Marius Olivier
Adjunct-professor, University of Western Australia; Extraordinary professor, Northwest University, South Africa; Director: International Institute for Social Law and Policy (ISLP)

Climate Change and Social Protection: Enhancing the Legal Framework

Social Protection and Climate change in the SADC 2030 Agenda for Sustainable Development
OUTLINE

• Background and context
• A new paradigm: An expanded social protection concept
• Key requirements of a rights-based approach
• Overview: international instruments
• Overview: African continental instruments
• Overview: SADC instruments
• Conclusions and the way forward: Is there a need for a dedicated SP instrument in relation to climate and environmental change?
BACKGROUND AND CONTEXT

- People exposed to climate or environmental change have become a particular characteristic of in-country and cross-border deprivation, displacement and mobility in Africa. This reality is posing significant challenges to regulatory regimes at the global, regional (continental and sub-regional) and national level.

- A recent assessment report of the Intergovernmental Panel on Climate Change noted that climate change poses a significant threat to economic, social and environmental development in Africa.

- Warming in Africa has increased significantly over the past 50 to 100 years, with clear implications for the health, livelihoods and food security of people in Africa.
  - This has created considerable health and economic challenges for the continent, including: increased food insecurity, increased water scarcity, spread of weather-sensitive diseases, and reduced crop yields and livestock productivity.
BACKGROUND AND CONTEXT

- As noted in the report, extreme weather events are expected to become more frequent and **agricultural yield losses** are projected to reach 22% across sub-Saharan Africa, with increases in the frequency and prevalence of failed crop seasons. As a result, it has been predicted that **by 2080**, it is likely that **75% of the African population** will be at risk of hunger.

- (http://www.ohchr.org/EN/Issues/Migration/Pages/VulnerableSituations.aspx)

- The impact of climate change is severe for **vulnerable families and households**, and in particular **women** who have to face the dual burden of income generation and caring, those who are disabled, and the young. Due to the dramatic and often sudden onset of floods and other natural calamities, those who move across country borders do so **irregularly**.
BACKGROUND AND CONTEXT

- The access of people so affected by climate or environmental change to social protection interventions, also if they migrate as a result of climate change, is usually weakly developed.

- Although the picture is changing, state practice in Africa seems to confirm a limited approach: Africa's efforts at the domestic level in tackling climate change appear to focus on disaster risk management and humanitarian care, as well climate change adaptation, and not on longer-term social protection support.

- While African countries have helped to adopt and subscribed to a range of international, continental and sub-regional instruments, these instruments make minimal provision for social protection interventions.
A NEW PARADIGM: AN EXPANDED SOCIAL PROTECTION CONCEPT

- A new paradigm is evident: incorporating climate and environmental change concerns into SP
- “While the social and economic aspects of sustainable development are more evident in existing social protection programmes, environmental components are equally as important and inherently linked. People living in situations of vulnerability are often dependent on subsistence agriculture and extractive activities, which are greatly affected by natural disasters and, in the case of the latter, can also create other hazards. The sustainable management of such resources should be given greater priority to ensure that people - particularly the most vulnerable - have a stable source of livelihood. As such, this report makes the case for linking climate change adaptation measures with social protection schemes to reduce the risk of climate events undermining development efforts. (UNDP Social Protection for Sustainable Development: Dialogues between Africa and Brazil (2016) 15)
• This expanded conceptual framework has a large and growing institutional and operational footprint, reflected among others in SP interventions applied and also developed to deal with climate and environmental change
  • Despite the many challenges, including the lack of institutional and programmatic coordination

• And yet, the regulatory environment –
  • Remains essentially the mainstream SP regulatory environment, which is said to be applied to the particular context; and
  • Does not (yet) sufficiently reflect a dedicated and specifically-developed and -arranged SP framework
A NEW PARADIGM: AN EXPANDED SOCIAL PROTECTION CONCEPT

• See par 15 of ILO Recommendation 202 of 2012 (National Floors of Social Protection): “Social security extension strategies should apply to persons both in the formal and informal economy and support the growth of formal employment and the reduction of informality, and should be consistent with, and conducive to, the implementation of the social, economic and environmental development plans of Members.” (emphasis added)
KEY REQUIREMENTS OF A RIGHTS-BASED APPROACH

- One would expect that the SP legal framework in relation to climate and environmental change should reflect a Rights-Based Approach to SP, and not merely be relegated to a policy and programmatic framework, at the discretion of government or involved partners.

- Key elements of a Rights-Bases Approach:
  - SP should be considered as a **right and entitlement** and not just a matter of charity; those affected should be able/enabled to claim and enforce their entitlement to SP;
  - There is an **obligation on states** to recognise, guarantee and protect SP;
  - **Certain core obligations and minimum standards** may be expected in assessing the compliance with the obligation to provide SP, in particular in relation to vulnerable groups; and
  - There is a deliberate focus on mechanisms to keep those who design and deliver SP **accountable** and to **involve those affected** by and benefitting from SP interventions.
OVERVIEW: INTERNATIONAL INSTRUMENTS

• The 2015 *Paris Agreement on Climate Change* refers to the human rights obligations in respect of those affected by climate change, including the right to health and the rights of migrants, children, persons with disabilities and people in vulnerable situations, and stresses the importance of safeguarding food security, but stops short from providing any (other) concrete framework for extending social protection to those affected.

• Similarly, the UN's *Sendai Framework for Disaster Risk Reduction 2015-2030* stipulates as a guiding principle "Managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development".
Also, the UN's *Sustainable Development Goals*, as is the case with the *Global Compact for Safe, Orderly and Regular Migration*, provide a range of pointers for appropriate action to deal with climate change, but stop short from addressing specific social protection measures, in particular from a rights-based perspective.

Filling the gaps: Initially, insufficient attention was paid to the context of displaced persons who were forced to migrate *across borders* –

- This led to the development of the *Nansen Initiative*, outside the UN framework
- Since then, the Initiative has been endorsed an subsumed in The Platform on Disaster Displacement: a State-led process working towards better protection for people displaced across borders in the context of disasters and climate change, and the adoption of the *Agenda for the protection of cross-border displaced persons in the context of displacement and climate change* – emphasising the human rights protection of affected persons
OVERVIEW: AFRICAN CONTINENTAL INSTRUMENTS

- AU foundational instruments, documents, policies and strategic frameworks acknowledge the need to **address climate change** and **environmental sustainability**, highlighting at times the need for appropriate **SP measures**:
  - **AU Agenda 2063** emphasises the linkages between environmental sustainability and development indicators such as health, education, agriculture, incomes and jobs
  - **Draft AU Strategy on Climate Change (2014)**: “Promote employment flexibility, green Jobs and social protection for the employed workers to make them more resilient and able to adapt their skills to climate change.”
  - See also, among others, the **Social Policy Framework for Africa (2009)** and the **Draft Social Agenda 2063**, as well as the large range of sectoral documents and programmes, such as the **Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods (2014)**, and the **Comprehensive African Agricultural Development Programme (CAADP)**
A limited legal framework exists at the continental level –

- Article 24 of the African Charter on Human and Peoples’ Rights in general terms indicates that: *All peoples shall have the right to a general satisfactory environment favourable to their development*

- Note in particular the application of specific rights enshrined in the Charter (e.g. health) to the persons exposed to environmental conditions, as developed by the African Commission on Human and Peoples’ Rights in the *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter*

- The *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (i.e. the *Kampala Convention*) of 2008 establishes among others a legal framework for protecting and assisting internally displaced persons in Africa, also by way of social protection measures, by imposing particular obligations on ratifying AU Member States
A limited legal framework exists at the continental level –

However, this protection is largely couched in humanitarian assistance terms. Article 9(2)(b) requires of States Parties to:

“Provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities.”

Also this Convention only concerns internally displaced persons and not those that have crossed international borders.

More recently, the new Draft AU Protocol on the Rights of Citizens to Social Protection and Social Security emphasises among others measures to mitigate the effects of climate change and environmental degradation through social protection schemes.
OVERVIEW: SADC INSTRUMENTS

• A legal framework embodying SP in the environmental/climate change context is largely absent

• Article 12(a) of the Charter of Fundamental Social Rights in SADC (i.e. the Social Charter) (2003) does provide, in general terms, that: “...every worker in the Region has the right to health and safety at work and to a healthy and safe environment that sustains human development and access to adequate shelter”

• No other SP instrument (e.g., the Code on Social Security (2007); Protocol on Employment and Labour (2014)) contains specific SP provisions in this context
OVERVIEW: SADC INSTRUMENTS

• Other documents/programmes, including sectoral ones, concern climate/environmental change, and do, at times, indicate the need for SP arrangements (food security; resilience strengthening; social development arrangements), but stop short from presenting a dedicated framework, let alone a regulator framework, for SP interventions – e.g.:
  • SADC Revised Strategic Regional Indicative Strategy 2015-2020
  • Programme on Climate Change Adaptation and Mitigation in Eastern and Southern Africa (COMESA-EAC-SADC)
  • SADC Climate Change Adaptation for the Water Sector
  • SADC Regional Strategic Action Plan (RSAP)

• See also the recent Migration, Environment and Climate Change - Regional Policy Forum for Southern Africa MECC) (2018)(IOM-supported initiative)
CONCLUSIONS AND THE WAY FORWARD

- Those exposed to climate and environmental change, especially in (southern) Africa seem to have **limited access to SP measures** –
  - Often the focus is on **sectoral and targeted interventions/programmes**, including resilience-building, climate change adaptation, disaster risk management, food security, housing support, health concerns, etc.
  - A raft on **SP interventions are applied and even innovatively developed** (e.g., weather (index) insurance, crop insurance, public works programmes (as a response and remedial measure))
  - However, there is **little emphasis on longer-term SP support**
  - In any event, there seems to be a **lack of an integrated SP approach**, as also reflected in **fragmented policy, institutional and operational responses** – even if there are in some areas (e.g., food security) well-developed sectoral approaches
CONCLUSIONS AND THE WAY FORWARD

• There is an **evident absence of an integrated legal framework** – legal approaches would largely reflect the **fragmented approach to access to SP** indicated above and/or are restricted to “mere” application of general SP legal interventions
  
  • This is evident at both the level of global, continental and sub-regional instruments, standards and guidelines, and in national legal frameworks (e.g. Constitutions)

• The question should be raised whether there is not a **need for a new social risk-based conceptual approach**, which would acknowledge **exposure to climate/environmental change as a particular social (security/protection) risk**, and to develop, on that basis, an **integrated, rights-based SP framework** – for other recent examples, see (i) long-term care (developing world context); (ii) insuring against loss of means by which livelihoods are pursued (e.g., India)
CONCLUSIONS AND THE WAY FORWARD

• There is ample rationale for such a social risk-based and rights-based SP approach
  • To strengthen and be an expression of the human right to social protection accruing to everyone (see, e.g., arts 22 and 25 of the UN Declaration of Human Rights), from the perspective of an integrated human-rights approach (several other human rights are at stake too) – see the instructive recent 2019 Nansen/UN publication - The slow onset effects of climate change and human rights protection for cross-border migrants, 2019
  • To address the multi-dimensional context of climate and environmental change
  • To move beyond broad or generalised standards/guidelines to an integrated and targeted framework addressing concrete areas of SP application in a coherent manner – see among others the influential UN Trafficking in Persons Protocol for a similar approach, emphasising the 4Ps – prevention, protection, prosecution and partnerships
CONCLUSIONS AND THE WAY FORWARD

• There is ample rationale for such a social risk-based and rights-based SP approach
  • To provide a basis for concrete policy development, institutional and programmatic design, operational roll-out and cross-sectoral coordination
  • To provide a measure for identifying specific areas of shortcomings, from a SP perspective, and how to potentially address them
CONCLUSIONS AND THE WAY FORWARD

• To achieve this objective, even if only in the form of an integrated set of SP guidelines, **specific considerations and particular dimensions** need to be taken into account – SP in this context fulfils a **diverge set of objectives** and has to deal with a **range of areas and issues** – emphasising among others **preventive, restorative, reintegrative and promotive objectives**

• **Different/varied vulnerability contexts** need to be heeded – with reference to, e.g.:
  - **Different categories of people** affected (e.g. in-country and cross-border migrants; the aged, children, women in their various capacities)
  - **Variety of sources leading to the exposure** (slow-onset or rapid-onset disasters; longer-term climate change developments)
  - **Different vulnerability needs** (e.g., food, medical care, housing, land preservation or restoration, job creation and skilling)
  - **Range of targeted SP responses needed** (e.g., rapid responses, resilience-building)
  - **Variety of monetary and non-monetary SP interventions** (e.g., cash transfers; insurance-based arrangements)
CONCLUSIONS AND THE WAY FORWARD

• To achieve this objective, essential human rights principles appearing from all mainstream human rights instruments, need to be heeded (as also reflected in a limited number of African constitutions, e.g. South Africa and Kenya) – see, in particular, the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by almost all African countries, and the AU African Charter on Human and Peoples’ Rights, ratified by all African countries
  • **Guarantee** of and **respect for all human rights**
  • Given effect to an **integrated, inter-related and interdependent understanding and application of human rights entitlements** – a holistic approach
  • **Priority attention** must be given to the **most vulnerable**
  • **No unjustifiable discrimination** allowed
  • **Progressive realisation** of the applicable human rights framework is required
  • **Deliberate funding allocation** has to be in place
  • **Range of reasonable legislative and other measures** would have to be adopted
THANK YOU!