

African approaches to climate and disaster displacement as loss and damage: Gaps and prospects

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Abstract: A research agenda charting out proposals for future research on addressing knowledge gaps at the intersection of climate change, disasters, and human mobility in Africa in 2021 emphasised the need for a deeper examination of the characterisation of displacement as loss and damage. Such an inquiry is essential for advancing the effective implementation of international and regional climate frameworks. This article seeks to assess the extent to which climate and disaster displacement is presently addressed as loss and damage in law and policy on the continent and to propose some suggestions for its better integration. It proposes enhanced data collection and reporting on the economic and non-economic costs and impacts of climate and disaster displacement, the adoption of a human rights-based approach and the provision of effective remedies for displacement as loss and damage.

Key words: climate and disaster displacement; climate change law and policy; loss and damage; human rights-based approach

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1 Introduction

Displacement resulting from the increasing severity and incidence of sudden and slow-onset events is on the rise in Africa, reaching record high figures over the past year, with aggravating impacts on livelihoods, security and fragility.¹ Recent data indicates that, owing to the region's elevated vulnerability, this trend is projected to persist and intensify over the next few decades, surpassing rates observed in other parts of the world and to affect 5 per cent of the African population by 2050.² Climate and disaster displacement occurs more often within countries rather than across borders and, more importantly, displaced populations – typically the poorest and most vulnerable – remain disproportionately exposed and susceptible to climate risks and impacts when displaced.³ Climate and disaster displacement also leads to a broad range of economic and non-economic losses ranging from infrastructural damages, losses to industries such as agriculture and tourism, the disruption of health and disenfranchisement, and the loss of traditional knowledge, culture and agency.⁴

Climate and disaster displacement has gained increasing prominence within the discourse on loss and damage,⁵ and is recognised equally as a form, signal and driver of loss and damage.⁶ At the Second Glasgow Dialogue held in June 2023 to discuss the arrangements for the funding of activities to avert, minimise and address loss and damage, displacement was identified as a cross-cutting issue in the operationalisation of the Loss and Damage Fund.⁷ In this respect, it was highlighted that there is a significant shortage of resources for the preparation and recovery of displaced communities, that their legal protection is inadequate, and that the reconstruction of societies is essential to facilitate their return.⁸

1 Internal Displacement Monitoring Centre (IDMC) *2023 Global Report on Internal Displacement: Internal Displacement and Food Security* (2023) 16-22, <https://www.internal-displacement.org/global-report/grid2023/> (accessed 1 September 2023).

2 Africa Climate Mobility Initiative 'The Africa Climate Mobility Report: Addressing climate-forced migration and displacement' (2023) 20, <https://africa.climate-mobility.org/about> (accessed 1 September 2023).

3 United Nations High Commissioner for Refugees (UNHCR) 'Gender, displacement and climate change' (November 2022) 1, <https://www.unhcr.org/uk/media/gender-displacement-and-climate-change> (accessed 1 September 2023).

4 A Thomas & L Benjamin 'Non-economic loss and damage: Lessons from displacement in the Caribbean' (2020) 20 *Climate Policy* 715.

5 B Mayer 'Migration in the UNFCCC workstream on loss and damage: An assessment of alternative framings and conceivable responses' (2017) 6 *Transnational Environmental Law* 107.

6 KE McNamara and others 'The complex decision-making of climate-induced relocation: Adaptation and loss and damage' (2016) 18 *Climate Policy* 111.

7 Subsidiary Body for Implementation 'Summary of the second Glasgow dialogue' June 2023 paras 52-58, <https://unfccc.int/documents/630612> (accessed 1 September 2023). See also N Biehler, N Knapp & A Koche 'Displacement and migration in the international climate negotiations: Loss and damage debate offers new scope for action' *Stiftung Wissenschaft und Politik Comment No 56* (December 2023), https://www.swp-berlin.org/publications/products/comments/2023C56_DisplacementMigrationCOP_Web.pdf (accessed 1 September 2023).

8 Summary of the second Glasgow dialogue (n 7).

In contrast with growing policy attention in international fora to displacement and loss and damage, the characterisation of climate and disaster displacement as loss and damage in the African context is not well established. The conceptualisation of displacement as loss and damage was recently identified as a priority area for future research on climate change law and policy in Africa, which was underscored to be central to furthering the effective development and implementation of relevant international and regional frameworks on the continent.⁹ This is particularly significant given the array of challenges commonly encountered by low and middle-income nations of the Global South when dealing with loss and damage more broadly,¹⁰ encompassing overlapping financial, political, institutional and capacity-based barriers. Significantly also, where loss and damage is addressed, it typically neglects the needs of vulnerable groups.¹¹

This study seeks to review the current conceptualisation of climate and disaster displacement in legal and policy responses in Africa and propose solutions for the improved protection of vulnerable displaced groups and communities. It is structured in five parts. It first reviews the salient impacts of climate and disaster displacement in the African context using recent examples, focusing specially on the compounded effects of climate impacts, conflict, poverty, low adaptive capacity as well as the intersectional determinants of vulnerability such as gender, age, class, disability, indigenous or minority status, among others. It then examines the definition of climate and disaster displacement and its linkages with loss and damage within international and regional institutional frameworks and initiatives across international climate change law, international human rights law and international migration law. Further, it analyses the characterisation of climate and disaster displacement in law and policy in the African context. More specifically, it interrogates the framing of climate and disaster displacement and the remedial solutions sought in the nationally-determined contributions (NDCs) of African states under the Paris Agreement. It also examines the integration of climate and disaster displacement concerns and cognate mechanisms within climate legislation and climate-related policies. Finally, it identifies current legislative and policy gaps and shortcomings in the protection of climate and disaster displaced populations in Africa and proffers some potential focus areas for intervention.

9 'Research agenda for advancing law and policy responses to displacement and migration in the context of disasters and climate change in Africa' Outcome of the virtual workshop series on developing a research and policy agenda for addressing displacement and migration in the context of disasters and climate change in Africa (November 2021) 14-17, <https://disasterdisplacement.org/portfolio-item/research-agenda/> (accessed 1 September 2023).

10 Overseas Development Institute (ODI) 'Barriers to addressing climate change-related losses and damages in low and middle-income countries: A rapid evidence assessment' (2023), https://cdn.odi.org/media/documents/Barriers_to_addressing_climate_change-related_LD_in_low_and_middle-income_cou_Z2pQ7VH.pdf (accessed 1 September 2023).

11 See K Lofts, S Jodoin & L Parker 'A rights-based approach to loss and damage due to climate change' in M Doelle and SL Seck (eds) *Research handbook on climate change law and loss and damage* (2021) 201.

2 African experiences of climate and disaster displacement

Vulnerability and exposure to climate risks and impacts in Africa vary across regions, countries and local communities, while also being shaped by non-climatic factors, notably socio-economic processes, access to resources, and intersectionality within social groups.¹² Further, dimensions of social identity and status affect susceptibility to loss and damage.¹³ The deleterious impacts of climate change on peoples and economies in Africa are amplified and more persistent due to acute dependence on climate-dependent sectors, poor urban infrastructure and the dearth of adequate planning and policy.¹⁴ These impacts aggravate conflict, poverty and displacement, thwarting longer-term economic development.¹⁵ Notably, displacement is one of the primary impediments to post-disaster recovery.¹⁶

Climate and disaster displacement is on the rise in Africa.¹⁷ Between 2008 and 2019, climate-related disasters caused around 23 million displacements.¹⁸ It increased threefold since 2021 and peaked at 7,4 million in 2022.¹⁹ This is a consequence of the trend toward more frequent and severe extreme weather events on the continent. Displacement is also increasingly protracted and longer lasting owing to recurring events and the erosion of the prospects of return and durable solutions. This in turn increases vulnerability. In 2019, tropical cyclone Idai displaced over 2 million people in Mozambique and around 300 000 in Zimbabwe. In affected areas, significant damage was caused to agricultural land, infrastructure and housing. Access to drinking water, food, sanitation and health, and shelter was disrupted over the longer term, which impeded the achievement of durable solutions and future preparedness.²⁰ Many displaced persons were transferred to resettlement sites with no hospitals or schools nearby.²¹ Consecutive

12 Intergovernmental Panel on Climate Change (IPCC) Climate Change 2022: Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) 1318-1320, https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf (accessed 1 September 2023).

13 IPCC (n 12) 1318.

14 International Monetary Fund (IMF) 'Climate challenges in fragile and conflict-affected states' (2023), <https://www.imf.org/en/Publications/staff-climate-notes/Issues/2023/08/24/Climate-Challenges-in-Fragile-and-Conflict-Affected-States-537797?cid=bl-com-CLNEA2023001> (accessed 24 September 2023).

15 IMF (n 14) 4.

16 RAA Zuñiga, GN de Lima & DE Quiroga 'Climate change and population displacement in Africa' in CO Odimegwu & Y Adewoyin (eds) *The Routledge handbook of African demography* (2022) 510.

17 For an analysis of the phenomenon of climate and disaster displacement in Africa, see Zuñiga and others (n 16).

18 Zuñiga and others (n 16) 527.

19 IDMC (n 1) 17.

20 IDMC 'Eight months after Idai: Chronology of displacement, humanitarian needs and challenges going forward in Mozambique' (2019) 13, https://www.internal-displacement.org/sites/default/files/publications/documents/report_dtm_idmc_idai_2019_0.pdf (accessed 1 September 2023).

21 UNHCR 'One year on, people displaced by cyclone Idai struggle to rebuild' 13 March 2020, <https://www.unhcr.org/news/stories/one-year-people-displaced-cyclone-idai-struggle-rebuild> (accessed 1 September 2023).

cyclones following Idai, notably, Kenneth in 2019 and Eloise and Chalane in 2021, led to enduring effects in the region, with many displaced years later due to loss of livelihoods and income, food insecurity and the deteriorating spread of communicable diseases.²² Amid the cyclones, Mozambique saw an outbreak of cholera.²³ In early 2022, tropical storm Ana triggered over 600 000 displacements across Malawi, Madagascar, Mozambique and Zimbabwe and, more recently in 2023, cyclone Freddy displaced around 1.5 million in Mozambique, adding to earlier instances of displacement and to conflict-induced displacement. In Madagascar, six consecutive storms over the course of 2022 resulted in the highest number of displaced persons in its history.²⁴ Storms destroyed more than 15 000 homes and severely damaged crops, dramatically reducing food provision and agricultural production,²⁵ significantly limiting prospects of return.

Moreover, crucially, displacement disproportionately affects populations living in vulnerable situations. Experiences and impacts of displacement are gendered.²⁶ Within patriarchal systems, women have less access and control over resources, information and credit, and are less involved in decision-making processes around climate-related coping strategies.²⁷ Women in rural areas often lack the resources to move and are more likely to be left behind.²⁸ In addition, at temporary rescue shelters, women are subjected to heightened risks of violence and impoverishment.²⁹ In Zimbabwe, where over 50 000 persons were displaced in the aftermath of cyclone Idai in 2019, gender-based violence was rife.³⁰ Owing to household conflict and the lack of privacy and security within the camps, women were more susceptible to sexual harassment and exploitation, trafficking, forced child marriage and domestic abuse.³¹ The interruption of maternal and neonatal healthcare services, combined with the loss of community support, increases the vulnerability of displaced women.

Similarly, children face the brunt of the effects of climate and disaster displacement. Displacement often results in the separation of children from their families and communities. In addition, disruption to education and development

22 CARE '2 years since cyclone Idai and Mozambique has already faced an additional 3 cyclones' 12 March 2021, <https://www.care.org/news-and-stories/press-releases/2-years-since-cyclone-idai-and-mozambique-has-already-faced-an-additional-3-cyclones/> (accessed 1 September 2023).

23 Médecins Sans Frontières (MSF) 'Mozambique declares cholera cases in Beira in wake of cyclone Idai' 28 March 2019, <https://www.msf.org/mozambique-declares-cholera-cases-beira-cyclone-idai> (accessed 1 September 2023).

24 MSF (n 23) 31.

25 As above.

26 S Bradshaw *Gender, development and disasters* (2013).

27 MA Abebe 'Climate change, gender inequality and migration in East Africa' (2014) 4 *Washington Journal of Environmental Law and Policy* 104, 113-118.

28 Abebe (n 27) 126.

29 S Bhatasara 'Debating sociology and climate change' (2015) 12 *Journal of Integrative Environmental Sciences* 217.

30 N Louis 'Environmental social work: Accounting for women's tragedies in the face of climate change-induced disasters in Chimanimani district in Zimbabwe (2020) 9 *African Journal of Gender, Society and Development* 197,199.

31 Louis (n 30) 206-207.

makes displaced children prone to forced conscription, child labour, child marriage and sexual assault.³² They are also particularly susceptible to severe malnutrition and health hazards.³³ Flooding across Nigeria in 2022 gave rise to a million displacements, half of which were children.³⁴ The latter were particularly affected by the cholera outbreak in temporary camps.³⁵ Also, persons with disabilities typically face several barriers to inclusion at various stages of a disaster or climate-related emergency, notably due to the lack of accessible emergency information and resources and disaster preparedness measures, limited access to shelters and basic services and additional challenges in recovery following disasters.³⁶ Persons with disabilities may be left behind given the inaccessibility of evacuation programmes, and face heightened vulnerability through the loss of support networks and loss and damage to assistive devices.³⁷ Learning facilities and temporary schools, when available, often are not equipped to meet the needs of children with disabilities.³⁸ Indigenous communities also commonly face discrimination and economic marginalisation when displaced, while lacking access to critical social services and intercultural health services.³⁹ They are also markedly affected when dislocated due to the cultural and spiritual significance of ancestral land and the loss of their traditional livelihoods, cultural heritage and local knowledge and practices.⁴⁰

Additionally, displacement can intensify competition over scarce land and water resources, escalating conflict and threatening social cohesion. In 2022 Somalia saw its most severe drought in 40 years causing over a million displacements. The large influx of people in some parts of the country put a strain on resources, heightening food insecurity and leading to a state of emergency.⁴¹

32 GS Yizgaw & EB Abitew 'Causes and impacts of internal displacement in Ethiopia' (2019) 9 *African Journal of Social Work* 32, 38.

33 UNICEF 'Children displaced in a changing climate: Preparing for a future already underway' (2023) 9-10, [https://www.unicef.org/media/145951/file/Climate%20displacement%20report%20\(English\).pdf](https://www.unicef.org/media/145951/file/Climate%20displacement%20report%20(English).pdf) (accessed 30 September 2023).

34 Save the Children 'Number of children displaced across sub-Saharan Africa by climate shocks doubled to a record high in 2022' (4 September 2023), <https://www.savethechildren.net/news/number-children-displaced-across-sub-saharan-africa-climate-shocks-doubled-record-high-2022> (accessed 30 September 2023).

35 'Cholera preys on displaced children in flood-hit Nigerian state' *Reuters* 28 October 2022, <https://www.reuters.com/business/healthcare-pharmaceuticals/cholera-preys-displaced-children-flood-hit-nigerian-state-2022-10-28/> (accessed 30 September 2023).

36 A Kosanic and others 'An inclusive future: Disabled populations in the context of climate and environmental change' (2022) 55 *Current Opinion in Environmental Sustainability* 101159.

37 UNHCR *Disability, displacement and climate change* (April 2021), <https://www.unhcr.org/uk/media/disability-displacement-and-climate-change> (accessed 30 September 2023).

38 Kosanic and others (n 36).

39 International Organisation for Migration (IOM) 'Three imperatives for ensuring integration of indigenous youth when moving in the context of climate change, environmental degradation and disasters', <https://environmentalmigration.iom.int/blogs/three-imperatives-ensuring-integration-indigenous-youth-when-moving-context-climate-change-environmental-degradation-and-disasters> (accessed 30 September 2023).

40 M Hansungule & AO Jegede 'The impact of climate change on indigenous peoples' land tenure and use: The case for a regional policy in Africa' (2014) 21 *International Journal on Minority and Group Rights* 256, 276.

41 IDMC (n 1) 29.

Moreover, climate and disaster displacement has also led to the loss of cultural values and traditional lifestyles.⁴²

3 Climate and disaster displacement in international law

As is elaborated above, an upsurge of climate and disaster displacement in recent years in Africa has had far-reaching and long-lasting effects on individuals and communities, most particularly on groups living in vulnerable situations. The impacts of climate change extend in time and space to a wide spectrum of economic and non-economic loss and damage in this context. Relevant normative frameworks on loss and damage have growingly recognised the need for addressing climate and disaster displacement. This part intends to clarify the scope and parameters of international and regional law on climate and disaster displacement,⁴³ particularly in the context of loss and damage. To this end, it examines select international and regional frameworks including those relating to international climate change law, international migration law and international human rights law, to illuminate the current understanding of climate and disaster displacement as loss and damage and measures aimed at averting, minimising and addressing displacement and its impacts on vulnerable people and communities.

3.1 Climate and disaster displacement and international climate change law

3.1.1 UNFCCC and the recognition of displacement as loss and damage

The United Nations Framework Convention on Climate Change (UNFCCC)⁴⁴ does not establish or define the concept of loss and damage. However, the latter gradually became a prominent part of the discussions under the UNFCCC, with climate and disaster displacement underscored as an important component. The sixteenth Conference of Parties (COP16) to the UNFCCC first established a work programme on loss and damage in 2010, which was intended to consider approaches to address loss and damage, including impacts of extreme weather events and slow-onset events in developing countries that are particularly vulnerable and to strengthen international cooperation and expertise in order to

42 Friedrich Stiftung, Act Alliance and Climate Migration and Displacement Platform 'Africa regional brief: Human rights in the context of climate-induced migration and displacement' (June 2023) 5, <https://library.fes.de/pdf-files/bueros/aethiopien/20464.pdf> (accessed 30 September 2023).

43 For a comprehensive overview, see M Cullen 'Disaster, displacement and international law: Legal protections in the context of a changing climate' (2020) 8 *Politics and Governance* 270-280.

44 United Nations Framework Convention on Climate Change adopted 9 May 1992, entered into force 21 March 1994 1771 UNTS 107.

understand and reduce loss and damage.⁴⁵ The 2010 Cancun Agreement featured the first stand-alone paragraph on climate displacement and migration, calling on the international community to take ‘measures to enhance understanding, coordination and cooperation with regards to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.’⁴⁶

A year later, at the thirty-fourth session of the Subsidiary Body for Implementation, the work programme on loss and damage was focused into three thematic areas, notably assessing the risk of loss and damage, the range of approaches to address loss and damage and the role of the Convention in enhancing the implementation of approaches to address loss and damage in developing countries.⁴⁷ At COP18 in 2012 it was agreed that the Convention should enhance knowledge and understanding of approaches to address loss and damage, strengthen dialogue and coordination among relevant stakeholders and enhance action and support to address loss and damage.⁴⁸ In this respect, it encouraged further efforts in better understanding ‘how impacts of climate change are affecting patterns of migration, displacement and human mobility.’⁴⁹

3.1.2 *International mechanisms for displacement as loss and damage*

The Warsaw Mechanism on Loss and Damage was established at COP19 in 2013 as an international mechanism for promoting the implementation of approaches to address loss and damage associated with the adverse effects of climate change in a comprehensive, integrated and coherent manner.⁵⁰ Notably, among others, it is mandated to address gaps in the understanding of approaches to address loss and damage in the areas outlined under decision 3/CP.18, paragraph 7, which includes the ways in which climate impacts are affecting patterns of migration, displacement and mobility patterns. It is tasked with facilitating support of action to address loss and damage, improving coordination and providing technical guidance and support.

45 Decision 1/CP.16 The Cancun agreements: Outcome of the work of the ad hoc working group on long-term cooperative action under the Convention (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1.

46 Decision (n 45) para 14.

47 Report of the Subsidiary Body for Implementation on its 34th session (12 August 2011) UN Doc FCCC/SBI/2011/7 paras 109-116.

48 Decision 3/CP.18 Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity (8 December 2012) UN Doc FCCC/CP/2012/L.4/Rev.1.

49 Decision (n 48) para 7(a)(vi).

50 Decision 2/CP.19 Warsaw international mechanism for loss and damage associated with climate change impacts (22 November 2013) UN Doc FCCC/CP/2013/L.15.

The 2015 Paris Agreement,⁵¹ adopted at COP21, includes a specific article on loss and damage. Article 8 states the ‘importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.’⁵² It identifies overarching areas of cooperation and facilitation, namely, early warning systems, emergency preparedness, slow-onset events, events that may involve irreversible and permanent loss and damage, comprehensive risk assessment and management, risk insurance facilities, climate risk pooling and other insurance solutions, non-economic losses and resilience of communities, livelihoods and ecosystems.⁵³ Significantly, COP21 called for the establishment of a task force to ‘develop recommendations for integrated approaches to avert, and address displacement related to the adverse impacts of climate change.’⁵⁴

The Task Force on Displacement is operationalised by the Executive Committee of the Warsaw International Mechanism for Loss and Damage. In its first phase of implementation between 2017 and 2019, the Task Force developed recommendations for integrated approaches to avert, minimise and address displacement related to the adverse effects of climate change.⁵⁵ Notably, it recommended to state parties to elaborate national and subnational legislation, policies and strategies recognising the importance of integrated approaches to avert, minimise, and address displacement related to adverse impacts of climate change and issues around human mobility, taking into account human rights obligations and other relevant international standards with the participation of relevant stakeholders.⁵⁶ It further recommended the improvement of research, data collection, risk analysis and information sharing in view of understanding and managing human mobility related to the adverse impacts of climate change, while ensuring the participation of communities affected and at-risk of displacement related to the adverse impacts of climate change.⁵⁷ It also underlined the need for integrating human mobility challenges and opportunities into national planning processes, including NDCs.⁵⁸ Moreover, it stressed efforts to advance durable solutions and facilitate safe, orderly and regular migration and mobility.⁵⁹

In its second phase of implementation between 2019 and 2021, the Task Force focused, among others, on enhancing the understanding of state parties in integrating climate-related mobility in relevant projects and programmes,

51 Paris Agreement adopted 13 December 2015, entered into force 4 November 2016 UN Doc FCCC/CP/2015/10/Add.1 Decision 1/CP.21.

52 Art 8 Paris Agreement (n 51).

53 As above.

54 Paris Agreement para 49.

55 Report of the Taskforce on Displacement (17 September 2018), https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf (accessed 30 September 2023).

56 Report (n 55) para 33.

57 As above.

58 As above.

59 As above.

supporting the development of laws, policies and strategies that reflect efforts to avert, minimise and address displacement, building capacities in risk assessment and analysis in relation to climate displacement and the integration of mobility challenges in national planning processes.⁶⁰

3.1.3 *A growing focus on displacement as loss and damage*

Other complementary mechanisms have been created to further the implementation of approaches for averting, minimising and addressing loss and damage, including displacement. The Santiago Network for Loss and Damage was established at COP25 in order to contribute to the effective implementation of the functions of the Warsaw International Mechanism at the local, national and regional levels.⁶¹ It is responsible for catalysing the technical assistance of relevant organisations, bodies, networks and experts for the implementation of relevant approaches. The structure of the Santiago Network was defined at COP27,⁶² where the Loss and Damage Fund, a dedicated fund to assist developing countries in responding to loss and damage, was also established.⁶³ The Transitional Committee set up to operationalise the Fund is required to be guided by the gaps pertaining to displacement and migration specifically, among other challenges.⁶⁴ The Sharm-El-Sheikh Implementation Plan, adopted at COP27, lays emphasis on the need for an effective and adequate response to loss and damage, particularly forced displacement.⁶⁵

3.2 Climate and disaster displacement and international refugee and migration law

3.2.1 *Refugee protection*

The applicability of the international refugee regime to persons and groups displaced in the context of the adverse effects of climate change and disasters has traditionally been elusive. The restrictive political definition of a refugee under

60 Task Force on Displacement: Plan of Action for 2019-2021, FCCC/SB/2019/5/Add.1, https://unfccc.int/sites/default/files/resource/sb2019_05_add1.pdf (accessed 30 September 2023).

61 Decision 19/CMA.3 Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (8 March 2022) UN Doc. FCCC/PA/CMA/2021/10/Add.3.

62 Decision 11/CP.27 Santiago network for averting, minimising and addressing loss and damage associated with the adverse effects of climate change under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (17 March 2023) UN Doc. FCCC/CP/2022/10/Add.1.

63 Decision 2/CP.27 Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage (17 March 2023) UN Doc. FCCC/CP/2022/10/Add.1.

64 Decision 2/CP.27 (n 63) para 6.

65 Decision 1/CP.27 Sharm el-Sheikh Implementation Plan (17 March 2023) UN Doc FCCC/CP/2022/10/Add.1 para 25.

the 1951 Refugee Convention,⁶⁶ centred around persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion, was not conceived to capture climate and disaster displacement.⁶⁷ Also, while crossing an international frontier is a necessary requirement to be accorded refugee status,⁶⁸ most of those displaced as a result of climate change do not leave their countries. Moreover, the impacts of climate change are not considered to constitute persecution as it has conventionally been construed to involve the sustained or systemic violation of human rights, along with the failure of state protection.⁶⁹ In the case of climate change and disasters, states arguably remain willing to assist and protect affected persons and communities. Furthermore, persons or groups susceptible to climate and disaster displacement are unlikely to constitute a particular social group on the basis of which they face discrimination. Direct and exclusive causality between climate change and displacement is also difficult to establish.⁷⁰ Additionally, concerns regarding the adequacy of the governance arrangements of the international refugee regime have been raised to oppose its extension to climate and disaster displacement. Added streams of refugees would purportedly put the United Nations (UN) Refugee Agency (UNHCR) under untenable pressure and produce trade-offs between climate and political refugees.⁷¹ The Global Compact on Refugees underlines the pertinence of climate, environmental degradation and natural disasters, not as causes of refugee movements, but in interacting with their drivers.⁷² On the other hand, regional instruments provide a more expansive definition of refugees. Under the OAU Refugee Convention⁷³ and the Cartagena Declaration,⁷⁴ refugee status can be ascribed to those fleeing as a result of ‘events seriously disturbing public order’. Although the latter may be interpreted to include climate change and disasters,⁷⁵ it has not been characterised as such in practice by governments,

66 Convention Relating to the Status of Refugees adopted 28 July 1951, entered into force 22 April 1954 189 UNTS 137, art 1A(2), read in conjunction with Protocol Relating to the Status of Refugees adopted 31 January 1967, entered into force 4 October 1967 606 UNTS 267.

67 J McAdam ‘Climate change and displacement’ UNHCR Legal and Protection Policy Research Series (May 2011) 12.

68 As above.

69 JC Hathaway & M Foster *The law of refugee status* (2014) 182-211.

70 W Kälin ‘Conceptualising climate-induced displacement’ in J McAdam (ed) *Climate change and displacement: Multidisciplinary perspectives* (2010) 84-86.

71 See, eg, MF Vallandro do Valle ‘Six of one, half a dozen of the other: The inefficiency of recognising refugee status to environmentally displaced persons’ in GC Bruni and others (eds) *Migration and the environment: Some reflections on current legal issues and possible ways forward* (2017) 1, https://www.iriss.cnr.it/wp-content/uploads/2018/02/Migration_and_the_Environment_2017.pdf (accessed 30 September 2023).

72 Global Compact on Refugees, UN Doc A/73/12 (Part II) (2 August 2018) para 8.

73 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted 10 September 1969, entered into force 20 June 1974 1001 UNTS 45 art 1(2).

74 Cartagena Declaration on Refugees adopted 22 November 1984, <https://www.unhcr.org/uk/media/cartagena-declaration-refugees-adopted-colloquium-international-protection-refugees-central> (accessed 30 September 2023).

75 M Addaney ‘The legal challenges of offering protection to climate refugees in Africa’ in M Addaney and others (eds) *Governance, human rights and political transformation in Africa* (2017) 81.

who have rather resorted to temporary protection under domestic law.⁷⁶ Thus, the role of the refugee regime in the protection of individuals and groups displaced in the context of climate change and disasters has been limited.

However, the growing pertinence of the impacts of climate change more recently has prompted a broader understanding of the eligibility of persons displaced in the context of climate change and disasters to refugee protection. The UNHCR, in its first guidance on the issue, in 2020 recognised that persons displaced by climate change and disasters can make valid claims to refugee status.⁷⁷ In making such determinations, decision makers ought not refer solely to the natural hazard or climate event but rather to their broader effects on 'state and societal structures and individual well-being and the enjoyment of human rights', thereby recognising the social and political characteristics of climate change.⁷⁸ The various breaches to the enjoyment of human rights, notably, the right to life, physical integrity, an adequate standard of living, health, water and sanitation and self-determination and development can amount to persecution.⁷⁹ In assessing state protection, operational responses in the country of origin, or improvements or innovations in the adaptive capacity of the country and its communities need to be taken into account.⁸⁰ Persons living in situations of pre-existing vulnerabilities and those disproportionately affected or targeted may have a well-founded fear of persecution.⁸¹ The applicability of the refugee regime is also pertinent where climate change interacts with conflict and violence.⁸²

3.2.2 IDP frameworks

As stated in preceding parts of the article, climate and disaster displacement takes place largely within borders. The law on internal displacement has saliently recognised climate and disaster displacement. The 1998 Guiding Principles on Internal Displacement sets the international standards for the protection and assistance of internally-displaced persons.⁸³ Significantly, the Guiding Principles set forth flight as a result of natural hazards.⁸⁴ It expressly provides for the prohibition of arbitrary displacement in the case of disasters.⁸⁵ The Kampala Convention – the only legally-binding instrument governing internal

76 UNHCR 'Protecting people crossing borders in the context of climate change normative gaps and possible approaches' (February 2012) 34, <https://www.refworld.org/docid/4f38a9422.html> (accessed 30 September 2023).

77 UNHCR 'Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters' (1 October 2020), <https://www.refworld.org/docid/5f75f2734.html> (accessed 30 September 2023).

78 UNHCR (n 77) para 5.

79 UNHCR (n 77) para 7.

80 UNHCR (n 77) para 9.

81 UNHCR (n 77) para 10.

82 UNHCR (n 77) para 11.

83 Guiding Principles on Internal Displacement (11 February 1998) UN Doc E/CN.4/1998/53/Add.2.

84 Guiding Principles (n 83) Scope and Purpose.

85 Guiding Principles (n 83) Principle 6(2)(d).

displacement – provides for preventing and addressing displacement caused by natural disasters.⁸⁶ It requires states to deploy early warning systems, disaster risk reduction strategies, emergency and disaster preparedness and management measures.⁸⁷ It also requires that states take special measures to guarantee protection against environmental degradation in areas where internally-displaced persons are located.⁸⁸ It further establishes the liability of a state to make reparation for damage when refraining from protecting and assisting internally-displaced persons during natural disasters.⁸⁹

3.2.3 *Migration frameworks and policy processes*

The Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (The Nansen Initiative)

The Nansen Initiative on Disaster-Induced Cross-Border Displacement, launched in 2012 as a bottom-up consultative process, with the view of identifying community needs and best practices in protection and assistance in the context of cross-border climate and disaster displacement, culminated in the development of a Protection Agenda.⁹⁰ The Protection Agenda, endorsed by a global intergovernmental consultation of 109 states in 2015, is intended as a complementary tool to international and regional frameworks, in guiding states and other actors to enhance their preparedness and responses to disaster displacement. It focuses on mitigating vulnerability and building resilience to displacement risks, planned relocation before and after disaster displacement in consultation with affected communities and, the adequate protection of internally-displaced persons (IDPs).⁹¹ Though a non-binding instrument, through its focus on the local, national and regional level and practical solutions and priority areas and recommendations for future work, it was envisioned to be taken up by states and other actors in their national plans and legislation and cooperation.⁹² The Platform on Disaster Displacement, the successor to the

86 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa adopted 23 October 2009, entered into force 6 December 2012 Preamble para 5, <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> (accessed 30 September 2023).

87 AU Convention (n 86) art IV.

88 AU Convention (n 86) art IX.

89 AU Convention (n 86) art XII.

90 The Nansen Initiative 'Agenda for the protection of cross-border displaced persons in the context of disasters and climate change' (Vol 1 December 2015) (Protection Agenda Vol 1), <https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>; The Nansen Initiative 'Agenda for the protection of cross-border displaced persons in the context of disasters and climate change' (Vol 2, December 2015), <https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf> (accessed 30 September 2023).

91 Protection Agenda Vol 1 (n 90).

92 See J McAdam 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping international approaches to climate change, disasters and displacement' (2016) 39 *University of New South Wales Journal* 1518.

Nansen Initiative, was launched in 2016, to implement the Protection Agenda's recommendations.⁹³ The Platform has four strategic priorities drawn from the focus areas identified by the Nansen Initiative, notably, addressing knowledge and data gaps, enhancing the use of effective practices and strengthening cooperation, promoting policy coherence and mainstreaming human mobility challenges in policy areas, and promoting policy and normative development in gap areas.

The Platform contributes to efforts to minimise and address the loss and damage incurred due to climate change.⁹⁴ It runs the Project to Avert, Minimise and Address Disaster Displacement (PAMAD) aimed at developing a better understanding of displacement in the context of loss and damage and supporting measures for averting, minimising and addressing displacement.⁹⁵ Its Data and Knowledge Working Group (DKWG) has also focused on disaster displacement as loss and damage.⁹⁶ In this regard, it has stressed the need for improving data efforts in the interventions to avert, minimise and address displacement, clarifying definitions of loss and damage concepts and understanding the diverse and complex repercussions of displacement for different people over time and space. Further, it has called for data collection in the realm of loss and damage such as direct economic costs, access to food and water, loss of income and livelihoods, loss of future outlooks and opportunities, reduced health and access to health care, reduced safety of women and girls, reduced access to education, reduced access to political representation, disruption of community, loss of sense of place/identity and trauma and psychological impacts. It also underscored the need for assessment of loss and damage to account for long-term and cascading impacts.

The Sendai Framework for Disaster Risk Reduction

The Sendai Framework, adopted at the Third UN World Conference on Disaster Risk Reduction in 2015, establishes seven targets for preventing and reducing disaster risks.⁹⁷ Notably, it addresses loss and damage as a focus area, notably in Target C, 'Reduce direct disaster economic loss in relation to global gross domestic product by 2030' and Target D 'Substantially reduce disaster

93 Platform on Disaster Displacement 'Addressing the protection needs of people displaced across borders in the context of disasters and climate change' (May 2016), <https://www.knomad.org/sites/default/files/2017-03/PDD-Leaflet-11-2016-screen.pdf> (accessed 30 September 2023).

94 Platform on Disaster Displacement, Strategy 2019-2023, <https://disasterdisplacement.org/wp-content/uploads/2022/07/30062022-Annex-I-PDD-Workplan-2019-2023.pdf> (accessed 30 September 2023).

95 Platform on Disaster Displacement 'Project fact sheet – Action and support to avert, minimise and address displacement related to the adverse effects of climate change' <https://disasterdisplacement.org/portfolio-item/project-fact-sheet-action-and-support-to-avert-minimize-and-address-displacement-related-to-the-adverse-effects-of-climate-change/> (accessed 30 September 2023).

96 Platform on Disaster Displacement '15 observations on disaster displacement as loss and damage' (November 2022), <https://disasterdisplacement.org/portfolio-item/15-observations-on-disaster-displacement-as-loss-and-damage/> (accessed 1 September 2023).

97 Sendai Framework for Disaster Risk Reduction 2015-2030 adopted 8 March 2015, <https://www.undrr.org/publication/sendai-framework-disaster-risk-reduction-2015-2030> (accessed 29 September 2023).

damage to critical infrastructure and disruption of basic services, among them health and educational facilities, including through developing their resilience by 2030'. The Sendai Framework explicitly recognises displacement as an impact of disasters for which to build the resilience of communities.⁹⁸ It calls on states to adopt policies and programmes addressing disaster-induced mobility in view of strengthening the resilience of affected people and host communities based on national laws and circumstances.⁹⁹ However, currently, indicators used to monitor progress against the risk reduction objectives of the Sendai Framework do not include displacement-related metrics.¹⁰⁰ The International Organisation for Migration (IOM) and the Internal Displacement Monitoring Centre (IDMC) are developing displacement-related metrics and indicators to promote the integration of displacement in disaster risk reduction interventions.¹⁰¹

The Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Migration, the first UN global agreement on international migration, was adopted in 2018 with the aim of addressing international migration in a comprehensive and holistic manner.¹⁰² It sets out 23 objectives to address migration in a holistic manner. Of those, at least three objectives are explicitly relevant to climate and disaster displacement. First, it aims to 'minimise the adverse drivers and structural factors that compel people to leave their country of origin'.¹⁰³ This objective acknowledges that climate change is a driver and structural factor for migration and, as such, it should be addressed by resilience and disaster risk reduction and climate change mitigation and adaptation.¹⁰⁴ In this respect, it focuses on the development of adaptation and resilience strategies, the integration of displacement into disaster preparedness strategies, the development of mechanisms at the regional and sub-regional levels to address vulnerabilities of people, strengthening information sharing to enhance an understanding of migration movements resulting from disasters and the adverse effects of climate change and ensuring coherent approaches.¹⁰⁵ The Global Compact also aims to enhance the availability and flexibility of pathways for regular migration and climate change.¹⁰⁶ It underscores cooperation

98 Sendai Framework (n 97) paras 19(b) & 33(a).

99 Sendai Framework (n 97) para 30(1).

100 Platform on Disaster Displacement 'Disaster displacement and disaster risk reduction: Policy brief and key messages' (2021), https://globalplatform.undrr.org/sites/default/files/2022-05/Platform%20on%20Disaster%20Displacement%2C%202021.%20PDD%20Policy%20Brief%20and%20Key%20Messages.%20Disaster%20Displacement%20and%20Disaster%20Risk%20Reduction_1.pdf (accessed 30 September 2023).

101 IOM & IDMC 'Developing indicators on displacement for disaster risk reduction', https://environmentalmigration.iom.int/sites/g/files/tmzbd11411/files/documents/drr-displacement-indicator-project-brochure_0.pdf (accessed 30 September 2023).

102 The Global Compact for Safe, Orderly and Regular Migration 19 December 2018 UN Doc A/RES/73/195.

103 Global Compact (n 102) Objective 2 para 18.

104 As above.

105 Global Compact (n 102) paras 18(h)-(l).

106 Global Compact (n 102) para 21.

in solutions such as planned relocation and visa options, where adaptation and return are not possible.¹⁰⁷ Another objective relates to the consolidation of global partnerships for safe, orderly and regular migration.¹⁰⁸ As such, it stresses the need to enhance global and regional cooperation to catalyse the implementation of frameworks addressing the drivers of displacement, notably, climate change.¹⁰⁹

UN Agenda 2030 and AU Agenda 2063

The UN 2030 Agenda for Sustainable Development establishes a clear link between climate change, displacement and development.¹¹⁰ It recognises the role of more frequent and intense disasters and forced displacement in driving back development gains in prior years.¹¹¹ It also underlines the challenges brought about by climate change to the sustainable development of nations.¹¹² Under Goal 1 on ending poverty, it highlights resilience building of the poor and vulnerable in the face of the adverse effects of climate change and disasters.¹¹³ Similarly, AU Agenda 2063 places emphasis on the significance of climate resilient economies and communities for economic prosperity and sustainable development.¹¹⁴

3.2.4 *Climate and disaster displacement and international human rights law*

Climate and disaster displacement brings to bear the broad field of human rights obligations expressed in international and regional human rights law that underpin climate, refugee and migration and development frameworks described in the preceding parts. International human rights law continues to apply to those displaced as a result of climate change and disasters. In most cases, those that are displaced as a result of climate change and disasters remain within their country. In such circumstances, international human rights law imposes a responsibility upon states to respect, protect and fulfil the rights of internally displaced people within their territory free from discrimination.¹¹⁵ For those persons displaced outside of their country of origin, international human rights law remains relevant on the basis of the principle of *non-refoulement*.¹¹⁶ Human rights instruments also specifically articulate obligations for vulnerable groups displaced as a result of

107 Global Compact (n 102) para 21(h).

108 Global Compact (n 102) para 39.

109 Global Compact (n 102) para 39(b).

110 UN General Assembly 'Transforming our world: The 2030 Agenda for Sustainable Development' 21 October 2015 UN Doc. A/RES/70/1.

111 UNGA (n 110) para 14.

112 As above.

113 UNGA (n 110) Goal 1.5.

114 African Union Commission (AUC) 'African Union Agenda 2063: A shared strategic framework for inclusive growth and sustainable development' (2013), https://au.int/Agenda2063/popular_version (accessed 30 September 2023).

115 UNHCR 'Climate change, displacement and human rights' March 2022, <https://www.unhcr.org/sites/default/files/legacy-pdf/6242ea7c4.pdf> (accessed 30 September 2023).

116 As above.

climate change and disasters. The African Charter on the Rights and Welfare of the Child (African Children's Charter) requires states to take measures to reunite children with relatives where displacement results from natural disasters.¹¹⁷ The UN Convention on the Rights of Persons with Disabilities, under article 11, requires member states to take all necessary measures to ensure the protection and safety of persons with disabilities in natural disasters.¹¹⁸

A challenge, however, is that climate change and disasters can considerably weaken state institutions and structures, prompting the question of the scope of state duties in the context of disasters.¹¹⁹ The Draft Articles on the Protection of Persons in the Event of Disasters, adopted by the International Law Commission in 2016, provide useful guidance on this regard.¹²⁰ Importantly, it reaffirms the central role of the state in the protection of persons affected by disasters and in providing disaster relief.¹²¹ The Draft Articles include mass displacement in its definition of a 'disaster', notably 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.'¹²² The ILC made clear that states should account for displacement in their obligations in disaster relief.¹²³ Article 5 of the Draft Articles states that 'persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law'. This potentially encompasses the right to life, economic and social rights, notably, the provision of essential food and health care, shelter, housing and education, the right to receive humanitarian assistance, the right of communities to participate in the planning of risk reduction and recovery initiatives and the right to non-discriminatory assistance in the durable solutions to displacement.¹²⁴ Moreover, the Draft Articles establish a state duty to seek external assistance where the disaster 'manifestly exceeds its national response capacity'.¹²⁵

4 Legal and policy responses to climate and disaster displacement as loss and damage

This part analyses the characterisation by African states of climate and disaster displacement in the context of loss and damage. Notably, it examines the content

117 African Charter on the Rights and Welfare of the Child adopted 11 July 1990, entered into force 29 November 1999 CAB/LEG/24.9/49 (1990) art 25(2).

118 UN Convention on the Rights of Persons with Disabilities adopted 12 December 2006, entered into force 3 May 2008 2515 UNTS 3 art 11.

119 Cullen (n 44).

120 ILC 'Draft articles on the protection of persons in the event of disasters, with commentaries' (2016), https://legal.un.org/ilc/texts/instruments/english/commentaries/6_3_2016.pdf (accessed 30 September 2023).

121 ILC (n 120) Preamble.

122 ILC (n 120) art 3.

123 ILC (n 120) art 3 Commentary para (8).

124 ILC (n 120) art 5 Commentary para (6).

125 ILC (n 120) art 11.

of NDCs to identify the salient displacement concerns highlighted by states. It also surveys the integration of displacement considerations in climate legislation and policies. To this end, it draws from the updated African NDCs as well as climate legislation.

4.1 Climate and disaster displacement as loss and damage in NDC commitments

African NDCs have been deplored for failing to reflect loss and damage incurred as a result of climate change despite the fact that African states are the most vulnerable to its impacts. According to a 2021 study, only 14 per cent of initial or updated African NDCs had explicitly mentioned loss and damage.¹²⁶ A review of NDCs further indicates sparse reporting on climate and disaster displacement as loss and damage. As of September 2023, 46 African states had submitted updated NDCs.¹²⁷ Most NDCs, such as that of Chad,¹²⁸ Côte d'Ivoire,¹²⁹ Eswatini and¹³⁰ Tanzania,¹³¹ among others, have referred to the loss and degradation of biodiversity, the loss of agricultural productivity, the loss of crop and livestock, the loss of forests, the loss of habitats and the loss of infrastructure, and so forth. Some NDCs have additionally provided detailed estimates of the direct economic costs associated with extreme weather events, including Central African Republic,¹³²

126 B Ryder & E Calliari 'How does loss and damage feature in nationally determined contributions?' (2021) 3, University College London Global Governance Institute, <https://www.ucl.ac.uk/global-governance/news/2021/oct/loss-and-damage-nationally-determined-contributions> (accessed 30 September 2023).

127 See UNFCCC *Nationally determined contributions registry*, <https://unfccc.int/NDCREG> (accessed 30 September 2023).

128 Chad 'Update to the nationally determined contribution' (October 2021) 16, 24 & 25, <https://unfccc.int/sites/default/files/NDC/2022-06/CDN%20ACTUALISEE%20DU%20TCHAD.pdf> (accessed 30 September 2023).

129 Côte d'Ivoire 'Updated NDC' March 2022 20, https://unfccc.int/sites/default/files/NDC/2022-06/CDN_Congo.pdf (accessed 30 September 2023).

130 Eswatini 'Update of the nationally determined contributions' October 2021, https://unfccc.int/NDCREG?field_party_region_target_id=All&field_document_ca_target_id=All&field_vd_status_target_id=5933&start_date_datepicker=&end_date_datepicker=&page=3 (accessed 30 September 2023).

131 Tanzania 'Updated NDC' July 2021 2, https://unfccc.int/sites/default/files/NDC/2022-06/TANZANIA_NDC_SUBMISSION_30%20JULY%202021.pdf (accessed 30 September 2023).

132 Central African Republic 'NDC – Revised version' October 2021 8 & 24, <https://unfccc.int/sites/default/files/NDC/2022-06/CDN%20Revisée%20RCA.pdf> (accessed 30 September 2023).

Comoros,¹³³ Malawi,¹³⁴ Mauritius,¹³⁵ Nigeria¹³⁶ and Zimbabwe,¹³⁷ to mention but a few.

Some NDCs recognised displacement as an impact of climate change and pointed to responses to climate and disaster displacement as a priority area for adaptation. The Republic of Congo, for instance, underlined enhancing gender sensitivity in resettlement, awareness raising on the impacts of climate displacement on customary land, and consultations with displaced persons and host communities in resettlement.¹³⁸ It provided an estimate of adaptation needs for addressing displacement specifically.¹³⁹ The Democratic Republic of the Congo (DRC) highlighted the health implications of climate displacement.¹⁴⁰ Egypt underlined the loss of coastal land and associated loss of livelihoods and migration from coastal areas.¹⁴¹ Gabon mentioned anticipatory measures as an adaptation measure in the face of the risks of increased climate displacement and regional instability.¹⁴² Kenya highlighted the scale of displacement engendered by floods in 2018: 230 000 persons, including 150 000 children, were displaced, 700 schools were shut, roads and infrastructure destroyed, and crops and livestock lost. Liberia underscored the need for adaptation in the context of forced migration as a climate health hazard.¹⁴³ Malawi referred to migration leading to human rights violations, instability and conflict as a key risk of the increasing incidence of extreme weather events.¹⁴⁴ Seychelles aimed at improving the health and gender responsiveness of adaptation measures with respect to displacement.¹⁴⁵ Sierra Leone identified population displacement as an impact

133 Comoros 'Updated NDC' (2021) 3, https://unfccc.int/sites/default/files/NDC/2022-06/CDN_revisée_Comores_vf.pdf (accessed 30 September 2023).

134 Malawi 'Updated nationally determined contributions' July 2021 VII, <https://unfccc.int/sites/default/files/NDC/2022-06/Malawi%20Updated%20NDC%20July%202021%20submitted.pdf> (accessed 30 September 2023).

135 Mauritius 'Update of the nationally determined contribution' October 2021 22, https://climate-laws.org/document/mauritius-first-ndc-updated-submission_07cf (accessed 30 September 2023).

136 Nigeria 'Nationally determined contribution – 2021 update' July 2021 10-11, https://unfccc.int/sites/default/files/NDC/2022-06/NDC_EN_Final.pdf (accessed 30 September 2023).

137 Zimbabwe 'Revised NDC' (2021) 12, <https://unfccc.int/sites/default/files/NDC/2022-06/Zimbabwe%20Revised%20Nationally%20Determined%20Contribution%202021%20Final.pdf> (accessed 30 September 2023).

138 The Republic of Congo 'Updated NDC' 2021 27, https://unfccc.int/sites/default/files/NDC/2022-06/CDN_Congo.pdf (accessed 30 September 2023).

139 Republic of Congo (n 138) 38.

140 The Democratic Republic of the Congo 'Revised nationally determined contribution' October 2021 30, <https://unfccc.int/sites/default/files/NDC/2022-06/CDN%20Revisée%20de%20la%20RDC.pdf> (accessed 30 September 2023).

141 Egypt 'Second updated nationally determined contribution' June 2023 6, <https://unfccc.int/sites/default/files/NDC/2022-06/CDN%20Revisée%20de%20la%20RDC.pdf> (accessed 30 September 2023).

142 Gabon 'Second nationally determined contribution' 2021 23, https://unfccc.int/sites/default/files/NDC/2022-07/20220706_Gabon_Updated%20NDC.pdf (accessed 30 September 2023).

143 Liberia 'Updated NDC' July 2021 36, https://unfccc.int/sites/default/files/NDC/2022-06/Liberia%27s%20Updated%20NDC_RL_FINAL%20%28002%29.pdf (accessed 30 September 2023).

144 Malawi (n 134) 51.

145 Seychelles 'Updated nationally determined contribution' July 2021 36, https://unfccc.int/sites/default/files/NDC/2022-06/Seychelles%20-%20NDC_Jul30th%202021%20_Final.pdf (accessed 30 September 2023).

of climate change.¹⁴⁶ Somalia alluded to the effects of the loss of livelihoods in driving internal displacement and humanitarian crises, compounding conflicts and vulnerabilities of resource-dependent communities.¹⁴⁷

Few NDCs made explicit mention of loss and damage. Mozambique affirmed that the loss and damage sustained as a result of climate change hampered economic development and poverty eradication.¹⁴⁸ It pointed to the costs necessary for reconstruction in the aftermath of extreme weather events during the rainy season, taking into account classrooms, health, agriculture, infrastructure and assistance.¹⁴⁹ Similarly, Senegal acknowledged the effects of loss and damage on economic development.¹⁵⁰ South Africa invoked the need for support from developing countries in the context of climate action and loss and damage.¹⁵¹ Uganda identified addressing loss and damage as a priority area.¹⁵²

Cabo Verde made express reference to the displacement of coastal communities in the context of loss and damage.¹⁵³ It also affirmed risks to all priority sectors, resulting in permanent loss of territory due to sea level rise, food insecurity, detrimental impacts on tourism, loss of cultural and spiritual land, increased risks of deaths and injuries from disasters as well as increasing outbreaks of infectious diseases. It advanced the importance of international support in the implementation of risk management measures. Further, it committed to enhanced livelihood protection policies for assisting vulnerable persons in recovering from the damages associated with extreme weather events and providing support to displaced persons and host communities.¹⁵⁴ Kenya committed to addressing loss and damage, particularly advancing innovative livelihood strategies to build the climate resilience of local communities.¹⁵⁵

146 Sierra Leone 'Updated NDC' July 2021 32, <https://unfccc.int/sites/default/files/NDC/2022-06/210804%20125%20SL%20NDC%20%281%29.pdf> (accessed 30 September 2023).

147 Somalia 'Updated NDC' July 2021 1, <https://unfccc.int/sites/default/files/NDC/2022-06/Final%20Updated%20NDC%20for%20Somalia%202021.pdf> (accessed 30 September 2023).

148 Mozambique 'Update of the first nationally determined contribution' December 2021 15-17, https://unfccc.int/sites/default/files/NDC/2022-06/NDC_EN_Final.pdf (accessed 30 September 2023).

149 As above.

150 Senegal 'Nationally determined contribution' December 2020 7, <https://unfccc.int/sites/default/files/NDC/2022-06/CDNSenegal%20approuvée-pdf.pdf> (accessed 30 September 2023).

151 South Africa 'Updated NDC' September 2021 28, <https://unfccc.int/sites/default/files/NDC/2022-06/South%20Africa%20updated%20first%20NDC%20September%202021.pdf> (accessed 30 September 2023).

152 Uganda 'Updated NDC' September 2022 16, https://unfccc.int/sites/default/files/NDC/2022-09/Updated%20NDC%20_Uganda_2022%20Final.pdf (accessed 30 September 2023).

153 Cabo Verde 'Update to the first nationally determined contribution' February 2021 32, https://unfccc.int/sites/default/files/NDC/2022-06/Cabo%20Verde_NDC%20Update%202021.pdf (accessed 30 September 2023).

154 Cabo Verde (n 153) 43.

155 Kenya 'Updated NDC' December 2020 14, <https://unfccc.int/sites/default/files/NDC/2022-06/Kenya%27s%20First%20%20NDC%20%28updated%20version%29.pdf> (accessed 30 September 2023).

4.2 Climate and disaster displacement as loss and damage in climate legislation and policy

Climate laws in the African context are largely framework laws, addressing several aspects of climate change policy holistically, rather than taking a sectoral approach.¹⁵⁶ These framework laws typically provide for the establishment of institutional arrangements such as a national council for serving as a national oversight and coordination mechanism, financial arrangements and various climate change measures and duties. They prescribe the development of policies and action plans that in turn would define national goals, priority areas of intervention and programmes. Since the adoption of the Paris Agreement, a few African countries, such as Kenya, Nigeria, Uganda, South Africa and Mauritius, have developed climate legislation. Most African countries have yet to enact climate laws. Legislative reforms in the area of disaster laws have also proven to be thwarted and delayed.¹⁵⁷

The 2016 Kenya Climate Change Act, one of the early and most comprehensive climate legislative instruments on the continent, provides extensively for climate change measures and duties, notably mainstreaming climate change responses into sectoral functions and disaster risk reduction into development programmes, access to information and public consultations, and the enforcement of rights relating to climate change.¹⁵⁸ It requires government to develop national climate change action plans for operationalising the Act. The last iteration for the period 2018 to 2022 set out seven priority areas, including disaster risk management and food and nutrition security.¹⁵⁹ Both these priorities emphasise enhancing coping mechanisms and building the resilience of communities to shocks. The 2021 Uganda Climate Change Act similarly provides broadly for climate change measures, duties of the state and private entities, litigation on climate change, and intricate institutional arrangements.¹⁶⁰ It requires the development of a Framework Strategy on Climate Change. Interestingly, it is emphasised that the Strategy is mandated to take into account the loss and damage occasioned by climate change on ecosystems, communities and humankind.¹⁶¹ It also requires the development of National Climate Change Action Plans.¹⁶² While the National Climate Change Action Plan has not yet been developed, previous policies such as the 2018 National Climate Change Policy focuses on disaster preparedness

156 O Rumble 'Climate change legislative development on the African continent' in P Kameri-Mbote and others (eds) *Law/Environment/Africa* (2020) 33, 43.

157 See, eg, B Mucherera & S Spiegel 'Forced displacement: Critical lessons in the protracted aftermath of a flood disaster' (2022) 87 *GeoJournal* 3855, 3858.

158 Climate Change Act of 2016, Kenya Gazette Supplement 68 (Act 11).

159 Government of the Republic of Kenya 'National Climate Change Action Plan 2018-2022' (2018), https://rise.esmap.org/data/files/library/kenya/Clean%20Cooking/Kenya_NCCAP_2018-2022.pdf (accessed 30 September 2023).

160 National Climate Change Act of 2021.

161 Art 5(3)(f) National Climate Change Act (n 160).

162 Art 6 National Climate Change Act (n 160).

as a key area of intervention.¹⁶³ Other relevant climate laws include the Nigeria Climate Change Act, the Mauritius Climate Change Act and the South Africa Climate Change Act, although they have not yet introduced national climate action plans.

Since climate legislation and policy touch scarcely upon displacement and loss and damage, it may be worthy to investigate the scope of IDP instruments developed by some countries since the adoption of the Kampala Convention. For instance, the 2013 Zambia Guidelines for the Compensation and Resettlement of Internally Displaced Persons defines the rights and guarantees relating to the protection and assistance of IDPs during displacement and during return, resettlement or local integration.¹⁶⁴ It recognises that natural disasters are a prominent driver of internal displacement.¹⁶⁵ It establishes the state duty to devise early warning systems and disaster risk reduction and preparedness measures.¹⁶⁶ It requires authorities to avoid displacement where there are feasible alternatives and otherwise to minimise displacement and its effects.¹⁶⁷ Pertinently, it establishes a broad host of obligations on protection during displacement, including prohibition of violence and attacks against IDPs, prohibition of internment in camps, the obligation to inform and consult IDPs of resettlement options, the obligation to establish the fate and whereabouts of missing relatives, the obligation to provide temporal shelter and food rations, the obligation to compensate loss of land, access to psychological services, women's health and reproductive health services, appropriate counselling for victims of sexual abuse and the prevention of infectious diseases.¹⁶⁸ In addition, it specifies that property and possessions of IDPs are protected against destruction and arbitrary appropriation and the duty for the government to assist returnees or resettled IDPs in recovery efforts.¹⁶⁹

The 2014 Somalia Policy Framework on Displacement within Somalia recognises natural disasters and climate change impacts as causes of internal displacement.¹⁷⁰ It notably establishes preventive measures, such as reducing disaster risks and vulnerabilities of communities, increasing resilience notably of farmers and pastoralists with livelihood dependency in drought prone areas, and establishing monitoring and early warning mechanisms.¹⁷¹ It also provides for protection in the context of protracted displacement and the improvement of

163 Uganda National Climate Change Policy (2018), <https://ccd.go.ug/wp-content/uploads/2018/09/NATIONAL-CLIMATE-CHANGE-POLICY-SUMMARY-VERSION-2018-2.pdf> (accessed 30 September 2023).

164 Guidelines for the Compensation and Resettlement of Internally Displaced Persons (2013), <https://www.refworld.org/pdfid/5b72a9194.pdf> (accessed 30 September 2023).

165 Guidelines (n 164) Introduction.

166 Guidelines (n 164) Guideline 9.

167 Guidelines (n 164) Guideline 10.

168 Guidelines (n 164) Guidelines 13-22.

169 Guidelines (n 164) Guidelines 22 & 26.

170 Policy Framework on Displacement within Somalia (2014), <https://www.refworld.org/pdfid/5b682c4c4.pdf> (accessed 30 September 2023).

171 Policy Framework (n 170) sec 4.1.

living conditions.¹⁷² On the provision of the conditions for and supporting durable solutions, it underscores the reconstruction of shelter, housing and basic services, the restoration of and access to land, housing and property, the re-establishment of livelihoods or creation of alternative livelihood options, reunification of separated families and access to effective remedies and justice.¹⁷³ Moreover, the 2015 Malawi Durable Solutions Framework for Internally Displaced Persons and Flood Affected Populations guides the government and humanitarian partners in supporting durable solutions of disaster affected IDPs.¹⁷⁴ It defines eight criteria for the attainment of durable solutions, including long-term safety and security, adequate standard of living, mechanisms for restoring land and property, access to personal documentation, family reunification, participation in public affairs and access to remedies.¹⁷⁵

5 Gaps and prospects

A review of NDCs coupled with legislative and policy frameworks in the foregoing part suggests that displacement features inadequately in climate interventions and assessments of the costs and impacts of climate change as well as legislative mechanisms put in place to respond to climate change. Some countries dispose of IDPs guidelines and frameworks, adopted further to the adoption of the Kampala Convention, and mostly prior to the adoption of the Paris Agreement. These instruments remain insightful references, though not always specifically relevant to climate change and natural disasters. While some countries acknowledge the role of climate change and extreme weather events in inducing displacement, they have not drawn these linkages and have not stipulated relevant structures and measures under their climate legislation and policy frameworks. This lacuna is unfavourable as it leads to uncertainty and to the lack of effective, accountable, coordinated and enduring national mechanisms. Domestic legislation is also important for addressing climate change reflecting context-specific and tailored needs and circumstances. It is crucial, therefore, for future legislative responses and legislative reforms to provide for measures in addressing displacement as a result of climate change or to make linkages with other legal instruments relevant to the latter. In this view, a few salient aspects need to be most crucially catered for, as outlined below.

172 Policy Framework (n 170) sec 6.1.

173 Policy Framework (n 170) sec 7.1.

174 Durable Solutions Framework for Internally Displaced Persons (IDPs) and Flood affected Populations in Malawi (2015).

175 Durable Solutions Framework (n 174) para 2.2.

5.1 Reporting the economic and non-economic costs and impacts of climate and disaster displacement

African states should put in place robust mechanisms for monitoring, measuring and reporting the economic and non-economic losses of climate and disaster displacement as well as those associated with averting, minimising and addressing displacement. It is clear from a review of African NDCs that such practice currently is crucially lacking. Where reference is made to climate impacts, they tend to be broad and emphasise economic costs. States' investment and commitment to addressing and reducing displacement are shaped by their knowledge and understanding of its linkages with other structural challenges, as well as the country's longer-term development plans.¹⁷⁶ To this end, they need to double efforts in gathering disaggregated data and evidence on the costs and impacts of climate and disaster displacement, towards developing adequate policies, informing planning and preparedness and enhancing institutional and technical capacities, notably, in the context of the implementation of their national adaptation plans, NDCs and climate-financing instruments.¹⁷⁷ Relevant metrics should include, among others, demographic profiles of those displaced and differentiated impacts on groups, the number and duration of displacement and outcome of durable solutions, the immediate and long-term impacts of displacement on sectors such as education, housing and health and the costs and benefits of responses and investments.¹⁷⁸ This is also crucial for longer-term sectoral planning in addressing displacement risk.¹⁷⁹ Significantly, reporting is equally essential to 'strengthen the business case for action'. Accounting for the impacts of climate and disaster displacement will also help in creating and attracting much-needed national and international political interest and facilitating access to financial and technical support along with galvanising sufficient state prioritisation and action.¹⁸⁰ It thereby serves as a strong foundation for budgeting and fundraising from states, donors and other development and humanitarian stakeholders.¹⁸¹ This is critical at this juncture where displacement is set to be given priority focus under the Loss and Damage Fund and the broader financing framework.¹⁸² Monitoring and reporting the impacts of displacement also has a pivotal role in promoting better accountability at national and international level.

176 Submission from IDMC to United Nations Secretary-General's High-level Panel on Internal Displacement 2, https://www.un.org/internal-displacement-panel/sites/www.un.org.internal-displacement-panel/files/published_idmc_submission.pdf (accessed 30 September 2023).

177 Submission from IDMC (n 176) 3.

178 Submission from IDMC (n 176) 5.

179 Submission from IDMC (n 176) 3.

180 As above.

181 As above.

182 Biehler and others (n 7).

5.2 Human rights-based approaches to displacement and the durable solutions

Human rights provide a framework within which to consider the challenges of climate and disaster displacement and the policy structures as well as mechanisms required to provide effective responses to the displaced. A human rights-based approach to displacement helps states to develop policies and strategies geared towards equity especially in the implementation of durable solutions to the plight of displaced people. Participatory approaches to decision making are critical to mitigate the negative impact of prolonged displacement by systematically addressing the risks, needs and vulnerabilities of specific groups. If displaced groups remain marginalised and in limbo without a prospect of a lasting solution, this could present challenges for long-term peace, stability, recovery and reconstruction.¹⁸³ According to the Guiding Principles on Internal Displacement and the Kampala Convention, internally-displaced persons have a right to a durable solution.¹⁸⁴ These instruments set forth the rights of IDPs to durable solutions and obligations of states in that regard.¹⁸⁵ By virtue of these frameworks, states are required to promote and create satisfactory conditions enabling IDPs to return voluntarily, integrate locally and relocate on a sustainable basis with safety and dignity.¹⁸⁶ In order to realise durable solutions, displaced persons should no longer have any specific assistance and protection needs in relation to their displacement and should be able to exercise their human rights without discrimination on the basis of their displacement.¹⁸⁷ While the primary duty bearer to implement durable solutions for the displaced lays on the state, non-state actors such as humanitarian and development actors have complimentary roles.¹⁸⁸ Mobility decisions and policies regarding durable solutions should mainly be guided by the rights, needs and interests of displaced people.¹⁸⁹ The choice of which durable solutions to pursue should be governed by displaced communities and they should be able to participate in the planning and management of durable solutions in order to make an informed and voluntary choice.¹⁹⁰ Displaced groups that have achieved a lasting solution should continue to receive protection under international human rights law.¹⁹¹

183 S Zingg 'Exploring the climate change-conflict-mobility nexus' (2021) Migration Research Series 70, International Organisation for Migration, <https://publications.iom.int/books/mrs-no-70-exploring-climate-change-conflict-mobility-nexus> (accessed 1 September 2023).

184 See Guiding Principles on Internal Displacement, Principles 28-30 (n 83) and African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (n 86) art 11.

185 As above.

186 As above.

187 Inter-Agency Standing Committee (IASC) Framework on durable solutions for internally displaced persons' (April 2010) The Brookings Institution – University of Bern Project on Internal Displacement, 11-15.

188 As above.

189 As above.

190 As above.

191 As above.

5.3 Effective remedy for loss and damage associated with displacement

By virtue of international and regional human right instruments, all persons who experience human rights violations are entitled to a right to effective remedy.¹⁹² Similar to other circumstances, in cases of climate and disaster displacement, states and businesses are accountable for remedying climate-related harms and their failure to provide adequate safeguards.¹⁹³ As a result, displaced groups that have sustained loss and damage as a result of displacement should have equal and effective access to remedies.¹⁹⁴ As part of effective remedies, they should be able to access justice without discrimination on the basis of their displacement. In some cases, simple non-judicial approaches might be enough rather than overly complex systems.¹⁹⁵ Besides, displaced groups should also be able to access relevant information regarding the violation of their rights and mechanisms of redress. A failure by states to ensure effective remedies for the harms experienced by displaced groups could lead to additional displacement, thus perpetuating a persistent sense of injustice or bias among displaced groups.¹⁹⁶ Additionally, the provision of effective remedies for loss and damage associated with displacement is critical for long-term peace and stability.¹⁹⁷ In operationalising the right to effective remedy for loss and damage associated with climate and disaster displacement, relevant action should ensure adequate, effective and prompt reparation for harms suffered, in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁹⁸ States should establish operative and appropriate administrative, judicial, legislative procedures or other appropriate measures that can provide fair, effective and prompt access to justice. In this view, domestic and international climate litigation and human rights grievance mechanisms at the national, regional and international level ought to be leveraged to urge states to redress climate-related harms.¹⁹⁹

192 See, eg, Universal Declaration of Human Rights (Universal Declaration) adopted by UN General Assembly Resolution 217 A (III) of 10 December 1948 art. 8; International Covenant on Civil and Political Rights (ICCPR) adopted 16 December 1966, entered into force 23 March 1976 999 UNTS 171 art 2(3); African Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, entered into force 21 October 1986 21 ILM 58 art 17.

193 IASC Framework (n 187) 45.

194 IASC Framework (n 187) 42.

195 As above.

196 As above.

197 As above.

198 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 21 March 2006 UN Doc A/RES/60/147.

199 See A Savaresi 'Human rights and the impacts of climate change: Revisiting the assumptions' (2021) 11 *Oñati Socio-Legal Series* 231; M Wewerinke-Singh 'The rising tide of rights: Addressing climate loss and damage through rights-based litigation' (2023) 12 *Transnational Environmental Law* 537-566.

6 Conclusion

This article has sought to examine the conceptualisation of climate and disaster displacement in law and policy in Africa, drawing upon which, it identifies current gaps and opportunities for better prioritising displacement as loss and damage in law and policy. Climate and disaster displacement is accelerating in Africa, where it is specially protracted, carries important implications for security and development, and significantly affects vulnerable populations. Despite a relatively more established international and regional framework on displacement and loss and damage, climate legislation and policy across Africa scarcely speak to displacement and its challenges. The article proposes enhanced data collection and reporting on the economic and non-economic costs and impacts of climate and disaster displacement, adopting human rights-based approaches to durable solutions to climate and disaster displacement and the provision of effective remedies for displacement as loss and damage.