

THE POTENTIAL ROLE OF FREE MOVEMENT AGREEMENTS IN ADDRESSING CLIMATE CHANGE-RELATED MOVEMENT IN AFRICA

Submission to the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts TASK FORCE ON DISPLACEMENT – STAKEHOLDER MEETING

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1. INTRODUCTION

This submission sets out the potential role of agreements for the free movement of persons in addressing displacement in the context of disasters and the adverse impacts of climate change. The focus of this submission is Africa, where climate change-related displacement is already a reality and where free movement agreements have been adopted, or proposed, at the regional and sub-regional levels. This submission aims to: outline the potential role of free movement agreements in averting, minimising and addressing displacement related to the adverse impacts of climate change; outline some of the key challenges in this regard; and make recommendations for further investigation of this issue.

This submission relates specifically to Topic 2 in the Call for Submissions for the Task Force on Displacement Stakeholder Meeting, which is:

- *Possible measures to address key legal, policy and institutional challenges for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.*

By focusing on the African region, this submission also promotes the objective of the Stakeholder Meeting to:

- *focus on the experience of developing countries that are particularly vulnerable to the adverse effects of climate change.*

This submission is drawn primarily from a study undertaken by the author on behalf of the Platform on Disaster Displacement. The study is titled: **The role of free movement agreements in preventing and responding to disaster displacement: a study of Africa**. The study consists of a desk review of existing and proposed regional and sub-regional agreements in Africa related to the free movement of persons between states, providing analysis of their potential role in preventing and responding to disaster displacement and

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recommendations for the future. The final study report will be published in June 2018.

2. DISPLACEMENT RELATED TO THE ADVERSE IMPACTS OF CLIMATE CHANGE IN AFRICA

Displacement in the context of disasters and climate change is already a reality in Africa. In 2016, 1.1 million people were newly displaced in Africa by sudden-onset disaster, such as flooding.² The total number of people displaced by slow-onset disasters, such as drought, is not available, but it is likely to be much, much higher.³ In Ethiopia alone, during the first six months of 2017, drought forced more than 400,000 people to move.⁴ While most disaster and climate change-related displacement is internal, meaning that those who move stay within their own countries,⁵ Africa has also seen significant incidences of cross-border disaster displacement.⁶ During the 2011-12 Horn of Africa drought and famine, for example, hundreds of thousands of people fled Somalia to nearby countries, including Kenya, Ethiopia and Yemen.⁷ As climate change produces more extreme temperatures and reduces the predictability of rainfall, instances of disaster and climate change-related displacement in Africa will only increase.

3. LEGAL CHALLENGES IN ADDRESSING CLIMATE CHANGE-RELATED DISPLACEMENT IN AFRICA

Despite the reality of disaster displacement in Africa, there is no comprehensive legal framework for addressing the predicament and needs of those forced to move. For those displaced within their own countries, international human rights law and specific frameworks for internally displaced persons (IDPs) – including the African Union *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Kampala Convention) – provide a range of protections and assurances of fundamental human rights.⁸ For those displaced across borders, however, avenues for protection are much less assured. In some circumstances, international protection mechanisms based on refugee and/or human rights

² IDMC, *Africa Report on Internal Displacement* (2017) (IDMC Africa Report) 9.

³ Statistics from IDMC do not include displacement in the context of slow-onset disasters. Ibid 16.

⁴ UNOCHA, 'Horn of Africa: Humanitarian Impacts of Drought – Issue 11' (3 November 2017) <<https://reliefweb.int/report/somalia/horn-africa-humanitarian-impacts-drought-issue-11-3-november-2017>>.

⁵ Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Agenda for the Protection of Cross -Border Displaced Persons in the Context of Disasters and Climate Change: Volume I* (December, 2015) (Nansen Initiative Protection Agenda) 6.

⁶ Ibid.

⁷ South Africa also received significant numbers of Somalis during the crisis. See Girmachew Adugna Zewdu and Graeme Hugo, 'Cross-Border Migration and Displacement in the Context of the 2011-12 Drought in the Horn of Africa', First Draft of a Report to the Nansen Initiative (July 2014) 31-33.

⁸ *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (adopted 22 October 2009, entered into force 6 December 2012) (Kampala Convention). The definition of an IDP includes persons forced to move 'as a result of or in order to avoid the effects of... natural or human-made disasters'. However, implementation of the Kampala Convention has been slow. See generally, IDMC Africa Report, above n 2, 10-11.

may apply,⁹ or specific groups may benefit from mechanisms for the movement of pastoralists.¹⁰ However, these mechanisms will have only limited application in the disaster context, meaning that those displaced in the context of disasters and the adverse effects of climate change are often forced to move irregularly and face considerable restrictions on their rights and opportunities.

4. POTENTIAL ROLE OF FREE MOVEMENT AGREEMENTS IN AVERTING, MINIMISING AND ADDRESSING DISPLACEMENT RELATED TO THE ADVERSE IMPACTS OF CLIMATE CHANGE

4.1 Free movement agreements in Africa

The free movement of persons is a key goal of the African Union, which envisages the gradual realisation of free movement on the continent through a bottom-up process of liberalisation of travel restrictions.¹¹ To date, progress on free movement in Africa has occurred primarily at the sub-regional level within Africa's regional economic communities (RECs), most of whom have either adopted, or proposed, free movement agreements. The free movement of persons in Africa is to be progressively realised in three phases.¹² Phase 1 – the free movement of persons – concerns the right of entry and abolition of visa requirements between African states. Phase 2 – the right of residence – concerns the right to reside and undertake employment in the host state. Phase 3 – the right of establishment – concerns the right to conduct business and self-employment in the host state.

Free movement agreements may permit entry and stay of persons displaced in the context of disaster or climate change, allowing access to territory, assistance and livelihoods.¹³ However, free movement agreements do not always guarantee entry. They have not been developed with protection considerations in mind, but rather to 'accelerate economic growth and development' of African states.¹⁴ They may have onerous documentation requirements

⁹ See Nansen Initiative Protection Agenda, above n 5, 27; Tamara Wood, 'Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts', Technical Paper for the Nansen Initiative Greater Horn of Africa Regional Consultation, Nairobi, Kenya, 21-23 May 2014 (January 2015) 23-29.

¹⁰ See generally, Wood, above n 9, 19-20; Nina Schrepfer and Martina Caterina, 'On the Margin: Kenya's Pastoralists. From displacement to solutions, a conceptual study on the internal displacement of pastoralists' Report for IDMC and NRC (March 2014).

¹¹ *Treaty establishing the African Economic Community* (adopted 3 June 1991, entered into force 12 May 1994) (Abuja Treaty) art 43(1). See also, African Union Executive Council, *Migration Policy Framework for Africa* (2006) EX.CL/276 (IX) 4-5, 12.

¹² See, eg, *Draft Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment* (Revised Draft of July 2017 – the Protocol as adopted in January 2018 has not been made public) (AEC Draft Protocol) Art 2, also Art 5(1).

¹³ 'Natural Hazards, Climate Change and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move', Outcome Report of the Nansen Initiative Greater Horn of Africa Regional Consultation, Nairobi, Kenya, 21-23 May 2014 (Nansen Initiative Horn of Africa Outcome Report).

¹⁴ See, eg, *Protocol on the Establishment of the East African Community Common Market* (adopted 20 November 2009, entered into force 1 July 2010) (EAC Protocol) Art 4(2)(a).

that are difficult for displaced persons to meet, and may be suspended in certain circumstances.

4.2 Potential benefits of free movement agreements in addressing climate change-related displacement

Agreements for the free movement of persons could play a role in addressing disaster and climate-related displacement in Africa, by facilitating lawful access to territory, assistance and livelihoods. Free movement agreements have three distinct advantages over other cross-border mobility mechanisms addressing the protection gap for disaster displaced persons in Africa. These advantages are detailed below.

4.2.1 Broad eligibility

The primary criterion for entry into a state under free movement agreements is citizenship of another Member State of the same REC. While this does not constitute universal eligibility, owing to Africa's large population of stateless persons,¹⁵ it is a significant advantage over other cross-border mobility mechanisms, where more specific eligibility criteria provide barriers to access for disaster displaced persons. Even humanitarian protection mechanisms that have been developed with disaster displaced persons in mind can pose hurdles for those who move in the context of slow-onset disasters, as the result of a multitude of overlapping reasons, or pre-emptively in order to avoid a disaster or the adverse effects of climate change. This is particularly the case in Africa, where the prevalence of drought, and the frequent co-existence of poverty, conflict and underdevelopment, make identifying 'disaster displaced persons' especially difficult.

4.2.2 Opportunities for access to employment and other livelihoods

Opportunities for access to employment, trade or business activities are also a key advantage of free movement agreements in the disaster context, particularly when compared with international protection mechanisms, under which work rights may be more limited. The ability to generate income is foundational to ensuring the self-sufficiency of disaster displaced persons, and lawful employment reduces the risks of abuse or exploitation of workers. Opportunities for work under free movement agreements are neither universal nor automatic, however – they require significant implementation by Member States, and meaningful access in practice and may require intervention from others – for example, to support skill development and more sustainable livelihoods.

¹⁵ UNHCR reported that there were 715,089 persons under its statelessness mandate in Africa in 2016, though the organisation has repeatedly emphasised the difficulty of establishing exact numbers of statelessness persons. See UNHCR, *Statistical Yearbook 2016* (16th ed, February 2018).

4.2.3 Scalability

Many sub-regional free movement agreements in Africa envisage the conclusion of smaller-scale bilateral or trilateral agreements between Member States, to address specific issues or populations. This provides flexibility to Member States to explore and implement smaller scale arrangements with neighbouring states, and to test out arrangements before committing more broadly. This is another advantage over protection-specific mobility mechanisms, where states may be reluctant to commit to widening existing obligations. While bilateral or trilateral agreements between African states may undermine efforts at harmonisation, they provide considerable flexibility to states to adopt situation-specific mechanisms that cater to the dynamics and needs of particular regions or populations.

4.3 Challenges associated with using free movement to address disaster and climate change-related displacement

As noted above, free movement agreements have not been developed with the protection needs of displaced persons in mind. As a result, there are a number of potential challenges or limitations associated with using free movement agreements to address displacement in the context of disasters and the adverse impacts of climate change. These may be summarised as follows:

- 1) potential for African states to suspend free movement agreements in a disaster situation for reasons relating to public order, public health or national security,
- 2) potential exclusion of individual displaced persons under the domestic legislation of countries of destination, as permitted by the provisions of free movement agreements themselves,
- 3) onerous documentation and financial requirements for access to free movement that may prohibit access for displaced persons,
- 4) limited or no options for displaced persons to regularise status in the country of destination following irregular entry,
- 5) potential exclusion of disaster displaced persons who are also stateless and unable to satisfy citizenship requirements under free movement agreements,
- 6) potential exclusion of displaced persons who are eligible for refugee status due to ambiguity in the status of refugees under free movement agreements,
- 7) limited protection of displaced persons' human rights under free movement agreements, including lack of protection against forcible return to areas affected by disaster or the adverse impacts of climate change,
- 8) difficulties or inability of displaced persons to obtain relevant residence or establishment permits that enable work in country of destination,
- 9) limitations on number and/or duration of entries to territory for displaced persons restricting options for temporary or circular migration, and
- 10) lack of pathways to permanent residence for displaced persons.

Though the list of challenges and limitations is long, as noted above, it sets out only *potential* barriers to the role of free movement in addressing disaster and climate change-related displaced persons. In most cases, the extent which these potential barriers *actually* impact on access and protection for displaced persons will depend on how they are incorporated and applied by African states at the domestic level. For example, suspension of free movement mechanisms during a disaster could totally prevent free movement agreements from addressing the needs of displaced persons, and broad restrictions on residence and establishment permits may make access to work or other livelihoods all but impossible. On the other hand, limited rights protections under free movement agreements may be overcome by comprehensive rights provisions under the domestic legislation of African states, and pathways to permanent residence for persons who enter under free movement agreements could provide secure and lasting solutions for those who cannot return home.

5. RECOMMENDATIONS FOR FUTURE RESEARCH AND ACTION

This submission recommends further engagement by African states and other stakeholders to assess the extent to which the potential barriers and limitations on free movement agreements set out above do impact, or have impacted, on disaster displaced persons in practice. Further research and action on this topic should aim to identify aspects of African states' law, policy and practice that either increase the limitation, or reduce it, and to develop proposals for specific measures – at the regional, sub-regional and national levels – that could increase the capacity of free movement agreements to avert, minimise and address displacement related to disasters and the adverse effects of climate change.

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