



THE ROLE OF FREE MOVEMENT OF PERSONS AGREEMENTS IN ADDRESSING DISASTER DISPLACEMENT

A STUDY OF AFRICA

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PLATFORM
ON DISASTER
DISPLACEMENT
FOLLOW-UP TO THE NANSEN INITIATIVE



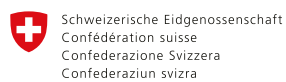
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LIST OF ACRONYMS

AEC	African Economic Community
AMU	Arab Maghreb Union
AU	African Union
CAR	Central African Republic
CEMAC	Economic and Monetary Community of Central Africa
CEN-SAD	Community of Sahel-Saharan States
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
DRC	Democratic Republic of Congo
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ICMPD	International Centre for Migration Policy Development
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
IGAD	Intergovernmental Agency for Development
ILO	International Labour Organization
IOM	International Organization for Migration
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
RCM	Regional Conference on Migration
REC	Regional Economic Community
SADC	Southern African Development Community
SADR	Sahrawi Arab Democratic Republic
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

EXECUTIVE SUMMARY

Cross-border disaster-displacement is a reality in Africa, where drought, flooding and other natural hazards combine with conflict, weak governance and underdevelopment to force people from their homes. Many disaster displaced persons remain within their own countries, but some are forced to flee to neighbouring countries, and even further afield. With climate change, disaster-related movement in Africa is only likely to increase. The recently adopted Global Compact for Safe, Orderly and Regular Migration recognises the role that disasters play in human mobility and calls on states to address this issue. However, there remains no comprehensive legal framework for addressing the predicament or needs of those who cross borders in the context of a disaster.

In Africa, agreements for the free movement of persons between states could assist in addressing the protection gap for disaster displaced persons, by permitting entry and stay into host states, allowing access to territory, livelihood opportunities and assistance from international and non-government organisations. Free movement agreements have been adopted, or proposed, in most of Africa's sub-regional economic communities and at the continental level. However, free movement agreements have not been developed with the protection needs of disaster displaced persons in mind. This report therefore considers the extent to which such agreements do, or could, address the needs of those displaced in the context of a disaster.

This report considers the potential for free movement agreements to address three core protection needs of cross-border disaster-displaced persons.

These are:

- 1) access to territory,
- 2) status and rights during stay, and
- 3) opportunities for lasting solutions.

1 ACCESS TO TERRITORY FOR DISASTER DISPLACED PERSONS

The scope of eligibility under African free movement agreements is broad, permitting entry to African states for citizens of Member

States of the same economic community. This is a key advantage of free movement agreements for disaster displaced persons, who will often be unable to satisfy the more specific eligibility criteria of other migration and international protection regimes. Some of Africa's free movement agreements also provide avenues for the regularisation of individuals who arrive irregularly in a state's territory, increasing the prospects for lawful stay and work, and reducing the risks of exploitation and abuse.

However, access to territory under free movement agreements is not universal and is subject to significant discretion at the state level. Disaster displaced persons may be excluded from free movement arrangements where they lack citizenship of a relevant state, are excluded under the domestic legislation of a host state, or cannot fulfil the relevant documentation and financial requirements for entry. The relationship between free movement and refugee protection under several of Africa's free movement agreements is also unclear, and should be clarified to ensure that those disaster displaced persons who are also refugees can benefit from both free movement and refugee protection frameworks.

2 STATUS AND RIGHTS DURING STAY

The right to work and conduct business in another state under free movement agreements could facilitate sustainable livelihoods and self-sufficiency for cross-border disaster-displaced persons. This is a key advantage of free movement agreements over other international protection mechanisms, where such rights may be more limited. However, the right to work and conduct business is not automatic upon entry to a state, and in practice may entail prohibitive bureaucratic and financial requirements.

Beyond the right to work and conduct business, protection of fundamental human rights under free movement agreements is scant, limiting the extent to which such agreements ensure the more specific needs of disaster displaced persons, such as food, shelter and other basic forms of assistance. Free movement agreements also do not guard

against forced removal of disaster displaced persons to countries or regions where they may continue to be at risk from a disaster. While this gap is supplemented by international and regional human rights frameworks, which continue to apply to those who move under free movement agreements, more specific recognition of human rights within free movement agreements could help to guide states in their treatment and protection of disaster displaced persons.

3 OPPORTUNITIES FOR LASTING SOLUTIONS

Beyond initial entry and stay in another state, free movement agreements offer two possible lasting solutions for cross-border disaster-displaced persons in Africa. The first is permanent settlement in a host state. However, this option is envisaged under only some of Africa's free movement agreements, and remains at the prerogative of host states. The second is the use of free movement to facilitate temporary or circular migration as a long-term adaptation strategy. Temporary or circular migration could support alternative livelihoods and trade, and enable disaster displaced persons to preserve their land and property at home.

Ultimately, the extent to which agreements for the free movement of persons between African states could address disaster displacement on the continent will depend largely on how they are incorporated and implemented at the national level by Member States of Africa's regional and sub-regional economic communities. State practice in the implementation of free movement agreements could either reinforce or address the potential limitations of such agreements in the disaster context. Further research on the implementation of free movement at the domestic level in Africa is therefore essential for a full assessment of the role of free movement agreements in addressing disaster displacement in Africa, and could assist in developing proposals for how such agreements could be adapted, or supplemented, to better address the current protection gap for disaster displaced persons.

1.1.

DISASTER DISPLACEMENT IN AFRICA

In 2016, 1.1 million people were newly displaced in Africa by sudden-onset disaster, such as flooding.¹ 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.² In Ethiopia alone, during the first six months of 2017, drought forced more than 400,000 people to move.³

As elsewhere, most disaster-related displacement in Africa is internal, meaning that those who move stay within their own countries.⁴ However, Africa has also seen significant incidences of cross-border disaster-displacement.⁵ During the 2011-12 Horn of Africa drought and famine, hundreds of thousands of people fled Somalia to nearby countries, such as Kenya and Ethiopia.⁶ Flooding in Mozambique and Malawi regularly leads to cross-border movement between

- 1 IDMC, Africa Report on Internal Displacement (2017) (IDMC Africa Report) 9. Flooding accounted for 90% of sudden-onset disaster-related displacement in Africa, with smaller numbers forced to move following earthquakes, landslides, storms and wildfires. IDMC Africa Report, 27.
- 2 Statistics from IDMC do not include displacement in the context of slow-onset disasters. See IDMC Africa Report, above n 2, 16.
- 3 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>>. In a similar period (November 2016-May 2017) there were an estimated 739,000 drought displacements, including 480,000 children, in Somalia. UNHCR, Protection and Return Monitoring Network, Drought Displacements to 31 May 2017 <<https://reliefweb.int/sites/reliefweb.int/files/resources/57361.pdf>>.
- 4 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. This is not peculiar to disaster- or climate change-related movement, but accords with migration patterns generally. See Jane McAdam, Climate Change, Forced Migration and International Law (OUP, 2012) 16.
- 5 Nansen Initiative Protection Agenda, above n 5, 6.
- 6 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.

the two countries.⁷ Cross-border disaster-displacement in Africa occurs within broader patterns of mobility on the continent, where the majority (approximately 80%) of those who move stay within the continent itself,⁸ though some move further afield, to Europe or the Arabian Peninsula.⁹

With climate change, disaster displacement in Africa is only likely to increase. Increased frequency and intensity of weather events, higher temperatures and other environmental pressures will pose new threats to communities and further impact on their ability to cope.¹⁰ Indeed, climate change is already having severe impacts in Africa. For example, Lake Chad – a vital source of water for more than 20 million people across Cameroon, Chad, Niger and Nigeria – has shrunk by more than 90% in the last 50 years, with at least 50% of this reduction attributed to climate change.¹¹

1.2

PROTECTION GAP FOR DISASTER DISPLACED PERSONS

Despite the reality of cross-border disaster-displacement, there is no comprehensive legal framework for addressing the predicament and needs of those forced to move. For those displaced within their own countries, national laws and policies, international human rights law, and specific frameworks for internally displaced persons (IDPs), provide a range of protections and assurances of fundamental human rights.¹² In Africa, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, known widely as the 'Kampala Convention', provides one of the most progressive frameworks for the protection of IDPs in the world.¹³

For those displaced across borders in the context of a disaster, avenues for protection are much less assured. In certain circumstances, international protection

7 'Disasters, Climate Change and Human Mobility in Southern Africa: Consultation on the Draft Protection Agenda, Report of the Nansen Initiative Southern Africa Consultation', Stellenbosch, South Africa, 4-5 June 2015 (Nansen Initiative Southern Africa Report) 3-4; Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches', UNHCR Legal and Protection Policy Research Series (February 2012) 14.

8 According to a 2016 report by the AU, 80% of cross-border movement in Africa occurs within Africa and is either intra-regional – occurs within the West, East or Southern African regions – or inter-regional – for example, from West Africa to Southern Africa, from East/Horn of Africa to Southern Africa. AU, Evaluation of the African Union Migration Policy Framework for Africa (African Union, 2016).

9 During the 2011-12 Horn of Africa drought, for example, many Somalis fled to Yemen. See Zewdu and Hugo, above n 7.

10 '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) 9; Nansen Initiative Southern Africa Report, above n 8, 2. See, eg, reporting on Senegal's 'extreme and unprecedented' flooding in August 2016. Momar Niang, 'Senegal floods expose need for community warning, preparation' Reuters (15 August 2016).

11 The remaining causes of shrinking relate to population growth and damming. See Amali Tower, 'Shrinking Options: The Nexus between Climate Change, Displacement and Security in the Lake Chad Basin', Report for Climate Refugees (September 2017) 9.

12 See 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement, 11 February 1998' (UN Guiding Principles on Internal Displacement). Paragraph 2 of the Introduction to the UN Guiding Principles on Internal Displacement states that internally displaced persons are 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border' (emphasis added).

13 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). Though implementation of the Kampala Convention has been slow, the legal framework it sets up is strong. See generally, IDMC African Report, above n 2, 10-11.

mechanisms based on refugee and/or human rights law will apply.¹⁴

In some regions of Africa, specific mechanisms for the movement of pastoralists assist disaster-affected pastoral communities to access water and grazing land across borders.¹⁵ However, these mechanisms will have only limited application in disaster scenarios, leaving a significant 'protection gap' under international law.¹⁶

The recently adopted Global Compact for Safe, Orderly and Regular Migration (Migration Compact) provides a first step in addressing this gap – it recognises the significant role that disasters, including in the context of climate change, play in human mobility and calls on states to 'address the challenges of migration movements in the context of sudden-onset and slow-onset disasters'.¹⁷ The non-binding nature of the Compact, however, means that its success will depend on action taken by states to implement these commitments at the national and regional levels.

The protection gap for disaster displaced persons means that they often have no choice but to move irregularly – without the

authorisation of the host country¹⁸ – putting them at risk of abuse, violence, criminality and death.¹⁹ They stay, and sometimes work, in host countries without regular status, facing considerable restrictions on their rights and opportunities. In the longer term, some disaster displaced persons return home, once conditions there have returned to normal. However, others – including those whose homes have been rendered uninhabitable, or who have lost their livelihoods – require alternative long-term solutions.

1.3

THIS STUDY

1.3.1

Aims

This study analyses the potential role of agreements for the free movement of persons between states in addressing the protection gap for disaster displaced persons in Africa. Free movement agreements – including visa free travel and the relaxation of entry requirements – have been either adopted or proposed in many of Africa's sub-regional economic communities, including the East African Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC). On 29 January 2018, the African Union

14 This may be due to the effects of the disaster, or because of surrounding circumstances and political context. Indeed, the expanded notion of a 'refugee' under African regional refugee law provides significantly more potential in the disaster context than its international counterpart in the 1951 Refugee Convention. 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.

15 See generally, Wood, above n 15, 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).

16 See Nansen Initiative Protection Agenda, above n 5, 8, 18. It should be noted, however, that with significant capacity building of national authorities to enhance implementation of these mechanisms, they could have significantly greater application in the disaster contexts than they have had to date.

17 'Global Compact for Safe, Orderly and Regular Migration' UNGA Doc A/CONF.231/3 (30 July 2018) (Migration Compact) para 18(l). See generally Walter Kälin, 'The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons' (2018) IJRL Global Compacts Special Issue.

18 IOM defines irregular migration as 'Movement that takes place outside the regulatory norms of the sending, transit and receiving countries.' See IOM, 'Key Migration Terms' <<https://www.iom.int/key-migration-terms>>. This report uses the term 'host country' or 'host state' as short hand for the country of destination as this is the term generally used in the text of Africa's free movement agreements.

19 'Natural Hazards, Climate Change, and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move' Background Paper prepared by the Nansen Initiative Secretariat for the Greater Horn of Africa Regional Consultation, Nairobi, Kenya, 21-23 May 2014 (Nansen Initiative Horn of Africa Background Paper) 20. See also, Zewdu and Hugo, above n 7, 41, who noted that the closure of the Somalia-Kenya border during the 2011 Horn of Africa drought undoubtedly increased the vulnerability of those who moved. Patterns of irregular arrival for disaster displaced persons accord with cross-border mobility generally in Africa, which is often irregular. See Irregular Migration in Horn of Africa Increases in 2015, IOM (26 January 2016) <<https://www.iom.int/news/irregular-migration-horn-africa-increases-2015>>.

(AU) adopted a region-wide Protocol for Free Movement.²⁰

The potential role of free movement agreements in addressing disaster displacement was noted during regional intergovernmental consultations by the Nansen Initiative on Disaster-Induced Cross-Border Displacement²¹ and in the resulting 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change' (Nansen Initiative Protection Agenda).²² Free movement agreements may permit entry and stay of disaster displaced persons, allowing access to territory, employment and labour markets, and facilitating social protection and assistance from international and non-government organisations. Free movement agreements are therefore one way that African states could implement the Migration Compact – in particular, their commitment to enhancing opportunities for regular migration pathways for disaster displaced persons.²³

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 Member States.²⁴ They may have onerous documentation requirements that are difficult for displaced persons to meet, and may be suspended in certain circumstances.²⁵ Accordingly, one of the 'key actions' recommended by the Nansen Initiative Protection Agenda, and endorsed by 109 states – including 32 African states – was:

*Reviewing existing regional, sub-regional and bilateral free movement of persons agreements to determine to what extent such agreements already, or could better, facilitate international migration.*²⁶

This study takes up this recommendation. It provides a closer look at African free movement agreements, both existing and proposed, to identify the opportunities and limitations they present for addressing the protection gap for disaster displaced persons in Africa.

1.3.2 Methodology

This study comprises a desk review of existing and proposed regional and sub-regional agreements for the free movement of persons between African states. The primary source for this review is the agreements themselves, the provisions of which are analysed to identify opportunities and potential limitations for those crossing borders in the context of a disaster. This study focuses on free movement agreements that apply generally to citizens of relevant economic communities. While other related agreements have been concluded by African states to provide for cross-border movement of particular groups, such as pastoralists, these are not considered in this report and should be the subject of separate research.

In addition, this study considers the incorporation of free movement agreements in the domestic legislation of a small number of selected African states.²⁷ While the analysis of domestic legislation in this study is far from comprehensive, it does assist in identifying issues that might arise in the implementation of regional and sub-regional agreements at the national level.

Research for this study did not yield any literature directly addressing the role of free

20 Tsion Tadesse Abebe, 'A New Dawn for African Migrants' Institute for Security Studies (31 January 2018 <<https://issafrica.org/iss-today/a-new-dawn-for-african-migrants>>.

21 Nansen Initiative Horn of Africa Outcome Report, above n 11, 5; Nansen Initiative Southern Africa Report, above n 8, 5.

22 Ibid, 26. The Protection Agenda was endorsed by 109 states in 2015.

23 See Migration Compact, above n 18, para 21.

24 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). Some free movement agreements use the term Partner States to refer to states parties to them; however, for ease of expression, this report uses Member States throughout.

25 Ibid. See also Wood, above n 15, 22.

26 Nansen Initiative Protection Agenda, above n 5, 36.

27 This study reviewed relevant national legislation in the following states: Côte d'Ivoire (Member State of ECOWAS, CEN-SAD), Ethiopia (IGAD, COMESA), Kenya (EAC, CEN-SAD, COMESA, IGAD), Nigeria (CEN-SAD, ECOWAS) and Tanzania (EAC, SADC). This small sample was selected primarily on the basis of readily available information and access to relevant domestic legislation.

movement agreements in addressing disaster displacement. However, a number of related issues have been examined by scholars, practitioners and other stakeholders, and provide helpful background for the present study. These include: disaster displacement and international law generally, migration as a form of climate change adaptation, and the role of migration pathways as an alternative to international protection (particularly for refugees). This literature is drawn on to better understand the protection needs of disaster displaced persons and to identify potential issues associated with the use of migration (including free movement) pathways to address the needs of displaced persons.

Reports on free movement in Africa by several international organisations – including the African Development Bank, International Organisation for Migration and United Nations Economic Commission for Africa – provide some limited information on the implementation of free movement in African states in practice. However, this is also far from comprehensive, and such reports provide contextual and/or supplementary information only. The operation of free movement agreements in Africa in practice is outside the scope of the present study and should be considered as part of future research on this topic.²⁸

1.3.3

Structure of the report

This report is in five parts. Following this Introduction, Part 2 of the report sets out the conceptual approach underlying the study. It describes the common characteristics of disaster displacement in Africa and the traditional distinction between international migration and international protection regimes. It then articulates the three core protection needs of persons displaced across borders in the context of a disaster. These are: 1) access to territory, 2) status and rights during stay, and 3) opportunities for lasting solutions. Part 3 sets out the legal context for free movement agreements in Africa. It describes Africa's regional and sub-regional

governance frameworks and introduces the various free movement agreements that have been adopted or proposed therein, including in Africa's Regional Economic Communities (RECs) and at the whole-of-region level by the African Economic Commission (AEC). Part 4 of this report analyses African free movement agreements for their potential role in addressing disaster displacement in Africa. This section is structured according to the three core protection needs of disaster displaced persons set out in Part 2. Part 4 identifies and describes specific provisions and features of free movement agreements that will be relevant to each protection need, noting commonalities and/or differences between the various regional and sub-regional agreements. It considers the potential implications of the provisions and features for disaster displaced persons and assesses their potential to fulfil, or undermine, their protection needs.

Part 5 – the Conclusion – draws together the preceding analysis to provide an overall assessment of the potential role of free movement agreements in addressing the protection gap for disaster displaced persons in Africa. The Conclusion summarises the key features of free movement agreements that help to facilitate protection for disaster displaced persons. It also summarises the key potential limitations of free movement agreements in this context. Finally, it makes some recommendations for further research in this field.

1.3.4

Note on terminology

A brief note is warranted here on the use of the term 'free of movement'. In this study, free movement is used to refer to agreements for the free movement of persons between states. These are bilateral or multilateral agreements between states, often (but not necessarily) concluded under the auspices of regional or sub-regional organisations, that provide for the relaxation or removal of restrictions on travel between states for citizens of certain states. Free movement in this context should be distinguished from 'freedom of movement' as it appears predominantly in international human rights law, which pertains to the right of individuals (whether citizens or immigrants) to move freely within the territory of a particular state.

²⁸ See further, Section 5.3 of this report.

2.1

UNDERSTANDING DISASTER DISPLACEMENT IN AFRICA

The dynamics of disaster displacement differ between regions. For example, Asia sees the largest numbers of people displaced internally, usually in the context of sudden-onset disasters such as storms, earthquakes and floods,²⁹ while cross-border disaster-displacement has been more common in Africa and Central and South America.³⁰

In Africa, cross-border disaster-displacement occurs primarily in the context of slow-onset disasters, such as drought.³¹ However, this relatively simple fact belies the more complex nature of disaster displacement in reality. ‘Slow-onset’ disasters can turn into emergencies quite quickly – ‘for example when drought “suddenly” contributes to a famine’.³² Sudden-onset disasters such as flooding can have impacts over a longer period, as repeated incidences gradually erode the resilience of affected communities.³³

The distinction between internal and cross-border displacement is also not as straightforward as it may at first seem. Many IDPs later move beyond their countries of origin, when they cannot access adequate protection and assistance following a disaster,³⁴ while cross-border displaced persons may become IDPs after they return and are unable to re-establish themselves in their place of origin. Some movement is circular, as people

29 Nansen Initiative Protection Agenda, above n 5, 14.

30 Ibid, 6.

31 Ibid, 14.

32 Ibid, 24.

33 According to IDMC’s 2017 report, 60% of sudden-onset related displacement recorded in Africa occurred in the context of small-scale, recurring flooding that gradually erodes resilience and increase vulnerability, eventually leading to displacement. See IDMC Africa Report, above n 2, 27-8. See also Nansen Initiative Protection Agenda, above n 5, 24.

34 Nansen Initiative Protection Agenda, above n 5, 9. For example, in the Lake Chad region, many communities that have been internally displaced by environmental hazards, including the shrinking of the lake, have later been forced across a border due to conflict. Tower, above n 12, 12.

move back and forth between locations as conditions allow, often to access a wider range of economic opportunities.³⁵

Finally, and particularly in Africa, disaster displacement is 'multi-causal', meaning that 'the myriad, over-lapping factors make it difficult to identify a specific trigger' for movement.³⁶ Disasters alone rarely force people to move.³⁷ Instead, natural hazards combine with other factors, such as poverty, lack of decent work, conflict and underdevelopment, to compel people to leave their homes in search of safety and livelihood opportunities.³⁸ This can make it difficult to quantify the extent of disaster displacement in Africa, and creates challenges for identifying 'disaster displaced persons' in practice.³⁹

Differences in the regional dynamics of disaster displacement mean that 'appropriate responses vary from region to region'.⁴⁰ In Central America, for example, the protection gap for disaster displaced persons has been addressed to some extent by the development of temporary humanitarian protection measures.⁴¹

35 Zewdu and Hugo, above n 7, 17.

36 IDMC Africa Report, above n 2, 24.

37 Indeed, some of the most vulnerable disaster-affected populations may not have the capacity or resources to move, or may become 'trapped' by the effects of the disaster itself. For example, research in Tanzania showed that, in some situations, extreme rain actually decreased the number of people migrating from vulnerable households. K. Warner, T. Afifi, K. Henry, T. Rawe, C. Smith and A. de Sherbinin 'Where the Rain Falls: Climate Change, Food and Livelihood Security, and Migration.' Global Policy Report of the Where the Rain Falls Project (Bonn: UNU and CARE, 2012). See generally Foresight Report, 'Migration and Global Environmental Change: Future Challenges and Opportunities' (Government Office for Science, UK, 2011) 119-120.

38 Nansen Initiative Protection Agenda, above n 5, 15. See also, Tower, above n 12; IDMC Africa Report, above n 2, 14, 31.

39 See, eg, IDMC Report, above n 2, 16; Zewdu and Hugo, above n 7, 24.

40 Nansen Initiative Protection Agenda, above n 5, 10.

41 See, eg, David James Cantor, 'Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters', Background Paper for States of the Regional Conference on Migration and Others in the Americas Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disaster, San José, Costa Rica, 10-11 February 2015; Walter Kälin and David Cantor, 'The RCM Guide: a novel protection tool for cross-border disaster-induced displacement in the Americas' (2017) 56 *Forced Migration Review* 58.

In Africa, however, where borders are porous, migration regimes are rudimentary, and most displacement occurs in the context of slow-onset disasters, similar regimes are unlikely to succeed any time soon.⁴² Instead, existing and proposed regional and sub-regional free movement agreements could provide a more pragmatic option for addressing disaster displacement in Africa. However, unlike Central America's humanitarian protection regimes, free movement agreements have not been developed with the protection needs of displaced persons in mind.

2.2

MIGRATION VERSUS PROTECTION

Under international law, cross-border mobility mechanisms generally distinguish between voluntary movement (for example, labour migration) and forced movement (displacement). International protection mechanisms, such as refugee law and human rights-based complementary protection mechanisms, address the latter. They impose international law obligations on states not to return (*refouler*) individuals who would be at risk of certain, defined harms, such as persecution, torture, and cruel, inhuman or degrading treatment. International protection mechanisms operate as exceptions to the general discretion of states to decide who enters their territory and under what conditions.

In some states, these core international protection mechanisms are supplemented by additional humanitarian protection measures, such as those in Central America referred to above. These facilitate admission and temporary stay to displaced persons who do not qualify for refugee or complementary protection.⁴³ Humanitarian protection measures may be based on regular or exceptional

42 See generally, McAdam, above n 5, 201. McAdam explains that managed migration pathways are 'better suited to respond to slow-onset climate change impacts, which are unlikely to trigger existing (or future) temporary protection mechanisms designed for sudden disasters.'

43 These additional humanitarian protection measures are sometimes referred to as 'temporary protection'.

migration categories, and usually rely on the discretionary powers of national authorities.⁴⁴

A third option for providing admission and stay to persons displaced across borders is through regular migration schemes, including labour migration, student visas, and agreements for the free movement of persons.⁴⁵ The use of regular migration schemes as an avenue for protection has been considered in the refugee context, where the complexities of such an approach have been well noted. On the one hand, '[e]xpanding opportunities for mobility can reduce vulnerability' to displacement⁴⁶ and 'provide complementary avenues for refugees to access international protection',⁴⁷ particularly in places where traditional protection frameworks and opportunities for lasting solutions are lacking.⁴⁸ On the other hand, regular migration categories have been criticised as a protection alternative, for their often limited availability, and their potential to undermine needs-based protection.⁴⁹

In Africa, historically, opportunities for formal migration have been limited, with national migration frameworks tending to restrict, rather than encourage, migration.⁵⁰

However, in recent decades, free movement agreements have been adopted as part of regional integration and common market initiatives, aimed primarily at promoting economic development across the continent. African states have recognised the broader potential of free movement agreements as well – noting their potential to provide alternative pathways to durable solutions for refugees⁵¹ and contribute to improved peace and security within the region.⁵²

For free movement agreements to provide a valuable tool for addressing disaster-displacement, however, they must respond to the specific protection needs of disaster displaced persons. These will differ, depending on the nature and extent of the disaster, and the capacities and vulnerabilities of the individual. However, it is possible to identify some core protection needs of all disaster displaced persons, against which the protection potential of free movement agreements can be assessed.

2.3

THE THREE CORE PROTECTION NEEDS OF DISASTER DISPLACED PERSONS

Cross-border persons share three core protection needs.

They are:

1. access to territory,
2. status and rights during stay, and
3. opportunities for lasting solutions.

These three core protection needs are reflected in the Nansen Initiative Protection Agenda's statement of the protection gap for disaster displaced persons under international law:

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- 44 See Nansen Initiative Protection Agenda, above n 5, Protection Agenda, 26-7.
- 45 Indeed, at the international level, in the 2016 New York Declaration for Refugees and Migrants, states committed to cooperate to 'facilitate and ensure safe, orderly and regular migration'. New York Declaration for Refugees and Migrants, Resolution adopted by the UN General Assembly on 19 September 2016, UN Doc A/RES/71/1 (New York Declaration) para 41.
- 46 'Technical Summary' in Climate Change 2014: Impacts, Adaptation, and Vulnerability, Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014) 73.
- 47 OECD and UNHCR, Safe Pathways for Refugees. OECD–UNHCR Study on third country solutions for refugees: family reunification, study programmes and labour mobility (December 2018) 22.
- 48 Elizabeth Collett, Paul Clewett and Susan Fratzke, 'No Way Out? Making Additional Migration Channels Work for Refugees' Report for the Migration Policy Institute Europe (2016) 24. The Nansen Initiative Protection Agenda emphasises the role of migration as a means of preventing displacement. See Nansen Initiative Protection Agenda, above n 5, 9.
- 49 Katy Long, 'From Refugee to Migrant? Labor Mobility's Protection Potential', Report for the Migration Policy Institute (2015) 7. See also Collett et al, above n 49, 4-9.
- 50 See generally, Feleke Tadele, 'An Overview of the State of International Migration in Horn and East Africa' (2007) International Migration Institute, University of Oxford, 12.

51 See discussion in Section 4.1.5, below.

52 'Kenya Embraces the IGAD Regional Protocol on Free Movement of Persons' IGAD website (20 February 2018) < <https://igad.int/divisions/health-and-social-development/2016-05-24-03-16-37/1759-kenya-embraces-the-igad-regional-protocol-on-free-movement-of-persons>>.

International law does not explicitly address whether and under which circumstances disaster displaced persons shall be admitted to another country, what rights they have during their stay, and under what conditions they may be returned or find another lasting solution.⁵³

The first protection need – access to territory – means being able to cross an international border lawfully, with the authorisation of the host state. Meeting this need is fundamentally a matter of eligibility for entry, including the effect of any potential exclusions from eligibility. However, there may be important practical considerations as well, such as access to the necessary documentation for entry and the capacity to meet any financial requirements.

The second protection need – status and rights during stay – concerns the legal status afforded to disaster displaced persons during their stay in the host state’s territory. In order to provide meaningful protection, the status of displaced persons in the country of destination must provide access to necessary assistance and ensure the enjoyment of fundamental human rights – including via access to national systems, such as education, health and labour markets. The type of status awarded, the duration of stay permitted, and the rights afforded during stay will all be relevant. Of particular relevance to disaster displaced persons is protection from forcible return to a place rendered unsafe by a disaster.

The third protection need – opportunities for lasting solutions – involves bringing an end to displacement. This may occur, for example, through the return of the disaster displaced person to their country of origin, or through settlement in the host state or elsewhere. For solutions to displacement to be lasting, they must provide security of status, access to employment and sustainable livelihoods, and reduce, or remove, the risk of future disaster-displacement

These three core protection needs of disaster displaced persons provide the framework for

the analysis of free movement agreements in Part 4 of this report. The broad scope of this report means that it does not consider the more specific protection needs of particular groups, such as women, children, older persons, persons with disabilities, ethnic minorities or other vulnerable groups. These should be the subject of future research.

2.4

PROTECTION VERSUS PREVENTING DISPLACEMENT

Finally, while protecting cross-border disaster-displaced persons fundamentally involves providing admission and stay in territory, at least until it is safe to return home, addressing disaster displacement is not only about protecting persons who have already been displaced. According to the Nansen Initiative Protection Agenda, a ‘comprehensive approach to cross-border disaster-displacement also requires tackling disaster displacement risk in the country of origin.’⁵⁴

One of the ways of reducing the risk of disaster displacement, is by allowing people to move before they are displaced. Particularly in the context of slow-onset disasters, such as drought, where impacts on populations are felt gradually over time, opportunities for pre-emptive, ‘voluntary’ migration can allow populations to move away from harm before reaching a situation of crisis and becoming ‘forcibly’ displaced. In some instances, pre-emptive migration can contribute to adaptation at home, through the supply of remittances, knowledge and new networks.

The needs of people who move to avoid a disaster may differ from those displaced following a disaster – for example, the latter may be more likely to need emergency assistance, or protection from forcible return. However, both groups still share the same three core needs – that is, access to territory, status and rights during stay, and opportunities for lasting solutions. The analysis in Part 4 of

⁵³ Nansen Initiative Protection Agenda, above n 5, 8, emphasis added. See also, 18.

⁵⁴ Ibid, 16, also 34.

this report therefore considers the potential for free movement to address the needs of both groups together.

The next section provides an overview of African free movement agreements themselves, explaining their origins and objectives, and setting them in their legal and political context.

3.1

AFRICA'S REGIONAL ECONOMIC COMMUNITIES

Agreements for the free movement of persons between states in Africa sit within Africa's regional and sub-regional economic communities – that is, the continent-wide African Economic Community (AEC) and the smaller Regional Economic Communities (RECs). The AEC was established in 1991 under the auspices of the Organisation of African Unity (OAU) to promote economic, social and cultural development on the continent and 'establish, on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to achieve a self-reliant development'.⁵⁵ The Treaty Establishing the African Economic Community (commonly known as the 'Abuja Treaty') sets out a six stage process for the Community's establishment, including strengthening of the existing RECs, increasing integration between RECs, removal of trade barriers, establishment of an African Common Market, and ultimately regional financial institutions.⁵⁶ Ultimately, African regional economic integration serves the broader objectives of the AU to achieve solidarity amongst African countries, promote African interests at the global level, and 'enable the continent to play its rightful role in the global economy and in international negotiations'.⁵⁷

55 Treaty establishing the African Economic Community (adopted 3 June 1991, entered into force 12 May 1994) art 4(1)(b) (Abuja Treaty). For a full list of objectives, see Abuja Treaty, art 4.

56 Treaty establishing the African Economic Community (adopted 3 June 1991, entered into force 12 May 1994) (Abuja Treaty); see generally Apuuli, above n 56, 148-9.

57 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) art 3.

Within the AEC, Africa has eight official RECs.

These are:

- Arab Maghreb Union (UMA)
- Common Market for Eastern and Southern Africa (COMESA)
- Community of Sahel-Saharan States (CEN-SAD)
- East African Community (EAC)
- Economic Community of Central African States (ECCAS)
- Economic Community of West African States (ECOWAS)
- Intergovernmental Authority on Development (IGAD)
- Southern African Development Community (SADC)

There is some overlap in the membership of Africa's eight RECs – the Democratic Republic of Congo, for example, is a member of COMESA, ECCAS and SADC.⁵⁸ This creates challenges in implementation, due to duplicated efforts, limited resources, and the overlapping and potentially conflicting commitments of states.⁵⁹ Nevertheless, Africa's RECs remain the 'building blocks' for the continental framework.⁶⁰ Their importance in addressing disaster displacement in Africa is recognised in the Nansen Initiative Protection Agenda, which emphasises that 'the African Union and the African regional economic communities... are of primary importance for developing integrated responses'.⁶¹

3.2

FREE MOVEMENT IN AFRICA

3.2.1

Introduction and key components

The free movement of persons has been a key goal of the AEC since its establishment.⁶² The Abuja Treaty envisages the gradual realisation of free movement on the continent through a bottom-up process of liberalisation of travel restrictions.⁶³ To date, however, progress on free movement in Africa has occurred primarily at the sub-regional level, within Africa's RECs. Indeed, free movement in many of Africa's RECs pre-dates the establishment of the AEC itself.

African agreements for the free movement of persons are part of wider efforts at regional integration, which aim to further economic development on the continent. To this end, free movement can reinforce and diversify states' labour forces and facilitate free trade in goods and services between states.⁶⁴ As noted above, however, the economic aims of regional integration in Africa are not opposed to human interests. In the EAC, for example, one of the stated objectives of the Community is 'the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development within the Partner States and which would in turn, raise the standard of living and improve the quality of life of their populations'.⁶⁵ Moreover, better managed migration can have significant benefits for human rights and the rule of law

58 For a complete list of Member States of each of Africa's RECs see Annex 1.

59 See MME on the Move: A Stocktaking of Migration, Mobility, Employment and Higher Education in Six African Regional Economic Communities, a report by the Africa-EU Migration, Mobility and Employment (MME) Partnership Support Project (2013) (MME on the Move report) esp Ch 1.

60 Apuuli, above n 56, 145.

61 Nansen Initiative Protection Agenda, above n 5, 10.

62 Though the desire for free movement in Africa dates back to the post-independence push for pan-African political and economic integration. See African Union Commission and the International Organization for Migration, Study on the Benefits and Challenges of Free Movement of Persons in Africa (January 2018) (AU-IOM Free Movement Report) 19.

63 Abuja Treaty, Art 43(1). See also, African Union Executive Council, Migration Policy Framework for Africa (2006) EX.CL/276 (IX) 4-5, 12.

64 See Ottilia Anna Maunganidze, 'Freedom of Movement: Unlocking Africa's Development Potential' Policy Brief for Institute of Security Studies (2017) 2.

65 The Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) (EAC Treaty) Art 5(3)(b).

in African states.⁶⁶ Indeed, this is a core theme of the recently adopted Migration Compact, which ‘intends to reduce the risks and vulnerabilities migrants face’.⁶⁷ The Compact has been widely supported by African states, who have emphasised the importance of ‘mainstreaming migration into development strategies’ on the continent.⁶⁸

While most RECs have either adopted, or proposed, agreements for the free movement of persons between states, implementation has been slow, hampered by insufficient political will, security concerns and the economic disparities between states.⁶⁹ To date, implementation in practice has occurred only in ECOWAS and the EAC.⁷⁰

The free movement of persons in Africa is to be progressively realised in three phases.

These are:

- **free movement of persons,**
- **right of residence, and**
- **right of establishment.**

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. The three phases of free movement are set out in the AEC’s Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and

Right of Establishment (AEC Free Movement Protocol) as follows:

The objective of this Protocol is to facilitate the implementation of the Treaty Establishing the African Economic Community by providing for the progressive implementation of free movement of persons, right of residence and right of establishment in Africa.⁷¹

3.2.2

Regional and sub-regional agreements

Free movement agreements in Africa’s RECs, as well as at the whole-of-region level, generally confer rights of movement, residence and establishment on citizens of Member States of the same economic community. As will be seen, some agreements have been adopted and entered into force, others have been adopted but are not yet in force, and others are still in draft form and subject to ongoing negotiation. The status of each agreement will be noted below; however, for the sake of simplicity, the relevant agreements will all be considered and analysed in the same way in Section 4 of this report.

3.2.2.1

AEC

The African Economic Community (AEC) comprises all Member States of the AU.⁷² Upon its establishment in 1991, states agreed to ‘adopt, individually, at bilateral or regional levels, the necessary measures, in order to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment by their nationals within the Community.’⁷³ Region-wide free movement was endorsed more recently in Agenda 2063, Africa’s 50-year strategic framework, adopted in 2015. ‘Aspiration 2’ of Agenda 2063 is ‘an

⁶⁶ AU-IOM Free Movement Report, above n 63, 53.

⁶⁷ See Migration Compact, above n 18, para 12.

⁶⁸ African Union, Draft Common African Position (CAP) on the Global Compact for Safe, Orderly and Regular Migration (October 2017) preambular para 12. Indeed, during negotiations for the Migration Compact, African states had requested an additional, separate objective on migration in the context of environmental degradation and climate change. See Kälin, above n 18, 2.

⁶⁹ A 2013 report coordinated by ICMPD notes some African states’ ‘fear that immigrants will flock to the wealthier countries, drain their public purse and take jobs away from local communities’. See MME on the Move report, above n 60, esp 121. See generally AU-IOM Free Movement Report, above n 63, Ch IX.

⁷⁰ Ibid.

⁷¹ Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (adopted 29 January 2018) (AEC Free Movement Protocol) Art 2 (emphasis added); see also Art 5(1).

⁷² For a full list of states of the AEC, as well as Africa’s other RECs, see Annex 1.

⁷³ Abuja Treaty, Art 43(1).

integrated continent', including accelerated progress towards free movement of people.⁷⁴

The AEC's Free Movement Protocol was finally adopted in early 2018.⁷⁵ So far it has been signed by 32 African states,⁷⁶ though it will not enter into force until at least 15 have ratified it.⁷⁷ While the AEC Protocol envisages continent-wide free movement of persons, it preserves the central role of the RECs in free movement, as 'the focal points for promoting, monitoring and evaluating implementation of this Protocol and reporting the progress towards free movement of persons in their respective regions.'⁷⁸ Also at the regional level, the AU Passport was launched in 2016,⁷⁹ though to date it has only be issued to Heads of State and other select government representatives.

3.2.2.2 COMESA

The Common Market for Eastern and Southern Africa (COMESA) comprises Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, South Sudan, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. COMESA states adopted a Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements in 1981 as part of the Treaty establishing the Preferential Trade Area for

Eastern and Southern Africa,⁸⁰ and a Protocol on the Free Movement of Persons, Labour, Services, the Right of Establishment and Residence (COMESA Protocol) in 1998.⁸¹ The COMESA Free Movement Protocol has not yet entered into force, and in July 2017, nearly 20 years after its adoption, Burundi was the only state to have ratified it.⁸²

The COMESA Protocol explicitly envisages the conclusion of bi-lateral agreements between Member States for the accelerated implementation of free movement,⁸³ and in practice, some states have waived visa requirements for citizens of other COMESA Member States.⁸⁴

3.2.2.3 EAC

The East African Community (EAC) comprises Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. The Protocol on the Establishment of the East African Community Common Market (EAC Protocol)⁸⁵ was adopted in 2009 and came into force in 2010 upon ratification by all Partner States of the EAC. It deals with 'Free Movement of Persons and Labour'⁸⁶ and 'Rights of Establishment and Residence'.⁸⁷ Implementation is to be 'in accordance with the East African Community Common Market (Free Movement of Persons) Regulations',⁸⁸ which are annexed to the Protocol

74 'Agenda 2063: The Africa We Want' Framework Document of the African Union Commission (September 2015) 13.

75 Abebe, above n 21.

76 For a full list of states who have signed the Protocol, see <<https://au.int/en/treaties/protocol-treaty-establishing-african-economic-community-relating-free-movement-persons>>.

77 AEC Free Movement Protocol, Art 33(1). Only one state – Rwanda – has ratified it to date.

78 AEC Free Movement Protocol, Art 28(1). The AEC also directs RECs to harmonise their own protocols and procedures to be consistent with the AEC Protocol, with the goal of achieving this by 2020. AEC Free Movement Protocol, Art 28(3),

79 See 'African Union Passport Launched during Opening of 27th AU Summit in Kigali', African Union (16 July 2016) <<https://au.int/en/pressreleases/20160716-2>>.

80 Treaty establishing the Preferential Trade Area for Eastern and Southern Africa (adopted December 1981, entered into force September 1992).

81 Protocol on the Free Movement of Persons, Labour, Services, the Right of Establishment and Residence (adopted 20 June 1998, not yet in force) (COMESA Free Movement Protocol).

82 Rwanda is reportedly in the process of doing so. See 'Chiefs of Immigration meet to review status of free movement in the region' COMESA website (26 July 2017) <<http://www.comesa.int/chiefs-of-immigration-meet-to-review-status-of-free-movement-in-the-region/>>.

83 COMESA Protocol, Art 13

84 Such states include Mauritius and Seychelles. See 'COMESA – Free Movement of Persons' United Nations Economic Commission for Africa website (undated) <<https://www.uneca.org/pages/comesa-free-movement-persons>>.

85 EAC Protocol.

86 EAC Protocol, Part D.

87 EAC Protocol, Part E.

88 EAC Protocol, Art 7(9).

itself.⁸⁹ The EAC Protocol has been more widely ratified than many others. Several states have ratified the EAC Protocol but not the agreements of other REC of which they are also members.⁹⁰

While Partner States of the EAC were relatively quick to adopt the Protocol, implementation in practice has been inconsistent. There has been considerable progress between some states – in 2018, Kenya launched ‘one stop’ border posts with both Uganda and Tanzania, aimed at expediting movement of persons and goods between the two countries.⁹¹ However, there have been sticking points elsewhere. South Sudan, who officially joined the EAC only in March 2016,⁹² the last state to adopt the EAC Protocol, does not yet provide visa free access to EAC citizens, and in turn Uganda and Kenya do not provide visa free access to citizens of South Sudan.⁹³

3.2.2.4 ECCAS/CEMAC

The Economic Community of Central African States (ECCAS) comprises Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo,

Equatorial Guinea, Gabon, Rwanda and São Tomé and Príncipe. ECCAS states adopted a Protocol relating to the Freedom of Movement and Right of Establishment of Nationals of Member States within the Economic Community of Central African States (ECCAS Protocol) in 1983,⁹⁴ which was further endorsed by a 1990 ECCAS Decision.⁹⁵ Implementation has been negligible; while some ECCAS states allow free movement of citizens between them,⁹⁶ others still require visas of citizens from other ECCAS states.⁹⁷ Some of the reasons cited for the lack of progress in free movement in ECCAS are states’ security concerns and concerns about the spread of disease.⁹⁸

In 1999, a smaller bloc of six ECCAS Member States established the Economic and Monetary Community of Central Africa (CEMAC). Though not an officially recognised REC within the African Union, in 2013, CEMAC states concluded their own agreement for the free movement of persons between them,⁹⁹ which entered into force in 2017.¹⁰⁰

3.2.2.5 ECOWAS

The Economic Community of West African States (ECOWAS) comprises Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

89 See The East African Community Common Market (Free Movement of Persons) Regulations, Annex I to the EAC Protocol (EAC Secretariat, November 2009) (EAC Free Movement of Persons Regulations); The East African Community Common Market (Free Movement of Workers) Regulations, Annex II to the EAC Protocol (EAC Secretariat, November 2009) (EAC Free Movement of Workers Regulations); The East African Community Common Market (Right of Establishment) Regulations, Annex III to the EAC Protocol (EAC Secretariat, November 2009) (EAC Right of Establishment Regulations).

90 For example, Kenya has ratified the EAC Protocol but not COMESA; Tanzania has ratified EAC Protocol but not SADC. See generally, Africa Regional Integration Index, available at <<https://www.integrate-africa.org>>.

91 See ‘Efficient border crossing to boost trade between Kenya and Uganda with launch of Busia one stop border post’, EAC Press Release (Busia, 24 February 2018) <<https://www.eac.int/press-releases/1002-efficient-border-crossing-to-boost-trade-between-kenya-and-uganda-with-launch-of-busia-one-stop-border-post>>. East Africa’s One Stop Border Post Project’ African Development Bank (25 October 2018) <<https://www.afdb.org/en/news-and-events/east-africas-one-stop-border-post-project-18611/>>.

92 South Sudan automatically adopted the EAC Common Market Protocol upon joining the EAC. See EAC Treaty, Art 151(4).

93 ‘EAC Update Issue No. 117’ (06 March 2018) <<https://www.eac.int/documents/category/newsletter>>.

94 Protocol relating to the Freedom of Movement and Right of Establishment of Nationals of Member States within the Economic Community of Central African States, Annex VII of the Treaty Establishing the Economic Community of Central African States (adopted 18 October 1983, entered into force 1 January 1985).

95 ECCAS Decision No. 03/CCEG/VI/90 (1990), cited African Development Bank African Development Fund, ‘Economic Community of Central Africa States (ECCAS) – Regional Integration Assistance Strategy Paper for Central Africa, 2005-2009 (July 2005) (AfDB Report).

96 Namely Congo, Central African Republic, Cameroon and Chad. *Ibid.*, v.

97 *Ibid.*, 24.

98 *Ibid.*, 14.

99 Traite Instituant la Communauté Economique et Monétaire de l’Afrique Centrale (adopted 16 March 1994, entered into force 2017) (CEMAC Treaty).

100 ‘Six central African countries seal deal on visa-free movement’ Daily Nation (01 November 2017) <<https://www.nation.co.ke/news/africa/Six-central-African-countries-seal-deal-on-free-movement/1066-4165364-8ccw8wz/index.html>>.

ECOWAS Member States signed their first Protocol relating to Free Movement of Persons, Residence and Establishment (ECOWAS Protocol) in 1979.¹⁰¹ It has been supplemented several times and, in total, there are now five separate ECOWAS Protocols addressing the issue.¹⁰²

Free movement arrangements have been better implemented in ECOWAS than in Africa's other RECs, though '[w]hile the right of entry and abolition of visa requirements for a 90-day stay have been implemented in all the ECOWAS member countries, there is less progress on the right of residence, right of establishment and access to employment'.¹⁰³ In 2000, ECOWAS introduced a common passport, known as the formally as the ECOWAS travel certificate, and it is in the process of introducing a common visa for non-ECOWAS citizens to cover entry to all Member States.¹⁰⁴ The ECOWAS Commission is also establishing National Steering Committees in certain pilot countries in the region, as part of a Regional Monitoring Mechanism for the Free Movement of Inter-State Passenger Vehicles, Persons and Goods, aimed at finding solutions for remaining obstacles to the full realisation of free movement in the region.¹⁰⁵

3.2.2.6 IGAD

The Intergovernmental Authority on Development (IGAD) formed in 1996¹⁰⁶ and comprises Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda.¹⁰⁷ The promotion of free movement within the region has been one of the key aims of IGAD since its formation.¹⁰⁸ IGAD officially launched the process of negotiating a Protocol on Free Movement of Persons in 2017,¹⁰⁹ and this remains underway.¹¹⁰ The IGAD Regional Migration Policy Framework notes that the EAC Common Market 'provides a template for IGAD to adopt its envisaged protocol on Free Movement of Persons'¹¹¹ and early drafts of the Protocol are modelled closely on the EAC Protocol, with only a small number of modifications.¹¹²

Prior to the drafting of a free movement protocol, free movement arrangements existed on a bilateral basis between some IGAD states

101 ECOWAS Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment (adopted 29 May 1979, entered into force 8 April 1980) (ECOWAS Protocol).

102 ECOWAS Protocol; ECOWAS Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (adopted 29 May 1981) (ECOWAS 1985 Supplementary Protocol); ECOWAS Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of persons, the Right of Residence and Establishment (adopted 1 July 1986) (ECOWAS 1986 Supplementary Protocol); ECOWAS Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment (adopted 13 June 1989) (ECOWAS 1989 Supplementary Protocol); ECOWAS Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right to Establishment) of the Protocol on Free Movement of persons, the Right of Residence and Establishment (adopted 29 May 1990) (ECOWAS 1990 Supplementary Protocol).

103 'Evaluation of the African Union Migration Policy Framework for Africa', Report by the African Migration and Development Policy Centre (2017) 34

104 See 'ECOWAS – Free Movement of Persons', United Nations Economic Commission for Africa (undated) <<https://www.uneca.org/pages/ecowas-free-movement-persons>>.

105 See 'Ghana commits to ECOWAS Free Movement Protocol', Ghana Business News (19 September 2017) <<https://www.tralac.org/news/article/12155-ghana-commits-to-ecowas-free-movement-protocol.html>>.

106 Agreement Establishing the Inter-Governmental Authority on Development (IGAD) (adopted 21 March 1996) (Agreement Establishing IGAD). IGAD superseded the Intergovernmental Authority on Drought and Development, which had been established ten years earlier (in 1986) to facilitate inter-state cooperation on the management of drought and other disasters. See generally 'Intergovernmental Authority for Development: History' African Union <<https://au.int/en/recs/igad>>.

107 IGAD membership overlaps considerably with two other African RECs – all IGAD Members States except Somalia and South Sudan are also members of COMESA, while Kenya, South Sudan and Uganda are also members of the EAC.

108 Agreement Establishing IGAD, Art 7.

109 Negotiations were officially launched in July 2017. See 'IGAD Launches Negotiations on Protocol on Free Movement of Persons', IGAD website (3 July 2017) <<https://igad.int/divisions/economic-cooperation-and-social-development/2016-05-24-03-16-37/1588-igad-launches-negotiations-on-protocol-on-free-movement-of-persons>>.

110 The national consultation process for the Protocol concluded in September 2018 with formal negotiations due to commence soon. See 'IGAD Closes National Consultations on Free Movement of Persons and Transhumance' IGAD website (31 September 2018) <<https://igad.int/divisions/health-and-social-development/1932-igad-closes-national-consultations-on-free-movement-of-persons-and-transhumance>>.

111 IGAD Regional Migration Policy Framework, adopted by the 45th Ordinary Session of the IGAD Council of Ministers, Addis Ababa, Ethiopia (11 July 2012) 16.

112 For example, the EAC Protocol's commitment to 'encourage the exchange of young workers between the Partner States' (Art 10(8)) is not replicated in the IGAD Draft Protocol.

– for example, between Ethiopia and Kenya, and Ethiopia and Djibouti. While the IGAD Protocol is yet to be adopted, it could provide a significant development given the scale of disaster displacement in the region.¹¹³

3.2.2.7 SADC

The Southern African Development Community (SADC) comprises Angola, Botswana, Comoros, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe. The SADC Protocol on the Facilitation of Movement of Persons (SADC Protocol) was signed on 18 August 2005.¹¹⁴ Despite wide acknowledgement of the importance of free movement for the region,¹¹⁵ it has not yet entered into force. Only six SADC Member States have ratified the Protocol,¹¹⁶ though many other SADC Member States have concluded bilateral agreements exempting each other from visa requirements.¹¹⁷

The SADC Protocol is somewhat more cautious in tone than the other RECs. It emphasises the need to ‘adopt a flexible approach in order to accommodate disparities in the levels of economic development among Member States and the need to redress imbalances in large-scale population movements within the Community’.¹¹⁸

3.2.2.8 OTHERS

The Arab Maghreb Union (AMU) was established in 1989 and comprises Algeria, Libya, Mauritania, Morocco and Tunisia.¹¹⁹ The free movement of persons is one of the AMU’s objectives;¹²⁰ however, the Union’s activities have been stymied by disputes over the Western Sahara, and it remains ‘the least integrated region on the continent’.¹²¹ Less formal ties between three of the AMU Member States – namely, Libya, Morocco and Tunisia – have facilitated the relaxation of borders between them,¹²² but there are no signs of a more formal agreement in the region soon.

The Community of Sahel-Saharan States (CEN-SAD) was also established in 1998, setting free movement as a core objective;¹²³ however, a draft agreement on ‘Free Movement and Establishment of Persons within the territory of Member States of the Community of Sahel-Saharan States’, inspired by the text of the ECOWAS Protocol, was never adopted.¹²⁴ What success there has been in implementing free movement in the region has been attributed to its significant overlap with ECOWAS.¹²⁵

113 For example, in 2016, 63 per cent of sudden-onset disaster displacement in Africa occurred in the East African region, with several IGAD Member States (Ethiopia, Somalia, Sudan and South Sudan) among the most affected. IDMC Africa report, above n 2, 20.

114 SADC Protocol on the Facilitation of Movement of Persons (adopted 18 August 2005, not yet in force) (SADC Protocol).

115 See ‘Immigration Sub-Sub Committee & other Experts Consultative Meeting on Free Movement of Persons & Implementation of the African Passport’ SADC website (6 April 2017) <<https://www.sadc.int/news-events/news/immigration-sub-sub-committee-other-experts-consultative-meeting-free-movement-persons-implementation-african-passport/>>.

116 These are Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zambia. This falls short of the nine countries required for the Protocol to enter into force. See SADC Protocol, Art 36.

117 AfDB Report, above n 96, 5-6

118 SADC Protocol, preambular para 3.

119 Treaty Establishing the Arab Maghreb Union (AMU) (adopted 17 February 1989, entered into force 1 July 1989) (AMU Treaty)

120 AMU Treaty, Art 2.

121 Ottilia Anna Maunganidze, ‘Freedom of Movement: Unlocking Africa’s Development Potential’ ISS Policy Brief 111 (December 2017); see also ‘The Maghreb Union is one of the world’s worst-performing trading blocs. Here are five ways to change that’, World Economic Forum Report (1 June 2017).

122 See, eg, ‘AMU – Free Movement of Persons’, United Nations Economic Commission for Africa (undated) <<https://www.uneca.org/pages/amu-free-movement-persons>>.

123 Treaty on Establishment of Community of Sahel-Saharan States (adopted 4 February 1998) Art 1(2).

124 ‘Assessing Regional Integration in Africa: Towards an African Continental Free Trade Area’, Report by the Economic Commission for Africa (June 2012) 70.

125 See ‘CEN-SAD – Free Movement of Persons’, United Nations Economic Commission for Africa (undated) <<https://www.uneca.org/pages/cen-sad-free-movement-persons>>.

4

ANALYSIS

This section analyses African regional and sub-regional free movement agreements for their potential to address the protection needs of disaster displaced persons. It describes the features and provisions of the agreements that will be most relevant to disaster displaced persons, noting commonalities and differences across the various agreements as appropriate. It then analyses the potential impact of these features and provisions on disaster displaced persons, and assesses the extent to which they could fulfil, or undermine, their protection needs. This Part has three main sub-sections. These correspond to the three core protection needs of disaster displaced persons, set out in section 2.3 above.

They are:

- **access to territory,**
- **status and rights during stay, and**
- **opportunities for lasting solutions.**

As noted at the outset, this report analyses the text of Africa's regional and sub-regional free movement agreements themselves. The implementation of these agreements in practice is outside the scope of this report, and should be considered as part of future research. As also noted at the outset, this report analyses the potential of free movement agreements to address the needs of both persons displaced following a disaster, and persons who move in order to avoid a disaster. Both groups are discussed together in the sections below, as the analysis of free movement agreements did not suggest any significant differences between them. This may warrant further attention, however, as future research on the operation of free movement at the national level and in practice may reveal considerations or impacts not immediately evident in the text of the agreements themselves.

4.1

ACCESS: ACCESS TO TERRITORY FOR DISASTER DISPLACED PERSONS

This sub-section analyses access to territory for disaster displaced persons under African free movement agreements. It considers both legal

access – that is, eligibility for free movement under relevant agreements, including the effect of any exclusions – as well as practical access – that is, the procedural and financial requirements of free movement in practice.

4.1.1

Broad eligibility

The broad scope of eligibility under free movement agreements is the key distinguishing feature of such agreements, particularly when compared with other cross-border mobility mechanisms. It is also the key advantage of free movement agreements as a means of providing access to territory for disaster displaced persons.

The regional and sub-regional free movement agreements reviewed for this study all confer the right of entry to Member States on ‘citizens’ of other Member States of the same REC. This contrasts with other migration pathways, which are generally limited to individuals with specific skills or qualifications, students and other specifically defined individuals,¹²⁶ as well as international protection mechanisms, such as refugee law, which depend on an individual meeting specific eligibility criteria (for example, the definition of a refugee).¹²⁷

Broad eligibility for free movement also contrasts with mobility mechanisms catering more specifically to disaster displaced persons, which also include specific eligibility criteria. For example, to qualify for a ‘humanitarian protection visa’ in Central America, it is a recommendation that a person must demonstrate they have been ‘directly and seriously affected’ by a disaster.¹²⁸

The absence of specific eligibility criteria under free movement agreements means that those

who move in the context of a disaster do not need to ‘prove’ they are disaster displaced persons to access territory and safety. This is a significant advantage given the multi-causal nature of disaster displacement and the well-recognised difficulties associated with identifying ‘disaster displaced persons’.¹²⁹ It is especially significant in Africa, where the prevalence of slow-onset disasters, and the frequent co-existence of poverty, conflict and underdevelopment, make such difficulties even more pronounced.

Access to territory under free movement agreements in Africa is not universal, however – the requirement of ‘citizenship’ will itself be a hurdle for many.¹³⁰ In 2016, the United Nations High Commissioner for Refugees (UNHCR) estimated that there were more than 700,000 stateless persons in Africa.¹³¹ Stateless persons displaced in the context of a disaster will be ineligible for free movement. Moreover, free movement agreements are limited to citizens of Member States of the same REC. They will not facilitate inter-regional movement between African states, including many neighbouring states, that are not members of the same REC.¹³² There are also several other limitations on eligibility under African free movement agreements, which are discussed in the sections below.

4.1.2

State discretion to suspend and exclude

Cross-border mobility mechanisms that rely on state discretion, rather than legal obligation, provide less predictable sources of

¹²⁶ For example, under family reunification or private sponsorship arrangements.

¹²⁷ See generally, Elizabeth Ferris and Jonas Bergmann, ‘Soft law, migration and climate change governance’ (2017) 8(1) *Journal of Human Rights and the Environment* 6, 7.

¹²⁸ See *A Guide to Effective Practices for RCM Member Countries: protection for persons moving across borders in the context of disasters* (2016), esp Part II(A).

¹²⁹ See above, Section 2.1. Participants in the Nansen Initiative’s Southern Africa Regional Consultation specifically noted the potential for free movement agreements to respond to ‘people’s different reasons for moving in disaster contexts and the challenge of distinguishing between forced and voluntary movements’. See Nansen Initiative Southern Africa Report, above n 8, 5.

¹³⁰ Statelessness also leads to considerable challenges in obtaining other forms of identity documentation.

¹³¹ UNHCR reported that there were 711,589 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, *Global Trends 2017* (25 June 2018) Annex Table 1.

¹³² For a full list of Member States of Africa’s RECs see Annex 1.

protection for disaster displaced persons.¹³³ Despite the generally broad scope of eligibility described above, the free movement agreements reviewed for this study all provided significant discretionary powers to Member States to suspend free movement in certain circumstances, or to exclude specific individuals or groups from their territory.

Most of Africa's regional and sub-regional free movement agreements include provisions that allow Member States to suspend free movement for reasons of national security, public policy, public order and/or public health.¹³⁴ Some agreements also allow other, more specific reasons – for example, 'on the grounds of... influx of persons as refugees'.¹³⁵ Generally, all that is required to suspend free movement under such provisions is that the Member State notify other Member States of the same REC. Under the COMESA Protocol, suspension is limited to 12 months.¹³⁶ Other agreements do not specify a time limit.

The rights of Member States to exclude certain persons from accessing free movement is similarly broad. For example, under the ECOWAS Protocol, 'Member States shall reserve the right to refuse admission into their territory any Community citizen who comes within the category of inadmissible immigrants under its laws'.¹³⁷ In many Member States, this category is broad, including 'undesirable persons'¹³⁸ and those who are unable to financially support themselves.¹³⁹

Discretionary powers of suspension and exclusion under Africa's free movement agreements are broad,¹⁴⁰ and according to some commentators, give African states 'the effective right of veto over the entry of any particular group'.¹⁴¹ Such powers could significantly impede access to territory for disaster displaced persons. Where the impact of a disaster has led to, or been exacerbated by, poverty and lack of livelihoods, individuals may fall foul of 'prohibited' or 'inadmissible' immigrant provisions, while suspension provisions aimed at widespread disturbances and large scale influxes seem likely to capture large-scale and/or sudden-onset disaster situations.

The actual impact of discretionary powers on access to territory for disaster displaced persons will depend on the domestic legislation and practice of individual African states. This can only be assessed over time and following the full adoption and implementation of relevant agreements. However, experience in other contexts suggests it is not merely theoretical. In the lead-up to the 2011 Horn of Africa drought and famine, Kenya closed its borders with Somalia, citing national security concerns.¹⁴² In a different context, during the 2014-16 Ebola outbreak, several West African states closed their borders in an attempt to stop the spread of the disease.¹⁴³

4.1.3

Documentation and financial requirements

Access to personal documentation is a key protection concern for disaster displaced persons. It guarantees a person's status under domestic law and right to stay in the host territory, and is usually necessary to secure assistance with other basic needs, including

133 See generally, Nansen Initiative Protection Agenda, above n 5, 28.

134 EAC Protocol, Art 7(5) (public policy, public security or public health); ECOWAS 1985 Supplementary Protocol, Art 8(1) (internal security); IGAD Draft Protocol, Art 1(5) (public policy, public security or public health); SADC Protocol, Art 8 (national security, public policy, public order or public health); ECCAS Protocol, Art 3(4) (public order, public safety and public health); CEMAC Treaty, Art 27(a) (public policy, public security and public health).

135 COMESA Protocol, Art 7(1).

136 Though it may be extended by the Council of the Common Market. See COMESA Protocol, Art 7(2).

137 ECOWAS Protocol, Art 4

138 For example, in the Gambia and Sierra Leone. See generally, Aderanti Adepoju, Alistair Boulton and Mariah Levin, 'Promoting integration through mobility: Free movement under ECOWAS' UNHCR New Issues in Refugee Research, Research Paper No. 150 (December 2007) Table 3.

139 For example, in the Gambia, Ghana, Nigeria, Sierra Leone. *Ibid.*

140 For example, in the European Union, state discretion is much more limited. See Collett et al, above n 49, 25.

141 *Ibid.*

142 'Somalia: Kenya Closes Its Border With Somalia' All Africa (19 December 2009); see also, Zewdu and Hugo, above n 7, 41.

143 'Keeping Ebola at bay along West African borders' International Federation of Red Cross and Red Crescent Societies (28 July 2015) <<http://www.ifrc.org/en/news-and-media/news-stories/africa/liberia/keeping-ebola-at-bay-along-west-african-borders-68945/>>.

food, health care, housing and education.¹⁴⁴ Personal documentation is also a fundamental pre-requisite for access to territory under free movement agreements.¹⁴⁵

African free movement agreements all require individual citizens of Member States to provide an approved travel document, as defined by the relevant agreement.¹⁴⁶ Most commonly, this is an international passport;¹⁴⁷ however, several agreements envisage the use of alternative travel documents, including regional passports and even national identity cards. The AEC Protocol states:

“travel document” means a passport which complies with the International Civil Aviation Organisation standard for travel documents, or any other document identifying a person issued by or on behalf of a Member State or the Commission which is recognized by the host Member State.¹⁴⁸

The use of travel documents other than international passports is often provided for under separate agreements, concluded between smaller groups of Member States in the same REC. For example, while the SADC Protocol generally requires citizens to provide an international passport,¹⁴⁹ Member States may enter into bilateral agreements for simplified border passes/permits for citizens who reside in border areas.¹⁵⁰ The EAC Protocol also requires a passport, or – where Partner States agree – a national identity

card.¹⁵¹ In 2014, Uganda, Kenya and Rwanda signed an agreement allowing citizens to travel between the three states using national Identity Cards.¹⁵²

Some free movement agreements contain documentation requirements in addition to a valid travel document. For example, under the ECOWAS Protocol, travellers must provide an international health certificate.¹⁵³ Additional requirements may be found at the national level as well. For example, Nigeria’s 2017 Immigration Regulations require an onward or return transportation ticket as a condition of entry.¹⁵⁴ Persons wishing to cross a border with a vehicle will also need to meet additional documentation requirements.¹⁵⁵

In addition to documentation requirements, there may be significant financial requirements for access to free movement agreements in practice. While there is generally no fee for entry to a state,¹⁵⁶ fees are imposed for residence or establishment permits, which must be obtained by any person wishing to undertake income-generating activity in a host state.¹⁵⁷ Permit fees vary greatly – within ECOWAS alone, they range from USD\$10 (Côte d’Ivoire) to more than US\$500 (The Gambia).¹⁵⁸ In some states, fee waivers have been made available for specific groups. In

144 See generally, Nansen Initiative Protection Agenda, above n 5, 28. In the refugee context, the New York Declaration for Refugees and Migrants recognises the importance of documentation ‘as a protection tool and to facilitate the provision of humanitarian assistance’. See New York Declaration, para 71.

145 In some states, documentation is required in order to depart the country of origin as well.

146 See, eg, AEC Free Movement Protocol, Art 7(1)(b).

147 For example, the IGAD Protocol retains the international Travel Passport as the only permissible travel document. IGAD Draft Protocol, Art 2. The AEC Free Movement Protocol envisages an eventual African passport to facilitate free movement across the continent. See AEC Draft Protocol, Art 10.

148 AEC Free Movement Protocol, Art 1.

149 SADC Protocol, Art 1, 14(2)(b).

150 SADC Protocol, Art 13(e); see also, AEC Free Movement Protocol, Art 12.

151 EAC Protocol, Art 1, 9(2); see also, EAC Free Movement of Persons Regulations, Reg 5(2); EAC Free Movement of Workers Regulations, Reg 5(2)(a); EAC Right of Establishment Regulations, Reg 5(2)(a).

152 ‘The Experience of Cross Border Travel Using National ID’ Trade Mark East Africa (12 January 2017) <<https://www.trademarka.com/news/the-experience-of-cross-border-travel-using-national-id/>>.

153 ECOWAS Protocol, Art 3. Member States are obliged to provide such travel documents to their nationals. ECOWAS 1985 Supplementary Protocol, Art 2(1). See also, ECCAS Protocol, Art 3(1).

154 Immigration Regulations 2017 (Nigeria) Reg 6(3). The Regulations support the Immigration Act 2015 (Nigeria).

155 For example, under the AEC Protocol, this includes a driver’s licence, evidence of ownership, certificate of road worthiness and insurance policy. See AEC Protocol, Art 11.

156 EAC Free Movement of Persons Regulations, Reg 5(8). ECOWAS states officially don’t charge fees for 90 day entry. Adepoju et al, above n 139, 6. Even the SADC Protocol, which permits the continuation of visa requirements where deemed necessary by Member States, provides that they should be issued free of charge at the port of entry. SADC Protocol, Art 13(f), 15.

157 These are discussed further in Section 4.2.2, below.

158 Adepoju et al, above n 139, 7, also Table 2.

Ghana, for example, permit fees are waived for refugees referred by UNHCR.¹⁵⁹

An individual's financial capacity may affect their access to territory under free movement agreements in other ways as well. Under the SADC Protocol, it is a condition of entry that a citizen has 'evidence of sufficient means of support for the duration of the visit'.¹⁶⁰ A person without sufficient financial means to support him or herself may also be excluded from free movement as a 'prohibited' or 'inadmissible' immigrant under a Member State's domestic law.¹⁶¹ Just obtaining a valid travel document and/or health certificate may be costly, and there are reports of unofficial payments being made at African borders to facilitate entry and stay.¹⁶²

The burden of meeting documentation and financial requirements may exclude large numbers of disaster displaced persons from access to territory under free movement mechanisms.¹⁶³ In sudden-onset disasters, where people have to move quickly, they may not have the time to obtain relevant documentation. Moreover, an estimated 500 million Africans live without any legal proof of their identity,¹⁶⁴ making it extremely difficult to obtain a passport or other valid travel

document.¹⁶⁵ Africa is also a region with high rates of poverty. This may be exacerbated in disaster situations, where impacts on livelihoods mean that, by the time people move, they have often exhausted their financial resources trying to cope.

Simplified documentation and financial requirements under free movement agreements make it more likely that disaster displaced persons will be able to access them. National identity cards may be cheaper and easier to obtain than passports, so agreements such as the one between Uganda, Kenya and Rwanda could facilitate access for greater numbers of people. Fee waiver programs and practical assistance, such as has been provided for refugees under the auspices of UNHCR, could also assist for specific disaster-affected populations.¹⁶⁶

4.1.4

Dealing with irregular movement

A great deal of cross-border movement in Africa is irregular – that is, it takes place outside the lawful channels for entry or stay in the host state.¹⁶⁷ Reducing irregular migration and ensuring respect for the human rights of migrants regardless of status are among the aims of the Migration Compact,¹⁶⁸ and the implementation of free movement agreements is one way to achieve this. However, irregular movement across Africa's notoriously porous borders will continue. It is especially likely to occur in the disaster context, where people may move suddenly, or be unable to meet

159 Ibid, Table 2.

160 SADC Protocol, Art 14(2)(c). A similar requirement may be found at the national level. For example, Nigeria's Immigration Regulations require that a person has made 'adequate arrangements for his maintenance' in Nigeria. Immigration Regulations 2017 (Nigeria) Reg 6(3).

161 See above, Section 4.1.2.

162 Adepoju et al, above n 139, 6; see also Draft Revised Migration Policy Framework for Africa (2017) 6. For example, while Côte d'Ivoire has made significant progress in the domestic implementation free movement agreements, in 2015, Human Rights Watch reported the extortion at checkpoints remained an acute problem in Côte d'Ivoire and undermine free movement in the country. Human Rights Watch, 'Côte d'Ivoire: Extortion by Security Forces Prosecute Violators; Strengthen Anti-Racket Unit' (29 July 2015).

163 See Adepoju et al, above n 139, 7.

164 This figure is from the World Economic Forum and is for sub-Saharan Africa only. See 'Making everyone count: how identification could transform the lives of millions of Africans' World Economic Forum (24 May 2017) <https://www.weforum.org/agenda/2017/05/making-everyone-count-the-case-for-national-identification-systems/?utm_content=bufferae647&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer>.

165 This is due at least in part to the costs associated with obtaining identity documents. See 'Africa's invisible millions survive without ID documents', Equal Times (22 March 2018) <<https://www.equaltimes.org/africa-s-invisible-millions#.Wr20nyN7HOR>>. Some free movement agreements specifically oblige Member States to issue valid travel documents to their nationals in order to facilitate free movement. See, eg, AEC Free Movement Protocol, Art 9(1).

166 See, eg, Adepoju et al, above n 139, 7.

167 For a definition of irregular migration, see above, n 19.

168 Migration Compact, above n 18, paras 11, 15.

the documentation and financial requirements outlined above.¹⁶⁹

International protection mechanisms, such as refugee law, deal specifically with the issue of irregular arrival;¹⁷⁰ migration mechanisms, however, generally do not. In practice, a lack of requisite documentation can lead to expulsion and deportation. For example, there have been numerous reports of EAC citizens being arrested and expelled from Tanzania for their failure to meet documentation requirements.¹⁷¹ It is significant, therefore, that some of Africa's free movement arrangements do address irregular migration, and even provide for the regularisation of those who enter a Member State unlawfully.

The ECOWAS Protocol obliges Member States to 'ensure or facilitate the obtaining of the correct documents by illegal immigrants, if desired and possible',¹⁷² and to ensure such immigrants' fundamental human rights.¹⁷³ Annexes 2 and 3 of the EAC Protocol provide for the regularisation of individuals whose work permits are cancelled.¹⁷⁴ The SADC Protocol envisages admission of citizens without travel documents, including in situations of 'personal

emergency', though it does not impose any concrete obligations on states in this regard.¹⁷⁵

If utilised by states, regularisation provisions could provide the basis for disaster displaced persons who travel irregularly to have their stay in a host state regularised, rather than continuing to be treated as 'illegal' immigrants or forced to return home. Indeed, this could serve the dual purposes of meeting the disaster displaced person's need for lawful status, and fulfilling states' interests in documenting who is within their borders.¹⁷⁶ However, provisions for the regularisation of irregular arrivals are often qualified. For example, the ECOWAS Protocol provides that regularisation shall be based on a number of factors, which include 'the existence of an ample political consensus making regularisation of stay desirable or necessary'¹⁷⁷ and 'the acceptability of the immigrants by a large section of society'.¹⁷⁸ These qualifications appear to provide an 'opt out' for Member States, particularly in relation to large groups of migrants, in situations where regularisation may not be viewed as politically or socially acceptable.

4.1.5

Relationship with refugee protection

Some disaster displaced persons will also qualify for refugee protection – for example, where 'the effects of a disaster... create international protection concerns by generating violence and persecution'¹⁷⁹ or when 'a government uses a disaster as pretext

169 The reverse may also occur – that is, individuals who enter a country lawfully may later become unlawful when their permission to stay expires. This is discussed further below, in Section 4.2.1.

170 See, eg, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (1951 Refugee Convention) Art 31, which provides that, subject to certain qualifications, 'Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees... coming directly from a territory where their life or freedom was threatened'.

171 See '12 expelled traders given travel papers' Daily Nation (4 May 2012); 'Two Kenyans held in Tanzania for working without permits' The East African (2 March 2018); 'Tanzania expels EAC immigrants, hikes fees' The East African (21 September 2013).

172 ECOWAS 1985 Supplementary Protocol, Art 5(1).

173 As defined under the Universal Declaration of Human Rights. See ECOWAS 1985 Supplementary Protocol, Arts 1, 3(1).

174 EAC Free Movement of Workers Regulations; EAC Right of Establishment Regulations.

175 SADC Protocol, Art 14(3). It provides: 'A State Party may enter into a bilateral agreement with other State Parties regarding the reciprocal handling of travellers without travel documents arriving at ports of entry, and regarding procedures where citizens of a State Party need to be admitted into the territory of another State Party in situations of personal emergency.' Termination of such an agreement remains a State prerogative. SADC Protocol, Art 14(4).

176 It would also go towards fulfilling states' commitments under the Migration Compact to 'facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status'. Migration Compact, above n 18, para 23(i).

177 ECOWAS 1985 Supplementary Protocol, Art 5(2).

178 ECOWAS 1985 Supplementary Protocol, Art 5(2).

179 Nansen Initiative Protection Agenda, above n 5, 27.

to persecute its opponents'.¹⁸⁰ The broader notion of who is a refugee under African regional refugee law – which extends refugee protection to persons compelled to leave their homes owing to 'events seriously disturbing public order'¹⁸¹ – means that refugee protection frameworks have even more potential for disaster displaced persons in the Africa than elsewhere. Indeed, several African states have already taken the view that persons fleeing disasters may qualify for protection under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.¹⁸²

Many of Africa's free movement agreements include explicit provisions relating to refugees and asylum seekers. These provisions are significant, given that refugees constitute a high proportion of those who move across borders in Africa.¹⁸³ Most commonly, Member States reaffirm their commitments to international and regional refugee protection obligations¹⁸⁴ and cooperate in the management of refugees in the region.¹⁸⁵ The AEC Protocol provides that Member States may establish specific procedures for the movement of specific vulnerable groups, including refugees and asylum seekers.¹⁸⁶

While commitments to refugee protection are commendable, the effect of these provisions on refugees' access under the free movement agreements themselves is ambiguous. It is not clear whether they merely preserve additional protections for refugees who move under free movement agreements, or exclude refugees from access to free movement entirely.¹⁸⁷ This ambiguity may be replicated in the domestic legislation of Member States. For example, national legislation in Côte d'Ivoire provides for separate permit cards to be issued to ECOWAS citizens and refugees, without specifying which kind of permit should be issued to those who are refugees and ECOWAS citizens.¹⁸⁸

In ECOWAS, the ECOWAS Commission has endorsed the applicability of free movement to refugees and urged refugee host states to confer the right of residence on refugees who are also ECOWAS citizens.¹⁸⁹ This has occurred in practice – for example, a 2017 Multipartite Agreement between UNHCR, ECOWAS and the Governments of Liberia, Sierra Leone and Nigeria facilitated the award of residence permits to refugees who were ECOWAS citizens in Nigeria.¹⁹⁰

Elsewhere, however, states appear more equivocal.¹⁹¹ For example, the 2017 Nairobi Declaration on Somali Refugees, and its accompanying Comprehensive Plan of Action, recommends that IGAD states 'pursue the

180 Ibid. See also UNHCR, Legal considerations on refugee protection for people fleeing conflict and famine affected countries (5 April 2017).

181 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 (opened for signature 10 September 1969, entered into force 20 June 1974) (1969 African Refugee Convention) Art I(2).

182 See Wood, above n 15, 25.

183 See, eg, MME on the Move Report, above n 60, 25, which states in relation to COMESA: 'Refugees constituted a high proportion of international migrant stocks in several countries in the region (50% in Zambia, 43.4% in the DRC, 38.7% in Uganda, 37.9% in Egypt and 32.9% in Kenya).'

184 SADC Protocol, 28(2); IGAD Draft Protocol, Arts 15(1), 15(3); EAC Protocol, Art 7(8).

185 COMESA Protocol, Art 7(3); IGAD Draft Protocol, Art 15(2); SADC Protocol, Art 28(2). Both the IGAD and SADC Protocol envisage the development of specific MOUs between states parties on refugee management. According to the EAC website, 'Chiefs of Refugee Management are in process of development of the EAC refugee management policy and action plan.' See 'Immigration and Labour' EAC website (undated) <<https://www.eac.int/immigration>>.

186 As well as victims of human trafficking and pastoralists. See AEC Free Movement Protocol, Art 24. The provision stipulates that such procedures must remain consistent with relevant international and regional instruments, though perhaps significantly, does not specifically require that the be consistent with the Protocol itself. AEC Free Movement Protocol, Art 24(1).

187 An analysis of state practice on this issue is outside the scope of this report, but should be considered as part of future research on free movement and disaster displacement. See further, Section 5.3.

188 A Fiche de Libre Circulation (Free Circulation Card) or Carte de Sejour (Residence Card) for nationals of ECOWAS states, and Autorisation Provisoire de Sejour (Temporary Residence Permission) or Carte de Refugie (Refugee Card) for asylum seekers and refugees. See Loi relative a l'Identification Despersonnestau Sejour des Etrangers en Cote d'Ivoire et Portant Abrogation de la No98-448 du 4 Aout 1998 (Côte d'Ivoire) Art 8.

189 See ECOWAS Commission, 'ECOWAS Common Approach on Migration' 33rd Ordinary Session of the Head of State and Government, Ouagadougou (18 January 2008) 10.

190 The agreement included obligations on refugees' home states to issue passports to the refugees and support from UNHCR with the costs of passports and permits. It also required refugees to 'acknowledge that in accepting such passport and residence permits they were voluntarily re-availing themselves of the protection of their countries of origin and hence ceasing to be refugees.' Adepoju et al, above n 139, fn 49.

191 Ibid, 16.

possibility to broaden the [free movement] protocol to benefit Somali refugees',¹⁹² suggesting that it does not do so in its current form. Under the COMESA Protocol, an influx of refugees is grounds for suspending free movement entirely.¹⁹³ Some refugee host states have reportedly been reluctant to allow refugees to regularise their stay under free movement agreements, for fear that this may lead to the withdrawal of existing international support.¹⁹⁴ Some of Africa's main refugee host states – for example, Ethiopia and South Africa – have historically been reluctant to implement free movement at all.¹⁹⁵

Clarifying the relationship between free movement agreements and refugee protection is important for all refugees, and will impact on those refugees who have been, or may be, affected by disaster. Free movement agreements and refugee protection instruments themselves do not appear to be incompatible – for example the 1951 Refugee Convention sets out refugees' rights 'without prejudice to States granting more favourable treatment'.¹⁹⁶ Moreover, states cannot limit the rights afforded to refugees under international law.¹⁹⁷ However, an express commitment by states to ensuring that refugees can also access free movement agreements could greatly enhance the protection potential of such agreements.

192 IGAD, 'Nairobi Comprehensive Plan of Action for Durable Solutions for Somali Refugees', Annex to the 'Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia', Nairobi, Kenya (25 March 2017) Action 5.1.2, emphasis added.

193 COMESA Protocol, Art 7(1) and (2).

194 See Adepoju et al, above n 139, 15-18

195 See generally, Africa Regional Integration Index, available at <<https://www.integrate-africa.org>>; John O. Oucho and Jonathan Crush, 'Contra Free Movement: South Africa and the SADC Migration Protocols' (2001) 48(3) Africa Today 139.

196 See 1951 Refugee Convention, 'Introductory Note by the Office of the United Nations High Commissioner for Refugees'. Further research on the relationship between free movement agreements and the 1951 Refugee Convention would be valuable in identifying any potential incompatibilities.

197 Doing so would put states in breach of their obligations under the 1951 Refugee Convention and/or the 1969 African Refugee Convention.

4.2

STATUS: STATUS AND RIGHTS OF DISASTER DISPLACED PERSONS DURING STAY IN HOST STATES

Lawful status in a host country is essential to ensuring disaster displaced persons' access to assistance and enjoyment of fundamental human rights. This sub-section analyses the status and treatment of disaster displaced persons during their stay in Member States under African free movement agreements. It considers the duration of stay and the rights afforded to citizens by the host state. In particular, it considers the right to conduct employment-generating activities, such as employment and/or business, and protection against forcible return.

4.2.1

Rights during stay

'Protection' for disaster displaced persons consists primarily of 'obtaining full respect for the rights of the individual in accordance with the letter and spirit of applicable bodies of law'.¹⁹⁸ Clarifying the rights of disaster displaced persons during their stay in another territory 'not only ensures respect for the rights and basic needs of those admitted, but also helps avert the risk of secondary movements to another country'.¹⁹⁹

African free movement agreements allow citizens of Member States to enter, stay, move freely within and exit the territory of a host Member State.²⁰⁰ The duration of permitted stay is usually 90 days,²⁰¹ but may be extended

198 Nansen Initiative Protection Agenda, above n 5, 7. This definition was developed by the ICRC and has been adopted by the IASC.

199 Ibid, 28.

200 See, eg, EAC Protocol, Art 7(2)(b); IGAD Draft Protocol, Art 1(2); AEC Free Movement Protocol, Art 6(1).

201 COMESA Protocol, Art 4(1); ECOWAS 1979 Protocol, Art 3; AEC Free Movement Protocol, Art 6(4). SADC provides for a maximum of 90 days per year. SADC Protocol, Art 13(a).

‘subject to permission obtained from the appropriate authorities’.²⁰²

Some of Africa’s free movement agreements confer more specific rights on citizens in host Member States. For example, the SADC Protocol provides citizens granted residence or establishment in another state enjoy all the rights, privileges and obligations provided under the law of that state.²⁰³ The ECOWAS Protocol explicitly incorporates rights from the Universal Declaration of Human Rights,²⁰⁴ and migrant worker rights under the ILO Conventions.²⁰⁵ Some agreements confer specific property rights,²⁰⁶ and there are rights relating to employment and expulsion, that are discussed further in the sections below. Perhaps the strongest statement of rights is found in the ECCAS Protocol, which provides that citizens in host states ‘shall enjoy the same rights and freedoms as the nationals of such State except for political rights and in accordance with the provisions of this Protocol’.²⁰⁷

The EAC and AEC Protocols contain similar provisions relating to the ‘protection’ of citizens under free movement agreements. Under the EAC Protocol, Partner States undertake to ‘guarantee the protection of the citizens of the other Partner States while in their territories’.²⁰⁸ The AEC Protocol includes a slightly qualified version of this provision, providing that citizens ‘shall enjoy the protection of the law of the host Member State, in accordance with the relevant national policies and laws, of the host Member State.’²⁰⁹ What is meant by protection here is not defined, though provisions elsewhere in the

relevant agreements relate to harmonisation of states’ social policies, including in relation to human and peoples’ rights, equal opportunity and protection of the rights of marginalised and vulnerable groups.²¹⁰

Despite these various references to the rights and protection of citizens, human rights guarantees under African free movement agreements remain limited. They are provided in only some agreements and often only in relation to only certain aspects of the agreement – for example, the rights of migrant workers in the ECOWAS Protocol pertain only to expulsion.²¹¹ Moreover, the rights set out in free movement agreements – in particular, rights to work or conduct business – apply only so long as an individual’s stay in the host country remains lawful. Beyond the initial period of stay, an individual must obtain permission for an extension of stay from the authorities of the host country.²¹² Where such permission is not obtained, the individual’s lawful status may expire, resulting in the loss of associated rights under free movement agreements and rendering the individual vulnerable to exploitation, abuse and removal.

Moreover, free movement agreements do not contain the comprehensive rights guarantees of more specific protection mechanisms, such as refugee law.²¹³ Indeed, some rights may even be limited under free movement agreements. Under the EAC Protocol, national laws and policies concerning access to and use of land and premises retain primacy over the rights of workers and self-employed persons.²¹⁴ This is a considerable disadvantage of free movement agreements when compared

202 COMESA Protocol, Art 4(2). See also, ECOWAS Protocol, Art 3(2); AEC Free Movement Protocol, Art 6(5).

203 SADC Protocol, Art 20.

204 ECOWAS 1985 Supplementary Protocol, Arts 1, 3(1).

205 ECOWAS 1986 Supplementary Protocol, Arts 1(1), 16(2).

206 AEC Free Movement Protocol, Art 22; ECOWAS 1985 Supplementary Protocol, Art 7; COMESA Protocol, Art 6(2) and (3).

207 ECCAS Protocol, Art 2(3). Though this ‘shall not be a bar to the sovereign right of the Governments of Member States to expel nationals of another Member State.’

208 EAC Protocol, Art 7(3).

209 AEC Free Movement Protocol, Art 4(4).

210 EAC Protocol, Art 39(2)(b)-(d) and (3)(h).

211 See above, n 206.

212 See, eg, ECOWAS Protocol, Art 3(2). ‘A citizen of the Community visiting any Member State for a period not exceeding ninety (90) days shall enter the territory of that Member State through the official entry point free of visa requirements. Such citizen shall, however, be required to obtain permission for an extension of stay from the appropriate authority if after such entry that citizen has cause to stay for more than ninety (90) days.’ In addition, some agreements provide that authorities may revoke or cancel the permission to stay in certain circumstances. See, eg, EAC Free Movement of Persons Regulations, Reg 7(2).

213 See, eg, 1951 Refugee Convention, Arts 2 to 34.

214 EAC Protocol, Art 15, 19.

with more specific protection mechanisms, such as refugee law, which enumerate the specific rights necessary to ensure individuals' protection.

In one sense, explicit guarantees of fundamental human rights under free movement agreements are unnecessary. As a matter of international law, relevant international and regional human rights instruments apply to all persons within a state's territory, whether nationals or migrants, and irrespective of their incorporation into other agreements or legislation.²¹⁵ This includes general human rights instruments as well as more specific instruments directed, for example, at the rights of migrant workers.²¹⁶ Indeed, in the 2016 New York Declaration for Refugees and Migrants, states reaffirmed their commitment to 'fully protect the human rights of all refugees and migrants, regardless of status'.²¹⁷ The national legislation of individual African states may also provide more comprehensive rights guarantees for those who enter under free movement agreements.²¹⁸ For example, the Constitution of South Africa provides an extensive Bill of Rights that apply to 'everyone', irrespective of nationality or legal status.²¹⁹

However, as has been emphasised by UN Office of the High Commissioner for Human Rights (OHCHR), the application of human rights norms to vulnerable migrants is often

poorly understood.²²⁰ Principle 1 of OHCHR's Principles and Guidelines on the human rights protection of migrants in vulnerable situations is to '[e]nsure that human rights are at the centre of efforts to address migration in all its phases, including responses to large and mixed movements.'²²¹ Thus, explicit recognition of all persons' human rights in free movement agreements would provide a useful reminder to states of their obligations, and a valuable framework for promoting the rights of persons who use them, including disaster displaced persons.²²²

4.2.2

Right to work and conduct business during stay

Access to livelihood opportunities is one of the core protection needs of disaster displaced persons²²³ and the key to achieving self-sufficiency and lasting solutions.²²⁴ The right to work under free movement agreements is therefore a key potential benefit of such agreements for disaster displaced persons, and an advantage over more specific protection mechanisms, under which rights to wage-earning employment may be more limited.²²⁵

The right to work is a feature of all African free movement agreements, which confer the right as part of the latter phases of free movement – that is, the rights to residence and establishment. Under most agreements, the

215 See, eg, the African Commission on Human and Peoples' Rights, Communication No. 71/92: Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) / Zambia (1996) esp para 22.

216 See, eg, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003); ILO Declaration on Fundamental Principles and Rights at Work (International Labour Conference, 86th sess, Geneva, 18 June 1998).

217 New York Declaration, para 5.

218 This could be the subject of further research. See further below, Section 5.3.

219 This is with the exception of certain political rights and rights relating to citizenship. See Constitution of South Africa 1997, ss 19-20.

220 According to OHCHR: 'The international human rights framework that States have put in place provides protection to all persons, including to all migrants. However, the framework's application to migrants who are in situations of vulnerability is often less clearly understood. States (and other stakeholders) therefore lack complete guidance on how to operationalize the framework in such situations'. OHCHR, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (2019) 9 (OHCHR Principles and Guidelines).

221 OHCHR Principles and Guidelines, Principle 1.

222 This was emphasised by participants in the Nansen Initiative's Southern Africa Consultations, who asserted the need for cross-border mobility mechanisms to 'specifically address the human rights of cross-border disaster-displaced persons'. See Nansen Initiative Southern Africa Consultation Report, above n 8, 5.

223 Nansen Initiative Protection Agenda, above n 5, 28.

224 *Ibid*, 31.

225 For example, refugees may not have the right to work, and may be subjected to restrictions on their freedom of movement due to policies of encampment. See, eg, Long, above n 50, 4.

right to undertake paid employment is part of the right of residence, while the right to conduct business or work as a self-employed person is part of the right of establishment.²²⁶ The AEC Protocol defines the two terms as follows:

“right of establishment” means the right of a national to take up and pursue the economic activities... in the territory of another Member State; “right of residence” means the right of a national of one Member State to reside and seek employment in another Member State other than their Member State of origin.²²⁷

Family members of those with residence or establishment permits usually attain similar rights with respect to undertaking work or business. As noted above, however, such rights will only apply so long as an individual’s stay in the host country remains lawful – they will not apply to those whose permission to stay expires or is cancelled.²²⁸

Despite free movement of labour being a core component of African free movement agreements, there may be significant limitations on the ability of individuals to undertake income-generating activities in host Member States. Under some agreements, there are limitations on the kind of work that individuals can take up – for example, under the EAC and CEMAC Protocols, citizens are prohibited from working in the public sector in host Member States.²²⁹ Other provisions may also impact on an individual’s ability to work – for example, the limitations on individuals’ land rights mentioned above may be detrimental to those relying on agricultural means of production for income.²³⁰

Moreover, the right to work is not automatic upon admission to a state; rights of residence and establishment requirement citizens to obtain relevant permits, the award of which

is generally subject to wide discretion by Member States.²³¹ Under the ECOWAS Protocol, Member States may ‘determine the criteria authorising the admission, stay, employment of migrant workers and members of their family’.²³² Under the SADC Protocol, a state may issue relevant permits ‘in terms of its national laws’.²³³ As for entry into the state, rights to residence and establishment may be subject to restrictions where justifiable ‘by reasons of public order, public security and public health’.²³⁴

Residence and establishment permits may be subject to additional fees and documentation requirements. Workers wishing to undertake employment may be required to produce a contract of employment,²³⁵ while self-employed persons wishing to undertake business may be required to produce additional documentation relating to relevant business licenses and registrations, as well as proof of ‘sufficient capital and other resources for the purpose of establishment’.²³⁶

There are some exceptions to the general requirements for residence and establishment permits. For example, Kenya, Rwanda and Uganda have signed an agreement abolishing work permits for professionals.²³⁷ Some Protocols also provide for simplified work arrangements in certain circumstances. The EAC Protocol provides a simplified process for workers undertaking short term employment, of less than ninety days.²³⁸ The ECOWAS

231 The AEC Free Movement Protocol is typical in this regard. It provides that persons have the right to seek and accept employment ‘in accordance with the laws of the host Member State’ and that relevant passes and permits shall be issued ‘in accordance with the immigration procedures’ of the host Member State. AEC Free Movement Protocol, Arts 14(1), 15(2).

232 See, eg, ECOWAS 1986 Supplementary Protocol, Art 19; COMESA Protocol, Art 9(2); ECCAS Protocol, Art 3(4)(b).

233 SADC Protocol, Art 19.

234 ECOWAS 1986 Supplementary Protocol, Art 3; COMESA Protocol, Art 9(2).

235 EAC Free Movement of Workers Regulations, Reg 6(2).

236 EAC Right of Establishment Regulations, Ref 6(4)(c).

237 Professionals must register with national associations where relevant, though they are not required to obtain any other approvals prior to starting work. See ‘Uganda joins Kenya, Rwanda in abolishing work permits for professionals’ *The East African* (13 June 2015).

238 EAC Free Movement of Workers Regulations, Reg 6(4) and (5).

226 The exception is the SADC Protocol, which includes both rights to employment and business as part of the right to establishment. SADC Protocol, Arts 16, 17.

227 AEC Free Movement Protocol, Art 1.

228 See further above, section 4.2.1.

229 EAC Protocol, Art 10(10); see also CEMAC Protocol, Art 27(a).

230 See above, n 215.

Protocol allows border area or itinerant workers to enter host states for short periods of time, though they do not acquire full residence rights there.²³⁹

Other agreements are much more restrictive. Under the COMESA Protocol, Member States agree to remove restrictions on the movement of 'labour' within six years of the entry into force of the Protocol;²⁴⁰ however, 'labour' is defined in the Protocol as including 'only skilled labour of persons with specialised skills that are not available in a member State'.²⁴¹ This is akin to many more specialised migration programs. Relevant permits may be very restricted at the national level as well. For example, in Tanzania, work permits for non-citizens are conditional on there not being a Tanzanian citizen who could do the same job.²⁴² In a similar vein, while South Africa's 2002 Immigration Act aims to facilitate 'the movement of students and academic staff within the Southern African Development Community for study, teaching and research',²⁴³ it limits employment of non-citizens, including citizens of other SADC Member States, to those who are 'exceptionally skilled or qualified'.²⁴⁴

As for general human rights, explicit protections of workers' rights under free movement agreements are limited. This is despite the well known vulnerability of migrant workers to exploitation and discrimination. Some agreements protect the property rights of workers and the transfer of

savings and earnings to their home state.²⁴⁵ Only the ECOWAS Protocol refers to the ILO Conventions, and then only in relation to expulsion.²⁴⁶ While pathways to lawful employment are themselves a means of reducing migrant workers' vulnerability to exploitation, the lack of explicit recognition of the rights of migrant workers under free movement agreements is a considerable shortcoming.

Beyond obtaining a residence or establishment permit, access to sustainable livelihoods for disaster displaced persons is even more complex. Indeed, migrants with 'fewer resources and employment opportunities may find themselves in an even more precarious economic situation and face numerous threats to their physical security.'²⁴⁷ Many African free movement agreements include provisions for the mutual recognition of qualifications and experience between states,²⁴⁸ which is important. However, as participants in the Nansen Initiative's Greater Horn of Africa Regional Consultation emphasised, migration opportunities such as are provided under free movement agreements must be supported by 'necessary skills training and education to prepare such people... to find employment and diversified livelihood opportunities abroad.'²⁴⁹

The ability to undertake employment promotes self-sufficiency, reduces displaced persons' protection needs and makes them less reliant

239 See ECOWAS 1986 Supplementary Protocol, Arts 10, 12. For border area workers this means returning to their normal residence in their home state at least once a week. See ECOWAS 1986 Supplementary Protocol, Art 1(1).

240 COMESA Protocol, Art 9(1).

241 COMESA Protocol, Art 1.

242 Tanzania's domestic legislation provides that work permits in mainland Tanzania shall be issued by the Labour Commissioner, who shall 'satisfy himself that all possible efforts have been explored to obtain a local expert' before issuing a permit. Non-Citizens (Employment Regulations) Act 2015 (Tanzania) s 11(2). Moreover, an employer engaging a non-citizen must prepare a succession plan for the transfer of the non-citizens skills or expertise to Tanzanian citizens. Non-Citizens (Employment Regulations) Act 2015 (Tanzania), s 7.

243 Immigration Act 2002 (South Africa), s 2(1)(j)(i)(ee).

244 Immigration Act 2002 (South Africa), s 2(1)(j)(i)(c).

245 ECOWAS 1986 Supplementary Protocol, Art 17.

246 Migrant workers may not be expelled without ensuring that their rights under the ILO Conventions are respected. ECOWAS 1986 Supplementary Protocol, Arts 1(1), 16(2). It should be noted that, with the exception of Sahrawi Arab Democratic Republic (SADR), which is recognised by the AU but not by the UN, all African states are members of the ILO. This entails an obligation to respect, promote and realise the fundamental human rights set out in the ILO Convention. See ILO Declaration on Fundamental Principles and Rights at Work (International Labour Conference, 86th sess, Geneva, 18 June 1998). For a full list of members of the ILO see <[http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:::NO:::~](http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:::NO:::)>.

247 Nansen Initiative Horn of Africa Background Paper, above n 20, section 3.3.2.

248 See, eg, AEC Free Movement Protocol, Art 18.

249 Nansen Initiative Horn of Africa Outcome Report, above n 11, 5; see also, Collett et al, above n 49, 30-31.

on aid.²⁵⁰ In theory, access to employment and alternative livelihoods is one of the key advantages of free movement agreements in addressing disaster displacement. However, in practice, such access is extremely complex, and subject to significant hurdles and discretion at the domestic level within host Member States. The capacity of disaster displaced persons to access sustainable livelihoods under African free movement agreements therefore warrants considerably more attention than it has been given here, and should be the subject of further research.²⁵¹

4.2.3

Protection against return

Disaster displaced persons who cross an international border may not be able to safely return home, either because the conditions that produced displacement persist, or because 'the area concerned is no longer habitable or too exposed to the risk of recurrent disasters'.²⁵² Protection from forcible return is therefore a core component of protection for disaster displaced persons, and while it is a key feature of international protection mechanisms, it is much less certain in free movement agreements.

Most of Africa's free movement agreements do not guarantee protection from return to situations where a person is at risk of harm. For example, the EAC Regulations allow for a worker (and his or her spouse and/or child) whose work permit has been revoked to be expelled or deported,²⁵³ with no specific requirement to consider potential international protection obligations prior to deportation. Indeed, as the foregoing analysis has shown, beyond the initial three-month period of stay, states are afforded wide discretion concerning

extensions or grants of longer term residence or establishment permits, which may not be exercised to the benefit of those who apply. Individuals may even be required to provide evidence of return or ongoing travel as a condition of entry in some states.²⁵⁴

The exception is in ECOWAS, where expulsion of a citizen is prohibited where it would lead to the 'violation of fundamental human rights'.²⁵⁵ Workers must also not be expelled 'without ensuring that all the fundamental rights of the migrant worker have been respected'.²⁵⁶ This includes the rights of all migrants under the ILO Conventions.²⁵⁷

While guarantees against return per se are rare, several Protocols do impose certain limitations on Member States in relation to the expulsion and deportation of persons who enter under free movement agreements. Many agreements prohibit mass expulsion, requiring that 'each case of expulsion from the territory of a Member State shall be considered and determined on its own merits',²⁵⁸ or provide for certain procedural requirements, such as a sufficient notification period before expulsion and access to consular assistance.²⁵⁹ The IGAD and SADC Protocols limit the permissible reasons for expulsion, though the list of reasons is broad and includes an individual's failure to fulfil the conditions of their residence or establishment,²⁶⁰ or where 'reasons of national security, public order or public health of the host State so dictate'.²⁶¹

As a matter of international law, African states' non-refoulement obligations – under both

250 See, eg, Long, above n 50, 8-9; Paul Collier and Alexander Betts, 'Why denying refugees the right to work is a catastrophic error' *The Guardian*: Long Read (22 March 2017).

251 See further below, section 0. In this regard a forthcoming study by IGAD and the ILO titled 'Free Movement of persons and Transhumance in the IGAD Region: Improving Opportunities for Regular Labour Mobility' is of especial interest.

252 Nansen Initiative Protection Agenda, above n 5, 8.

253 EAC Free Movement of Workers Regulations, Regs 10, 11.

254 See above, n 37.

255 ECOWAS 1985 Supplementary Protocol, Art III(5).

256 ECOWAS 1986 Supplementary Protocol, Art 16(2).

257 See ECOWAS 1986 Supplementary Protocol, Art 1(1).

258 IGAD Draft Protocol, Art 13(2). See also ECOWAS 1986 Supplementary Protocol, Art 13; AEC Free Movement Protocol, Art 20.

259 See ECOWAS 1986 Supplementary Protocol, Arts 13-16; SADC Protocol, Art 23(2).

260 IGAD Draft Protocol, Art 11(1)(b) and (c); SADC Protocol, Art 22.

261 IGAD Draft Protocol, Art 11(1)(a). The addition of these provisions is one of the most significant differences between the IGAD Protocol and the EAC Protocol on which it is based. See also, SADC Protocol, Art 22; COMESA Protocol, Art 6(1).

refugee law and broader human rights law – continue to apply alongside free movement agreements, including to individuals whose presence in a country may be unlawful.²⁶² While the potential application of such obligations in the disaster context remains a contested and evolving area of law,²⁶³ it is likely that at least some disaster displaced persons will benefit from the principle of non-refoulement, whether owing to the disaster itself, or to other circumstances in the country of origin. Acknowledgement of states' non-refoulement obligations in free movement agreements is therefore important in reinforcing the prohibition on states from returning disaster displaced persons to situations where they would be at risk of refugee-related harms and infringements of certain fundamental human rights.²⁶⁴ However, as has been well noted elsewhere, such obligations will not always capture those at risk of disaster-related harm.²⁶⁵ This is the core component of the 'protection gap' for disaster displaced persons and is not addressed by existing free movement agreements.

4.3

SOLUTIONS: LASTING SOLUTIONS FOR DISASTER DISPLACED PERSONS UNDER FREE MOVEMENT ARRANGEMENTS

This sub-section analyses the potential for African free movement agreements to provide lasting solutions for disaster displaced persons. This means putting an end to displacement, usually through either return to the country of origin, or more permanent settlement and integration into the host state.²⁶⁶ However, solutions for disaster displaced persons should also include long-term sustainable livelihood

opportunities and reduce the risk of future disaster displacement. This sub-section considers two possible lasting solutions for disaster displacement under free movement agreements: permanent settlement in a host state, or temporary/circular migration as a long-term adaptation strategy.

4.3.1

Pathways to permanent residence

Lasting solutions for disaster displaced persons 'may mean facilitating permanent admission in the country that admitted them'.²⁶⁷ This generally entails permanent residence leading to eventual naturalisation. Pathways to permanent residence under international protection mechanisms such as refugee law are few.²⁶⁸ Free movement agreements may offer slightly more promise in this regard, by providing pathways to permanent residence in certain circumstances; however, they still remain limited.

The length of stay permitted under free movement agreements is generally temporary – that is, initial entry is limited to three months, and residence and establishment permits are issued for defined periods of time. Permits are usually renewable, and may therefore facilitate long-term stay in a host state; however, this remains at the discretion of the host government, who may refuse an application for renewal or extension at any time.²⁶⁹

Some of Africa's free movement agreements envisage pathways to permanent residence for citizens of the same REC; however, such pathways also remain the prerogative of the host state. The EAC and IGAD Protocols provide explicitly that 'matters relating to permanent residence shall be governed by the national policies and laws of the Partner States.'²⁷⁰ Moreover, where permanent residence or naturalisation is an option, the restrictive nationality laws of many African

262 For example, due to their irregular arrival, or their permission to stay having expired. See further above, section 4.2.1.

263 See generally, Nansen Initiative Protection Agenda, above n 5, 27-8.

264 For a more detailed analysis of African states' non-refoulement obligations see Wood, above n 15, 32-34.

265 See generally, Section 1.2, above.

266 See Nansen Initiative Protection Agenda, above n 5, 30-31.

267 Ibid, 8.

268 For example, the 1951 Refugee Convention does not address long-term solutions for refugees.

269 See above, Section 4.2.1.

270 EAC Protocol, Art 14(7); IGAD Draft Protocol, Art 7(7).

states – which prohibit dual nationality, thus requiring an individual to give up his or her home nationality²⁷¹ – may provide a disincentive to taking this up, particularly for those who wish to retain the option to return to their home state in the future.

The extent to which disaster displaced persons can find lasting solutions within host states therefore depends on the exercise of state discretion in letting them stay, making it a contingent and precarious basis for lasting solutions to disaster displacement.

4.3.2

Circular movement

An alternative solution to permanent residence for disaster displaced persons may be increased mobility itself. Particularly in the context of climate change, '[c]ircular or temporary migration can create new livelihood opportunities, support economic development, and build resilience to future hazards by allowing migrants to send back remittances and return home with newly acquired knowledge, technology and skills.'²⁷²

Free movement agreements generally do not limit the number of entries to a state permitted to citizens of other Member States, and may therefore allow for movement back and forth as the individual requires. Indeed, ECOWAS free movement agreements specifically confer the rights associated with residence on seasonal workers.²⁷³ The possible exception to this is the SADC Protocol, which supports entry and stay for SADC citizens for a maximum period of 90 days per year.²⁷⁴ However, it also envisages bilateral arrangements between states for simplified border passes/permits for citizens who reside in border areas.²⁷⁵

Opportunities for circular migration under free movement agreements are a considerable

advantage of such agreements over international protection mechanisms, which are usually 'one-way', such that return to one's country of origin brings an end to protection.²⁷⁶ Under free movement arrangements, individuals or families have more flexibility to move back and forth between locations as circumstances require. This supports alternative livelihoods and trade, and enables disaster-affected populations to preserve their housing, land and property, particularly in areas of origin, which when left for long periods may be vulnerable to looting, destruction or arbitrary appropriation.²⁷⁷

271 See generally, Adepoju et al, above n 139, 19-20.

272 Nansen Initiative Protection Agenda, above n 5, 9. See also, Nansen Initiative Horn of Africa Background Paper, above n 20, section 3.3.

273 ECOWAS 1986 Supplementary Protocol, Art 11.

274 SADC Protocol, Art 13(a).

275 SADC Protocol, Art 13(e).

276 See, eg, 1951 Refugee Convention, Art 1C(1).

277 See Nansen Initiative Horn of Africa Background Paper, above n 20, 3.1.4

There are numerous ways in which free movement agreements could address the needs of disaster displaced persons in Africa, by providing access to territory, status during stay, and access to lasting solutions. Free movement agreements therefore provide a mechanism by which African states could address the current ‘protection gap’ for disaster displaced persons in the region and implement their commitments relating to disaster displacement under the Global Compact on Migration, including by enhancing pathways for regular migration. Indeed, free movement agreements have a number of advantages over other cross-border mobility mechanisms in the context of disaster displacement, including broad eligibility, access to employment and opportunities for circular and seasonal movement.

However, as the analysis in Section 4 shows, there are also potential limitations to the use of free movement agreements in the context of disaster displacement, some of which have the potential to exclude its application altogether. This Conclusion summarises the key advantages and potential limitations revealed in this report, and provides some brief recommendations on further research that would help to assess the extent of potential limitations and identify possible measures to resolve them

5.1

KEY ADVANTAGES OF FREE MOVEMENT AGREEMENTS IN ADDRESSING DISASTER DISPLACEMENT

Free movement agreements provide a framework for African states to implement their commitments to addressing the challenges of disaster displacement²⁷⁸ and enhancing pathways for regular migration, including for vulnerable migrants.²⁷⁹ Agreements for the free movement of persons in Africa have three key advantages over other cross-border mobility

²⁷⁸ Migration Compact, above n 18, para 18(l).

²⁷⁹ Migration Compact, above n 18, para 21.

mechanisms as a means of addressing the protection gap for disaster displaced persons in Africa.

These advantages are:

- 1) broad eligibility,
- 2) opportunities for access to employment and other livelihoods, and
- 3) scalability.

Eligibility under African free movement agreements is broad. The primary criterion for entry into a host Member State is citizenship of another Member State of the same REC. The broad eligibility is a significant advantage of free movement agreements over other cross-border mobility mechanisms, including both international protection and labour migration mechanisms, where specific eligibility criteria may 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. As discussed in this report, access to territory under African free movement agreements is not universal – citizenship requirements, Member States' discretionary powers of suspension and exclusion, and onerous procedural and financial requirements may prevent disaster displaced persons from accessing free movement in practice. However, these potential barriers to access could be addressed at the domestic level, through national legislation, positive exercise of state discretion, and waivers or assistance in relation to procedural requirements.²⁸⁰

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 of exploitation of workers. As for general eligibility, above, opportunities for work under free movement agreements are neither universal nor automatic. 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. Nevertheless, free movement agreements provide a sound basis for this and, with the right support, could facilitate long-term sustainable livelihoods for disaster displaced persons.

Finally, the scalability of free movement agreements provides flexibility to Member States to explore and implement smaller scale arrangements with neighbouring states, and to test out arrangements before committing more broadly. Many of the sub-regional frameworks that currently comprise the major sources of free movement in Africa are supported by smaller scale agreements, such as bilateral agreements for the relaxation of documentation requirements or movements of border area populations between two or three states. Many of these smaller scale agreements are envisaged in the sub-regional frameworks themselves.²⁸¹ This is another advantage of free movement agreements over protection-specific mobility mechanisms, which generally apply at the international or whole-of-region level and where states may be reluctant to commit to widening existing commitments and obligations.²⁸² While bilateral or trilateral agreements between African states are necessarily narrower in scope and may undermine efforts at harmonisation, this increases the possibility of state uptake, by allowing states to 'test the waters' before committing to similar arrangements on a wider scale. This could be particularly helpful in those RECs where economic disparities

²⁸¹ In the refugee context, Long notes: 'Existing frameworks, such as regional cooperation agreements and comprehensive solution arrangements, may provide an umbrella under which specific mobility opportunities for refugees can be developed. Long, above n 50, 2.

²⁸² Smaller scale agreements related to refugee protection are also possible and indeed have been adopted in Africa in the context of refugee returns. However, such agreements are not envisaged in the relevant international law instruments and tend to focus on operational matters, rather than the scope of entitlements for refugees themselves.

²⁸⁰ See further below, Section 5.2.

between Members States have proven an impediment to the broader implementation of free movement agreements.²⁸³ They therefore provide considerable flexibility to states to adopt situation-specific mechanisms that cater to the dynamics and needs of particular regions or populations.

5.2

POTENTIAL LIMITATIONS OF FREE MOVEMENT AGREEMENTS IN ADDRESSING DISASTER DISPLACEMENT

The analysis of free movement agreements in Section 4 of this report identified a number of potential limitations of free movement agreements in addressing the protection needs of disaster displaced persons. These related to potential exclusion from access to territory, limitations on status and rights during stay, and restricted availability of lasting solutions.

The potential barriers for disaster displaced persons under African free movement agreements are numerous. They main ones are summarised as follows:

1. suspension of free movement agreements in a disaster situation for reasons relating to public order, public health or national security;
2. exclusion of individual disaster displaced persons from entry to a Member State under the domestic legislation of that State, with or without the support of enabling provisions in free movement agreements themselves;
3. disaster displaced persons' inability to meet procedural requirements, such as documentation and financial requirements,
4. disaster displaced persons' inability to regularise status in a host country following irregular entry;
5. exclusion of disaster displaced persons

who are also stateless due to lack of citizenship in Member States of free movement agreements;

6. exclusion of disaster displaced persons due to eligibility for refugee status,
7. limited protection of disaster displaced persons' human rights;
8. disaster displaced persons' inability to obtain relevant residence or establishment permits that enable work;
9. lack of protection against forcible return of disaster displaced persons;
10. lack of pathways to permanent residence for disaster displaced persons, and
11. limitations on number and/or duration of entries to territory for disaster displaced persons.

As noted above, however, this list sets out potential barriers to free movement for disaster displaced persons only. In almost all cases, the extent which these potential barriers actually impact access and protection for disaster displaced persons will depend on how they are incorporated and applied by Member States at the domestic level. For example, suspension of free movement mechanisms in a disaster situation could totally prevent free movement agreements from addressing the needs of disaster 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 host Member 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.

5.3

RECOMMENDATIONS FOR FUTURE RESEARCH AND ACTION

This report recommends that further research is required in order to better understand how free movement agreements operate in Africa in practice, identify examples of where they have been used to facilitate movement for disaster displaced persons, and to assess the extent to

²⁸³ See, eg, Sonja Nita, Antoine Pécoud, Philippe De Lombaerde, Paul de Guchteneire, Kate Neyts and Joshua Gartland (eds), *Migration, Free Movement and Regional Integration* (UNESCO, 2017) xxiv-vv.

which the potential barriers and limitations on free movement agreements set out above do impact, or have impacted, persons displaced by disasters.

Such research should be undertaken primarily at the national level within African Member States, and should aim to identify aspects of Member States' law, policy and practice that either increase the limitation, or reduce it.

Recommendations for further research are set out more fully in Annex 3 to this report. Such research could provide a more detailed understanding of the extent to which the operation of free movement at the national level addresses, or could address, the protection gap for disaster displaced persons in Africa.

This could also provide insight into several issues noted in this report but not explored in detail, including: distinctions in the application of free movement agreements to those already displaced by disaster, and those who move in order to avoid a disaster; the extent to which free movement agreements address the more specific protection needs of particular groups of vulnerable persons; and the capacity of disaster displaced persons to pursue meaningful and sustainable employment and livelihoods under free movement agreements.

Further research on the implementation of free movement agreements in practice would assist in identifying which, of the potential limitations above, constitute the most serious barriers to access for disaster displaced persons in reality, and in developing proposals for specific measures, at the regional, sub-regional and/or national levels, that could be taken by states to increase the prospects for protection of disaster displaced persons under free movement agreements. Comparative analysis between the operation of free movement agreements in Africa and elsewhere – for example, in Europe – could also assist in identifying examples of good practice that could be replicated by African states. Measures taken now could help to ensure the benefits of free movement for disaster and climate change-affected communities well into the future.

ANNEXES

ANNEX 1

– MEMBER STATES OF
AFRICA'S REGIONAL ECONOMIC
COMMUNITIES

	AEC	AMU	CEN-SAD	COMESA	EAC	ECCAS	ECOWAS	IGAD	SADC
Algeria	●	●							
Angola	●					●			●
Benin	●		●				●		
Botswana	●								●
Burkina Faso	●		●				●		
Burundi	●			●	●	●			
Cape Verde	●		●				●		
Cameroon	●					●			
CAR	●		●			●			
Chad	●		●			●			
Comoros	●		●	●					●
Congo	●					●			
Côte d'Ivoire	●		●				●		
DRC	●			●		●			●
Djibouti	●		●	●				●	
Egypt	●		●	●					
Equatorial Guinea	●					●			
Eritrea	●		●	●				●	
Ethiopia	●			●				●	
Gabon	●					●			
Gambia	●		●				●		
Ghana	●		●				●		
Guinea	●		●				●		
Guinea-Bissau	●		●				●		
Kenya	●		●	●	●			●	
Lesotho	●								●
Liberia	●		●				●		
Libya	●	●	●	●					
Madagascar	●			●					●
Malawi	●			●					●
Mali	●		●				●		

	AEC	AMU	CEN-SAD	COMESA	EAC	ECCAS	ECOWAS	IGAD	SADC
Mauritania	●	●	●						
Mauritius	●			●					●
Morocco	●	●	●						
Mozambique	●								●
Namibia	●								●
Niger	●		●				●		
Nigeria	●		●				●		
Rwanda	●			●	●	●			
Sahrawi Arab Democratic Republic (SADR) ^{<?>}	●								
Sao Tome and Principe	●		●			●			
Senegal	●		●				●		
Seychelles	●			●					●
Sierra Leone	●		●				●		
Somalia	●		●					●	
South Africa	●								●
South Sudan	●			●	●			●	
Sudan	●		●	●				●	
Swaziland	●			●					●
Tanzania	●				●				●
Togo	●		●				●		
Tunisia	●	●	●						
Uganda	●			●	●			●	
Zambia	●			●					●
Zimbabwe	●			●					●

ANNEX 2

– KEY AGREEMENTS RELATING
TO THE FREE MOVEMENT OF
PERSONS BETWEEN AFRICAN
STATES

AEC

2018	<i>Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment</i>	Not yet in force
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COMESA

1981	<i>Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements</i>	Entered into force 1992
1998	<i>Protocol on the Free Movement of Persons, Labour, Services, the Right of Establishment and Residence</i>	Not yet in force

EAC

2009	<i>Protocol on the Establishment of the East African Community Common Market</i>	Entered into force 2010
2009	<i>The East African Community Common Market (Free Movement of Persons) Regulations (Annex I to the EAC Protocol)</i>	Entered into force 2010
2009	<i>The East African Community Common Market (Free Movement of Workers) Regulations (Annex II to the EAC Protocol)</i>	Entered into force 2010
2009	<i>The East African Community Common Market (Right of Establishment) Regulations (Annex III to the EAC Protocol)</i>	Entered into force 2010

ECCAS/CEMAC

1983	<i>Protocol relating to the Freedom of Movement and Right of Establishment of Nationals of Member States within the Economic Community of Central African States (Annex VII to the Treaty Establishing the Economic Community of Central African States)</i>	Entered into force 1985
1994	<i>Traite Instituant la Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC states only)</i>	2017

ECOWAS

1979	<i>Protocol relating to Free Movement of Persons, Residence and Establishment</i>	Entered into force 1980
1981	<i>ECOWAS Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment</i>	Entered into force 1989
1986	<i>ECOWAS Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment</i>	Entered into force 1989
1989	<i>ECOWAS Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment</i>	Entered into force 1989
1990	<i>ECOWAS Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right to Establishment) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment</i>	Entered into force 1992

IGAD

Draft only – not yet adopted	<i>Draft Protocol on Free Movement of Persons</i>	Not yet in force
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SADC

2005	<i>Protocol on the Facilitation of Movement of Persons</i>	Not yet in force
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ANNEX 3

– RESEARCH AGENDA FOR FUTURE RESEARCH ON THE ROLE OF FREE MOVEMENT OF PERSONS AGREEMENTS IN ADDRESSING DISASTER DISPLACEMENT IN AFRICA

A key recommendation of this report is that further research is required in order to fully assess the extent to which agreements for the free movement of persons do, or could, address disaster displacement in Africa, and to develop recommendations for how African states could further develop or supplement existing free movement agreements to maximise the potential benefits for disaster displaced persons.²⁸⁴ This Research Agenda expands on what such further research should entail, including suggestions regarding its scope, methodology and key research questions.

OBJECTIVE

The primary objective of further research on the role of free movement agreements in addressing disaster displacement in Africa should be to assess the extent to which the potential limitations of free movement agreements in addressing disaster displacement, set out in Section 5.2 of this report, actually limit access and protection for disaster displaced persons in practice.

METHODOLOGY

Further research on the role of free movement agreements in addressing disaster displacement in Africa should focus on the incorporation and implementation of free movement at the national level, by way of case study analyses of specific locations and states in Africa. Case studies should comprise selected borders between two African states (e.g. the border between Kenya and Uganda)

²⁸⁴ See above, Section 5.3

where free movement arrangements are (at least partly) in operation and where cross-border disaster-related displacement has occurred or is likely to occur.²⁸⁵ For each case study, the research should consider implementation of free movement agreements in national law and policy, as well as in practice. The research should therefore comprise a desk review of relevant national legislation and policy documents, and field-based research (e.g. interviews with relevant government officials) on the operation of free movement in practice.

OUTPUTS

The future research proposed in this Research Agenda should produce a report that:

- identifies relevant domestic legislation and policy documents in the case study states that are relevant to the implementation and operation of free movement agreements at the national level;²⁸⁶
- outlines the extent to which the potential limitations of free movement agreements in addressing disaster displacement are reinforced, or redressed, in national law and policy;
- assesses the extent to which the implementation of free movement in practice reinforces, or redresses, the potential limitations on free movement in addressing disaster displacement;
- identifies key aspects of bilateral cooperation on free movement that reinforce, or redress, the potential limitations;

²⁸⁵ Recognising the difficulties associated with identifying 'disaster displaced persons', this Research Agenda proposes that a flexible approach be taken to identifying locations where cross-border disaster-displacement has taken place or is likely to take place. In particular, it cautions against selecting case studies based on specific occurrences of a disaster, as this may skew selection towards regions experiencing sudden-onset disasters, such as flooding, and away from regions experiencing slow-onset disaster, such as drought, where disaster displacement may be more difficult to identify.

²⁸⁶ This may include legislation and policy documents aimed directly at implementing free movement – for example, immigration-related legislation – as well as other areas of law and policy that impact on those who move under free movement arrangements – e.g. labour-related legislation, refugee law, human rights bills.

- identifies examples of ‘good practice’ at the national or bilateral level that could promote the capacity of free movement agreements to address the protection needs of disaster displaced persons; and
- identifies areas for further development or supplementation of free movement agreements in order to address potential limitations and maximise the potential benefits of free movement for addressing disaster displacement in Africa in the future.²⁸⁷

KEY ISSUES/RESEARCH QUESTIONS

- To what extent are the potential limitations of free movement agreements identified in this report reinforced, or redressed, through the incorporation and implementation of free movement at the national and bilateral level?
- Does the operation of free movement in practice reveal any additional limitations or opportunities regarding the capacity of free movement agreements to address disaster displacement?
- How does the incorporation and implementation of free movement agreements at the national level impact on the more specific protection needs of individual disaster displaced persons, including members of particular groups, such as women, children, older persons, persons with a disability, ethnic minorities and other vulnerable groups?
- Does the operation of free movement agreements in practice impact differently on individuals displaced by disaster and those who move in order to avoid a disaster?

In order to facilitate analysis and comparisons across multiple case studies and locations, a further list of more specific research questions could be developed, corresponding to each of the potential limitations identified in Section 5.3 of this report.

For example:

Potential limitation 4: disaster displaced persons’ inability to regularise status in a host country following irregular entry:

- Are there options under domestic legislation for irregular entrants to regularise their stay in the host state? If so, what are the criteria and/or procedural requirements for regularisation?
- What are the consequences of irregular entry in the host state? Is irregular entry a crime? If so, what are the penalties?
- Is practical assistance readily available to persons who enter the host state irregularly?

²⁸⁷ The development of recommendations for how free movement agreements could be developed or supplemented in order to better address the protection needs of disaster displaced persons could be a component of the research proposed here, or could be deferred until later – for example, following stakeholder consultation on the outputs of the research itself. The development of such recommendations could also be usefully informed by some comparative analysis of free movement agreements in other regions – for example, in Europe and/or Latin America.



PLATFORM
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DISPLACEMENT
FOLLOW-UP TO THE NANSEN INITIATIVE

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