibrahim Foundation (n 20) 25.

36 Mo Ibrahim Foundation (n 20) 22.

37 As above.

38 International Labour Organisation (ILO) 'Working on a warmer planet. The impact of heat stress on labour productivity and decent work' (2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_712011.pdf (accessed 25 April 2023).

39 As above.

40 As above.

Charter⁴¹ guarantees a person the right to live within the conditions that ensure that they should enjoy good health of the highest standard. Climate change, however, as already highlighted, has led to malnutrition, and also increased diseases among populations across the globe.⁴² Although the global health systems have indeed been weakened by climate change, the African continent has been significantly affected. Axiomatically, the African continent as a vulnerable continent has a predominantly low adaptive capacity and a low health capacity, which was worsened by the COVID-19 pandemic. Over the past two decades in Africa, 40 per cent of climate-related health emergencies have arisen from water-borne diseases. Similarly, vector-borne diseases such as yellow fever account for the 28th of emergencies that are health-related.⁴³

More specifically, Madagascar, Mozambique, Malawi as well as surrounding countries suffered severe floods in January and February 2022. This was after a series of tropical floods hit the area, including cyclones such as cyclones Ana and Batsirai. Cyclone Ana specifically was accompanied by heavy rainfall that came along with greenhouse gas and aerosol emissions.⁴⁴ In Malawi, tropical cyclone Freddy killed more than 600 people in March 2023. In addition to the destruction of property and livelihoods, over half a million people were displaced.⁴⁵ Moreover, when cyclone Gombe hit Mozambique in March 2022, more than 100 000 people were affected, with over 11 000 houses destroyed. Sixteen health posts were affected by the heavy rains and wind, and 346 classroom blocks in about 113 schools were damaged. Moreover, during the Kiremt rainy season in Ethiopia in 2020, severe floods displaced about 3 000 people with estimated damages amounting to about US \$135 million.⁴⁶ The floods that were partly attributed to four consecutive rainy seasons were later followed by a severe prolonged drought which partly spread across the eastern, southern and southwestern parts of the country. This left many vulnerable communities affected because they lacked water, food and shelter, among others, and 3,5 million livestock lost their lives. Between January and November 2022, about 4 000 people's lives were lost because of extreme weather events.⁴⁷ The actual figure of lost lives could be much higher especially because most of the extreme weather events and their impact go unrecorded. All these effects undoubtedly leave psychological, health and economic consequences for the communities. All these impacts have a direct link

41 Art 12 ICESCR; art 16 African Charter.

42 United Nations Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the relationship between climate change and human rights – A/HRC/10/6' (2009) paras 31-34.

43 Mo Ibrahim Foundation (n 20) 26.

44 S Harmeling 'Climate loss and damage in Africa: Massive costs on the horizon' (2024) Care Climate Change and Resilience Platform, <https://careclimatechange.org/climate-loss-and-damage-in-africa-massive-costs-on-the-horizon/#post-content> (accessed 1 March 2024).

45 B Bafana 'Vulnerable countries need action on loss and damage today and not at COPs to come', <https://reliefweb.int/report/world/vulnerable-countries-need-action-loss-and-damage-today-and-not-cops-come> (accessed 1 March 2024).

46 Harmeling (n 44).

47 As above.

to human rights, as explained above.⁴⁸ We suggest that the obligation of states to address climate change impacts on human rights is a crucial consideration. This is especially because, under human rights law, states are obligated to not only refrain from interfering with human rights but to also protect human rights through all necessary steps and measures to ensure that human rights are protected from violation from other sources.⁴⁹ States are under a direct obligation to protect individuals from weather-related hazards that are foreseeable and, hence, an obligation to protect persons from the climate change impact that causes L&D. In the next part of this article we analyse and demonstrate the extent to which the climate change legal framework employs the HRBA in addressing L&D.

3 The legal framework for addressing losses and damages in Africa

Although not unprecedented within the climate change discourse, the concept of L&D is ambiguous. This ambiguity concerns the failure of international climate change policy to provide a concise definition of the concept.⁵⁰ Despite this ambiguity, L&D has been a major aspect of the Conference of the Parties (COPs)' decisions and international environmental law principles. Even if it may be argued that L&D does not find explicit reference in the UNFCCC, we take for granted highlighting the normative provision of article 4(8) of the Convention which makes provision for insurance as a viable mechanism for developing countries in addressing the inevitable adverse impacts of climate change. The inclusion of this insurance scheme was perhaps based on earlier calls and concerns by the Alliance of Small Island States reiterating the importance of L&D and the necessity to establish some type of insurance scheme for L&D.⁵¹ Indeed, vulnerable communities in developing countries have routinely advocated industrialised countries to provide L&D finance taking into consideration their historical responsibility for climate change. Article 4(3) of the UNFCCC requires developed countries to provide 'new and additional financial resources' to help developing countries meet the costs of climate action. In meeting the cost of climate change adaptation, article 4(4) requires that developing countries adversely affected by climate change must be assisted. Furthermore, article 4(8) of the UNFCCC requires member states to consider funding, insurance, and the transfer of technology to address the specific needs and concerns of developing countries caused by climate change.

48 As above.

49 United Nations Environment Programme (UNEP) *Climate change and human rights* (2015) 12.

50 L Jensen & P Jabczynska 'Understanding loss and damage: Addressing the unavoidable impacts of climate change' (2022) *European Parliament*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733598/EPRS_BRI\(2022\)733598_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733598/EPRS_BRI(2022)733598_EN.pdf) (accessed 12 February 2023).

51 Jensen & Jabczynska (n 50) 2.

The same commitment is reiterated in the Paris Agreement's reporting guidelines. These guidelines require developed country parties to explain how their financial support to developing countries constitutes new and additional resources to combat climate change.⁵² Furthermore, the UNFCCC's COP decision in Paris 2015 agreed to include a standalone provision on L&D.⁵³ Interestingly, article 8 of the Paris Agreement exclusively focuses on L&D and provides that 'parties should enhance understanding, action, and support, including through the Warsaw International Mechanism as appropriate, on a cooperative and facilitative basis with respect to loss and damage'. Nevertheless, commentators have questioned whether the use of *should* instead of *shall* imposes any binding obligations on state parties⁵⁴ such that they would normally agree to bear responsibility and liability for climate change impacts. Even if it may be possible on the off-chance that the legality of article 8 could be in doubt, we concur with Toussaint's suggestion that article 8 only outsources liability and compensation to international, regional and domestic courts.⁵⁵

Taking the view that climate change epitomises the ongoing challenge of the twenty-first century and its impact could cause irreparable losses and damages to especially vulnerable communities, we argue that the commitment of developed countries under article 8 of the Paris Agreement, to address the impacts of change through L&D, is salutary. Yet, as rightly argued by Jegede, the ambiguity about the normative content of article 8 makes it problematic for its eventual deployment in practice at the African level, because this option is yet to be identified and explored.⁵⁶ Perhaps developed countries' (mis)interpretation of article 8 of the Paris Agreement is responsible for their shared reluctant and vehement refusal to commit to a climate change fund to fund L&D. This contentious debate about the viability of article 8 and, presumably, the L&D provision underpinning it, portrays that reversing the unavoidable harm of climate change has been a major hindrance to the progress on L&D in the entire climate change response regime. When read together with paragraphs 48 to 52 of the COP21 decision, article 8 forswears the possibility of being used as a legitimate basis for future liability for climate change and associated compensation.⁵⁷ The foregoing could be attributed to the problematic nature of the Paris Agreement which, according to Sands,

52 UNFCCC 'Decision 2/CP.17, Annex I, UNFCCC Biennial Reporting Guidelines for Developed Country Parties' UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012); UNFCCC 'Decision 19/CP.18, Common Tabular Format for 'UNFCCC Biennial Reporting Guidelines for Developed Country Parties' UN Doc FCCC/CP/2012/8/Add.3 (28 February 2013).

53 UNFCCC 'Decision 1/CP.21, Adoption of the Paris Agreement' UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) para 51.

54 D Bodansky 'The legal character of the Paris Agreement' (2016) 25 *Review of European, Comparative and International Environmental Law* 142-150.

55 P Toussaint 'Loss and damage and climate litigation: The case for greater interlinkage' (2021) 30 *Review of European, Comparative and International Environmental Law* 16-33.

56 AO Jegede 'Africa versus climate change loss and damages: Exploring AU regional channels for influencing national policy' (2018) 5 *Journal of African Foreign Affairs* 207-208.

57 A Gilder & O Rumble 'An African perspective on loss and damage' (2022) SAIIA Policy Insight 130 8, <https://saiia.org.za/wp-content/uploads/2022/06/Policy-Insight-130-gilder-rumble.pdf> (accessed 30 March 2023); Jegede (n 56) 212.

failed to provide (any) 'legally binding provisions that require countries to take domestic legal action'.⁵⁸ Within this context, we submit, based on the arguments advanced by developed countries within the climate debate, that practical implementation of article 8 of the Paris Agreement in the context of L&D is contingent solely on facilitation and cooperation measures between developed and developing states and not considered as imposing obligations on developed states only. The problematic nature of article 8 is more evident at the African regional level when one gauges the existing potentials at the African Union (AU) level to complement, shape and influence national policy and efforts to address climate change through L&D.⁵⁹ The reason for this is that the African Charter contains no provision on L&D, due, in part, to the fact that climate issues only became prominent in the 1990s with the adoption of the UNFCCC.

Principles 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) of 1972 and 2 of the United Nations Conference on Environment and Development (Rio Declaration or Earth Summit) of 1992 address transboundary pollution according to which states have to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁶⁰ In this context, the foregoing suggests that the intentional breach by a state of a due diligence standard and the obligations under the 'no-harm' rule not to cause losses and damages, to prevent harm, or to minimise the risk of harm occurring, constitutes the international responsibility of that state to address the losses and damages occasioning from the negligent or intentional breach of duty.

In similar vein, Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration establish that there is a need for states to accelerate efforts to improve the international law on liability and compensation for the harmful impact of environmental damage, whether caused by activities within their domestic jurisdictions or control areas beyond their domestic jurisdictions. This suggests that cooperation and, supposedly, financial cooperation is a central point in addressing L&D in climate change. International cooperation also resonates as an important theme in the COP's decision. For example, in 2010 decision 1/CP.16 recognised the fundamental need to strengthen international cooperation and expertise about the need to understand and reduce L&D associated with the adverse effects of climate change, such as those relating to extreme weather events and slow-onset events, for example.⁶¹ The COP decision established a

58 P Sands 'Climate change and the rule of law: Adjudicating the future in international law' (2016) 28 *Journal of Environmental Law* 19-35; Bodansky (n 54) 142-150.

59 Jegede (n 56) 207.

60 Schaeffer (n 1) 34.

61 Decision 1/CP.16, para 25, FCCC/CP/2010/7/Add.1, Report of the Report of the Conference of the Parties on its 16th session, held in Cancun, 29 November to 10 December 2010 6, <https://unfccc.int/process-and-meetings/conferences/past-conferences/cancun-climate-change-conference-november-2010/cop-16/cop-16-reports> (accessed 31 March 2023).

work programme to consider approaches to L&D and sought suggestions about which factors should be included in the work programme. This work programme includes the development of a climate risk insurance facility to address issues about severe weather events, risk management and reduction, risk sharing and transfer mechanisms such as insurance, including options for micro-insurance, and resilience building, including through economic diversification, approaches for addressing rehabilitation measures associated with slow-onset events, engagement of stakeholders with relevant specialised expertise.⁶² In addition, COP19 established

institutional arrangements, such as an international mechanism, including functions and modalities ... to address loss and damage associated with the adverse effects of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change.⁶³

Also, at COP19, the UNFCCC determined a need

to establish ... institutional arrangements, such as an international mechanism, including functions and modalities ... to address loss and damage associated with the impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change.⁶⁴

Article 24 of African Charter on environmental protection implicitly provides the potential to gauge losses and damages related to climate change. Article 24 imposes the onus to take measures to prevent pollution and ecological degradation on African states. These measures find useful application in the context of climate change which, as reported by the 2022 IPCC Report, has an ongoing implication in Africa. Gauging article 24 of the African Charter in the context of climate change provides the platform for measuring losses and damages associated with climate change.

This segment puts across an argument that whereas the international and regional legal framework attempts to proffer remedies to the climate change dilemma, solutions focusing on human rights are not adequately provided for and, therefore, vulnerable communities will continue to suffer losses and damages associated with climate change.

4 Fostering rights-based solutions to mitigate climate induced losses and damages

Climate change describes a phenomenon that indicates that the earth's surface temperatures and the sub-surface ocean temperatures are moving at an alarming rate. Part of the consequences is that humans will suffer significant losses and

62 Schaeffer (n 1) 35.

63 Decision 3/CP.18 para 9.

64 UNFCCC, Decision 3/CP.18.

damages on account of the impact of climate change. This part dwells on the actual human rights-focused solutions of relevance to the L&D debate. In this context, the L&D during climate change refers to the adverse impacts of climate change that people have not been able to cope with or adapt to, resulting in irreparable damage or irreversible losses.⁶⁵ The L&D can be economic but can also imply the loss of non-economic features such as cultures, traditions, and languages, for example, in the case of displacement of affected island communities.⁶⁶

As alluded to above, the IPCC report on the nature of climate change and its impacts reiterates the dangers that climate change poses to well-being, sources of income, food and water availability, and human safety. It identifies those that are more likely to be negatively affected by climate change including rural people reliant on agriculture, those living in dryland areas, and in developing countries. Climate change has aggravated poverty for vulnerable people in Africa and this is reported to continue unabatedly irrespective of the fact that they are the least responsible for causing it.⁶⁷

Most African countries are categorised as developing and least developed with a high population of vulnerable persons who struggle with low levels of export capacity and productivity.⁶⁸ As highlighted in part 3 of this article, the rights-based solutions to the mitigation of losses and damages during climate change are imperative. At a continental level, the IPCC in 2022 reiterated that Africa is one of the continents on earth most vulnerable to the potentially devastating effects of climate change.⁶⁹ In the African context, the ecological impacts resulting from climate change are exacerbated by what the IPCC qualifies as 'multiple stresses'. The stresses express themselves in various forms, including colossal socio-economic challenges such as poverty, and poor institutional and infrastructural development. These multiple stresses perpetuate poor governance across jurisdictions, a dearth of human capital, lack of financial resources, health risks, conflict, political instability and, ultimately, the displacement of people.

The emergence of the HRBA to mitigate losses and damages during climate change is generally grounded on the understanding that caring for the survival of

65 K Warner and others *Evidence from the frontlines of climate change: Loss and damage to communities despite coping and adaptation* UNU-EHS Report. UNU-EHS (2012) 20.

66 For a recent overview of non-economic loss and damage, see O Serdeczny 'Non-economic loss and damage and the Warsaw international mechanism' in Mechler and others (n 6) 205-220, https://link.springer.com/chapter/10.1007/978-3-319-72026-5_8 (accessed 10 March 2023).

67 Proposal by the Maldives to the OHCHR in September 2008, as part of OHCHR's consultative study on the relationship between climate change and human rights in 'Climate change: Tackling the greatest human rights challenge of our time: Recommendations for effective action on climate change and human rights'. The document was prepared by the Centre for International Environmental Law and CARE International.

68 Least Developed Countries (LDCs) Report 2022 (UNCTAD/LDC/2022), <https://unctad.org/lde2022>, <https://worldpopulationreview.com/country-rankings/developing-countries> (accessed 29 March 2023).

69 IPCC 6th Assessment Report (2022), <https://www.ipcc.ch/report/ar6/wg2/> (accessed 9 June 2023).

the ecosystem is a fundamental issue of common concern for humanity.⁷⁰ Issues relating to climate change exist within the 'template' of values, practices, and moral viewpoints relating to human interaction with the environment. Beyond this, the issues also exist in a wider context of generally-held values that underpin modern, liberal-democratic societies. These include issues such as respect for individual rights and private property, respect for procedural fairness in the cause of environmental decision making, and the 'rule of law' which generally falls under the rubric of human rights law.⁷¹ It is therefore necessary to fashion rights-based solutions to mitigation of losses and damages during climate change to protect nature and human interests. The current approach to addressing the problem of losses and damages associated with climate change has largely focused on technical and technological solutions, but the HRBA assumes a new significance in the question of what constitutes a pragmatic response to climate change-induced losses and damages. Rights-based solutions provide comprehensive and equitable upshots to the losses and damages associated with climate change. These approaches are based on the recognition and protection of human rights, such as the right to life, the right to food and the right to health, as well as the rights of communities to their land and resources. The right of communities to their resources and the human right to a 'decent', 'healthy' and 'safe' environment is regarded as an emerging 'third-generation' or 'solidarity' right.⁷² Nonetheless, a rights-based approach to L&D acknowledges that the root cause of the problem is the failure to respect, protect and fulfil human rights.

Rights-based solutions to the quagmire of losses and damages caused by climate change recognise the rights of affected communities to participate in decision-making processes related to climate change. This involves ensuring that communities are fully informed of the impacts of climate change and that they have the opportunity to express their views and concerns. It also requires that their voices be considered in the design and implementation of adaptation and mitigation measures.⁷³

70 LA Malone & S Pasternack *Defending the environment: Civil society strategies to enforce international environmental law* (2006) xvii.

71 Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union (IPU) *Human rights handbook for parliamentarians No 2* (2016), <https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf> (accessed 2 April 2023).

72 P Gormley *Human rights, and environment: The need for international cooperation* (1976) 48-55; K Mahoney & P Mahoney (eds) *The right to environment in human rights in the twenty-first century* (1993) 517-614; C Dommen 'Claiming environmental rights: Some possibilities offered by the United Nations' human rights mechanisms' (1998) 11 *Georgetown International Environmental Law Review* 1; P Neil 'In pursuit of environmental human rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1996) 27 *Columbia Human Rights Law Review* 487; T Melissa 'Establishing environment as a human right' (1991) 19 *Denver Journal of International Law and Policy* 301; J McClymonds 'Note: The human right to a healthy environment: An international legal perspective' (1992) 37 *New Year Law School Law Review* 583.

73 OHCHR 'Applying a human rights-based approach to climate change negotiations, policies and measures', <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf> (accessed 2 April 2023).

A rights-based solution that obliges states and other key stakeholders to provide compensation and reparation for losses and damages caused by climate change is a pragmatic means to mitigate the unavoidable L&D. In this context, states and other relevant actors are liable to provide compensation and reparation to victims affected by climate change impact. African states and other key actors are equally required to adopt and implement measures to prevent further losses and damages from occurring. National efforts such as the development of laws and policies that recognise the rights of communities, as well as the establishment of independent and impartial mechanisms for monitoring and enforcing these rights, are considered part of the rights-based approach.

The establishment of a climate justice framework at the national level to ensure that the burden of climate change impacts is not disproportionately borne by vulnerable communities may pose a significant means of embedding a rights-based solution. This may involve recognising historical responsibility for emissions. In establishing such legal frameworks, the needs of marginalised groups should be paramount and prioritised to promote equitable solutions. Similarly, legal frameworks that engender robust adaptation measures that prioritise the needs of vulnerable communities can help mitigate losses and damages. To achieve this, such legal frameworks should include investments in resilient infrastructure, early warning systems, and sustainable livelihood options.⁷⁴ Similarly, engaging affected communities in decision-making processes related to climate change adaptation and mitigation are pragmatic ways in which to promote inclusive governance structures, facilitate meaningful participation in policy development, and ultimately entrench human rights-based solutions.

Investing in risk reduction and preparedness strategies can help communities cope with climate-related disasters. Risk reduction and preparedness strategies that strengthen disaster response mechanisms, improve access to information, and appropriate vulnerability assessments promote the use of a human rights-based approach to address L&D as they not only establish the root causes of the problem, but also show practically that the rights of affected communities are duly recognised. Through platforms for providing training, technical assistance and resources to enhance resilience and adaptive capacity, communities become increasingly aware of the issues and are likely to embrace the rights-based solutions.

We submit that rights-based solutions that recognise the root causes of the problem and the rights of affected communities, as well as place obligations on states and other actors to provide compensation and reparation, are pragmatic to mitigating losses and damages associated with climate change. This approach is grounded in the idea that individuals and communities have the right to

74 OHCHR 'The impact of loss and damage from the adverse effects of climate change on human rights', <https://www.ohchr.org/en/climate-change/impact-loss-and-damage-adverse-effects-climate-change-human-rights> (accessed 27 February 2024).

a safe and healthy environment and that they should be protected from the negative impacts of climate change. The initial step towards implementing such a rights-based solution is to recognise and acknowledge the rights of affected communities. This includes the right to access to information, the right to participate in decision-making processes, and the right to access to justice. These rights provide the foundation for communities to be able to protect themselves from the negative impacts of climate change and to hold those responsible accountable for their actions. Second, the state has to decisively develop legal and institutional frameworks that protect the rights of affected communities and ensure accountability and transparency.

5 Conclusion and recommendations

The article has highlighted the significant impact of losses and damages on the human rights of vulnerable communities in Africa in the context of climate change. It emphasised the need to integrate an HRBA in the L&D debate and calls for strengthening legal frameworks and enhancing capacity building to protect the rights of affected communities. The interface between climate-induced losses and damages, vulnerability and human rights in Africa is a complex and pressing issue that requires urgent attention. Africa, with its diverse ecosystems, rich biodiversity and high dependence on natural resources is particularly vulnerable to the impacts of climate change. The continent is experiencing a wide range of adverse effects, including extreme weather events, rises in sea levels, desertification, and changes in rainfall patterns, all of which contribute to significant economic, social and environmental losses.

Climate-driven losses and damages aggravate the already-existing vulnerability of African communities, especially marginalised populations such as women, children, indigenous peoples and rural communities. Limited access to resources, inadequate infrastructure, poverty and weak governance structures further compound the challenges faced by these vulnerable groups. As a result, they experience heightened risks to their livelihoods, health, food security and overall well-being. The intersection of climate change impacts with human rights in Africa is a critical concern. The adverse effects of climate change often infringe upon various human rights, such as the rights to life, food, water, health, housing and self-determination. The inability to effectively adapt to climate change and address its consequences could lead to violations of these fundamental rights, undermining social justice, equity and sustainable development.

Despite this gloomy picture, we have suggested that adopting a holistic HRBA is the crucial and indispensable tool needed to address these interconnected challenges. Generally, ambitious reduction of GHG emissions, more effective climate change adaptation and better disaster risk management tend to minimise

losses and damages.⁷⁵ However, this requires the massive support of countries and companies that contribute disproportionately to global warming. They have a moral obligation to transfer financial resources for adaptation and disaster management to vulnerable countries.

African countries can enhance their efforts to protect the human rights of vulnerable communities in the face of climate change-induced losses and damages. This approach should encompass measures to mitigate greenhouse gas emissions, enhance climate adaptation and resilience, promote sustainable development and safeguard human rights. It requires collaboration and cooperation at local, national, regional and international levels, involving governments, civil society organisations, the private sector and the international community.

Key interventions should include enhancing climate change education and awareness, supporting vulnerable communities with adaptation strategies and technologies, strengthening social safety nets, empowering marginalised groups, promoting gender equality and women's rights, improving governance, and ensuring equitable access to resources and justice systems.⁷⁶ These actions should be underpinned by a commitment to human rights principles, including participation, accountability, non-discrimination, and the empowerment of vulnerable communities. This much has been highlighted in the context of the need to achieve the Sustainable Development Goals in Africa.⁷⁷

In conclusion, we firmly submit that addressing the interface between L&D, vulnerability and human rights in Africa requires a comprehensive and transformative approach. By integrating climate action, human rights and sustainable development, Africa can build resilient and inclusive societies that are better prepared to mitigate and adapt to the impacts of climate change, while protecting and promoting the rights and well-being of its people. It is our shared duty to act firmly and urgently, ensuring that no one is left behind in the pursuit of a sustainable and equitable future for Africa and the world.

75 United Nations University Institute for Environment and Human Security (UNU-EHS) *Handbook for assessing loss and damage in vulnerable communities Report No 21* (April 2017), https://collections.unu.edu/eserv/UNU:6032/Online_No_21_Handbook_180430.pdf (accessed 17 May 2023).

76 C Terry 'Reducing people's vulnerability to natural hazards communities and resilience. Research Paper 2008/034' (2008) *Helsinki: United Nations University World Institute for Development Economics Research (UNU-WIDER)*.

77 JCN Ashukem and others 'From political rhetoric to concrete actions – A human rights-based approach to the Sustainable Development Goals in Africa' (2025) *African Journal of International and Comparative Law* (forthcoming).