

## Transparency and accountability in the loss and damage debate? A critical analysis of South Africa's position

*Oliver C Ruppel\**

Professor of Public, Mercantile and International Law, Director, Development and Rule of Law Programme (DROP), Stellenbosch University, South Africa; Director, Research Centre for Climate Law (ClimLaw: Graz), University of Graz, Austria  
<https://orcid.org/0000-0003-3362-4285>

*Ruda Murray\*\**

Researcher, Development and Rule of Law Programme (DROP), Stellenbosch University, South Africa  
<https://orcid.org/0009-0004-1485-6851>

**Abstract:** The 27th United Nations Climate Change Conference (COP27) in Sharm el-Sheikh, Egypt, in 2022 ended with an agreement to establish a loss and damage (L&D) fund to aid climate-vulnerable developing countries. During COP28, in Dubai, the United Arab Emirates, in 2023, the highly anticipated Loss and Damage Fund was operationalised. Yet, several lingering questions and concerns remained, on the way to COP29. Over the past few years, there has been a deluge of academic research that has greatly improved the general understanding of L&D. Still, few address national responses thereto. These include how national policymakers understand the concept, and what progress has been made to develop and implement L&D policies. As an expected beneficiary of the Loss and Damage Fund, this article, accordingly, critically examines the

\* LLB Hons / State Law Exam (Germany); LLM (Stellenbosch); Master of Mediation (Hagen); PGDip Human Rights (Åbo Akademi); Doctor of Laws (Bratislava); [ruppel@sun.ac.za](mailto:ruppel@sun.ac.za)

\*\* LLB (Stellenbosch); LLM (Cape Town); Doctoral Candidate (Stellenbosch); [ruda@sun.ac.za](mailto:ruda@sun.ac.za)

relationship between South Africa's national climate change legislation and policy relevant to L&D. This contribution found that South Africa addresses the impacts of climate change through its disaster management framework, albeit with limited policy coherence between the two. Until recently, the concept of L&D has been foreign. Reactive instead of proactive disaster management approaches were favoured, with allocated public funding frequently misplaced. To benefit from the Loss and Damage Fund, measures should be taken to enhance and strengthen government budget tracking, reporting, and verification systems in South Africa.

**Key words:** climate law; disaster management; loss and damage; UNFCCC

## 1 Introduction

The 27th United Nations Climate Change Conference (COP27), held in Sharm el-Sheikh, Egypt, in 2022, was described as a 'breakthrough', 'historic', 'landmark', 'important step', and 'milestone', which ended with an agreement to establish a Loss and Damage Fund to assist climate-vulnerable developing countries.<sup>1</sup> During COP28, Dubai, the United Arab Emirates, in 2023, the highly-anticipated fund was operationalised.<sup>2</sup> On the occasion, South Africa's President remarked that the country 'applauds the landmark decision ... and welcomes the pledges that have already been made', and 'would like to see the fund growing along with the implementation of all other commitments that have been made thus far'.<sup>3</sup>

South Africa, however, to this point, for the most part, had remained silent on the topic. This is despite the country having played a key role in advancing the 'African Agenda' in continental and international affairs and having also been at the forefront of global efforts to address climate change.<sup>4</sup> The only notable, pre-COP28, remark on the subject came in response to the commentary received on the country's Climate Bill of 2022 (now Act 22 of 2024). Commentators had

1 United Nations Framework Convention on Climate Change (COP27) FCCC/CP/2022/10/Add.1 17 March 2023 Report of the Conference of the Parties on its 27th session, held in Sharm el-Sheikh from 6 to 20 November 2022 Decision 2/CP.27; United Nations Framework Convention on Climate Change 'Establishing a dedicated fund for loss and damage' December 2022, <https://unfccc.int/establishing-a-dedicated-fund-for-loss-and-damage> (accessed 3 October 2023); N Alayza and others 'COP27: Key takeaways and what's next' 8 December 2022, <https://www.wri.org/insights/cop27-key-outcomes-un-climate-talks-sharm-el-sheikh> (accessed 3 October 2023).

2 United Nations Framework Convention on Climate Change (COP28) FCCC/CP/2023/L.1-FCCC/PA/CMA/2023/L.1 29 November 2023 held in United Arab Emirates from 30 November to 12 December 2023 Draft decision-/CP.28-/CMA.5 Operationalisation of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decisions 2/CP.27 and 2/CMA.4.

3 Department of International Relations and Cooperation 'Media statement: President Cyril Ramaphosa pleased with milestones reached as he concludes visit to COP28, in Dubai' 3 December 2023, <https://www.dirco.gov.za/president-cyrl-ramaphosa-pleased-with-milestones-reached-as-he-concludes-visit-to-cop28-in-dubai/> (accessed 26 December 2023).

4 A Averchenkova, KE Gannon and P Curran 'Governance of climate change policy: A case study of South Africa' Policy Report (2019); African Union 'Agenda 2063: The Africa we want' (2013).

critiqued South Africa's climate bills from 2018 to 2022 for, among other issues, failing to provide for loss and damage (L&D) or, at the very least, acknowledge it, to which the Department of Forestry, Fisheries, and the Environment (DFFE) replied that '[L&D] issues are dealt with through the Disaster Management Act 57 of 2002 [DMA] where once a disaster happens there is a legal process to respond to the disaster. At current there is no information system agreed upon to deal with and submit [L&D] in the international space.'<sup>5</sup>

In contrast, Kenya's Climate Change Act 11 of 2016, read with the Amendment Act 9 of 2023, provides a climate change fund (section 25), which is a financing mechanism for priority climate change actions and interventions.<sup>6</sup> They have also implemented a county climate change fund, which is designed to finance local adaptation measures and is managed at the discretion of the county government.<sup>7</sup> Similarly, Nigeria's Climate Change Act of 2021 in section 15 establishes a Climate Change Fund, which also allows for international contributions.<sup>8</sup> Section 21 of Uganda's Climate Change Act of 2021 provides for a similar financing mechanism, while section 26 permits an individual to claim L&D from the government, an individual, or a private entity in line with the polluter-pays principle.<sup>9</sup>

As Van der Bank and Karsten point out, not only has South Africa agreed to and ratified several vital international instruments, but it has also implemented diverse national climate programmes and policies.<sup>10</sup> However, South Africa, as noted, has remained a silent bystander to the L&D debate, compared to, for example, outspoken Kenya.<sup>11</sup>

Accordingly, this article critically discusses the relationship between South Africa's climate change laws and policies with L&D, considering the country's role in promoting the 'African Agenda' and global efforts to address climate change. A special focus lies on the need for transparency and accountability in the L&D debate. As McNamara and Jackson demonstrate, the majority of

5 Department of Forestry, Fisheries and the Environment 'Comments and responses on the Climate Bill' (2023) 2.

6 C Wambua 'The Kenya Climate Change Act 2016: Emerging lessons from a pioneer law' (2019) 4 *Carbon and Climate Law Review* 257, 262-263, 267-268.

7 F Crick and others 'Delivering climate finance at the local level to support adaptation: Experiences of county climate change funds in Kenya' (2019).

8 F Barrio and others 'Nigeria's climate change response: Analysis of the 2021 Nigeria Climate Change Act' (2022).

9 C Higham and others 'Innovations in climate change acts: Kenya, Uganda and Nigeria in focus' 2023, <https://www.cpahq.org/knowledge-centre/blogs/climate-change-acts-in-kenya-uganda-and-nigeria/> (accessed 5 October 2023).

10 M van der Bank & J Karsten 'Climate change and South Africa: A critical analysis of the *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* 65662/16 (2017) case and the drive for concrete climate practices' (2020) 13 *Air, Soil and Water Research* 1, 2.

11 Republic of Kenya 'Kenya's submission on the Santiago Network for Loss and Damage UNFCCC' (2022); Republic of Kenya 'Kenya's Statement at the Opening Plenary of COP26, CMP16, CMA3, SBSTA 52-55 AND SBI 52-55' (2021) 3.

L&D-related literature concentrates on the general international landscape.<sup>12</sup> Recently, Calliari and Vanhala have called for a ‘national turn’ in the study of L&D governance, urging researchers to help identify knowledge gaps to support L&D policymaking from the global to the local level, as well as identify potential tensions and impediments within L&D policy-making processes.<sup>13</sup> While progress is being made at the global level, addressing L&D must also take place from the ‘national level of determining policies and strategies to the local scale, where communities and households must confront changing conditions.’<sup>14</sup> As Vanhala and others stipulate, the way L&D is ‘constructed by different actors across levels of governance will shape whether and how it is understood, prioritised, institutionalised and operationalised in research and policy-making’.<sup>15</sup>

Therefore, the purpose of this article is to turn the focus to South Africa. Our contribution aims to build on existing knowledge and offer a ‘helicopter view’ of South Africa’s legal and policy framework concerning climate change to determine if and how it relates to L&D. This contribution will first provide an overview of the definitions and meanings that have been attributed to L&D in ongoing research. It will then note South Africa’s vulnerability to climate change-induced impacts and demonstrate the country’s mitigation and adaptation focus, to the omission of L&D. Challenges hindering the implementation of South Africa’s relevant climate change policies will then be discussed. This contribution will thereafter examine South Africa’s approach to climate change-induced disasters. Lastly, a few aspects of the Loss and Damage Fund will be addressed, along with a few of the remaining questions. This part will be followed by the conclusion.

## 2 Understanding loss and damage

### 2.1 Finding a definition

Currently, there is no universally accepted definition of L&D.<sup>16</sup> In the context of climate change, it may be defined as ‘the actual and potential manifestation of

12 KE McNamara & G Jackson ‘Loss and damage: A review of the literature and directions for future research’ (2019) *Wiley Interdisciplinary Reviews: Climate Change* 1, 26.

13 E Calliari & L Vanhala ‘The national turn in climate change loss and damage governance research: Constructing the L&D policy landscape in Tuvalu’ (2022) 22 *Climate Policy* 184-186.

14 A Thomas & L Benjamin ‘Management of loss and damage in small island developing states: Implications for a 1.5 °C or warmer world’ (2018) 18 *Regional Environmental Change* 2369, 2370; S Surminski & A Lopez ‘Concept of loss and damage of climate change – A new challenge for climate decision-making? A climate science perspective’ (2015) 7 *Climate and Development* 267.

15 L Vanhala and others ‘The knowledge politics of climate change loss and damage across scales of governance’ (2021) 30 *Environmental Politics* 141, 143.

16 MM Nand & DK Bardsley ‘Climate change loss and damage policy implications for Pacific Island countries’ (2020) 25 *Local Environment* 725, 726.

climate change impacts that negatively affect human and natural systems'.<sup>17</sup> As Roberts and Pelling explain, 'loss and damage' (lower case) refers 'to the impacts of climate change not avoided by mitigation and adaptation efforts', whereas 'Loss and Damage' (upper case) refers 'to the broader policy frameworks at all levels within which these impacts are being addressed'.<sup>18</sup> Van der Geest and Warner refer to L&D as the 'negative effects of climate variability and climate change that people have not been able to cope with or adapt to'.<sup>19</sup>

Thus, L&D is often referred to as the 'third pillar of international climate change law', that complements mitigation and adaptation.<sup>20</sup> As Broberg summarises, there are three common approaches to understanding this relationship. The first concerns the interpretation of L&D as going 'beyond adaptation', L&D including actions that address the impacts of climate change that are 'residual' to mitigation and adaptation.<sup>21</sup> The second focuses on 'tolerable risk', where adaptation is about 'keeping risks within the range of what is perceived as tolerable', and L&D 'is a response to risks that cannot be kept within that range'.<sup>22</sup> The third distinguishes between 'avoidable, unavoidable, or unavoided impacts'.<sup>23</sup> If it is 'impossible to adapt to an impact so that it becomes unavoidable, it will fall in the L&D category'.<sup>24</sup> Martyr-Koller and others concur that L&D denotes the impacts of climate change that '(a) can be avoided by mitigation and adaptation efforts, (b) have not been avoided (unavoided) through adequate mitigation and adaptation efforts, or (c) cannot be avoided (unavoidable)'.<sup>25</sup>

Displacement is also connected to L&D – people who are facing intolerable levels of risk, and who do not have the ability or the resources to cope with hazards while remaining where they are, have no other options but to either flee their country or relocate internally.<sup>26</sup> Therefore, Bhandari and others argue that L&D actions 'must also be understood to go beyond relief, rehabilitation and recovery from disasters to include safe migration and resettlement and long-term

17 United Nations Framework Convention on Climate Change SBI FCCC/SBI/2012/INF.14 15 November 2012 A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage 4.

18 E Roberts & M Pelling 'Loss and damage: An opportunity for transformation?' (2019) *Climate Policy* 1, 2.

19 K Warner & K van der Geest 'Loss and damage from climate change: Local-level evidence from nine vulnerable countries' (2013) 5 *International Journal of Global Warming* 367, 369.

20 G Jackson and others 'An emerging governmentality of climate change loss and damage' (2023) 2 *Progress in Environmental Geography* 33; M Broberg 'The third pillar of international climate change law: Explaining loss and damage after the Paris agreement' (2020) 10 *Climate Law* 211.

21 Broberg (n 20) 218.

22 As above.

23 CS Bahinipati 'Assessing the costs of droughts in rural India: A comparison of economic and non-economic loss and damage' (2020) *Current Science* 1832.

24 Broberg (n 20) 218.

25 R Martyr-Koller and others 'Loss and damage implications of sea-level rise on small island developing states' (2021) 50 *Current Opinion in Environmental Sustainability* 245.

26 Loss and Damage Collaboration and Researching Internal Displacement 'Loss and damage and displacement: Key messages for the road to COP28' (2023) 3. See also P Meth and others 'Not entirely displacement: Conceptualising relocation in Ethiopia and South Africa as "disruptive re-placement"' (2023) 44 *Urban Geography* 824.

security to re-establish lives and livelihoods.<sup>27</sup> To clarify, L&D is said to have two components: pro-action and reaction. The first, which precedes L&D, includes climate change adaptation, disaster risk reduction and management, training, and long-term partnerships, while the second, which comes afterwards, includes disaster relief and long-term recovery, grants through government programmes, insurance pools, humanitarian aid, and potential compensation.<sup>28</sup>

There also is a distinction between economic L&Ds that ‘are traded in markets and quantified’, including harms to property and infrastructure, and non-economic L&Ds that are ‘intangible or are not traded in markets’, including loss of life, loss of biodiversity, and loss of cultural heritage.<sup>29</sup> Thus, Kreienkamp and Vanhala explain that while one can simply define L&D as referring ‘to the residual effects of climate change that cannot (or will not) be avoided through mitigation and adaptation’, it still has many facets thereto.<sup>30</sup> This includes impacts related to extreme weather events, such as flooding, droughts, or cyclones, and slow-onset events, such as sea level rises, desertification, or melting glaciers.<sup>31</sup>

As Boyd and others note, most of the concerns surrounding L&D could have been resolved by now, had there not been so many different perspectives on it.<sup>32</sup> While an unclear definition of L&D is constructive for diplomatic negotiations and engages researchers in debate, it could, as Toussaint warns, pose a significant obstacle for potential litigants seeking to base their arguments on the international policy response and for judges looking for clear guidance on state obligations regarding climate damages.<sup>33</sup> Thus, it is critical that a precise, universally-accepted definition, including the meaning and scope, of L&D, be established.

## 2.2 Practical examples

Climate change causes monetary and non-monetary losses and damages, particularly in vulnerable countries. Between 2000 and 2019, 6 681 climate-related disasters were recorded worldwide, affecting 3,9 billion people.<sup>34</sup> In 2023 alone, nearly 15 700 people were killed in extreme weather disasters in Africa,

27 P Bhandari and others ‘The current state of play on financing loss and damage’ 28 December 2022, <https://www.wri.org/technical-perspectives/current-state-play-financing-loss-and-damage> (accessed 5 October 2023).

28 L Jensen & P Jabczyńska ‘Understanding loss and damage: Addressing the unavoidable impacts of climate change’ (2022) 6.

29 Martyr-Koller and others (n 25) 245; E Boyd and others ‘Loss and damage from climate change: A new climate justice agenda’ (2021) 4 *One Earth* 1365, 1366.

30 J Kreienkamp & L Vanhala ‘Climate change loss and damage’ Policy Brief for the Global Governance Institute March (2017) 4.

31 As above.

32 Boyd and others (n 29) 1366.

33 P Toussaint ‘Loss and damage and climate litigation: The case for greater interlinkage’ (2021) 30 *Review of European, Comparative and International Environmental Law* 16, 19.

34 United Nations Office for Disaster Risk Reduction ‘Human cost of disasters 2000 – 2019 Report’ (2019) 6.

while a further 34 million were affected.<sup>35</sup> In Southern Africa, over 10 million people are displaced due to climate-related disasters, economic pressures, and human insecurity.<sup>36</sup> By 2050, over 85 million people could be forced to migrate throughout Africa if concrete climate and development actions are not taken.<sup>37</sup> It is estimated that up to 600 million more people in Africa could be affected by food insecurity and malnutrition as agricultural systems break down due to climate change impacts, and another 1,8 billion people could be affected by water scarcity.<sup>38</sup> In addition, nearly 200 heritage sites in Africa could be exposed to extreme events by 2050 if climate emissions remain unchecked.<sup>39</sup>

Many of the world's most climate-vulnerable countries and peoples, such as the least-developed countries (LDCs), which account for only 4 per cent of global greenhouse gas (GHG) emissions, have contributed little to climate change. Africa, for example, accounts for the smallest share of GHG emissions, at nearly 3,8 per cent.<sup>40</sup> Yet, they are being heavily exposed to extreme climate-related disasters.<sup>41</sup> A report by the Vulnerable Twenty Group, which consists of 68 countries including 28 from Africa, estimated that they had lost one-fifth of their gross domestic product (GDP) over the past two decades and would have been 20 per cent wealthier today without climate change.<sup>42</sup> It is reported further that annually African countries lose 3 to 5 per cent of their GDP, responding to climate change vulnerability costs and, in some cases, more than 15 per cent. According to an analysis of the nationally determined contributions (NDCs) of 51 African countries, an estimated €548 billion in adaptation funding is needed.<sup>43</sup>

35 D Dunne 'Analysis: Africa's extreme weather has killed at least 15 000 people in 2023' 25 October 2023, <https://www.carbonbrief.org/analysis-africas-extreme-weather-have-killed-at-least-15000-people-in-2023/#:~:text=The%20investigation%20shows%20that%20at,Congo%20and%20Rwanda%20in%20May>. (accessed 26 December 2023).

36 AN Mbiyozo 'While the world focuses on Ukraine, unprecedented funding shortages and shrinking migration pathways leave Africans stranded' 15 February 2023, <https://issafrica.org/iss-today/record-numbers-of-displaced-africans-face-worsening-prospects> (accessed 7 October 2023).

37 World Bank Group 'Groundswell policy note 1: Preparing for internal climate change migration' (2018) 1.

38 Action Aid 'Climate change and poverty' 9 February 2023, <https://www.actionaid.org/uk/our-work/emergencies-disasters-humanitarian-response/climate-change-and-poverty> (accessed 3 October 2023); United Nations Environment Programme 'Mainstreaming environment and climate for poverty reduction and sustainable development' (2015) 9.

39 MI Vousdoukas and others 'African heritage sites threatened as sea-level rise accelerates' (2022) 12 *Nature Climate Change* 256, 257.

40 CDP Worldwide (Europe) 'Africa report: Benchmarking progress towards climate safe cities, states, and regions' (2020) 3.

41 United Nations Conference on Trade and Development 'The least developed countries report' (2022) xv; B Tietjen 'Loss and damage: Who is responsible when climate change harms the world's poorest countries?' 3 November 2022, <https://theconversation.com/loss-and-damage-who-is-responsible-when-climate-change-harms-the-worlds-poorest-countries-192070> (accessed 3 October 2023).

42 Vulnerable Twenty Group and Climate Vulnerable Forum 'Report: Climate vulnerable economies loss (2000-2019)' (2022) 3.

43 Global Centre on Adaptation 'State and trends in adaptation: Adaptation finance flows in Africa' (2022) 96.

While the war continues to wage in Ukraine, an urgent and sizeable funding gap continues to widen in humanitarian aid for displaced persons in Africa.<sup>44</sup>

### 3 South Africa and loss and damage

#### 3.1 Vulnerability to climate change-induced impacts

As part of the continent most vulnerable to climate change-induced natural disasters, South Africa is experiencing severe droughts, floods and storms.<sup>45</sup> This has resulted in over 40 000 displacements in 2022.<sup>46</sup> Over the last several decades, warming in the Southern African interior has occurred at about twice the average rate of global warming.<sup>47</sup> Systematic increases in extreme temperature events, such as heat waves and high fire danger, have also been recorded.<sup>48</sup> By 2100, marine heat waves will increase around Africa, with a hotspot of around 2°C along the 24 coastlines of South Africa.<sup>49</sup> During the 2023 festive season, Simon's Town, in the Western Cape province of South Africa, was faced with a raging mountain fire.<sup>50</sup> This follows floods in September that resulted in damages estimated at R500 million (€24,51 million) for provincial infrastructure and a further R154 million (€7,55 million) for municipal damages.<sup>51</sup>

During 2016 to 2021, South Africa spent nearly R1 billion (€49 million) in drought relief fund allocations.<sup>52</sup> Between 1952 and 2019, the country experienced total economic losses of over €8 billion in responding to natural

44 Transitional Committee TC4/2023/8 Fourth meeting synthesis report on the outcomes of the activities and deliverables referred to in paragraphs 7(b), 11, 12 and 14 of decisions 2/CP.27 and 2/CMA.4 (15 October 2023) 2; United Nations Human Rights Council Refugee Agency 'Underfunded report' (2022).

45 World Bank Group 'Country, climate, and development report of South Africa' (2022) 1, 5; World Bank Group 'Climate risk country profile: South Africa' (2021) 3, 5, 10; Department of the National Treasury 'Financing a sustainable economy: Technical Paper' (2021) 1-2.

46 Global Report on Internal Displacement 'Internal displacement and food security' (2023) 20.

47 R Scholes & F Engelbrecht 'Climate impacts in Southern Africa during the 21st century: Report for the Centre for Environmental Rights' (2021) 1; F Engelbrecht and others 'Projections of rapidly rising surface temperatures over Africa under low mitigation' (2015) 10 *Environmental Research Letters* 1.

48 World Bank Group 'Disaster risk finance diagnostic: South Africa' (2022) 23-24.

49 African Union 'Climate change and resilient development strategy and action plan' (2022-2032) 11.

50 K Wilkinson & V O'Regan 'Simon's Town firefighting efforts continue after an intense night and evacuations after midnight' 20 December 2023, <https://www.dailymaverick.co.za/article/2023-12-20-simons-town-firefighting-efforts-continue-into-the-night-as-evacuations-start-after-midnight/> (accessed 26 December 2023).

51 'National state of disaster declared for Western and Eastern Cape after September floods' *Times Live* 7 November 2023, <https://www.timeslive.co.za/news/south-africa/2023-11-07-national-state-of-disaster-declared-for-western-and-eastern-cape-after-september-floods/> (accessed 26 December 2023); G Serra 'Damage to provincial roads due to floods reaches R500 million' 14 October 2023, <https://www.iol.co.za/weekend-argus/news/damage-to-provincial-roads-due-to-floods-reaches-r500-million-8b39b011-7a62-4fa1-810e-2e01ef9a8de6> (accessed 26 December 2023).

52 N King 'Climate change implications for SA's youth: Report commissioned by CER' (2021) 7.



disasters,<sup>53</sup> less than 16 per cent of which was insured.<sup>54</sup> It is anticipated that these disasters will continue to grow in their severity, while relief costs and rebuilding will become increasingly unaffordable for a country with an already weak economy, massive unemployment, and growing social support demands. By 2100, the country could lose up to 13,5 per cent of its GDP if climate change continues unabated.<sup>55</sup>

Since 1980, 'noticeable weather-related disasters' have caused over R113 billion (€5,54 billion) 'in economic losses'.<sup>56</sup> These costs have diverted resources from both long-term developmental objectives, such as education, health and poverty reduction, and from short-term much-needed repair of nationwide failing infrastructure.<sup>57</sup> For example, it will cost the government of South Africa an estimated R4,5 billion (approximately €220,62 million) to repair and replace infrastructure damaged by flooding in 2023.<sup>58</sup>

Although L&D debates are taking place internationally, it 'is mostly a local problem' that is increasingly difficult for vulnerable communities to address.<sup>59</sup> As Khine and Langkulsen discuss, climate change has a significant impact on South Africa's vulnerable populations, by further exacerbating their losses and damages, which is only expected to worsen as climate change persists.<sup>60</sup> Gray and others specifically note the significant impact of climate change on worker welfare and employment rates in South Africa.<sup>61</sup> Although the economic losses suffered are often cited, Bouchard and others rightfully encourage not to forget about the psychological harm incurred by the victims of climate change-induced events.<sup>62</sup>

In South Africa, cumulatively, drought has affected nearly 22 million people; every year on average, disasters result in 63 deaths and affect more than 500 000 people.<sup>63</sup> Approximately 300 000 people, per year, are anticipated to be vulnerable

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53 World Bank Group (n 48) 18.

54 World Bank Group (n 48) 19.

55 G20 Climate Risk Atlas 'South Africa' (2021) 20.

56 South African government 'First nationally determined contribution under the Paris Agreement' (2021) 6-7.

57 J Mambo & K Facer (eds) *South African risk and vulnerability atlas: Understanding the social and environmental implications of global change* (2017) 32, 106.

58 Reliefweb 'Eastern Cape floods cause R4,5 billion road, bridge infrastructure damage' 20 February 2023, <https://reliefweb.int/report/south-africa/eastern-cape-floods-cause-r45-billion-road-bridge-infrastructure-damage> (accessed 3 October 2023).

59 K Warner and others 'Framing the loss and damage debate: A thought starter by the loss and damage in vulnerable countries initiative' in OC Ruppel and others (eds) *Climate change: International law and global governance* (2013) 829.

60 MM Khine & U Langkulsen 'The implications of climate change on health among vulnerable populations in South Africa: A systematic review' (2023) 20 *International Journal of Environmental Research and Public Health* 3425.

61 HB Gray and others 'The impact of weather shocks on employment outcomes: Evidence from South Africa' (2023) 28 *Environment and Development Economics* 285.

62 JP Bouchard and others 'Réchauffement climatique et psychotraumatologie des catastrophes naturelles: le cas des pluies et inondations meurtrières d'avril 2022 en Afrique du Sud' (2023) 181 *Annales Médico-psychologiques, revue psychiatrique* 234.

63 World Bank Group (n 48) 20.

to malaria by 2050, under a high-emissions scenario.<sup>64</sup> It is also projected that, by 2030, an additional 8 500 people may be at risk of river floods annually as a result of climate change, and an annual average of 13 900 people are projected to be affected by flooding due to sea level rise between 2070 and 2100.<sup>65</sup> It, therefore, is domestically 'crucial' for South Africa to both articulate and clarify its position on L&D.<sup>66</sup>

## 3.2 Obligations under the Paris Agreement

### 3.2.1 *Relevant domestic policies on climate change*

At COP21, held in Paris, France, in 2015, the Paris Agreement emerged, which highlights the 'importance of averting, minimising, and addressing' L&D 'associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of' L&D (article 8(1)).<sup>67</sup> Under the Paris Agreement, South Africa has the following main obligations: to pursue efforts to keep the global average temperature rise to well below 2°C (article 2); to prepare and periodically submit nationally determined contributions (NDCs) (article 3); to submit an NDC with a mitigation focus and to pursue steps to achieve the communicated contribution, with subsequent NDCs every five years representing an increase in ambition targets (article 4); and to implement its adaptation contribution (article 7); as well as reporting obligations under article 13.

South Africa's National Development Plan (NDP) and the National Climate Change Response White Paper together provide the strategy for the country's transition to a lower carbon and climate-resilient society. The overarching aim of the NDP is to eliminate poverty and reduce inequality by ensuring, among others, a transition to an environmentally sustainable, climate change-resilient, low-carbon economy, and just society.<sup>68</sup> The NDP does stipulate that climate change impacts have caused 'losses' in the form of human life and economic and 'damage' to the environment, such as soil loss due to erosion, loss of soil fertility, salination, and other forms of degradation, but makes no other mention thereof. The White Paper has two main objectives: to manage expected climate change impacts through interventions that build and sustain South Africa's social, economic, and environmental resilience, and emergency response capacity; and to make a fair contribution to the global effort to stabilise GHG concentrations

64 World Health Organisation 'Climate and health country profile: South Africa' (2015) 3.

65 As above.

66 Cf, among others, A Gilder & O Rumble 'An African perspective on loss and damage' (2022) 130 *Policy Insights* 11.

67 United Nations Framework Convention on Climate Change CP/2015/10/Add.1 29 January 2016 Decision 1/CP.21 adoption of the Paris Agreement.

68 Department of the Presidency 'National development plan 2030: Our future – Make it work' (2012).

in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system within a timeframe that enables economic, social, and environmental development to proceed sustainably.<sup>69</sup>

The national priorities highlighted in the White Paper and NDP are the basis from which other programmes, plans, and reports are developed on a national, provincial, and municipal level. Planning and reporting documents are prepared both on a national level and as part of international reporting commitments. The national planning and reporting documents cover both adaptation and mitigation. The key document on adaptation is the Long-Term Adaptation Scenarios, which details national and sub-national adaptation scenarios for South Africa under future climate conditions and development pathways.<sup>70</sup> The scenarios summarise climate change impacts and potential response options for water, agriculture and forestry, human health, marine fisheries, and biodiversity. The key document on mitigation is the Mitigation Potential Analysis, which identifies and analyses further mitigation options in strategic economic sectors, including energy, industry, transport, waste and agriculture, forestry, and other land use.<sup>71</sup>

The National Climate Change Response Green Paper presents the government's vision for an effective climate change response and the long-term transition to a climate-resilient and low-carbon economy and society, based on the government's commitment to sustainable development. The Green Paper outlines several methods for achieving the government's climate objectives, such as giving adaptation and mitigation measures top priority; mainstreaming climate change responses into all national, provincial, and local planning processes; and acknowledging the efforts made by developed nations to combat climate change. Given its energy-intensive, fossil fuel-powered economy and high vulnerability to the effects of climate variability and change, the Green Paper characterises South Africa as 'both a contributor to and a potential victim of global climate change'.<sup>72</sup>

As required by article 12 of the United Nations Framework Convention on Climate Change (UNFCCC), South Africa's Third National Communication reports on national circumstances; provides an GHG inventory; sets out trends and projected changes in the country due to climate change; sets out measures to mitigate and adapt to climate change; and other relevant information. The Communication discloses that monitoring of vulnerability and the evaluation of adaptation measures in the country are 'considerably challenging' due to 'a lack of consensus regarding the appropriate frameworks and best methodologies

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69 Department of Environmental Affairs 'National climate change response white paper' (2011).

70 Department of Environmental Affairs 'Long-Term Adaptation Scenarios Flagship Research Programme (LTAS) for South Africa: Summary for Policy Makers' (2013).

71 Department of Environmental Affairs 'South Africa's greenhouse gas (GHG) mitigation potential analysis' (2014).

72 National climate change response green paper Notice: GN R1083 in GG 33801 of 25 November 2010 4.

for assessing vulnerability.<sup>73</sup> This might explain the lack of attention given to displacement resulting from climate change. As Jegede and others discuss, South Africa's climate-related policies and laws are centred around the prioritisation of the economy and the environment, to perhaps the omission of human rights and climate justice.<sup>74</sup> An additional hindrance is the country's reluctance to sign or ratify the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which was adopted by the African Union (AU) in 2009 and entered into force in 2012 and which aims to prevent internal displacement, to protect internally-displaced persons, and to provide for durable solutions.<sup>75</sup>

The National Climate Change Adaptation Strategy is a ten-year plan describing key strategic areas with measurable outcomes. It seeks to ensure that different levels of government and the private sector integrate and reflect climate change adaptation. The Strategy acknowledges that, currently, there is a lack of clarity and coordination in different spheres of government and sectors regarding responsibilities and mandates for climate action.<sup>76</sup>

South Africa's Climate Change Bill B9B-2022 was finally approved and on 23 July 2023, President Cyril Ramaphosa signed it (Act 22 of 2024) into law, setting out a national climate change response, including mitigation and adaptation actions, which also constitutes South Africa's fair contribution to the global climate change response.<sup>77</sup> No mention is made of L&D. As stated, this was a point of contention during public hearings. 'Losses' are also not mentioned, the distinction being that L&D encompasses all adverse effects of climate change that cannot be mitigated or adapted to, including both reversible and irreversible impacts, whereas 'losses' specifically refer to the irreversible impacts of climate change that cannot be restored or recovered.

As King and others observe, one need not discuss all of South Africa's achievements as regards climate change to be able to deduce that the focus is on mitigation and adaptation.<sup>78</sup> Mitigation efforts include reducing or preventing

73 Department of Environmental Affairs 'South Africa's Third National Communication under the United Nations Framework Convention on Climate Change' (2018) 13.

74 See AO Jegede and others 'Climate displacement and the relevance of climate justice: A trend analysis of South Africa, Zimbabwe, South Sudan and Liberia' (2022) 6 *Global Campus Human Rights Journal* 51-52, 58-59.

75 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted in 2009 and entered into force in 2012, Status list (2022) 1.

76 Department of Forestry, Fisheries and the Environment 'National climate change adaptation strategy' (2020) 49.

77 Applied Law and Technology Advisory 'South Africa: National Assembly passes the Climate Change Bill' 27 October 2023, <https://altadvisory.africa/2023/10/27/south-africa-national-assembly-passes-the-climate-change-bill/>; cf. <https://www.gov.za/news/media-statements/president-cyril-ramaphosa-assents-climate-change-bill-23-jul-2024#:~:text=The%20Climate%20Change%20Act%20sets,resilient%20and%20low%2Dcarbon%20economy> (accessed 31 July 2024).

78 ND King and others *Fuggle and Rabie's environmental management in South Africa* (2018) 760-761. See also Department of Forestry, Fisheries and the Environment 'South Africa's 4th biennial update report to the United Nations Framework Convention on Climate Change'

GHG emissions by utilising new technologies and renewable energies.<sup>79</sup> Adaptation denotes altering our behaviour, economies, infrastructure, and so forth, to reduce our vulnerability to the effects of climate change.<sup>80</sup> South Africa made a firm commitment in its statement to the COP13 Plenary to ‘take ambitious mitigation action’ and ‘contribute its fair share towards our common responsibility for the future’, with the assertion that ‘inaction by any country’ is ‘inexcusable.’<sup>81</sup> However, 17 years later, South Africa faces several diverse challenges in achieving its international commitments: ‘Timely and full implementation of’ the country’s climate change-related policies ‘remain uncertain’ with a ‘lack of progress in recent years and missing political leadership to take the required measures.’<sup>82</sup>

### 3.2.2 *Challenges in the public sector*

Government officials have confirmed that there ‘are not enough funds to implement all climate change plans and projects’ and, although ‘we receive external funding from donors, it is never enough.’<sup>83</sup> A recent report found that the country’s current public and private climate investments, at an average of R131 billion (€6,42 billion) a year for the 2019 to 2021 period, must increase to an average of R334 billion (€16,37 billion) per year to meet its net zero goal by 2050, and R535 billion (€26,22 billion) per year to meet its NDC target by 2030.<sup>84</sup> Yet, the paradox remains: South Africa continuously receives climate finance, which mostly remains either unallocated or is said to fund renewable energy solutions, funding, policy reforms, and capacity building – all measures, the implementation of which is said to be hindered by funding constraints.<sup>85</sup>

The Southern African region is said to bear the largest financing gap as regards climate change investment funding, but South Africa continues to receive the

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(2021) 82; Presidential Climate Commission ‘The State of Climate Action in South Africa: Priorities for Action for the Government of National Unity’ (2024).

79 WY Chen and others (eds) *Handbook of climate change mitigation and adaptation* (2017) v.

80 As above.

81 M van Schalkwyk ‘United Nations climate change conference’ 12 December 2007, <https://www.gov.za/m-van-schalkwyk-united-nations-climate-change-conference-0> (accessed 4 October 2023); also, refer to South African government ‘Statement on the cabinet meeting of 27 September 2023’ 28 September 2023, <https://www.gov.za/speeches/statement-cabinet-meeting-wednesday-27-september-2023-28-sep-2023-0000> (accessed 5 October 2023).

82 E Seyisi and others ‘Indicators for monitoring and evaluating climate change adaptation efforts in South Africa’ (2023) 15 *Journal of Disaster Risk Studies* 5; Climate Action Tracker ‘South Africa’ 23 November 2023, <https://climateactiontracker.org/countries/south-africa/policies-action/> (accessed 21 December 2023).

83 NP Sibiyi and others ‘Overcoming bureaucratic resistance: An analysis of barriers to climate change adaptation in South Africa’ (2023) 11 *Climate* 9.

84 C Meattle and others ‘The South African climate finance landscape: A technical report prepared for the Presidential Climate Commission’ (2023) 2.

85 C Meattle and others ‘Landscape of climate finance in Africa’ (2022) 16; A Sguazzin & L Prinsloo ‘Billions in climate funds face uncertain future in South Africa’ 18 February 2022, <https://www.bloomberg.com/news/articles/2022-02-18/south-africa-s-8-5-billion-climate-funds-sparks-battle#xj4y7vzkg> (accessed 5 October 2023). See also Department of Forestry, Fisheries and the Environment (n 78) 178.

most.<sup>86</sup> Yet, South Africa is not even listed as one of the countries and regions most affected by impacts from climate-related extreme weather events.<sup>87</sup> Therefore, in their proposed Climate Justice Charter (2020), the Climate Justice Charter Movement – a South African collaborative movement that engages with grassroots inputs from various communities, climate scientists, and academics – emphasises the necessity for transparent and accountable spending of funds related to climate change.<sup>88</sup> They had even launched petitions requesting that international funders and investors stop contributing to South Africa's just transition until the government begins fulfilling its promises, claiming that the 'government is engaging in doublespeak'.<sup>89</sup>

According to a 2021 survey, roughly 49 per cent of South Africans have heard of climate change, while the other half are unfamiliar with the concept.<sup>90</sup> Of the 34 African countries surveyed, South Africa ranked among the bottom ten in citizen awareness of climate change.<sup>91</sup> Researchers also looked at how farmers in South Africa perceived and dealt with adaptation and mitigation and found that they faced institutional, political, economic, and biophysical barriers.<sup>92</sup> For example, they experience a lack of governmental support, due to political tensions regarding land rights, and a lack of reliable and long-term information regarding climate change.<sup>93</sup>

According to government officials, the following are key challenges to developing and implementing climate change adaptation policies: outdated

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- 86 African Development Bank Group 'Southern Africa economic outlook' (2023) 47, 50; Meattle and others (n 84) vi, 7; Department of Forestry, Fisheries and the Environment (n 78) 166, 170; WaterAid 'Short-changed on climate change' (2020) 8.
- 87 D Eckstein and others 'Global climate risk index' (2021).
- 88 Climate Justice Charter 'Information' 2023, <https://cjcjm.org.za/> (accessed 7 October 2023); T Myeni 'Climate justice coalition files criminal complaint against South Africa' 15 April 2022, <https://www.aljazeera.com/news/2022/4/15/s-africa-climate-justice-orgs-file-criminal-complaints-agai-govt> (accessed 5 October 2023).
- 89 O Ngcuka 'Protestors demand the end of profits over people' 25 March 2022, <https://www.dailymaverick.co.za/article/2022-03-25-protestors-demand-the-end-of-profits-over-people/> (accessed 5 October 2023); The Climate Justice Charter Movement 'Make ending coal, gas and oil investment a condition for financial support to South Africa' 15 February 2022, <https://www.change.org/p/unfccc-and-ippcc-ch-make-ending-coal-gas-and-oil-investment-a-condition-for-financial-support-to-south-africa-cop27-climatechange-climatereport-frenchembassyza-germanembassysa-usembassysa-ukinsouthafrica-climateza-presidencyza-cyrilramaphosa> (accessed 5 October 2023); see also H Müllerová and others 'Building the concept of just transition in law: Reflections on its conceptual framing, structure and content' (2023) pre-press *Environmental Policy and Law* 1.
- 90 A Mpako & P Govindasamy 'Despite growing evidence, climate change is still unknown to many South Africans' *Afrobarometer Dispatch* 615 (2023) 2.
- 91 Mpako & Govindasamy (n 90) 3.
- 92 K Talanow and others 'Farmers' perceptions of climate change and adaptation strategies in South Africa's Western Cape' (2021) 81 *Journal of Rural Studies* 208; KT Thinda and others 'Determinants of relevant constraints inhibiting farmers' adoption of climate change adaptation strategies in South Africa' (2021) 56 *Journal of Asian and African Studies* 611; MF Olabanji and others 'Assessment of smallholder farmers' perception and adaptation response to climate change in the Olifants catchment, South Africa' (2021) 12 *Journal of Water and Climate Change* 13.
- 93 Talanow and others (n 92) 208-209; see also OC Ruppel & LJH Houston 'The human right to public participation in environmental decision-making: Some legal reflections' (2023) 53 *Environmental Policy and Law* 125.

information used; not enough climate change plans in place; lack of knowledge by staff members; no climate change unit at district and local levels; no legal mandate at the local level; inadequate coordination across government levels; limited understanding by communities; limited political will at local level; lack of human capacity at provincial and local level; and inadequate financial resources.<sup>94</sup>

As Averchenkova and others discuss, there is a pervasive tendency for municipalities and regional authorities to operate in 'silos'.<sup>95</sup> As Leck and Simon deliberate, in South Africa, tackling climate change involves processes and institutions operating at multiple interlinked scales, but meaningful and sustained cross-scale climate change governance has been lacking.<sup>96</sup> By its admission, the South African government notes the challenges faced 'on enhancing institutional relations between governmental departments ... to fast-track the implementation of mitigation actions,' which has resulted in 'silo approaches'.<sup>97</sup>

Exemplifying their argument, Leck and Simon examined the eThekweni Metropolitan Municipality, which has substantial financial resources with considerable infrastructure and capacity, and Ugu District Municipality, which is financially under-resourced and under-skilled, both located in the KwaZulu-Natal province.<sup>98</sup> Leck and Simon found that while both municipalities face similar challenges of high spatial segregation and social exclusion, extreme poverty, inadequate living facilities, unemployment, and water, sanitation and electricity backlogs, eThekweni is regarded as a world-leading municipality for its anticipatory climate change actions, specifically its explicit focus on adaptation at the municipal and community scales.<sup>99</sup> Ugu, on the other hand, is comparatively understaffed, with weaker expertise and resource capacities for developing climate strategies, which is 'a secondary priority' for the district, 'competing with other short-term critical issues'.<sup>100</sup>

While historical inequitable political-economic and social ordering can be blamed, which has resulted in municipalities with disparate resource capacities and development trajectories, Leck and Simon identified enduring constraints, such as a lack of harmonised and sectoral planning for climate change.<sup>101</sup> They

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94 Sibiya and others (n 83) 7.

95 Averchenkova and others (n 4) 24.

96 H Leck & D Simon 'Local authority responses to climate change in South Africa: The challenges of transboundary governance' (2018) 10 *Sustainability* 8.

97 Department of Forestry, Fisheries and the Environment (n 78) 113.

98 Leck & Simon (n 96) 8-9. For a similar study, see L Pasquini and others 'What enables local governments to mainstream climate change adaptation? Lessons learned from two municipal case studies in the Western Cape, South Africa' (2015) 7 *Climate and Development* 60.

99 Leck & Simon (n 96) 9; see also D Roberts & S O'Donoghue 'Urban environmental challenges and climate change action in Durban, South Africa' (2013) 25 *Environment & Urbanisation* 299; D Roberts 'Prioritising climate change adaptation and local level resilience in Durban, South Africa' (2010) 22 *Environment and Urbanisation* 397.

100 D Ogier & D Brink 'Climate change response strategy for the Ugu District Municipality' April (2017) 7, 28-29.

101 Leck & Simon (n 96) 5, 9. See also RK Adom and others 'Enhancing climate change adaptation governance through transforming institutions in Kwa-Zulu Natal Province, South Africa' (2023) *International Journal of Climate Change Strategies and Management* 4.

interviewed officials from both municipalities, who cited poor meaningful interaction and guidance on climate change issues; weak vertical integration, collaboration and information sharing; and a prevalent lack of understanding at the provincial and national government scales about local-level realities and contextual considerations, as major stumbling blocks:<sup>102</sup> ‘We are guiding them, unfortunately; that is the way it is. They are not in the same boat as us in addressing climate change ... We are all caught in the middle of political games here; the politicians play us off.’

Adom and others concur, contending that ensuring a coherent policy formulation and implementation, both vertically and horizontally, remains a severe challenge for South Africa, highlighting a lack of clarity among government structures, which has led to poor coordination on how the policies should be aligned and implemented.<sup>103</sup> These constraints are said to be more severe at provincial and municipal levels.<sup>104</sup> While it is correct to state, as Sibiya and others do, that these issues have time and again been cited by researchers, for example, by Ziervogel and others, it is concerning that these issues remain unaddressed.<sup>105</sup>

Irrespective of the concerns, in its updated draft NDC, South Africa notes that its estimates are based on ‘the assumption that support will be provided for’ the country to achieve its targets and ‘for mitigation, adaptation, and [L&D],’<sup>106</sup> explaining further that most of the climate finance that South Africa has received to date has supported mitigation projects. This contrasts with the findings of Serradinho and others, that ‘due to its standing within the region as predominantly a provider rather than the receiver of’ international disaster assistance, such assistance ought not to be ‘a priority’ for South Africa.<sup>107</sup> Critics have cautioned against this ‘victim mentality.’<sup>108</sup> As one researcher contended, ‘the most damaging unintended consequence of the ... [L&D] fund is what it does to the headspace of African countries ... Psychologically, it entrenches us as recipients of donor aid; victims.’<sup>109</sup> Unfortunately, as Adom and others discuss,

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102 Leck & Simon (n 96) 11.

103 RK Adom and others ‘The threats of climate change on water and food security in South Africa’ (2022) 1 *American Journal of Environment and Climate* 80.

104 Averchenkova and others (n 4) 4.

105 Sibiya and others (n 83) 2-6; G Ziervogel and others ‘Climate change impacts and adaptation in South Africa’ (2014) 5 *WIREs Climate Change* 605.

106 South African government (n 56) 14, 28.

107 JADS Serradinho and others ‘Legal preparedness for international disaster assistance in the SADC region’ (2023) *Yearbook of International Disaster Law* 117-118.

108 See EB Onyekachi ‘Foreign aid as mechanism for perpetuation of neo-colonialism and dependency: An interrogation of issues and way forward for developing economies’ (2020) 6 *INOSR-Arts and Humanities* 101; T Ngwane & P Bond ‘South Africa’s shrinking sovereignty: Economic crises, ecological damage, sub-imperialism and social resistances’ (2020) 20 *Vestnik RUDN International Relations* 67; VH Mlambo and others ‘Rethinking foreign aid for socio-economic development in sub-Saharan Africa’ (2019) 16 *African Renaissance* 277; AA Durokifa & EC Ijeoma ‘Neo-colonialism and millennium development goals (MDGs) in Africa: A blend of an old wine in a new bottle’ (2018) 10 *African Journal of Science, Technology, Innovation and Development* 362.

109 J Evans ‘Climate loss and damage fund entrenches Africa as beneficiaries – But some believe it’s a wrong turn’ 17 December 2023, <https://www.dailymaverick.co.za/article/2023-12-17-climate-loss-and-damage-fund-entrenches-africa-as-beneficiaries-but-some-believe-its-a-wrong-turn/>



the reality is that the South African government alone cannot provide all the financial resources needed to address climate change effectively.<sup>110</sup>

Although the issues highlighted in this article are not exclusive to South Africa,<sup>111</sup> one would expect the country to present a better role model on the continent. As Schoeman and others discuss, South Africa frequently portrays itself as a ‘bridge between the North, the Global South and Africa’ and as a ‘gateway into the continent’, given its membership in the (growing) alliance of (among others by now) Brazil, Russia, India, China, and South Africa (BRICS) and the G20.<sup>112</sup> With numerous reports cautioning African countries about the steady increase in climate change impacts, it no longer is acceptable for South Africa to window-dress its policies with attractive long-term goals and net zero emission targets while half-hearted implementation measures are being undertaken on the ground to alleviate its citizens of impacts being felt today.<sup>113</sup>

### 3.3 South Africa’s approach to climate change-induced disasters

Despite its policies stating the contrary, South Africa has a persistent and enduring habit of focusing on relief and emergency support, rather than implementing a proactive policy.<sup>114</sup> This approach is not new to countries similarly forced to deal with more pressing issues.<sup>115</sup> Yet, it must be borne in mind that the country has been advised to adapt to climate change and warned of the consequences of failing to do so since the 1990s.<sup>116</sup> Disaster risk reduction and climate change adaptation are connected through their common goal of ‘reducing the impacts of extreme events and increasing urban resilience to disasters’.<sup>117</sup> Many countries,

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17-climate-loss-and-damage-fund-entrenches-africa-as-beneficiaries-but-some-believe-its-a-wrong-turn/ (accessed 26 December 2023).

- 110 Adom and others n 101), 20. See also Department of Forestry, Fisheries and the Environment ‘South Africa’s 5th biennial update report to United Nations Framework Convention on Climate Change’ (2023) 195.
- 111 Refer to HM Tirivangasi and others ‘Exploring humanitarian response strategies in the aftermath of disasters induced by climate change in Zimbabwe’ (2021) *Development Southern Africa* 1.
- 112 M Schoeman and others ‘It’s time South Africa tuned into Africa’s views about its role on the continent’ 24 January 2017, <https://theconversation.com/its-time-south-africa-tuned-into-africas-views-about-its-role-on-the-continent-71019> (accessed 5 October 2023).
- 113 World Bank Group (n 45) 6; Economic Commission for Africa ‘Climate change and the rural economy in Southern Africa: Issues, challenges and opportunities’ (2012) xi.
- 114 Intergovernmental Panel on Climate Change ‘Climate change: Impacts, adaptation, and vulnerability – Part B: Africa’ (2014) 1225-1226; C Vogel and others ‘A persistent truth – Reflections on drought risk management in Southern Africa’ (2010) 2 *Weather, Climate, and Society* 9.
- 115 P Mogano & N Mokoele ‘South African climate change adaptation politics: Urban governance prospects’ (2019) 11 *International Journal of Social Sciences and Humanity Studies* 69-70; L Pasquini and others ‘Facing the heat: Barriers to mainstreaming climate change adaptation in local government in the Western Cape Province, South Africa’ (2013) 40 *Habitat International* 225.
- 116 TE Downing and others ‘Adapting to climate change in Africa’ (1997) 2 *Mitigation and Adaptation Strategies for Global Change* 19; JB Smith ‘Climate change adaptation policy options’ (1996) 6 *Climate Research* 193.
- 117 W Solecki and others ‘Climate change adaptation strategies and disaster risk reduction in cities: Connections, contentions, and synergies’ (2011) 3 *Current Opinion in Environmental Sustainability* 135.

South Africa included, address the impacts of climate change through their disaster management frameworks, albeit with limited policy coherence between the two.<sup>118</sup>

Since 2018 the ‘national state of disaster’ was declared by the South African government several times, due to ‘severe weather events’.<sup>119</sup> Such declaration enables the government to utilise emergency financial reserves through the Disaster Management Act 57 of 2002 (DMA) (sections 27(2) and 56).<sup>120</sup> Currently, there are two sets of overarching emergency funding, namely, the Provincial Disaster Relief Grant (PDRG) and the Municipal Disaster Relief Grant (MDRG), intended to fund emergency repairs to essential basic services infrastructure, the provision of temporary infrastructure, humanitarian relief, and other immediate essential services following a declared state of disaster. Both grants are administered by the National Disaster Management Centre (NDMC) in consultation with the National Treasury (chapter 3 of the DMA). These grants are allocated solely to respond to immediate needs, the so-called first phase response. Coupled with these funding streams, the government has implemented a Provincial Emergency Housing Grant (PEHG) and a Municipal Emergency Housing Grant (MEHG) for the provision of temporary shelter assistance to households affected by disasters. There is also the Municipal Disaster Recovery Grant, introduced to restore the functionality of municipal infrastructure following a disaster. Provinces and municipalities may further apply for post-disaster damages financing for the second phase of emergency response. However, according to the Policy Framework for Disaster Risk Management 2005 (Framework), this is contingent on the relevant state organs having earmarked money therefor.<sup>121</sup> Before any funding is released in either phase, verification processes must be followed.

In 2022, when severe floods hit parts of South Africa, massive unattended or inadequately-addressed needs were reported, notably, in the most remote and isolated affected areas.<sup>122</sup> The auditor-general commented that ‘the overall response to’ disasters is ‘too slow and inadequate’, indicating ‘systemic failures’.<sup>123</sup>

118 A Zembe and others ‘Policy coherence between food security, disaster risk reduction and climate change adaptation in South Africa: A summative content analysis approach’ (2022) 14 *Journal of Disaster Risk Studies*, 2, 5.

119 GN R4035 in GG 49612 of 7 November 2023; GN R4034 in GG 49611 of 7 November 2023; GN R3036 in GG 48036 of 13 February 2023; GN R2029 in GG 46247 of 18 April 2022; GN R117 in GG 44184 of 24 February 2021; GN R243 in GG 43066 of 4 March 2020; GN R210 in GG 41493 of 13 March 2018.

120 Director: Policy Development and Regulatory Frameworks ‘Guideline on classification of a disaster and the declaration of a state of disaster’ (2019); see also the Disaster Management Amendment Act 16 of 2015, which explicitly references climate change-related impacts as a concern, which must be prepared for in disaster management plans, and mandates frequent reporting on the communities that are vulnerable to change-related disasters.

121 Confirmed in the updated National disaster management framework Notice: GN R3635 in GG 48874 of 30 June 2023.

122 Reliefweb ‘South Africa – Flooding and landslides’ 26 April 2022, <https://reliefweb.int/report/south-africa/south-africa-flooding-and-landslides-dg-echo-government-ifrc-echo-daily-flash-26> (accessed 4 October 2023).

123 Parliamentary Budget Office ‘Fiscal brief’ (2022) 6.

For example, of the 4 799 temporary residential units, which had to be provided in 2022 for flood victims, only 45 were completed.<sup>124</sup> The Minister of Human Settlements has confirmed that several affected families had to wait two to three years after the disaster struck for adequate housing provisions.<sup>125</sup> In the eThekweni Metropolitan area, 57 per cent of victims had not received drinking water for more than three days following the flooding.<sup>126</sup>

Although disaster relief funding is available, only small amounts of it have been spent.<sup>127</sup> R1 billion (€49 million) were made available by the government for emergency relief in 2022.<sup>128</sup> However, the National Treasury reported that approximately R359 million (€17,60 million) had been spent in response to the disasters.<sup>129</sup> In August 2022, the KwaZulu-Natal and Eastern Cape provinces submitted requests for R2,9 billion (€142,17 million) and R50 million (€2,45 million), respectively, for reconstruction and rehabilitation interventions.<sup>130</sup> The auditor-general observed that this was due to a lack of effective oversight and monitoring of the original funding provided.<sup>131</sup> Community members affected by these events have voiced their distrust in the government when it comes to expecting disaster assistance.<sup>132</sup> This raises the question of why the money was not used to provide relief and, more importantly, whether the same would happen with L&D funds. Considering that the DMA contains limited provisions regarding international disaster assistance, let alone specific provisions on transparency and accountability mechanisms.<sup>133</sup>

In 2023, R372 million (€18,23 million) was added to the MDRG, while R1,2 billion (€58,83 million) was added to the Municipal Disaster Recovery

124 Auditor-General 'First special report on flood relief funding' (2022) 11.

125 Independent Online 'Human Settlements Minister unveils new emergency housing programme to respond to natural disasters' 3 April 2023, <https://www.iol.co.za/mercury/news/human-settlements-minister-unveils-new-emergency-housing-programme-to-respond-to-natural-disasters-d4ca6b4e-6356-4701-9fa0-a33f222f9f08> (accessed 4 October 2023).

126 Auditor-General (n 124) 28.

127 Auditor-General (n 124) 12.

128 Reliefweb 'National Treasury allocates first phase R516m floods funding' 8 July 2022, <https://reliefweb.int/report/south-africa/national-treasury-allocates-first-phase-r516m-floods-funding#:~:text=%E2%80%9CIn%202022%2F23%2C%20the,million%20and%20R175%20million%20respectively,%E2%80%9D> (accessed 4 October 2023).

129 Parliamentary Budget Office (n 123) 6.

130 As above.

131 Auditor-General (n 124) 11.

132 ND Hendrik 'Public protector probes billions in unspent government funds meant for 2022 KZN flood relief efforts' 12 July 2023, <https://www.dailymaverick.co.za/article/2023-07-12-public-protector-probes-billions-in-unspent-government-funds-meant-for-2022-kzn-flood-relief-efforts/> (accessed 4 October 2023); S Grootes 'No trust in SA government: KZN flood aid commitment met with cynicism and derision' 19 April 2022, <https://www.dailymaverick.co.za/article/2022-04-19-no-trust-in-sa-government-kzn-flood-aid-commitment-met-with-cynicism-derision/> (accessed 4 October 2023); M Wiener 'We expect officials to steal flood disaster relief funds. We've been here before' 18 April 2022, [https://www.news24.com/news24/xarchive/archive/mandy\\_wiener/mandy-wiener-we-expect-officials-to-steal-flood-disaster-relief-funds-weve-been-here-before-20220418](https://www.news24.com/news24/xarchive/archive/mandy_wiener/mandy-wiener-we-expect-officials-to-steal-flood-disaster-relief-funds-weve-been-here-before-20220418) (accessed 4 October 2023).

133 Serradinho and others (n 107) 116-117; International Federation of Red Cross and Red Crescent Societies 'Legal preparedness for international disaster assistance in South Africa' (2021) 22; A Cassim and others 'South African climate finance landscape' (2021).

Grant for the repair and rehabilitation of infrastructure damaged by flooding.<sup>134</sup> Aiming to avoid the scrutiny faced in 2022, the government appointed an *Ad Hoc* Joint Committee on Flood Disaster Relief and Recovery in 2023 to oversee the flood disaster relief and recovery measures in the affected provinces. These two instruments, being the added funding and oversight committee, certainly illustrate improvement from the national government. Provincial and municipal governments, however, still 'appear to lack' sufficient budgets and political will to invest in effective preparedness strategies.<sup>135</sup> In their inspection of the affected areas, the *Ad Hoc* Joint Committee noted housing units being built for victims on flood plains, making them again susceptible to damage. The progress on implementing disaster relief and recovery measures 'has been very slow', with certain disaster management plans received being 'too broad' and lacking time frames, and certain municipalities did not even request funding, leaving the flood damage as is,<sup>136</sup> thereby, leaving reaction as the preferred approach.

The concerns listed could be attributed to numerous obstacles, including heavy bureaucracy, intergovernmental fragmentation, rigidity of existing institutions, and corruption due to a lack of transparency and accountability measures.<sup>137</sup> According to Bhandari and others, 'quickly accessing reliable climate funds has been a persistent challenge for developing countries due to factors', such as 'insufficient fundraising, difficulties and inconsistencies in fund allocation, delays in access channels, as well as the structural political and organisational complexities in each of the existing funds.'<sup>138</sup>

Therefore, Baudoin and others conclude that 'there is little evidence' in practice of 'disaster risk reduction, preparedness, mitigation, and rapid, effective response'.<sup>139</sup> Coupled therewith is South Africa's 'tardiness', to date, in committing to the Southern African Development Community (SADC) Humanitarian and Emergency Operations Centre (SHOC) in Mozambique. The SHOC will be responsible for coordinating regional disaster risk preparedness, response, and early recovery efforts to support member countries affected by disasters. The Centre facilitates the supply chain management of equipment and supplies that

134 O Ngcuka 'Godongwana boosts Municipal Disaster Response and Recovery grants as climate crisis takes its toll' 1 November 2023, <https://www.dailymaverick.co.za/article/2023-11-01-godongwana-boosts-municipal-disaster-response-and-recovery-grants-as-climate-crisis-takes-its-toll/> (accessed 26 December 2023).

135 MA Baudoin and others 'Living with drought in South Africa: Lessons learnt from the recent El Niño drought period' (2017) 23 *International Journal of Disaster Risk Reduction* 134-135.

136 Parliament of South Africa 'Media Statement – Lack of skills contributes to slow progress of disaster relief and recovery Committee finds' 8 November 2023, <https://allafrica.com/stories/202311090080.html> (accessed 26 December 2023).

137 Baudoin and others (n 135) 129; Sibiya and others (n 83) 5-6; Averchenkova and others (n 4) 23-29; Pasquini and others (n 115) 228-230.

138 P Bhandari and others '3 Questions on loss and damage funding to tackle before COP28' 17 March 2023, <https://www.wri.org/insights/loss-and-damage-funding-questions-transitional-committee> (accessed 4 October 2023).

139 Baudoin and others (n 135) 135. See also Serradinho and others (n 107) 116; MF Chersich & CY Wright 'Climate change adaptation in South Africa: A case study on the role of the health sector' (2019) 15 *Globalisation and Health* 1.

SADC responders require during the deployment of humanitarian support to member states. This again highlights a lack of political will regarding emergency operations. As a country vulnerable to climate change and high-impact extreme climate events, South Africa has been urged to endorse the SHOC.<sup>140</sup>

Regarding proactive procedures, the DMA requires provinces and municipalities to implement relevant risk preparedness measures and to use early warning technologies to avoid or at least minimise the occurrence of disasters.<sup>141</sup> However, studies conducted on weather events in 2022 indicate that while South Africa's weather advisories predicted these events in advance, many people did not respond to the warnings or were not made aware of them.<sup>142</sup> In a study of some of the worst natural disasters recorded, De Perez and others found that disasters do not occur due to a lack of forecasts and early warning systems, but rather due to inadequate communication and response capability,<sup>143</sup> both issues that Mashao and others contend must be greatly improved in South Africa.<sup>144</sup>

Given that South Africa conflates L&D, and its disaster management processes, the purpose of the contribution thus far is to highlight the problems that have been apparent for several years now, to caution of a similar outcome for the Loss and Damage Fund, should South Africa become a beneficiary thereof. As Baudoin and Ziervogel warn, there currently is 'limited exploration of how international funding is landing on the ground and impacting on adaptation and the targeted vulnerable groups'.<sup>145</sup> Schultheiß and others further concede that it 'is already well established that most climate funds have struggled to reach the most vulnerable communities and groups, despite having ... policies in place'.<sup>146</sup>

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140 Defence Web 'SA taken to task for not committing to SADC emergency ops centre' 19 September 2023, <https://www.defenceweb.co.za/security/national-security/sa-taken-to-task-for-not-committing-to-sadc-emergency-ops-centre/> (accessed 26 December 2023).

141 Baudoin and others (n 135) 133.

142 B Ngcamu 'Climate change and disaster preparedness issues in Eastern Cape and KwaZulu-Natal, South Africa' (2022) 81 *Town and Regional Planning* 54; O Kunguma 'A South African disaster legislative perspective of information management and communication systems' (2022) 24 *South African Journal of Information Management* 1; L Andersson and others 'Local early warning systems for drought – Could they add value to nationally disseminated seasonal climate forecasts?' (2020) 28 *Weather and Climate Extremes* 1 2.

143 EC de Perez and others 'Learning from the past in moving to the future: Invest in communication and response to weather early warnings to reduce death and damage' (2022) 38 *Climate Risk Management* 1.

144 FM Mashao and others 'Extreme rainfall and flood risk prediction over the East Coast of South Africa' (2023) 15 *Water* 16.

145 MA Baudoin & G Ziervogel 'What role for local organisations in climate change adaptation? Insights from South Africa' (2017) 17 *Regional Environmental Change* 691.

146 L Schultheiß and others 'Report: Operationalising the loss and damage fund' (July 2023) 24.

### 3.4 COP28 and beyond

#### 3.4.1 *Loss and Damage Fund: Additional concerns*

In 2024, the Loss and Damage Fund has made significant strides towards becoming fully operational.<sup>147</sup> South Africa holds a position on the Board and has been actively participating in meetings. Yet, several lingering questions and concerns remain. As can be expected, ‘the political nature’ of L&D has contributed to its lagged development, specifically, concerning the provision of international finance.<sup>148</sup> Vulnerable countries have traditionally advocated L&D finance to be provided by industrialised countries given their argued ‘historical contribution’ to climate change which, in turn, has continually been met with strong resistance by developed countries.<sup>149</sup> This has led to a serious stalemate in the discussions of the Transitional Committee, which was appointed in the lead-up to COP28 to make recommendations for consideration and adoption of the proposed fund, namely, who should pay and receive the L&D funding support.<sup>150</sup>

The Committee has vaguely remarked that the fund ‘should target the particularly vulnerable people and communities ... in developing countries that are facing the adverse impacts of climate change and have limited capacity for adaptation.’<sup>151</sup> Other options include either limiting the fund to developing country parties to the UNFCCC and the Paris Agreement or LDCs and small island developing states (SIDs).<sup>152</sup> A representative of SIDs commented that ‘all developing nations should be eligible to receive support.’<sup>153</sup>

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- 147 A Rathi ‘World Bank says loss and damage fund could start in three months’ 1 December 2023, <https://www.bloomberg.com/news/articles/2023-12-01/cop-28-climate-loss-and-damage-fund-could-start-early-next-year> (accessed 26 December 2023); G Dickie & V Volcovici ‘World Bank poised to host climate loss and damage fund, despite concerns’ 4 November 2023, <https://www.reuters.com/sustainability/sustainable-finance-reporting/world-bank-poised-host-climate-loss-damage-fund-despite-concerns-2023-11-04/> (accessed 26 December 2023).
- 148 E Calliari and others ‘Making sense of the politics in the climate change loss and damage debate’ (2020) 64 *Global Environmental Change* 1; J Taub and others ‘From Paris to Marrakech: Global politics around loss and damage’ (2016) 72 *India Quarterly* 317.
- 149 A Marke and others ‘The development of a quasi-loss and damage compensatory system for developing countries through climate litigation’ (2020) 1 *Carbon and Climate Law Review* 57; Toussaint (n 33) 18; L Benjamin and others ‘An islands’ COP? Loss and damage at COP23’ (2018) 27 *Review of European, Comparative and International Environmental Law* 5.
- 150 M Civillini ‘Ministerial shows fault lines on climate loss and damage fund’ 25 September 2023, <https://climatechangenews.com/2023/09/25/ministerial-shows-fault-lines-on-climate-loss-and-damage-fund/> (accessed 7 October 2023).
- 151 Transitional Committee TC3/2023/CCsInf.2 Funding arrangements: Non-exhaustive, indicative list of issues raised 2023 1.
- 152 Transitional Committee TC4/2023/6 4th meeting on the operationalisation of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4 9 October 2023 4.
- 153 K Abnett ‘Developing countries propose \$100 billion climate damage fund’ 6 September 2023, <https://www.reuters.com/business/environment/developing-countries-propose-100bn-climate-damage-fund-2023-09-06/> (accessed 4 October 2023).

It has been confirmed during COP28 that the fund is open to all developing countries ‘particularly vulnerable’ to the effects of climate change.<sup>154</sup> However, the fear is that ‘small, highly vulnerable communities’ might be side-lined ‘by the demands of bigger nations’, such as, for example, South Africa.<sup>155</sup> South Africa is an attractive candidate for L&D funding, not only because it is part of the continent scientifically most vulnerable to the effects of climate change, but also because of its standing and relations in the international community, which has made it a favourite recipient of climate-related funding.<sup>156</sup> Moreover, as a negotiating partner has remarked, the (previous) ‘minister of energy in South Africa called himself “minister of coal”, just to tell you where the mentality is’, thus, ‘we need to work with South Africa’, and that is ‘why the finance is going in that direction’.<sup>157</sup> Therefore, a careful reconsideration of the meaning ascribed to ‘particularly vulnerable country’ might be imminently warranted<sup>158</sup> – the definition of which is not detailed in the approved text.

Boyd notes that in terms of eligibility for the Loss and Damage Fund, the question as to ‘what extent should the country have been affected’ remains unanswered.<sup>159</sup> This also raises the question as to whether the ‘beyond adaptation’ element is strictly required. There is room to argue that the damage caused by extreme weather events in South Africa over the last few years could have been lessened were infrastructure maintained and disaster fund spending strictly monitored.<sup>160</sup> For example, it is predicted that if adequate adaptation measures are implemented, South Africa could reduce climate-related road maintenance by 2050 by 43 per cent.<sup>161</sup> Furthermore, the University of Notre Dame Global Adaptation Initiative has ranked South Africa with a ‘low vulnerability score’ because ‘its current vulnerabilities are manageable’, albeit noting that ‘improvements in readiness’ are necessitated.<sup>162</sup> Ortega-Cisneros and others concur that scientific research is needed to determine whether present impacts

154 United Nations Framework Convention on Climate Change COP28 (n 2) 6.

155 Abnett (n 153).

156 Eg, compared to other African countries, South Africa still ranks relatively well on the 2022 Corruption Perceptions Index, <https://www.transparency.org/en/cpi/2022> (accessed 7 October 2023). See also African Development Bank Group ‘South Africa: African Development Bank approves \$1 billion guarantee from the United Kingdom to support SA’s Just Energy Transition’ 9 December 2023, <https://www.afdb.org/en/news-and-events/press-releases/south-africa-african-development-bank-approves-1-billion-guarantee-united-kingdom-support-sas-just-energy-transition-66885> (accessed 26 December 2023).

157 P Bond ‘Climate-financing carrots and sticks in South Africa’ 29 March 2023, <https://www.cadm.org/Climate-Financing-Carrots-and-Sticks-in-South-Africa#h12> (accessed 5 October 2023).

158 G Jackson & Sakshi ‘Political and legal implications of defining “particularly vulnerable” for the loss and damage fund’ (2023) *OSF Preprints* 1; M Civillini ‘Countries pledge \$400m to set up loss and damage fund’ 30 November 2023, <https://www.climatechangenews.com/2023/11/30/countries-pledge-400m-to-set-up-loss-and-damage-fund/> (accessed 26 December 2023).

159 N Egan interview with E Boyd ‘Many questions remain as new loss and damage fund is formally established at COP28’ 6 December 2023, <https://www.lucus.lu.se/article/many-questions-remain-new-loss-and-damage-fund-formally-established-cop28> (accessed 26 December 2023).

160 Refer to the discussion in Intergovernmental Panel on Climate Change ‘Climate change: The physical science basis – Sixth assessment report’ (2021) 1611-1612.

161 African Union (n 49) 22.

162 ND-GAIN Country Index ‘South Africa’ 2021, <https://gain.nd.edu/our-work/country-index/rankings/> (accessed 7 October 2023).

and longer-term impacts are reversible with adequate measures in place or beyond adaptation.<sup>163</sup> Additionally, with the extreme weather incidents that occurred in 2023, experts cautioned that while climate change has made South Africa more likely to experience such events, we cannot cry climate change after every episode, as more 'long-term data is required'.<sup>164</sup>

Currently, L&D falls within South Africa's existing disaster management realm. This highlights the complexity of deciding on the objective of the fund. Sherman, the co-chairperson for developing countries of the Transitional Committee on L&D finance, has stated that for South Africa, the fund could take the form of financial support to help respond to events, such as those seen in 2022 to 2023 or address slow-onset events, such as the economic costs of agricultural losses owing to a possible decline in pollinators, or economic losses because of a change in weather conditions that could destroy fisheries.<sup>165</sup>

Zero Carbon Analytics, an international research group, discusses that for African countries, the Loss and Damage Fund needs to function at multiple levels to cover unavoided, unavoidable, economic and non-economic L&D, and would require close cooperation and coordination among different levels of government, the multilateral system, and various sectors across society.<sup>166</sup> Using the flooding in South Africa in 2022 as an example, they discuss how ill-prepared the country was to respond to the event, given that there is no reliable disaster risk database; local, provincial, and national governments have not been proactive in planning and building resilience; and early-warning systems and flood mitigation measures are inadequate, thus, no rapid-response system is available. In addition, they point to uncontrolled urbanisation and a lack of land-use zoning enforcement, for example, prohibiting people from building below the flood line, and the poor education of many communities on the danger posed by such an event, as areas in need of improvement. Accordingly, for South Africa, they suggest that, in terms of disaster management, the Loss and Damage Fund be used to develop an advanced early-warning and rapid-response system; relocate at-risk communities; protect at-risk infrastructure; invest in projects that empower local government to educate communities regarding climate change; and provide mobile health facilities in anticipation of disaster events.<sup>167</sup> It is regrettable, however, that they

163 K Ortega-Cisneros and others 'Assessing South Africa's potential to address climate change impacts and adaptation in the fisheries sector' (2021) 8 *Marine Conservation and Sustainability* 14-16.

164 C Bhengu 'More data needed to link Western Cape flooding to climate change' 28 September 2023, <https://www.news24.com/news24/southafrica/news/these-weather-systems-are-usual-more-data-needed-to-link-western-cape-flooding-to-climate-change-20230928> (accessed 5 October 2023); E van Diemen 'Why more than two months' worth of rain fell in Western Cape weekend storm' 26 September 2023, <https://www.dailymaverick.co.za/article/2023-09-26-why-more-than-two-months-worth-of-rain-fell-in-western-cape-weekend-storm/> (accessed 5 October 2023); M Doelle & S Seck 'Loss and damage from climate change: From concept to remedy?' (2020) 20 *Climate Policy* 671.

165 Evans (n 109).

166 Zero Carbon Analytics 'Briefing: Exploring a comprehensive loss and damage facility for African countries' October (2022) 7.

167 Zero Carbon Analytics (n 166) 8-9.



suggest that if the fund were to be allocated to South Africa, priority should be given to addressing issues that should have already been tackled by now.

Boyd also points out that the question remains as to what types of losses and damages will be covered.<sup>168</sup> For example, humanitarian assistance is merely one component of L&D.<sup>169</sup> Indeed, it has been clarified that while humanitarian aid is related to L&D in terms of reacting to climate change-induced disasters and could enhance the response time of existing programmes, duplication of funding must be avoided.<sup>170</sup> Then there is also the issue of displacement, which can simultaneously be an indication of L&D incurred by people and communities, L&D in itself, and a cause thereof.<sup>171</sup> During COP28, it was confirmed that the Loss and Damage Fund could be utilised to support 'safe and dignified human mobility in the form of displacement, relocation and migration in cases of temporary and permanent loss and damage'.<sup>172</sup> In a country where timely relief for 'normal' weather disasters is severely lacking with mismanaged funds, a mechanism as vital and long fought for as climate change-induced L&D cannot merely be lumped under the existing pile of unimplemented policies or exposed to the 'black hole of public financing'. Thus, dedicated L&D policies in South Africa are necessary to not only set out its functioning and scope but also to harmonise it with disaster management, instead of merely making it ancillary thereto.

It was decided at COP28 that the fund will aid in addressing a variety of challenges associated with the adverse effects of climate change, such as climate-related emergencies, sea level rise, displacement, relocation, migration, insufficient climate information and data, and the need for climate-resilient reconstruction and recovery.<sup>173</sup> The focus is on providing complementary and additional support and improving the speed and adequacy of access to finance for responding to L&D.<sup>174</sup> The Transitional Committee concurred that the fund should be flexible enough 'to evolve in connection with evolving needs, priorities, and science'.<sup>175</sup> It was agreed during COP28 that the Loss and Damage Fund would be overseen

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168 Egan (n 159).

169 H Slim 'Is it right to count humanitarian aid as loss and damage?' 29 August 2023, <https://odihpn.org/publication/is-it-right-to-count-humanitarian-aid-as-loss-and-damage/> (accessed 5 October 2023); PK Clarke & D Hillier 'Addressing loss and damage: Insights from the humanitarian sector' (2023) 8; Bhandari and others (n 138).

170 United Nations Framework Convention on Climate Change COP28 (n 2) 6.

171 Platform on Disaster Displacement 'Advisory committee workshop' (2023) 26; A Baillat 'Seizing the opportunity to address disaster displacement in the loss and damage discussions' June 2023, <https://www.internal-displacement.org/expert-opinion/seizing-the-opportunity-to-address-disaster-displacement-in-the-loss-damage> (accessed 7 October 2023); Platform on Disaster Displacement '15 Observations on disaster displacement as loss and damage' (2022) 2.

172 United Nations Framework Convention on Climate Change COP28 (n 2) 6. See also Platform on Disaster Displacement 'Reporting back from the 2023 United Nations Climate Change Conference' 21 December 2023, <https://disasterdisplacement.org/news-events/reporting-back-from-the-2023-united-nations-climate-change-conference-cop28/> (accessed 26 December 2023).

173 United Nations Framework Convention on Climate Change COP28 (n 2) 6-7.

174 As above.

175 Transitional Committee TC3/2023/CCsInf.5 3rd meeting on the scope of the fund (non-exhaustive, indicative list of issues raised during the discussion) 2023 1.

in a country-driven manner, given that applying a strict scope would fail to consider the needs and realities on the ground in different countries.<sup>176</sup> With this flexibility, countries could reallocate funding to other areas of addressing L&D.<sup>177</sup> This raises the question of nationally managing the fund.

It was agreed that the beneficiary developing countries may designate a national authority or national focal point to be responsible for the overall management and implementation of activities, projects and programmes supported by the fund.<sup>178</sup> These activities are expected to be regularly monitored for impact, efficiency and effectiveness.<sup>179</sup> Periodic independent evaluations of the performance of the fund will also be conducted to provide an objective assessment of the results of the fund, including the activities financed thereby.<sup>180</sup>

For countries such as South Africa, transparency is crucial for successful implementation.<sup>181</sup> Fair Finance, a civil society coalition that investigates government spending, reports that there is a lack of transparency as to how the South African government utilises its climate finance.<sup>182</sup> Fair Finance further expresses concern over the lack of public consultation undertaken in that regard.<sup>183</sup> According to a 2022 study, communities 'wish to be part of the just transition decision-making and implementation process and wish to be empowered to participate in and support the transition effectively'.<sup>184</sup> However, communities lose interest because climate-related issues are often, perhaps intentionally, conveyed in an overly technical manner.<sup>185</sup> The hope is that the Loss and Damage Fund will be different in 'truly involving and being centred

176 Z Shawoo and others 'Operationalising the loss and damage fund: Learning from funder and recipient perspectives, TC3 Submission' (2023) 2-3; United Nations Framework Convention on Climate Change COP28 (n 2) 12-13.

177 Transitional Committee TC2/2023/4 2nd meeting on the Report of the first workshop on addressing loss and damage in the context of decisions 2/CP.27 and 2/CMA.4 12 May 2023.

178 United Nations Framework Convention on Climate Change COP28 (n 2) 12.

179 United Nations Framework Convention on Climate Change COP28 (n 2) 14.

180 As above.

181 The national treasury has remarked on the worrying situation of corruption and irregular public spending. 'Medium-term budget policy statement' (2021) 43. Regulatory and oversight agencies are underfunded and poorly led; K Mokgonyana 'SA must do more to combat corruption if it wants to get climate finance' 10 November 2022, <https://mg.co.za/thoughtleader/opinion/2022-11-10-sa-must-do-more-to-combat-corruption-if-it-wants-to-get-climate-finance/> (accessed 5 October 2023).

182 T Broughton 'Call for government to be transparent about R106-billion green energy loan' 22 February 2022, <https://www.groundup.org.za/article/full-picture-what-government-will-do-r106-billion-international-development-loan-needed/> (accessed 26 December 2023). See also Y Pillay 'Public sector spending: Allow transparency to help stop corruption' 5 July 2021, <https://www.bdo.co.za/en-za/insights/2021/advisory/public-sector-spending-allow-transparency-to-help-stop-corruption> (accessed 26 December 2023).

183 Broughton (n 182); see also T Molelekwa 'Coal communities fear South Africa's clean energy transition' 2 February 2023, <https://www.climatechangenews.com/2023/02/02/coal-communities-left-behind-fear-south-africa-green-energy-transition/> (accessed 26 December 2023); Institute for Economic Justice 'Secretly-negotiated South African "climate finance deal" a gift to private investors while choking local development' 10 November 2022, <https://www.iej.org.za/statement-secretly-negotiated-south-african-climate-finance-deal-a-gift-to-private-investors-while-choking-local-development/> (accessed 26 December 2023).

184 Presidential Climate Commission 'Community and stakeholder engagement on a just transition in South Africa' May 2022 12.

185 BBC World Service Trust 'Research report: South Africa talks climate' (2010) 29.

around affected communities and groups who have traditionally been excluded and marginalised'.<sup>186</sup>

To achieve this, strict guidelines must be set out to 'ensure that adaptation and [L&D] finance is not conflated and that finance for [L&D] is not diverted or relabelled'.<sup>187</sup> This point must not be glossed over but considered carefully. As a South African government official remarked, 'different political parties have different priorities and oftentimes climate change is not prioritised'.<sup>188</sup> Strict guidelines on accountability and transparency are crucial to prevent governments from merely reprioritising L&D funding to other areas carefully window-dressed to meet the fund's criteria. Especially since in their report, the Transitional Committee noted difficulties in monitoring L&D finance.<sup>189</sup>

Further lingering questions concern how the money from the Loss and Damage Fund will be paid out, how the fund will be financed or replenished, as there is no firm obligation for developed countries to pay into the fund, and whether the World Bank should administer the fund in the long term.<sup>190</sup> There are concerns over the World Bank serving as the interim organisation to manage the Loss and Damage Fund because it 'would lack independence, fail to provide communities direct access to funds, and risk further indebting nations'.<sup>191</sup> Critique has also been raised regarding the current commitment of \$700 million (€635,06 million), as it lags behind the estimated \$150 to 300 billion (€136,08 to 272,17 billion) needed by developing countries by 2030.<sup>192</sup>

A last issue concerns the interlinkage of the Santiago Network for L&D and the Loss and Damage Fund.<sup>193</sup> While the Loss and Damage Fund establishes

186 L Walsh 'Will the new loss and damage fund replicate the same old exclusion of local voices and organisations?' 3 November 2023, <https://reliefweb.int/report/world/will-new-loss-and-damage-fund-replicate-same-old-exclusion-local-voices-and-organisations> (accessed 26 December 2023).

187 Bhandari and others (n 138); C Zenda 'What will loss and damage fund mean for Africa's most vulnerable?' 30 November 2022, <https://www.fairplanet.org/story/cop27-loss-and-damage-fund-for-africa/> (accessed 7 October 2023).

188 Sibiyá and others (n 83) 8.

189 United Nations Framework Convention on Climate Change COP28 FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 28 November 2023 held in United Arab Emirates from 30 November to 12 December 2023 Report by the Transitional Committee on Operationalisation of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4 5.

190 Egan (n 159).

191 Dickie & Volcovic (n 147); Walsh (n 186); I Walker 'World Bank should not host loss and damage fund, say critics' 31 October 2023, <https://greencentralbanking.com/2023/10/31/world-bank-should-not-host-loss-and-damage-fund-say-critics/> (accessed 26 December 2023).

192 L Omarjee 'Pledges for loss and damage roll in, but billions needed – SA chief negotiator' 10 December 2023 [https://www.news24.com/fin24/climate\\_future/news/cop28-pledges-for-loss-and-damage-roll-in-but-billions-needed-sa-chief-negotiator-20231210](https://www.news24.com/fin24/climate_future/news/cop28-pledges-for-loss-and-damage-roll-in-but-billions-needed-sa-chief-negotiator-20231210) (accessed 26 December 2023); Independent High-Level Expert Group on Climate Finance 'Report: Finance for climate action' November (2022) 5 & 7.

193 See H Niyitegeka 'Unpacking the link between the Santiago Network and funding arrangements and fund for loss and damage' Brief for the Loss and Damage Collaboration (2023).

new funding arrangements and a fund for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, the Santiago Network emerged from COP25 in 2019 as part of the Warsaw International Mechanism for Loss and Damage, which serves both the UNFCCC and its Paris Agreement.<sup>194</sup> The Santiago Network is meant to catalyse technical assistance related to L&D directly to developing countries.<sup>195</sup> Parties at COP26 agreed to six functions for the Santiago Network, namely, assisting in identifying and communicating technical assistance needs and priorities; identifying relevant technical assistance; and actively connecting those seeking technical assistance with best-suited organisations, bodies, networks and experts that could provide that assistance.<sup>196</sup> The Santiago Network's governance arrangements and institutional structure were further agreed upon during COP27.<sup>197</sup> During COP28, the UN Office for Disaster Risk Reduction and the UN Office for Project Services were selected as the hosts of the Santiago Network secretariat.<sup>198</sup> Apart from mentions relating to the need for coherence between the two, more clarity on how the Santiago Network will fit into the L&D funding arrangements is needed.<sup>199</sup>

### 3.4.2 *Beyond the Loss and Damage Fund*

There are significant global developments underfoot, such as the pending advisory opinions from the International Court of Justice (ICJ) and the Inter-American

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- 194 United Nations Framework Convention on Climate Change COP19 FCCC/CP/2013/10/Add.1 31 January 2014 held in Warsaw, Poland from 11 to 22 November 2013 Decision 2/CP.19 Warsaw international mechanism for loss and damage associated with climate change impacts.
- 195 United Nations Framework Convention on Climate Change COP25 FCCC/PA/CMA/2019/6/Add.1 16 March 2020 held in Madrid, Spain from 2 to 13 December 2019 Decision 2/CMA.2 Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and its 2019 review 8.
- 196 United Nations Framework Convention on Climate Change COP26 FCCC/PA/CMA/2021/10/Add.3 8 March 2022 held in Glasgow, Scotland, United Kingdom from 31 October to 13 November 2021 Decision 19/CMA.3 Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts 29-30.
- 197 United Nations Framework Convention on Climate Change COP27 FCCC/PA/CMA/2022/10/Add.3 17 March 2023 held in Sharm El Sheikh, Egypt from 6 November to 20 November 2022 Decision 12/CMA.4 Santiago network for averting, minimising, and addressing loss and damage associated with the adverse effects of climate change under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts.
- 198 United Nations Framework Convention on Climate Change COP28 FCCC/PA/CMA/2023/L.9 12 December 2023 held in the United Arab Emirates from 30 November to 12 December 2023 Draft decision-/CMA.5 Santiago network for averting, minimising and addressing loss and damage under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts.
- 199 United Nations Framework Convention on Climate Change COP28 (n 2) 11, 16, 18; H Niyitegeka 'COP28 is finally here: What does a robust outcome on loss and damage look like for developing countries?' 27 November 2023, <https://www.lossanddamagecollaboration.org/pages/cop-28-is-finally-here-what-does-a-robust-outcome-on-loss-and-damage-look-like-for-developing-countries> (accessed 26 December 2023); N Warszawski and others '4 actions vulnerable countries need from COP28' 23 May 2023, <https://www.wri.org/technical-perspectives/actions-vulnerable-countries-need-un-climate-summit> (accessed 26 December 2023).

Court of Human Rights (IACHR) on the obligations of states concerning climate change.<sup>200</sup> The joint request for an advisory opinion on the climate emergency was submitted to the IACHR on 9 January 2023, by the Foreign Ministers of Chile and Colombia. This significant step aimed to clarify the scope of state obligations in addressing the climate crisis within the framework of international human rights law, particularly the American Convention on Human Rights. The request was prompted by the escalating impacts of climate change in the region, which disproportionately affect vulnerable populations and ecosystems. Recognising the urgent need for comprehensive and effective measures, Chile and Colombia sought to establish clear legal standards and guidelines for states to follow in their climate actions. This move highlights the growing recognition of the intrinsic link between environmental degradation and human rights violations, emphasising the need for robust legal frameworks to safeguard fundamental human rights in the face of climate change.

The European Court of Human Rights' (ECHR) recent ruling in *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (2024) marks a historic moment in climate change litigation, but it also highlights a missed opportunity to explore reparations for climate-related harm.<sup>201</sup> The case, involving four elderly women and a climate advocacy group, challenged Switzerland's climate policies under various ECHR articles, claiming health risks from climate-induced heatwaves. While the Court found violations, it did not address reparations. Instead, it emphasised general measures for Switzerland to achieve significant GHG reductions and carbon neutrality, reflecting its traditional cautious approach. Although the ruling did not delve into specific remedies, it sets important precedents for future climate litigation and guides for improving national climate policies. This decision might signal the start of a broader trend in addressing climate change through human rights frameworks.

On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) issued its first advisory opinion, determining that GHG emissions caused by human activity are considered 'pollution of the marine environment' under the United Nations Convention on the Law of the Sea (UNCLOS). This decision establishes that states have specific obligations, including the responsibility to prevent, reduce, and control anthropogenic GHGs originating from both land and sea sources. The African Union (AU), in their written statement and during oral hearings, emphasised the vulnerability of the African continent to climate change, confirmed their position in favouring the grant of an advisory opinion

200 United Nations General Assembly Resolution 77/276 Request for an advisory opinion of the International Court of Justice on the obligation of states in respect of climate change UN Doc A/77/L.58 (1 March 2023).

201 M Cohen and others 'Reparation for Climate Change at the ECtHR' 10 May 2024, <https://verfassungsblog.de/reparation-for-climate-change-at-the-ecthr/> (accessed 12 May 2024); J Reich 'KlimaSeniorinnen and the Choice Between Imperfect Options' 18 April 2024, <https://blogs.law.columbia.edu/climatechange/2024/04/18/klimasenioreninnen-and-the-choice-between-imperfect-options/> (accessed 20 April 2024).

that bears in mind the principle of common but differentiated responsibility and, accordingly, urged ITLOS to take this ‘unprecedented opportunity’ to ‘address this problem in a way that contribute[s] to ... the betterment of the majority of mankind.’<sup>202</sup>

As Torre-Schaub discusses, while advisory opinions ‘do not have the same binding force as decisions in litigation cases’, they can have ‘important effects on the principles of international law’ and on ‘climate disputes in the regional and national context.’<sup>203</sup> As Nedeski and others conclude, even if the expected outcome is not as hoped for by those petitioning it, global collective action is required to combat the climate emergency, and legal insight from these international courts could play a significant role going forward in negotiations.<sup>204</sup> For example, they could guide whether and how reparations should be calculated for the L&D suffered by countries due to climate change which, in turn, could further bolster climate litigation.<sup>205</sup>

A study on 73 legal cases demonstrates that currently it remains very difficult to hold private actors liable because the scientific evidence needed to distinguish their contributions from the whole ‘lags.’<sup>206</sup> Attribution science continues to develop, which helps us to understand ‘whether, or to what degree, human influence may have contributed to extreme climate or weather events.’<sup>207</sup> As a matter of fact, the ‘interplay between climate science and climate law becomes increasingly important when addressing L&D,’ causation, and compensation, which mandates that ‘science must enlighten the law.’<sup>208</sup>

202 International Tribunal for the Law of the Sea ITLOS/PV.23/C31/17 Public sitting African Union verbatim record on the Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (21 September 2023) 1 & 86; International Tribunal for the Law of the Sea Case No 31 African Union written statement on the Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law vol 1 (16 June 2023) 1.

203 M Torre-Schaub ‘International justice and the environment: Analysis of the request for an advisory opinion to the International Court of Justice’ 11 May 2023, <https://www.iddri.org/en/publications-and-events/blog-post/international-justice-and-environment-analysis-request-advisory> (accessed 5 October 2023).

204 N Nedeski and others ‘The world is burning, urgently and irreparably: A plea for interim protection against climatic change at the ICJ’ Max Planck Institute Research Paper Series (2023) 32.

205 D Bodansky ‘Advisory opinions on climate change: Some preliminary questions’ (2023) 32 *Review of European, Comparative and International Environmental Law* 190.

206 FEL Otto and others ‘Causality and the fate of climate litigation: The role of the social superstructure narrative’ (2022) 13 *Global Policy* 736; RF Stuart-Smith and others ‘Filling the evidentiary gap in climate litigation’ (2021) 11 *Nature Climate Change* 651.

207 Congressional Research Service ‘Is that climate change? The science of extreme event attribution’ (2023) 2; KW Steininger ‘Foreseeability of economic damages related to inadequate climate mitigation and adaptation’ in E Schulev-Steindl and others (eds) *Climate change, responsibility and liability* (2022) 93.

208 OC Ruppel ‘South Africa: Climate change, responsibility and liability – The legal system, public and private law considerations’ in Schulev-Steindl and others (n 207) 240.

Few attribution studies have considered African events to date.<sup>209</sup> Developments in attribution science could support plaintiffs in satisfying legal tests for causation and, thus, provide a crucial step in successful litigation concerning adaptation and losses where no claims for remedies have been successful.<sup>210</sup> Were such data readily available, the current legal framework in South Africa for claiming damages could accommodate such claims.<sup>211</sup> However, first, the ambiguity, which still shrouds L&D, must be settled.<sup>212</sup> Once the concept has been adequately defined, its litigation could become a vital gap filler to understanding how its elements set it apart from mitigation or adaptation cases.<sup>213</sup>

Only 15 climate change-related cases have so far been heard by national courts on the African continent, consisting of 54 countries, out of over 2 180 cases globally, these being in Kenya (two cases), South Africa (nine cases), Nigeria (two cases) and Uganda (two cases).<sup>214</sup> Several factors hinder climate litigation on the continent, and beyond,<sup>215</sup> including the complexity of the judicial processes; the onerous evidential burden and standard of proof required; the complexity of environmental issues; the lack of capacity and resources of communities affected; and the difficulty in proving causation due to a lack of scientific data.<sup>216</sup> Moreover, it could be attributed to either a lack of legislative frameworks for litigants to rely on or the ‘newness’ of such frameworks.<sup>217</sup> Only from 2022 onwards has there been a steady increase in climate change framework laws being implemented across Africa. Therefore, it might still be too early to expect substantive climate litigation from the region.<sup>218</sup> Moreover, for countries such as South Africa, the focus first is on addressing poor enforcement of existing planning and environmental legislation before litigants tackle climate change matters.<sup>219</sup> As a government official confirmed, ‘[i]t is not because people are in

209 Refer to Z Liu and others ‘The April 2021 Cape Town wildfire: Has anthropogenic climate change altered the likelihood of extreme fire weather?’ (2023) 104 *American Meteorological Society* 1; FEL Otto and others ‘Attribution of extreme weather events in Africa: A preliminary exploration of the science and policy implications’ (2015) 132 *Climatic Change* 532.

210 M Burger and others ‘The law and science of climate change attribution’ (2020) 45 *Columbia Journal of Environmental Law* 148-155; RA James and others ‘Attribution: How is it relevant for loss and damage policy and practice?’ in R Mechler and others (eds) *Loss and damage from climate change: Concepts, methods and policy options* (2019) 123-124.

211 Ruppel (n 208) 241-250; see also OC Ruppel & R Murray ‘Natural resources’ in *Max Planck Encyclopedia of Comparative Constitutional Law* (June) 1 5; C Reddell ‘Directors’ liability and climate risk: South Africa – Country paper’ (2018).

212 MA Tigre & M Wewerinke-Singh ‘Beyond the north-south divide: Litigation’s role in resolving climate change loss and damage claims’ (2023) *Review of European, Comparative and International Environmental Law* 4.

213 Refer to A Kodiveri and others ‘The significance of climate litigation for the political debate on loss and damage’ (2023); Toussaint (n 33) 21.

214 M Burger & MA Tigre ‘Global climate litigation report’ (2023) 16-17.

215 See OC Ruppel and others ‘Strategic climate litigation on the rise: An overview from a European perspective’ (2023) 3 *Huxiang Law Review* 124-138.

216 Cf among others O Adejonwo & O Afinowi ‘Human rights approach to climate justice in Africa: Experiences from other jurisdictions’ in AO Jegede & O Adejonwo (eds) *Climate change justice and human rights: An African perspective* (2022) 35 55.

217 J Setzer & L Benjamin ‘Climate litigation in the Global South: Constraints and innovations’ (2019) *Transnational Environmental Law* 10, 25.

218 Intergovernmental Panel on Climate Change (n 114) 1312.

219 LJ Houston & OC Ruppel ‘Just energy transitions in progress? The partnership between South Africa and the EU’ (2022) 19 *Journal for European Environmental and Planning Law*

denial, but people are dealing with real-life issues.<sup>220</sup> For example, less than 50 per cent of audiences surveyed in South Africa, Kenya and Nigeria are interested in climate change as a news topic, given the daily challenges they are facing.<sup>221</sup> In a recent survey, when citizens of 34 African countries were asked what they considered the most important problems that their government should address, fewer than 1 per cent of the participants listed climate change as a concern, while unemployment was at the top, followed by crime and housing.<sup>222</sup>

Since 2023, a notable shift has emerged in global climate litigation, characterised by increased efforts to hold major polluters accountable. This trend is particularly evident in the Global North, where jurisdictions are taking proactive steps to address climate change impacts. For instance, Multnomah County, Oregon, is seeking damages from corporations for the 2021 heat dome, while Vermont has enacted the Climate Superfund Act (S.259), imposing strict liability on major oil and gas companies for carbon pollution.<sup>223</sup> Similar legislative initiatives are underway in other US states.<sup>224</sup> This growing focus on climate liability underscores stark global disparities. While the Global North advances these measures, Global South communities often face significant barriers in pursuing comparable legal actions.

### 3.4.3 COP29

The 2024 UN Climate Change Conference (UNFCCC COP 29), set for 11-22 November 2024, in Baku, Azerbaijan, will advance the objectives of the UNFCCC and the Paris Agreement. The conference will focus on limiting global warming, enhancing adaptation efforts, and mobilising financial resources. Key sessions will include the 29th Conference of the Parties (COP 29), the 19th Meeting of the Parties to the Kyoto Protocol (CMP 19), and the sixth Meeting of the Parties to the Paris Agreement (CMA 6). Major agenda items will be finalising the enhanced transparency framework and setting a new collective quantified finance goal, alongside addressing other critical climate issues.

In the 2023 Global Stocktake, key findings from the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) were brought to light. The report confirmed that human activities have driven global warming of approximately 1.1°C, with widespread impacts that disproportionately affect the

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39; O Rumble & A Gilder 'Climate change litigation on the African continent' (2021) 3; Setzer & Benjamin (n 217) 3-4.

220 Sibiya and others (n 83) 8-9.

221 Reuters Institute 'Digital news report' (2022) 54.

222 Mpako & Govindasamy (n 90) 6.

223 J Setzer & C Higham 'Global trends in climate change litigation: 2024 snapshot' (2024) 46-47.

224 As above.



most vulnerable populations, who have contributed least to climate change.<sup>225</sup> It highlighted that current adaptation efforts are often fragmented and uneven, with significant gaps remaining. The Stocktake emphasised the need for integrated, multi-sectoral approaches such as sustainable land management and ecosystem conservation to bolster resilience and adaptation. It also called for continued financial support from developed countries and voluntary contributions to address L&D, following the Paris Agreement and the Warsaw International Mechanism. Progress under international mechanisms was acknowledged, yet the report noted persistent gaps in finance and support, stressing the urgency for enhanced action and coherence in managing climate impacts.

As the effects of climate change grow increasingly severe, COP29 faces immense pressure to produce actionable and impactful outcomes.

#### 4 Concluding remarks

Thomas and Benjamin assessed the state of L&D management in both the Caribbean and Pacific Islands and found that a lack of data constrains it; gaps in financial assessments; and the absence of specific policies or mechanisms that holistically address L&D.<sup>226</sup> Vanhala and others investigated the type of knowledge and ideas national policymakers and civil servants in Antigua and Barbuda draw on when conceptualising L&D as a governance object.<sup>227</sup> They identified several barriers to policymaking, including a lack of shared understanding of what L&D entails and how to address it across government departments; a lack of relevant data; and political tensions around its collection and disclosure.

South Africa certainly qualifies for prospective L&D funding, on paper at least, ticking the vulnerability box.<sup>228</sup> However, as highlighted herein, and mirrored by similar research by Thomas and Benjamin and Vanhala and others, significant obstacles remain. South Africa has shown limited progress in implementing the adaptation and mitigation measures it set out in its policies.<sup>229</sup> The current reliance on disaster management is merely an insufficient reactive over proactive strategy, exacerbated by unmaintained infrastructure. The scale of vulnerability increasingly projected in Southern African cities is focused on a broad range of sectors, including business and tourism, air quality, health and food security,

225 United Nations Framework Convention on Climate Change FCCC/PA/CMA/2023/L.17 13 December 2023 Outcome of the first global stocktake, held in the United Arab Emirates 30 November to 12 December 2023 Draft decision -/CMA.5.

226 Thomas & Benjamin (n 14) 2369.

227 L Vanhala and others 'The knowledge politics of climate change loss and damage across scales of governance' (2021) 30 *Environmental Politics* 1.

228 United Nations Framework Convention on Climate Change COP28 (n 2) 12.

229 See S van Wyk 'Climate change law and policy in South Africa and Mauritius: Adaptation and mitigation strategies in terms of the Paris Agreement' (2022) 30 *African Journal of International and Comparative Law* 1; K Ross & H Winkler 'Effective tracking of nationally determined contributions: A case study on South Africa' (2021) 32 *Journal of Energy in Southern Africa* 11.

infrastructure and services, biodiversity and water resources.<sup>230</sup> While larger cities have the political will and capacity to ensure the implementation of key climate policies, smaller cities continue to struggle therewith.<sup>231</sup> While this could be argued as self-inflicted, they are reliant on national and provincial support and oversight.<sup>232</sup> Thus, despite its sophisticated legal framework, implementation is hindered by South Africa's complex and layered challenges.

At the beginning of 2024, President Ramaphosa introduced a new Climate Change Response Fund aimed at financing infrastructure projects to bolster South Africa's climate resilience.<sup>233</sup> This fund, a collaboration between the government and the private sector, is intended to address the growing impacts of the climate crisis. Unlike disaster response funds, it focuses on investments in sectors that enhance resilience to extreme weather events. The criteria for accessing the fund are still being finalised, and it is expected to become operational in the 2025/2026 financial year. It remains to be seen whether this fund will effectively address the issues highlighted or suffer from the same mismanagement as existing funds. Regardless, it will serve as a critical test of how climate resilience investments are managed and could provide insights into the management and benefits of L&D funding.

Awareness, capacity building, and policy alignment across the board must be the centre points for South Africa, should it become a beneficiary of the Loss and Damage Fund. Measures should be taken to enhance and strengthen government budget tracking, reporting, and verification systems.<sup>234</sup> As the saying goes, 'where there is bad governance, aid is ineffective, and where there is good governance, aid is unnecessary'.<sup>235</sup> It is important to note that potential donors must have an appreciation for the fact that 'achieving climate justice in South Africa demands global climate finance measures responsive to the problematic roots of the

230 I Niang and others 'Africa' in VR Barros and others (eds) *Climate change 2014: Impacts, adaptation, and vulnerability. Part B: Regional aspects* (2014) 1225.

231 G Ziervogel and others 'Climate change in South Africa: Risks and opportunities for climate-resilient development in the IPCC sixth assessment WGII report' (2022) 118 *South African Journal of Science* 2; HD Cole and others 'Managing city-scale slow-onset disasters: Learning from Cape Town's 2015-2018 drought disaster planning' (2021) 63 *International Journal of Disaster Risk Reduction* 1; T Hickmann & F Stehle 'The embeddedness of urban climate politics in multilevel governance: A case study of South Africa's major cities' (2019) 28 *Journal of Environment and Development* 54.

232 For a discussion, refer to S Hlahla and others 'Assessing municipal-level governance responses to climate change in KwaZulu-Natal, South Africa' (2019) 62 *Journal of Environmental Planning and Management* 1100; NW Tshamano & MA Shopola 'Local government and climate change: How are rural local municipalities in Limpopo Province coping with the effects of climate change?' (2021) *African Renaissance Special Issue on Climate Change Strategy Management* 149.

233 Parliament of South Africa 'Media Statement – Government establishes climate change response fund' 9 February 2024, <https://www.parliament.gov.za/news/government-establishes-climate-change-response-fund> (accessed 12 February 2024).

234 Meattle and others (n 84) 6.

235 Reliefweb 'International aid to Africa needs an overhaul' 18 May 2021, <https://reliefweb.int/report/world/international-aid-africa-needs-overhaul-tips-what-needs-change> (accessed 5 October 2023); JD Park *Re-inventing Africa's development* (2019) 37-38.

country's political economy'.<sup>236</sup> It is all well and good for a country to be able to boast that they have contributed toward the Loss and Damage Fund and call it a day, but that does little to advance the contours of climate justice and alleviate the harm suffered by vulnerable communities whose governments are not concerned with their climate adaptability or losses and damages suffered.<sup>237</sup> Accordingly, before the fund becomes fully operational, the funding commitments must be made more clear and detailed, subject to appropriate conditions that enhance transparency and accountability. Such an L&D fund can support those who bear the major brunt of the climate crisis, based on the polluter-pays principle in response to non-economic losses and damages.

Moreover, it could present an attempt to rectify prevailing Global North-Global South injustices in the spirit of common but differentiated responsibilities and capabilities. As Bhambra and Newell discuss, colonialism has left a lasting imprint on climate change, as historical exploitation and resource extraction continue to shape environmental inequalities. The legacies of colonial practices contribute to disparate vulnerabilities and hinder the global efforts needed to address the challenges of a changing climate.<sup>238</sup> Unfortunately, since L&D is both a political object and a scientific concept, countries will continue to struggle with how to develop policies and frameworks at the national level long after the fund's anticipated operation.<sup>239</sup> This is especially the case in South Africa, where competing socio-economic demands continue to outweigh the need for urgent climate change response. As has rightfully been pointed out, the current approach appears to be ensuring that South Africa attracts international investors with its ambitious policies and targets in the '(vain) belief that doing so will not only make [it] look more presentable but will somehow work its way down', rather than first and foremost laying a foundation of efficient proactive policies with capable well-financed institutions to ensure their implementation.<sup>240</sup>

This is exemplified in the country's Just Transition Framework, which aims to ensure that the shift to a low-carbon economy does not leave any communities or workers behind and considers the social and economic impacts of the transition towards a more sustainable and inclusive economy.<sup>241</sup> As Swilling and others discuss, the Just Transition Framework is ambitious but its execution suffers institutional weaknesses and corruption; they posit that a just transition

236 F Kiboori 'Africa has been short-changed by climate change, not climate action' 22 September 2023, <https://www.confluencephilanthropy.org/Africa-Has-Been-Short-changed-By-Climate-Change> (accessed 7 October 2023); MJ Murcott 'A just COP26 outcome for South Africa?' (2022) 13 *Transnational Legal Theory* 358-362.

237 Accountability is a two-way street: Schultheiß and others (n 146) 26-27.

238 GK Bhambra & P Newell 'More than a metaphor: "Climate colonialism" in perspective' (2023) 2 *Global Social Challenges Journal* 183.

239 S Huq and others 'Loss and damage' (2013) 3 *Nature Climate Change* 948.

240 DT McKinley 'The making of a myth: South Africa's neoliberal journey' (2007) 35 *Discourse* 15.

241 Presidential Climate Commission 'A framework for a just transition in South Africa' (2022).

requires a socio-political regime aligned with a sustainability paradigm.<sup>242</sup> While the policies are in place, contradictory government actions hinder a truly just transition.<sup>243</sup>

In discussing the potential for improved environmental policies under South Africa's new government, it is essential to highlight the role of the Executive Committee of the Warsaw International Mechanism for Loss and Damage (EXCOM) in guiding these efforts. The new government, viewed as a beacon of hope following years of perceived neglect, aims to spearhead a just energy transition, integrating EXCOM's insights to address climate change and protect vulnerable communities.<sup>244</sup> As the first new government in South Africa in 30 years, changing political dynamics might pave the way for better implementation and proactive measures. Should it become a beneficiary of the Loss and Damage Fund, this article encourages South Africa to uphold its 'African role model' mantle and utilise the fund's resources to greatly improve its disaster management processes, particularly turning the aim from reaction to pro-action, and urgently addressing the issues listed herein.

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242 M Swilling and others 'Developmental states and sustainability transitions: Prospects of a just transition in South Africa' (2015) *Journal of Environmental Policy and Planning* 16.

243 Refer to M Orlhogile & R Shirley 'The evolving just transition: Definitions, context, and practical insights for Africa' (2023) 3 *Environmental Research: Infrastructure and Sustainability* 8-9; A Lenferna 'What went wrong with South Africa's once pioneering just transition plan?' 7 December 2023, <https://africanarguments.org/2023/12/what-went-wrong-with-south-africa-once-pioneering-just-energy-transition-plan/> (accessed 26 December 2023); K Connolly '5 Lessons from South Africa's just transition journey' 1 September 2022, <https://www.wri.org/technical-perspectives/5-lessons-south-africas-just-transition-journey> (accessed 26 December 2023); V Satgar and others 'South Africa's framework for a just transition fails to recognise the climate emergency' 16 August 2022, <https://www.dailymaverick.co.za/article/2022-08-16-framework-for-sas-just-transition-fails-recognise-the-climate-emergency/> (accessed 26 December 2023).

244 D Naidoo & Y Diko 'South Africa could build a united front on a just transition' 18 July 2024, <https://issafrica.org/iss-today/south-africa-could-build-a-united-front-on-a-just-transition> (accessed 20 July 2024).