

**CLIMATE CHANGE
JUSTICE
AND HUMAN RIGHTS**



An African perspective

Edited by

Ademola Oluborode Jegede and Oluwatoyin Adejonwo

Pretoria University Law Press

PULP

2022

Climate change justice and human rights: An African perspective

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:

Pinetown Printers, South Africa

To order, contact:

PULP

Faculty of Law

University of Pretoria

South Africa

0002

pulp@up.ac.za

www.pulp.up.ac.za

Cover design:

David Ikbo

ISBN: 978-1-7764117-3-3

© The Editors 2022

TABLE OF CONTENTS

Preface	v
Acknowledgments	ix
Contributors	xi
Abbreviations and acronyms	xv
Dedication	xix
1 Introducing climate change justice and human rights: An African perspective	1
<i>Ademola Oluborode Jegede and Oluwatoyin Adejonwo</i>	
PART I: Human rights paradigm as an intervention to climate change	
2 The role of human rights soft law instruments in clarifying the obligations of fossil fuel companies for climate change interventions in Africa	13
<i>Elsabé Boshoff</i>	
3 Human rights approach to climate justice in Africa: Experiences from other jurisdictions	35
<i>Oluwatoyin Adejonwo and Olubunmi Afinowi</i>	
4 Promoting reproductive rights as a pathway to climate compatible development in Africa	59
<i>Oluwatoyin Adejonwo</i>	
PART II: Climate change and regional protection of human rights	
5 The adequacy of the African Charter on the Rights and Welfare of the Child in the risky trinity of climate change, food security and children	77
<i>Robert Doya Nanima and Ebenezer Durojaye</i>	

6	Connecting climate change and human rights in Africa: The potential role of non-governmental organisations in the African human rights system	97
	<i>Ademola Oluborode Jegede</i>	

7	Climate transparency in Africa: An inquiry into the role of the African Peer Review Mechanism	123
	<i>Mansha Mohee</i>	

PART III: Domestic regulatory frameworks on climate change and emerging jurisprudence

8	Climate finance in Africa through a human rights lens: A case study of the Turkana people in Kenya	153
	<i>Attiya Waris, Afshin Nazir and Parita Shah</i>	

9	Low carbon energy sources as a tool in actualising the right to development in Africa: A Nigerian case study	173
	<i>Jumoke Akinbusoye</i>	

10	Promoting and protecting human rights through implementation of the Paris Agreement in Kenya	189
	<i>David Acheru Mufuayia</i>	

11	Climate change and human rights in the Democratic Republic of the Congo: REDD+ and the protection of the rights of indigenous peoples	207
	<i>Lassana Koné</i>	

12	The human right to a clean or healthy environment as an intervention to climate change in Mauritius	235
	<i>Roopanand Mahadew</i>	

	Selected bibliography	255
--	------------------------------	------------

PREFACE

The present and future projection on climate change trends and related impacts raise considerable concerns for vulnerable populations in Africa. Reports show that growing temperatures and sea levels, fluctuating precipitation patterns and more extreme weather are threatening human health and safety, food and water security and socio-economic development in Africa. These developments have implications for the human rights of populations across the world. Yet, in an unequal world, different populations will be able to adapt differently. Also, climate interventions are problematic as Africa states tend to resist their climate commitments as human rights duty bearers. This reluctance is informed by their view that states in the Global North largely bear historical responsibility for the current state of the climate, and the reality that African states are required to engage in climate change-induced sacrifices in order to ensure acutely needed economic development. While the need for climate justice is unquestionable, African states understandably ask how useful it is to frame their legal responses through a human rights and, thus, an accountability lense.

In the two decades since the interface of climate change and human rights was first made explicit by the UN Human Rights Council with the adoption of Resolution 10/4 of 2009, human rights has featured consistently as a framework for articulating the causes of climate change as human wrongs and in clarifying states' obligations to address these adverse effects. Most recently, the UN Human Rights Council Resolution 47/24 of 2021 reaffirms that adverse effects of climate change have a range of direct and indirect implications on the effective enjoyment of human rights, including on the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development. At the regional level, the African Commission on Human and Peoples' Rights has in a number of resolutions also gradually given greater prominence to climate change. The challenge of the moment is to ensure that human rights are on the front burner in the formulation and application of legal frameworks to address and redress the causes, consequences and layers of accountability related to climate change.

This edited book consists of thought-provoking contributions and charts an intellectual path on a range of topical themes related to using a human rights-based approach as a means of achieving climate justice for vulnerable populations in Africa. The contributors provide insightful analyses on whether a human rights-based approach is useful and how it may be applied in respect of issues with which states in Africa grapple in their efforts to address climate change in line with emerging global standards.

The co-editors of this volume are lecturers from the University of Venda, South Africa, and the University of Lagos, Nigeria. These two institutions are part of the African 'branch' of the Global Campus of Human Rights, which presents the Master's programme in Human Rights and Democratisation in Africa (HRDA). The Global Campus of Human Rights is an inter-disciplinary centre of excellence supported by the EU. It strives to promote human rights and democratisation through higher education, specialised training programmes, research and outreach. Its worldwide network of member universities has a presence in seven regions of the world: Africa, the Arab World, Asia-Pacific, Caucasus, Europe, Latin America and Caribbean, and South East Europe. In addition to Pretoria, its regional headquarters are in Beirut, Bangkok, Yerevan, Buenos Aires, Sarajevo/Bologna, and its main coordinating office in Venice, Italy.

The HRDA is coordinated by the Centre for Human Rights, University of Pretoria, in collaboration with twelve partner universities across the continent: in Southern Africa (Universidade Eduardo Mondlane (Mozambique); the University of Mauritius; the University of Venda (South Africa); and the University of the Western Cape (South Africa)); in East Africa and the Horn (Addis Ababa University (Ethiopia); Makerere University (Uganda); the University of Nairobi (Kenya)); in West Africa (Université d'Abomey Calavi (Benin), Université Gaston Berger de Saint Louis (Sénégal), the University of Ghana, and the University of Lagos (Nigeria)); and in Central Africa (Université Catholique d'Afrique Centrale (Cameroon)). By the end of 2021, 589 students have graduated from the HRDA programme. The rich contribution in many fields and the role in positive social change of these graduates is a matter of great pride to the Centre and its twelve partners. The reach and consistency of these alumni is underscored by the fact that seven of the contributors to this volume (including one of the co-editors) have graduated from the HRDA programme

This volume is innovative and path breaking. I am confident that the scholarship in its pages will appeal to a wide readership interested in climate change, climate justice and human rights in Africa, including researchers, professionals, decision makers, diplomats, negotiators and academics.

My sincere congratulations and gratitude go to all responsible for this timely contribution to African scholarship on a topic that really matters to us all.

Frans Viljoen

Director, Centre for Human Rights, Pretoria

Member, Advisory Committee, UN Human Rights Council

22 November 2022

ACKNOWLEDGMENTS

This book is produced with the financial assistance of the European Union (EU) as part of the research activities of the Global Campus of Human Rights. We appreciate the EU not only for its belief and support all through the execution of the project, but also for the good work it does generally in Africa.

The two editors of this volume are lecturers at the University of Venda and the University of Lagos, two institutions that are part of Global Campus of Human Rights, which presents the Master's programme in human rights and democratisation in Africa (HRDA), coordinated by the Centre for Human Rights, University of Pretoria. The other universities that form part of this network are the University of Nairobi (Kenya); Université d'Abomey Calavi (Benin); Addis Ababa University (Ethiopia); Université Catholique d'Afrique Centrale (Cameroon); Universidade Eduardo Mondlane (Mozambique); Université Gaston Berger de Saint Louis (Sénégal), the University of Ghana; Makerere University (Uganda); the University of Mauritius; and the University of the Western Cape (South Africa). The editors cannot but appreciate these institutions for advertising the call for abstracts and encouraging their interested staff members to submit manuscripts.

We also acknowledge all authors for their timely and impressive commitment and, of course, for their diligence, time and insightful comments, the reviewers from the University of Exeter, London; the University of Ottawa, Canada; the University of Energy and Natural Resources, Ghana; North West University, South Africa; the University of Cologne, Germany; the University of Lincoln, United Kingdom; the University of Ibadan, Nigeria; and the University of Lagos, Nigeria. We are thankful for the support given to the project by Professor Frans Viljoen, the Director of the Centre for Human Rights, and, more importantly, for graciously agreeing to write the preface to the book.

CONTRIBUTORS

ADEMOLA OLUBORODE JEGEDE is a professor of law and Interim Director of the Ismail Mahomed Centre for Human and Peoples' Rights, School of Law, Faculty of Management, Commerce and Law, University of Venda, Thohoyandou, South Africa. He holds degrees from Obafemi Awolowo University Ile-Ife, University of Ibadan and the Centre for Human Rights, Faculty of Law, University of Pretoria. He has been a research visitor to the Centre for International Environmental Law, United States of America and the Human Rights Institute at Åbo Akademi, Finland. His research principally focuses on the interface of climate change and biodiversity loss with the human rights of vulnerable populations.

OLUWATOYIN ADEJONWO is a senior lecturer at the Faculty of Law, University of Lagos and a solicitor and advocate of the Supreme Court of Nigeria. She obtained her LLB degree from Ogun State University, now Olabisi Onabanjo University; a Master's Degree in Law from the University of Lagos; and a PhD in International Environmental Law from the Faculty of Law, University of Dundee, United Kingdom. She recently visited the Faculty of Law, University of Stellenbosch as a visiting scholar and a guest lecturer in the postgraduate course on sustainable development law and policy, and the Centre for Human Rights, Faculty of Law, University of Pretoria as a guest lecturer for the Human Rights and Democratisation in Africa programme. She serves on the Committee of Experts providing legal, advisory, and technical support to the Department of Climate Change (DCC) of the Federal Ministry of Environment, Nigeria.

AFINOWI OLUBUNMI is a lecturer at the Faculty of Law, University of Lagos. Her teaching and research interests span Environmental Law, Sustainable Development and Climate Change Law and Governance. Specifically, she has embarked on research and published articles on land governance, coastal zones governance, sustainable development, and climate change adaptation in developing countries in Africa. Her current research includes climate change impacts on social, economic, and cultural well-being in sub-Saharan Africa (SSA).

AFSHIN NAZIR is a lawyer with a special interest in the fields of commercial, environmental, and fiscal law. She holds an Honours Bachelor of Laws (LLB) degree from the University of Nairobi and is currently undertaking the Advocates' Training Programme at the Kenya School of Law. She worked as a graduate researcher at the University of Nairobi's Committee on Fiscal Studies for two years, where she conducted research on tax, finance, environment and law. Afshin has previously published on debt and carbon taxation. She has also successfully completed the Chartered Institute of Arbitrators

introductory course on arbitration. In 2019 she was awarded the PLO Lumumba Foundation Award for her knowledge of criminal law. Her position paper at the Sub-Saharan International Model United Nations was also acknowledged as the best position paper for the United Nations High Commissioner for Refugees (UNHCR) Committee in 2019.

AKINBUSOYE ADEJUMOKE JULIANA is a legal practitioner and lecturer at the Department of Jurisprudence and International Law, University of Lagos, Nigeria. She teaches petroleum and energy law, international trade law and mineral and water law, among other subjects. Her research interests are in the fields of environment, development, energy and climate change law. She obtained her LLB degree from the University of Lagos (2010) and her LLM degree in Environmental Law and Policy from the Centre for Energy, Petroleum, Mineral Law and Policy (CEPMLP), University of Dundee (2014). She was called to the Nigerian Bar in the year 2012. Her experience in legal practice spans litigation, corporate commercial practice, corporate governance, and legal advocacy. Her current research is focused on the regulatory framework for low carbon development in Nigeria.

ATTIYA WARIS is the only professor of Fiscal Law and Policy in Eastern and Central Africa. She is the first female Director of Research and Enterprise at the University of Nairobi. She holds a PhD in Law and is a specialist in Fiscal Law, Policy and Development. She is an advocate, company secretary and arbitrator of over 20 years' standing and was the founding Chairperson, Fiscal Studies Committee from 2017-2020. Her book *Tax and development* (2013) is the first publication globally that links the areas of tax and human rights, and her more recent publication *Financing Africa* (2019) is the first publication globally to map out African fiscal systems. She is the incoming United Nations (UN) Independent Expert on Foreign Debt, Financial Transactions and Illicit Financial Flow (August 2021 to August 2024) and is an observer to the UN Tax Committee.

DAVID ACHERO MUFUAYIA is a jurist and social justice advocate. He is an advocate of the High Court of Kenya and an expert in land justice and natural resources with his current interest being in the field of environmental justice. He holds a Bachelor of Laws (LLB) from Moi University, Kenya 2011; a Diploma in Development Studies from MS-Training Centre for Development and Cooperation, Arusha-Tanzania (2013); a Post-Graduate Diploma in Development Studies, Kenya School of Law (Kenya); and a Master of Laws (LLM) in Human Rights and Democratisation in Africa from the Centre for Human Rights, University of Pretoria (South Africa). He has worked as an assistant programme officer at URAIA Trust (2011); programme officer at the Centre for Minority Rights Development (2012-2014); programme officer at Article 19-East Africa (2016); and programme manager at Kenya Land Alliance (2016-2019).

EBENEZER DUROJAYE is professor and head of the Socio-Economic Rights Project at the Dullah Omar Institute, University of the Western Cape (South Africa). His research interest is in socio-economic rights with a focus on the link between human rights and health, including sexual and reproductive health and rights.

ELSABÉ BOSHOFF is a PhD fellow at the Norwegian Centre for Human Rights, University of Oslo. She previously worked with the African Commission on Human and Peoples' Rights, supporting the Working Group on Extractive Industries, Environment and Human Rights in Africa. She has published several peer-reviewed articles and book chapters. She is a co-editor of an edited volume, *Governance, human rights and political transformation in Africa*, published by Palgrave Macmillan in 2020. Her primary research interests include human rights issues related to the environment, sustainable development, extractive industries and transitional justice, with a primary focus on the African context.

LASSANA KONÉ is a human rights lawyer dedicated to environmental and social justice of marginalised and vulnerable communities across the African region. He has worked as a lawyer for the Forest Peoples Programme for the past seven years, and spent a considerable time in the Democratic Republic of the Congo (DRC) and the Republic of Congo (ROC), providing legal advice and training, and supporting indigenous peoples and other forest-dependent communities to engage in legal reform processes and secure their access to land and property rights. His research interests include climate change and human rights, conservation and human rights, and access to land rights of indigenous peoples and local communities in Congo Basin and West Africa. He has provided *ad hoc* legal assistance to land and environmental defenders in Eastern DRC, whose subsistence activities are being criminalised by coercive law enforcement and strict regulations on nature conservation. He holds an LL.M in Human Rights and Democratisation in Africa from the University of Pretoria, South Africa (2009); an LL.B in International Law, University of Bouake, Côte d'Ivoire (2005).

MANSHA MOHEE is a research consultant at the office of the Secretary-General and General Secretariat of the African Development Bank group. She holds an LL.B Law in French Law (Hons) from the University of Birmingham; an LL.M in Human Rights and Democratisation in Africa from the Centre for Human Rights, University of Pretoria; and an LL.M in International Law from University College London. Her research interests include public international law, international human rights law, and African regional integration.

PARITA SHAH teaches at the Department of Geography and Environmental Studies, University of Nairobi (Kenya). She specialises in governance, biodiversity, climate change and sustainability. Parita holds a Bachelor's degree in Geography from the University of London; a Master's Degree in Environmental

Planning and Management; and a PhD in Biogeography from the University of Nairobi (Kenya). Her publications appear in some of the leading journals, namely, *International Environmental Agreements: Politics, Law and Economics* and the *African Journal of Ecology*. She has also authored book chapters on various topics including policy implementation, urban future of food and nutrition security and development of cultural heritage tourism in Kenya. Her interest in environmental activities is reflected through in her membership of the Karura Forest Educational and Environmental Trust (KFEET) where she has coordinated the Trust's educational syllabus. She is also a trainer of trainees at the African Fund for Endangered Species (AFEW) Giraffe Centre, Kenya.

ROBERT NANIMA is a senior lecturer at the Faculty of Law, University of the Western Cape, Cape Town, South Africa. He is also a member of the African Committee of Experts on the Rights and Welfare of the Child and Special Rapporteur for Children Affected by Armed Conflict. He is attached to the Dullah Omar Institute as a researcher on the rights of children and vulnerable groups. He has published several articles in accredited national and international journals and presented papers at both national and international conferences.

ROOPANAND MAHADEW is a senior lecturer at the Department of Law, Faculty of Law and Management, University of Mauritius. He obtained his LLB (Hons) degree from the University of Mauritius; a Master's Degree in Law (Human Rights and Democratisation in Africa) from the Centre for Human Rights, University of Pretoria; and a PhD in International Human Rights Law and Development from the Faculty of Law, University of the Western Cape, South Africa in 2020. His research interests span environmental law, international human rights law, public international law and legal research methodology. He was recently appointed as the External Expert in the Working Group on Children's Rights and Business to the African Committee of Experts on the Rights and Welfare of the Child (August 2021 to August 2023).

ABBREVIATIONS AND ACRONYMS

AAI	Africa Adaptation Initiative
ACCF	Africa Climate Change Fund
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACSAA	Africa Climate-Smart Agriculture Alliance
AFDB	African Development Bank
AFRP	Africa Regional Platform on Disaster Risk Reduction
AGECC	Advisory Group on Energy and Climate Change
AGN	African Group of Negotiators
AMCEN	African Ministerial Conference on the Environment
APR Focal Point	African Peer Review Focal Point
APR Forum	African Peer Review Forum
APR Panel	African Peer Review Panel of Eminent Persons
APR Secretariat	African Peer Review Secretariat
APRM	African Peer Review Mechanism
ARC	African Risk Capacity
AREI	African Renewable Energy Initiative
ARSDRR	Africa Regional Strategy for Disaster Risk Reduction
ASAR	Arid and semi-arid region
ASALs	Arid and semi-arid lands
AU	African Union
AUC	African Union Commission
CAAC	Children Affected by Armed Conflict
CAFI	Central Africa Forest Initiative
CAHOSCC	Committee of African Heads of State on Climate Change
CBD	Convention on Biological Diversity
CBFF	Congo Basin Forest Fund
CCD	Climate Change Division
CCIC	Climate Change Information Centre
COP	Conference of Parties
CRC	Convention on the Rights of the Child
CRM	Country Review Mission
CRR	Country Review Report
CRT	Country Review Teams
CSOs	Civil society organisations
DFID	Department for International Development
DRC	Democratic Republic of the Congo

EAC	East African Community
ECOSOC	Economic and Social Council
ECOSOCC	Economic and Social & Cultural Council
ECOWAS	Economic Community of West African States
ESCR	Committee on Economic, Social and Cultural Rights
FCPF	Forest Carbon Partnership Facility
FPIC	Free, prior informed consent
GCF	Green Climate Fund
GDP	Gross domestic product
GEF	Global Environment Facility
GHG	Greenhouse gas emissions
GIZ	German International Development Agency
GST	Global stock-take of the Paris Agreement
HFLD	High forest cover low deforestation
HLPF	High-Level Political Forum on Sustainable Development
HRWA	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel Climate Change
IPCCC	Intergovernmental Panel on Climate Change
IRENA	International Renewable Energy Agency
LCD	Low carbon development
LCPDP	Least Cost Power Development Plan
LTS	Long Term Strategy
MDGs	Millennium Development Goals
MoE	Ministry of Education
MRG	Minority Rights Group
NAMAs	Nationally appropriate migration actions
NAP	National Action Plan
NCCAP	National Climate Change Action Plan
NDCs	Nationally determined contributions
NEMA	National Emergency Management Agency
NEP	Nigerian Electrification Project
NEPAD	New Partnership for Africa's Development
NGC	National Governing Council
NGOS	Non-governmental organisations
PA	Paris Agreement
PAP	Pan-African Parliament
PID	Publication and information dissemination
PIDA	Programme for Infrastructure Development in Africa
PoA	Programme of Action
PSC	AU Peace and Security Council

REA	Renewable Energy Agency
REDD+	Reducing emissions from deforestation and forest degradation, conservation, sustainable forest management and enhancement of forest carbon stocks
RTD	Right to development
CCSAP	Climate Change Strategy and Action Plan
SADC	Southern African Development Community
SAMOA	SIDS Accelerated Modalities of Action
SCCF	Special Climate Change Fund
SDGs	Sustainable Development Goals
SE4ALL	Sustainable Energy for All
SERAC	Social and Economic Rights Action Centre
SIDA	Swedish International Development Co-operation Agency
SIDS	Small island developing state
SRHR	Sexual and Reproductive Health and Rights State Reporting Guidelines and Principles Related to the Extractive Industries Environment and Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDRTD	United Nations Declaration on the Right to Development
UNFCCC	United Nations Framework Convention on Climate Change
UNFCCC	United Nations Framework Convention on Climate Change
COP	Conference of Parties
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	UN Human Rights Council
UNICEF	United Nations Children's Fund
UNSDGs	United Nations Sustainable Development Goals
UPR	Universal Periodic Review
VNR	Voluntary national review
WILDAF	Women in Law and Development in Africa
WMO	World Meteorological Organisation
WWF	World Wide Fund For Nature

DEDICATION

To the vulnerable and marginalised populations in Africa
who continue daily to suffer the adverse effects of
climate change on their human rights.

1

INTRODUCING CLIMATE CHANGE JUSTICE AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE

Ademola Oluborode Jegede and Oluwatoyin Adejonwo

Climate change is a major global threat impacting persons and societies in varying degrees. The sobering reality of the challenge of climate change and the need to address its catastrophic consequences on human populations has been a subject of global attention. The Intergovernmental Panel on Climate Change (IPCC) Report highlights that Africa is disproportionately vulnerable to climate change.¹ A range of resolutions of the UN Human Rights Council (UNHRC) acknowledge the adverse effects of climate change, both direct and indirect, on the effective enjoyment of a range of human rights.² In the most recent Resolution 47/24 of 2021, the UNHRC reinforces the fact that adverse effects of climate change have a range of implications, both direct and indirect, on the effective enjoyment of human rights, including the right to life; the right to adequate food; the right to the enjoyment of the highest attainable standard of physical and mental health; the right to adequate housing; the right to self-determination; the right to safe drinking water and sanitation; the right to work; and the right to development.³ Considering the urgency of the phenomenon, it then encourages the continued discussions among states and relevant stakeholders on the creation of a new special procedure addressing the adverse impact of climate change on the full and effective enjoyment of human rights.⁴

1 The IPCC was established by the World Meteorological Organisation and the United Nations Environment Programme in 1988, following UNGA Resolution 43/53, Protection of Global Climate for Present and Future Generations of Mankind Resolution 43/53, UNGA 70th Plenary Meeting, 6 December 1988. For its comprehensive report on Africa and climate change adverse effects, see MI Boko et al 'Africa' in ML Parry et al (eds) *Climate change, impacts, adaptation and vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 433-467.

2 Resolution on human rights and climate change (Resolution 4/24), adopted 26 July 2021 at the 47th session of the Human Rights Council, A/HRC/RES/47/24; see also Resolution on human rights and climate change (Resolution 10/4) adopted 25 March 2009 at the 41st meeting of the Human Rights Council (Resolution 10/4); Resolution on human rights and climate change (Resolution 18/22) adopted 30 September 2011 at the 37th meeting of the Human Rights Council, A/HRC/Res/18/22; Resolution on human rights and climate change (Resolution 26L/33) adopted 23 June 2014 at the 26th meeting of the Human Rights Council, A/HRC/26/L.33, 1.

3 Resolution 4/24 (n 2).

4 As above.

There are several international instruments under the auspices of United Nations (UN) relating to climate change, including the United Nations Framework Convention on Climate Change⁵ and the Paris Agreement.⁶ Other instruments are the 2030 Agenda for Sustainable Development (SDGs);⁷ the Addis Ababa Action Agenda;⁸ the Sendai Framework for Disaster Risk Reduction 2015-2030;⁹ the Malé Declaration on the Human Dimension of Global Climate Change;¹⁰ the SIDS Accelerated Modalities of Action (SAMOA) Pathway;¹¹ the Vienna Declaration and Programme of Action;¹² the Declaration on the Right to Development;¹³ and the Vienna Programme of Action for Landlocked Developing Countries for the Decade 2014–2024¹⁴ that are of significance in the fast-growing discourse on the intricate connection of climate change, development and human rights. When taking action to address climate change, importantly, the Preamble to the Paris Agreement acknowledges that climate change is a common concern of humankind, and urges states to respect, promote and consider their respective obligations on human

- 5 United Nations Framework Convention on Climate Change (1992) 31 ILM 851 (UNFCCC).
- 6 Paris Agreement under the United Nations Framework Convention on Climate Change, adopted 30 November to 11 December 2015 at the 21st session, Conference of the Parties, FCCC/CP/2015/L.9/ Rev.1 (Paris Agreement 2015).
- 7 United Nations General Assembly 'Transforming our World: The 2030 Agenda for Sustainable Development' A/RES/70/1, adopted by the General Assembly on 25 September 2015.
- 8 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) adopted at the 3rd International Conference on Financing for Development (Addis Ababa, Ethiopia, 13-16 July 2015) and endorsed by the General Assembly in its Resolution 69/313 of 27 July 2015.
- 9 United Nations Office for Disaster Risk Reduction 'Sendai Framework for Disaster Risk Reduction', <http://www.unisdr.org/we/coordinate/sendai-framework> (accessed 14 November 2021).
- 10 Malé Declaration on the human dimension of global climate change, 14 November 2007, http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (accessed 1 January 2022).
- 11 SIDS Accelerated Modalities of Action (SAMOA) Pathway, Resolution adopted by the General Assembly at its 69th session on 14 November 2014, A/RES/69/15, 15 December 2014.
- 12 UN General Assembly 'Vienna Declaration and Programme of Action' 12 July 1993, A/CONF.157/23, <https://www.refworld.org/docid/3ae6b39ec.html> (accessed 1 January 2022).
- 13 UN General Assembly Declaration on the Right to Development: Resolution adopted by the General Assembly, 4 December 1986, A/RES/41/128, <https://www.refworld.org/docid/3b00f22544.html> (accessed 5 January 2022).
- 14 United Nations Draft Resolution submitted by the President Vienna Programme of Action for Landlocked Developing Countries for the Decade 2014-2024, A/CONF.225/L.1, 3 November 2014.

rights, including the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and persons in vulnerable situations, and the right to development, as well as gender equality, empowerment of women and intergenerational equity.¹⁵

Climate justice as a term recognises that climate change can have differing adverse impacts on populations. As climate change is a consequence of both human action and inaction, the need for African States to implement climate interventions while they face developmental challenges raises the issue of climate change justice between the north and the south, the latter adjudged as contributing least to the phenomenon for which the north largely is responsible. Also, of concern and relevance to climate justice is the overwhelming evidence of literature that people in Africa are disproportionately vulnerable to both the direct and indirect adverse effects of climate change of human rights significance,¹⁶ due to less capacity for adaptation and mitigation.¹⁷

It is not surprising that it has been argued that climate change can become a catalyst that will likely intensify tensions in vulnerable parts of the world and exacerbate existing socio-economic risks, vulnerabilities and inequalities.¹⁸ Balancing development aspirations with urgent climate action raises concerns around the just transition of economies which may either hinder or aid disproportionately the realisation of rights for populations in Africa. The developmental challenge of the continent is further compounded by irreversible losses and damages and uncertainty of finance for climate actions.¹⁹ Also, except if well implemented, mitigation measures such as reducing emissions from deforestation and forest degradation (REDD+)²⁰ and other developmental projects may worsen the

15 Paris Agreement (n 5).

16 AO Jegede 'Arguing the right to a safe climate under the UN human rights system' (2020) 9 *International Human Rights Law Review* 184; AO Jegede *The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications* (2016).

17 LJ Kotzé & A du Plessis 'Putting Africa on the stand: A bird's eye view of climate change litigation on the continent' (2020) 50 *Environmental Law* 615.

18 'Understanding human rights and climate change', submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change. See also Resolution 10/4 (n 2).

19 F Simlinger & B Mayer 'Legal responses to climate change induced loss and damage' in R Mechler et al (eds) *Loss and damage from climate: Concepts, methods and policy options* (2019) 185.

20 Jegede (n 16).

plight of vulnerable populations and adversely affect their human rights.²¹ Yet, the continent faces other challenges, such as an increasing population growth and poverty, which may shape its human rights interventions to the phenomenon of climate change, as states continue to engage with diverse levels of climate governance and implement interventions in response to climate change. Consequently, interrogating the application of human rights to climate change issues in all the foregoing ramifications is important for climate change justice in Africa while formulating their post-COVID pandemic recovery strategies.²²

A human rights-based approach may respond to the ‘unfairness’, ‘inequality’, ‘inequity’, ‘unevenness’ and ‘disproportionality’, which are typical climate justice concerns in the causation of and response to climate change. As another writer noted elsewhere, it can allow for concrete measures to be harmonised with social and economic development in an integrated manner with a view to avoiding an adverse impact on the latter.²³ The approach is most important for developing countries, taking into full account their legitimate priority needs for the achievement of sustained economic growth and the eradication of poverty.²⁴ In practical terms, a human rights-based approach can galvanise policies and measures of climate change mitigation and adaptation. It can inform assessments and strengthen processes, facilitate access to essential information, effective participation, and remedies, thus ensuring justice for populations mostly affected by climate change.

While human rights principles can play a crucial role in catalysing action to address climate change and enhance the quest for climate justice in Africa, there is a paucity of scholarship reflecting the human rights dimension to climate change issues with a focus on Africa. Resolutions have been passed under the auspices of the African Union (AU).²⁵ In particular,

21 R Adeola & F Viljoen ‘Climate change, development projects and internal displacement in Africa’ (2018) 62 *Journal of African Law* 335.

22 AO Jegede ‘From COVID-19 to climate change: Are there lessons for a human rights approach?’ GC *Human Rights Preparedness*, 25 January 2021, <https://gchumanrights.org/preparedness/article-on/from-covid-19-to-climate-change-are-there-lessons-for-a-human-rights-approach> (accessed 17 November 2021).

23 S Attapattu *Human rights approaches to climate change: Challenges and opportunities* (2016).

24 As above.

25 African Commission on Human and Peoples’ Rights Resolution 417: Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change, 2019, ACHPR/ Res.417 (LXIV); see also African Commission on Human and Peoples’ Rights Resolution 342: Resolution on climate change and human rights in Africa, 2016, ACHPR/Res.342 (LVIII), meeting at its 58th ordinary session held from 6 to 20 April 2016 in Banjul, The Gambia (Resolution 342); African Commission on Human and Peoples’ Rights Resolution 271: Resolution on climate

Resolution 342 of the African Commission on Human and Peoples' Rights (African Commission) notes that the implementation of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement should adequately reflect the African perspective on human and peoples' rights, especially the rights of vulnerable populations, including children, women, older persons and persons with disabilities, indigenous communities and other minorities.²⁶ Also, during its 35th ordinary session in 2020, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) established three working groups, including the Working Group on Children's Rights and Climate Change.²⁷ Despite this development, the linkage of human rights to climate change justice issues is sparse at the domestic, sub-regional and AU levels. Thus, from an African perspective, there is a need for scholarly contributions to build knowledge that will help in achieving a strong, committed and comprehensive climate action that enhances the realisation and protection of human rights and engages with issues of relevance to climate justice in Africa.

This edited book is an assemblage of critical thoughts of scholars in the field of climate change and human rights in Africa and seeks to fill the identified gap in existing knowledge by offering a timely assessment, analysis, and examination of the conceptual and practical challenges that are faced by vulnerable groups in the context of climate change, climate justice and human rights interface in Africa. The various chapters interrogate issues that are of climate justice and human rights significance to African states as they continue to face and cope with climate change. The book is divided into three thematic areas. Chapters in part I critique and highlight the potential of human rights paradigm as an intervention to climate change. The second part focuses on climate change in the context of the regional protection of human rights, while the third part analyses

change in Africa, adopted at its 55th ordinary session held from 28 April to 12 May 2014 in Luanda, Angola; African Commission on Human and Peoples' Rights Resolution 153: Resolution on climate change and human rights and the need to study its impact in Africa, adopted at its 46th ordinary session held from 11 to 25 November 2009 in Banjul, The Gambia.

26 Resolution 342 (n 25).

27 African Committee of Experts on the Rights and Welfare of the Child 35th ordinary session (Virtual) of the African Committee of Experts on the Rights and Welfare of the Child from 31 August to 8 September 2020; the other working groups are (i) the Working Group on Children's Rights and Business; and (ii) the Working Group on Implementation of Decisions and Recommendations.

domestic regulatory frameworks and emerging interventions on climate change and human rights in Africa.

PART I: Human rights paradigm as an intervention to climate change

The three chapters in this part analyse the human rights paradigm as an intervention mechanism in response to climate change and adverse effects.

In chapter 2 Boshoff considers two human rights soft law instruments that set out the human rights obligations of companies, namely, the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the African Commission's State Reporting Guidelines and Principles related to the extractive industries environment and human rights (ACHPR Guidelines). These two soft law instruments are assessed against the background of increasing and diversifying climate change litigation, to determine the extent to which these instruments strengthen or add to the arguments already being made before courts in relation to the obligations of corporations in the energy sector for climate change interventions. Boshoff highlights some of the procedural challenges of climate change litigation, including issues of standing, jurisdiction, the requirements of imminent harm and significant impact and the threat of companies lodging claims against states before international arbitration tribunals, in which fora human rights are given little or no consideration. Despite these challenges, the author notes that there has been a substantive increase in cases being brought both by state actors as well as private individuals and non-governmental organisations (NGOs) against companies for climate change accountability.

In chapter 3 Adejonwo and Afinowi consider how the normative framework of the 'rights-based approach' to climate change justice can galvanise climate change action and litigation in Africa. Thus, the chapter analyses the intersections of climate change, human rights and climate justice as a strategy for climate change response. It highlights how a 'rights-based approach' can be employed as a tool for climate action and justice. The authors note that considering the far-reaching impacts of climate change and its adverse effect, climate action aimed at stimulating adaptation and mitigation has become pertinent in Africa.

In chapter 4 Adejonwo explores the issues of unsustainable population growth and consumption patterns, two complex and interconnected issues

that need to be fairly addressed in both developing and developed countries as they are both key drivers of climate change. Africa is projected to grow the fastest, followed by Asia, Latin America, North America, Oceania and Europe, although it is expected to be the main contributor beyond 2050 with the population of sub-Saharan Africa projected to double by 2050. Despite its contested status between the north and the south, the chapter advocates that reproductive rights and access to family planning pathways may be crucial as an important climate mitigation and adaptation tool. Achieving universal access to family planning would result in fewer unintended pregnancies, improve the health and well-being of women and their families, and slow population growth, which are all benefits to climate-compatible development.

PART II: Climate change and regional protection of human rights

In chapter 5 Nanima and Durojaye evaluate the normative context of the African Charter on the Rights and Welfare of the Child (African Children's Charter) in relation to climate change and food security. The authors consider the jurisprudence of the Children's Charter, including the emerging principles and activities emanating from its work. The chapter finds that the jurisprudence of the Charter focuses on four major aspects, namely, the implementation of the Charter through the consideration of communications; state party reporting; investigative visits; and the use of recommendations in Concluding Observations. The authors argue that the lack of specific provisions on climate change and food security in the African Children's Charter should not preclude steps to mitigate the effects of climate change or to avert food insecurity regarding children. In conclusion, the chapter recommends a model that the Children's Charter can adopt to increase its traction in executing its mandate towards the protection of children affected by climate change and food security.

In chapter 6 Jegede examines the role of NGOs in the context of their involvement within the African human rights system and demonstrates that NGOs within the system are rarely noted for climate change-specific actions. Generally, at that level, the issue of climate change and its adverse effects on human rights remains a marginal concern, as relatively few organisations have embraced this task as their primary aim. To address this development, the chapter suggests potential pathways and role for NGOs at the regional level to ensure the visibility of climate change issues in the human rights mandate of mechanisms under the African human rights system.

In chapter 7 Mohee explores the role of the African Peer Review Mechanism (APRM) in climate action and the scope for it to gain more prominence in complementing national capacities for climate action monitoring and reporting. The inquiry is premised on its strategic appeal as a home-grown regional review structure fostering peer learning, accountability, political clout and cohesion, thereby providing opportunities for leveraging best practices, knowledge sharing and the African common position on climate action. The chapter concludes that whereas the expanded mandate of the APRM after its revitalisation in 2017 provides the basis for extending the APRM's purview to climate action, several challenges currently impede such a development, among which are an unfavourable framing of climate action in its review methodology, the absence of an AU climate instrument defining relevant state duties, and delayed progress on its revitalisation programme.

PART III: Domestic regulatory frameworks and emerging climate change interventions

The five chapters in this part of the book examine domestic regulatory frameworks and emerging interventions on climate change and human rights on a range of issues from climate finance, low carbon development, to energy poverty, domestication of climate pillar instruments and REDD+ projects.

In chapter 8 Waris, Nazir and Shah explore the linkages between climate change, finance and human rights, with a special focus on the Turkana region in Kenya and highlight the socio-economic and environmental challenges prevalent in the community due to climate change as a basis for climate justice. The chapter argues for the establishment of a Turkana Climate Change Fund. To facilitate the fund, the authors recommend that the county should commit 2 per cent of its annual budget to the fund. To sustain the fund, the authors highlight the urgency of domestic policies such as carbon taxes within the concept of the polluter-pays principle.

In chapter 9 Akinbusoye interrogates the interface between climate change and energy poverty as critical development issues affecting Africa's development agenda. Using Nigeria as a case study, the chapter argues that although the jurisprudence on the right to energy access is yet to be developed, the low carbon model of development serves as a fundamental tool in driving universal access to energy and energy services, thus performing a vital role towards fulfilling the contested right

to development (RTD). The chapter recommends that transiting from carbon-intensive energy sources to more environmentally-friendly and low carbon energy sources such as solar, wind and hydro, provides a ready and viable solution to addressing the twin challenges of climate change and energy poverty in Africa.

In chapter 10 Achero interrogates how the effective domestication and implementation of the Paris Agreement obligations in Kenya can promote and enhance human rights. The author notes that Kenya has undertaken impressive legal, institutional and strategic measures for climate action and has made great strides in setting up supporting legal and strategic frameworks, plans and targets in response to climate change, but poor political will, poor implementation of the legal framework, inadequate financing, low stakeholder engagement and corruption in climate change governance are a major constraint in effective implementation. The chapter further notes that these challenges have consequential threats on the citizen's rights to life, food, education, and health.

In chapter 11 Koné considers the several factors limiting the success of the REDD+ programme in Mai Ndombe province in the Democratic Republic of the Congo (DRC), despite the several milestones achieved by the programme. The chapter demonstrates the structural shortcomings in the legal and regulatory frameworks and argues that a weak compliance with social and environmental safeguards impacts the enjoyment of the rights of indigenous peoples and local communities politically disempowered to engage effectively in the REDD+ projects. The chapter recommends the application of human rights monitoring frameworks to the REDD+ programme in the DRC, to ensure that all REDD+ activities are consistent with safeguard standards and relevant international human rights treaties ratified by the state.

In chapter 12 Mahadew argues for the potential of incorporating the human right to a clean or healthy environment in Mauritian law as a basis of combating climate change in the country. It focuses on the theoretical framework of the right to a clean or healthy environment as a human right and presents an overview of the effects of climate change in Mauritius and salient existing features in the normative and legal framework on climate change with a focus on the right to a human right to a clean or healthy environment as a response to climate change in Mauritius.

In all, the collected volume projects the diverse voices from Africa on the urgent need to address the threats that climate change poses and the relevance of a human rights approach in ensuring climate change justice

for Africa as a continent and its diverse populations who continually suffer the adverse and disproportionate consequences of climate change.

PART I:

**Human rights paradigm as an intervention
to climate change**

2

THE ROLE OF HUMAN RIGHTS SOFT LAW INSTRUMENTS IN CLARIFYING THE OBLIGATIONS OF FOSSIL FUEL COMPANIES FOR CLIMATE CHANGE INTERVENTIONS IN AFRICA

Elsabé Boshoff

Abstract

This chapter considers two human rights soft law instruments that set out the human rights obligations of companies, namely, the United Nations Guiding Principles on Business and Human Rights and the African Commission on Human and Peoples' Rights State Reporting Guidelines and Principles related to the extractive industries environment and human rights (ACHPR Guidelines). These two soft law instruments are assessed against the background of the increasing and diversifying climate change litigation, including against corporations, to determine the extent to which these instruments strengthen or add to the arguments already being made before courts in relation to the obligations of corporations in the fossil fuel industry for climate change interventions. The chapter finds that both the UNGPs and the ACHPR Guidelines support the arguments already made before courts globally, encompassing not only cases based on human rights obligations, but also on public nuisance, negligence, the duty of care and unlawful enrichment. The chapter contributes to clarifying the climate-related corporate human rights obligations, which continue to be a matter of contestation, despite widespread recognition of the need for such obligations as well as the legal and equitable bases thereof.

Key words: *corporate human rights obligations; United Nations Guiding Principles; ACHPR Guidelines Commission; fossil fuel companies*

1 Introduction

Climate change has already started to impact on a whole range of human rights on the African continent, as in the rest of the world. It is not an overstatement to say that if climate change continues its current trajectory, no area of human rights will remain unaffected. It also no longer is in dispute that human activities are the main cause of current climate

change.¹ It is trite that the activities of companies,² in particular companies involved in the production of energy through fossil fuels, result in some of the largest greenhouse gas (GHG) emissions responsible for climate change. A 2017 study by the Carbon Disclosure Project (CPD) found that 50 fossil fuel companies account for half of the global industrial GHG emissions.³ The fact that these companies are from developed states in the north brings to light the increasing tension of whether, for the purpose climate justice, they should not have a substantial role to play in addressing the global climate crisis.

Also, the consequences of climate change on human rights in Africa are dire and are projected to increase. The 2019 Report on the State of the Climate in Africa, published in October 2020, sets out some of the serious climate change consequences experienced across the African continent for the year 2019.⁴ Rainfall was ‘remarkably below long-term means’ in Southern Africa, while above average rainfall was recorded in Central and Eastern Africa.⁵ Some areas, such as the Horn of Africa, experienced more erratic rainfall, with extreme drought through most of 2018 to 2019, followed by flooding towards the end of the year. Severe climatic events, such as cyclones Idai and Kenneth, also caused devastation along the eastern and southern coast of Africa.

According to the 2019 report, drought-prone countries have seen the number of undernourished people increase ‘by 45.6 per cent since 2012’ due to impacts on agriculture, food security and water resources.⁶ Apart from drought, factors such as heat stress, pests and disease also impact adversely on food security.⁷ Extreme events, drought and food insecurity result in the displacement of vast numbers of people, with the 2019 cyclones

1 LV Alexander et al ‘Working Group I contribution to the Intergovernmental Panel on Climate Change’s Fifth Assessment Report, Summary for Policy Makers’ (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf (accessed 23 March 2021).

2 The terms ‘companies’ and ‘corporations’ are used interchangeably.

3 The Carbon Majors Database ‘CDP carbon majors report 2017’, <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf> (accessed 24 March 2021).

4 World Meteorological Organisation (WMO) ‘State of the climate in Africa 2019’ (2020), https://library.wmo.int/doc_num.php?explnum_id=10421 (accessed 2 November 2021).

5 WMO (n 4) 3.

6 WMO (n 4) 3, 5.

7 WMO (n 4) 23.

resulting in the displacement of ‘hundreds of thousands’ of people.⁸ Projections for coming years include continuously rising temperatures and lower rainfall in Southern and Northern Africa, with more rainfall over the Sahel region.⁹ Higher rainfall and warmer temperatures also create conditions for the spread of vector-borne diseases, with diseases such as malaria and dengue fever spreading into areas where previously they were not present.¹⁰

It is clear from this brief exposition that climate change cuts across a wide range of human rights, from the right to life to the right to health, adequate food, a place to live and water and sanitation.¹¹ Core rights such as the right to dignity, to equality and to freedom of choice are impacted. Importantly, climate change also impacts on the right of people to a satisfactory environment suitable for their development.¹² Furthermore, climate change has the most far-reaching impacts on groups that already are vulnerable, including refugees and displaced persons, women, children and indigenous peoples/communities.¹³ Thus, it can not be disputed that the disproportionality and inequity features around climate change make it a human rights challenge which should, among others, be addressed through human rights-based approaches.

While human rights provide a basis for claims in relation to climate change and climate justice, there are some challenges. The most important hurdle in this regard is that in order to claim loss and damages under a human rights regime, litigants have to prove not only the link between the climatic change and human rights violations, but also the link between specific instances of emissions and specific meteorological effects.¹⁴

8 WMO (n 4) 18.

9 WMO (n 4) 11.

10 WMO (n 4) 24.

11 Amnesty International ‘Climate change’, <https://www.amnesty.org/en/what-we-do/climate-change/> (accessed 2 November 2021).

12 While debates are ongoing internationally about whether such a right exists, it is explicitly recognised in art 24 of the African Charter on Human and Peoples’ Rights.

13 OHCHR ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’ (2009) A/HRC/10/61, <https://www.refworld.org/docid/498811532.html> (accessed 2 November 2021).

14 F Otto et al ‘The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts’ Environmental Change Institute, https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf (accessed 3 November 2021); J Peel ‘Issues in climate change litigation’ (2011) 5 *Carbon and Climate Law Review* 19.

Climate change, being a form of ‘slow violence’,¹⁵ where the cause and effect are dispersed over space and time, makes it difficult to link specific actions to specific consequences.

Second, in international law, states are the main duty bearers, and obligations in relation to climate change are no exception. States’ consensus in relation to climate change are set out in international instruments, namely, the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement under the UNFCCC adopted in 2015.¹⁶ The UNFCCC sets out several substantive commitments and principles framed around four core issues of mitigation, adaptation, financing and loss and damages. For example, states may not use scientific uncertainty as an excuse for harmful conduct (precautionary principle). Developing states should cooperate, while industrialised countries are expected to assist developing states through financial and technical resources. From a human rights perspective, states have duties to respect, protect and fulfil human rights, including socio-economic rights, and have a duty to protect and fulfil procedural rights, such as the rights to access information, to participation and to access justice.¹⁷ It is not yet fully settled which of these responsibilities can be attributed to corporations, even when it is clear that it is necessary and fair to do so.

Third, there are many procedural challenges that litigants face in bringing climate change claims, including issues of standing,¹⁸ jurisdiction, the requirements of imminent harm¹⁹ and significant impact²⁰ and the

15 A term coined by Rob Nixon in his seminal work *Slow violence and the environmentalism of the poor* (2011).

16 The Paris Agreement requires of states to prepare, communicate and maintain Nationally Determined Contributions towards keeping the increase in global average temperatures to ‘well below 2°C’.

17 OHCHR (n 13) 25-26.

18 The Plaumann test in the European legal system makes it difficult to bring cases on climate change, because it requires that litigants must be individually and specifically impacted, which means that litigants would not have standing in relation to climate change impacts that affect everyone. See eg Case T-330/18 *Armando Carvalho & Others v Parliament and Council* (2019).

19 Because many climate change consequences are projected harm, it is a challenge for human rights which tends to be backward-looking at harm that already took place. While not related to human rights, the *Urgenda* case made an important stride by determining that the risk of climate change may be imminent even if it materialises over a long time. See *Urgenda v the Netherlands* (2019) para 2.3.3, <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> (accessed 3 March 2021).

20 Many jurisdictions require a ‘significant environmental impact’ for cases to be admissible, with polluters being able to argue that their contribution is only a ‘drop in the ocean’ of global climate change and does not meet this threshold. See eg Peel (n 14) 16.

threat of companies lodging claims against states before international arbitration tribunals, in which fora human rights are given little or no consideration. Despite these challenges, in the last few years there has been a substantive increase in cases being brought by both state actors and private individuals and non-governmental organisations (NGOs) against companies for climate change accountability. Increasingly, sophisticated arguments and access to climate science are showing positive results.

So, what are the human rights obligations of fossil fuel companies in relation to climate change? After considering the existing case law and related developments on the climate obligations of companies in part 2 of this chapter to establish the extent to which certain obligations have been recognised, part 3 turns to the soft law instruments relevant to the African context, which set out the human rights obligations of fossil fuel companies. The aim is to determine the obligations that are set out in these instruments, the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the State Reporting Guidelines and Principles on Extractive Industries, Human Rights and Environment (Guidelines and Principles), developed by the African Commission on Human and Peoples' Rights (African Commission), which may be relevant in a climate change context. The chapter concludes in part 4 with an assessment of the contribution of these instruments, as well as recommendations on how a human rights lens may be more effectively applied in determining corporate climate change liability, through stronger recognition of these soft law obligations.

2 Fossil fuel companies: Accountability for climate change

Corporations, particularly those in the energy production sector, are responsible for generating more than half of the global GHG emissions. An equitable and fair response to climate change should include corporations as they have a crucial role to play in terms of mitigating climate change through reducing emissions. However, corporations have an important role in relation to adaptation to climate change, due to their involvement in 'infrastructure provision, development and land use'.²¹ Furthermore, the enormous and disproportionate wealth of corporations, accumulated through inequitable externalisation of environmental costs and exploitation of the capitalist international financial and labour systems, would go a long way towards covering some of the substantial financial costs of addressing climate change and thereby enhance climate

21 G Ganguly et al 'If at first you don't succeed: Suing corporations for climate change' (2018) 38 *Oxford Journal of Legal Studies* 845.

justice. As an example, the fossil fuel industry spent \$265 773 915 on lobbying during the United States mid-term election in 2017-2018, along with millions in contributions to candidates, 'bringing the total spending by the industry to more than \$359 million in two years' or \$500 000 per day.²² While such sums may seem small in comparison to the trillions likely needed to stabilise climate change,²³ it is money that could be made available for climate action by corporations. These factors at the very least place a strong moral obligation on corporations to contribute to mitigation and adaptation to climate change. This part considers some of the most important case law and other steps to date in holding companies accountable for climate change damage.

While climate litigation against corporations only started taking off in the last decade or so, by July 2020 there were more than 40 cases of climate litigation against corporations ongoing worldwide.²⁴ A similar number of climate cases have been brought on a human rights basis, but the majority of these cases are against states.²⁵ Nevertheless, there is a proliferation of climate cases worldwide, with new cases continuously being filed, and a few human rights-based cases have been instituted against companies.

The very first human rights-based climate case was brought in 2005 by the Inuit people against the United States, before the Inter-American Commission on Human Rights.²⁶ Unfortunately, the complainants in this case were not successful, and a judgment was never issued. Nevertheless, even where cases are unsuccessful, they may still make important contributions. This may be either through the courts using *obiter dicta* to indicate circumstances or arguments that may successfully be applied in future litigation, or it could play a broader role in society, and in that way

22 K Kirk 'Fossil fuel political giving outdistances renewables 13 to one' (2020) *Yale Climate Connections*, <https://yaleclimateconnections.org/2020/01/fossil-fuel-political-giving-outdistances-renewables-13-to-one/> (accessed 30 June 2021).

23 BM Sanderson & BC O'Neill 'Assessing the costs of historical inaction on climate change' (2020) 10 *Scientific Reports*, <https://www.nature.com/articles/s41598-020-66275-4> (accessed 30 June 2021).

24 J Setzer 'Climate litigation against "carbon majors": Economic impacts' (2020) *Open Global Rights*, <https://www.openglobalrights.org/climate-litigation-against-carbon-majors-economic-impacts/> (accessed 30 June 2021).

25 C Rodríguez-Garavito 'Climate litigation and human rights: Averting the next global crisis' (2020) *Open Global Rights*, <https://www.openglobalrights.org/climate-litigation-and-human-rights-averting-the-next-global-crisis/> (accessed 30 June 2021).

26 UN Human Rights Council Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009) A/HRC/10/61, <https://www.refworld.org/docid/498811532.html> (accessed 30 June 2021).

it may ‘help to raise social awareness and may contribute to a change in attitudes’.²⁷

Unfortunately, to date climate cases in Africa were only brought against state institutions, rather than companies. However, the outcome of these cases often does have implications for companies, and it underscores the basic duty of states to regulate corporate conduct in relation to climate change. For example, in the case of *Save Lamu v National Management Authority*²⁸ in Kenya, the National Environment Tribunal revoked an environmental impact assessment (EIA) licence issued to Amu Power Company Limited.²⁹ While climate change was not the main argument, the tribunal found that the government, among others, had breached its obligations under the Climate Change Act 2016 by allowing a project with potentially grave climate implications to continue. Consequently, the company was not able to proceed with building a coal power plant. In a similar case related to the climate change impact of coal mining in Australia, the *Gloucester Resources* case,³⁰ the Court found that the Planning Assessment Commission was correct in not granting a licence to a major coal mine. In this case the Court based its decision on constitutional grounds, in that it decided that the coal mine was not in the public interest, would harm the quality of life of affected people and was contrary to approved land uses.³¹

Turning to cases on climate change and human rights obligations of companies, a ground-breaking case was recently decided by the Commission on Human Rights of the Philippines. The Philippines Commission in 2019 found 47 corporations legally liable for human rights harms suffered by people in the Philippines due to climate change.³² The Commission found that ‘major fossil fuel companies are morally obligated

27 Ganguly et al (n 21) 866.

28 *Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another* [2019] eKLR.

29 P Moodley ‘Litigation to challenge large extractive projects is gaining traction in Africa’ (2020) *Open Global Rights*, <https://www.openglobalrights.org/litigation-to-challenge-extractive-projects-gaining-traction-in-africa/> (accessed 30 June 2021).

30 *Gloucester Resources Limited v Minister for Planning* [2019], Land and Environment Court, New South Wales (Australia).

31 Business and Human Rights Resource Centre ‘Gloucester resources lawsuit (re mine’s impact on climate change, Australia)’ (2018), <https://www.business-humanrights.org/en/latest-news/gloucester-resources-lawsuit-re-mines-impact-on-climate-change-australia/> (accessed 30 June 2021).

32 Amnesty International ‘Philippines: Landmark decision by Human Rights Commission paves way for climate litigation’ (2019), <https://www.amnesty.org/en/latest/news/2019/12/landmark-decision-by-philippines-human-rights-commission-paves-way-for-climate-litigation/> (accessed 30 June 2021).

to respect human rights', as articulated in the UN Guiding Principles on Business and Human Rights.³³ In *Milieudefensie & Others v Royal Dutch Shell plc*,³⁴ a case decided in May 2021 explicitly based on human rights arguments, the complainants before a Dutch court argued that

given the Paris Agreement's goals and the scientific evidence regarding the dangers of climate change, Shell has a duty of care to take action to reduce its greenhouse gas emissions. The duty is said to arise from the Dutch Civil Code as further informed by the ECHR which guarantees rights to life (Article 2) and rights to a private life, family life, home, and correspondence (Article 8).³⁵

The ground-breaking decision of Hague District Court on 26 May 2021 confirmed the obligation on Royal Dutch Shell to reduce its carbon dioxide emissions by 45 per cent by 2030, as compared to 2019 levels.³⁶ Because such major fossil fuel companies generally are not based in African countries, it is difficult to envision similar cases being instituted before African courts. Nevertheless, decisions such as these by courts of the home countries of companies would also have implications for the operations of these companies in African countries. Additionally, cases based on damages and compensation already used by litigants from other developing countries are more likely to be brought in coming years.

However, even in such cases where the court allows a case, or accepts certain initial arguments on the side of the litigants, this points to important changes in the thinking about these matters. A recent case in the French court against oil and gas company Total (responsible for about 1 per cent of global GHG emissions) saw the Court confirming its jurisdiction and ruling that Total did not take sufficient steps to reduce its GHG emissions.³⁷ It further confirmed the duty on companies such as Total to take mitigating and prevention measures to manage risks of human rights and environmental violations.³⁸

33 E de Wit et al 'Climate change litigation update' (2020) Norton Rose Fulbright, <https://www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update#autofootnote13> (accessed 30 June 2021).

34 *Vereniging Milieudefensie et al v Royal Dutch Shell*, The Hague District Court, C/09/571932 2019/379.

35 De Wit (n 33).

36 De Rechtspraak 'Uitspraken: ECLI:NL:RBDHA:2021:5339', <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> (accessed 30 June 2021).

37 *Association Notre Affaire à tous et al c S.A. TOTAL*, Tribunal Judiciaire De Nanterre, 1ère Chambre, 11 Février 2021, <https://www.asso-sherpa.org/wp-content/uploads/2021/02/110221-MINUTE-Total-climat-compe%CC%81tence.pdf> (accessed 30 November 2021).

38 *Association Notre Affaire à tous* (n 37) 8.

In some cases litigants have sought damages to compensate for climate change injuries, such as rising sea levels, heat waves and increased precipitation that are unequally spread and experienced globally. An important and frequently-cited case is *Lluyya v RWE*.³⁹ In this case a farmer from Peru instituted a claim in the German courts against RWE, a German company, for its contribution to global climate change, which is resulting in glacial melting in Peru, posing flood risks.⁴⁰ The case currently is on appeal before German courts, and the Higher Regional Court is awaiting 'expert opinion on the RWE's CO₂ emissions, the contribution of those emissions to climate change, the resulting impact on the Palcaraju Glacier, and RWE's contributory share of responsibility for causing the preceding effects'.⁴¹ This proves not only that it is possible to determine the contributions of specific companies to global GHG emissions, but that it is possible to make causal connections between such emissions and consequences, such as melting ice.

In a case brought by the US State of Baltimore against various oil and gas companies in 2018, the state sought to hold companies, including BP, Shell and Chevron, accountable on these charges on the basis of consumer protection laws. While it was not framed in this way, the damages sought in this case may be understood as holding states accountable for adaptation measures, similar to the *RWE* case. Public nuisance is the approach used in most US-based litigation.⁴² However, several public nuisance cases have been thrown out by the courts, either because they consider the selling of fossil fuels as a lawful activity on which the economy is built or because they consider that these are matters to be determined by the legislature and not the judiciary under the doctrine of separation of powers.⁴³ Other arguments have relied on negligence claims, strict liability and unjust enrichment.⁴⁴

To date the climate litigation in Africa remains scant, and no climate cases have yet been brought against corporations on the continent. Even

39 *Saul Luciano Lluyya v RWE* (2017) 20171130 Case No-2-O-28515.

40 Sabin Centre for Climate Change Law '*Luciano Lluyya v RWE AG*' Non-US Climate Litigation Chart, <http://climatecasechart.com/non-us-case/lluyya-v-rwe-ag/?cn-reloaded=1> (accessed 30 November 2021).

41 As above.

42 E Larson 'Making big oil pay for climate change may be impossible' (2020) *Insurance Journal*, <https://www.insurancejournal.com/news/national/2020/01/24/556341.htm> (accessed 30 November 2021).

43 As above.

44 For a full exposition of the various climate change litigation strategies used, see Business and Human Rights Research Centre 'Climate litigation against companies: An overview of legal arguments' (2019).

in cases against the state, climate change arguments usually are secondary. However, it is clear from the case law discussed above that fossil fuel corporations can be and are being held liable for the negative consequences of their contributions to climate change in different parts of the world, in both developed and developing countries. A wide range of strategies are being employed, from nuisance law to consumer protection, to access to information, to hold companies accountable. Human rights, such as the right to life, are recognised as the basis of such claims. The main aim of the litigation is to ensure that companies reduce their future GHG emissions – correlating to a duty to mitigate climate change. Litigants are also seeking damages for the consequences of the company's contribution to climate change, as a fraction of the total costs incurred because of climate impacts. The latter is in line with the polluter-pays principle, a well-known principle in environmental law, and now increasingly recognised in relation to climate change. It correlates with the duty to adapt to climate change, as the damages paid are used to put in place measures to 'climate proof' communities,⁴⁵ in extreme cases by relocating them or, for example, by building sea walls.⁴⁶ Some areas that are not yet sufficiently explored through case law, and where the existing human rights soft law instruments on corporate obligations could be relevant, relate to corporate due diligence and positive obligations on companies to fulfil human rights.

3 Obligations derived from human rights soft law instruments

Despite the recognition that corporations can engage in activities that have far-reaching adverse human rights impacts,⁴⁷ and that they have a human rights role to ensure climate mitigation and adaptation,⁴⁸ to date there are no international instruments creating binding obligations on corporations to respect human rights. Holding states accountable at the international level through international (human rights) courts and tribunals for failing

45 *Kivalina v ExxonMobil* 696 F.3d 849 (9th Cir. 2012).

46 *Rhode Island v Chevron Corp.* 2019 WL 3282007 (D.R.I. July 22, 2019).

47 United Nations Human Rights Council Resolution A/HRC/26/L.22/Rev.1 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' adopted on 25 June 2014, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement> (accessed 30 November 2021).

48 The UN Office of the High Commissioner for Human Rights has confirmed that corporations 'must be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights'. OHCHR 'Understanding climate change', submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2015), <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (accessed 30 November 2021).

to provide adequate protection against the actions of corporations only provides an indirect route that often leaves victims without adequate or enforceable redress and, in many cases, allows the main perpetrators to go scot-free, a development that begs the question as to what constitutes climate justice and when would it be achieved by populations that suffer wrongs associated with climate change. This is further revealed by the accountability gap in instances where national justice systems are not able to provide adequate protection for victims of human rights violations by corporations. Such instances include inadequate or outdated national laws for holding corporations accountable, failures of courts and justice systems, particularly in relation to access to justice for indigent communities, or even where intimidation, corruption or the need for foreign direct investment inhibits justice.⁴⁹ The limits of the power of national jurisdictions are illustrated by a recent development in Nigeria. After losing on appeal in a Nigerian court in a case related to their role in environmental pollution, Shell lodged a claim against Nigeria in the International Centre for Settlement of Investment Disputes, with possible far-reaching implications for the state and the affected communities.⁵⁰

Furthermore, focusing only on states for human rights accountability no longer is effective given the inequitable modern world economic order.⁵¹ Yet, global networks of interconnected companies are subject only to national level laws, where the 'corporate veil' protects them from extensive scrutiny. Additionally, subsidiary companies operating in developing countries are 'often deliberately under-capitalised, essentially making them judgment-proof'.⁵² Finally, Strategic Lawsuits against Public Participation (SLAPP suits) are used to harass human rights defenders. For instance, between 2015 and 2018 a report shows that 12 major oil, gas and mining corporations filed about 24 SLAPPs against 71 defenders, claiming the cost of US \$904 million in damages.⁵³ A recent judgment in South Africa against an Australian company, *Mineral Sands Resources (Pty)*

49 T Thabane 'Weak extraterritorial remedies: The Achilles heel of Ruggie's "Protect, Respect and Remedy" Framework and Guiding Principles' (2014) 14 *African Human Rights Law Journal* 43.

50 J Ballantyne 'Shell takes Nigeria to ICSID' (2021) *Global Arbitration Review*, <https://globalarbitrationreview.com/shell-takes-nigeria-icsid-0> (accessed 30 November 2021).

51 S Burrow 'UN treaty on business and human rights vital for economic and social justice' (2019) *Social Europe*, <https://www.socialeurope.eu/un-treaty-on-business-and-human-rights-vital-for-economic-and-social-justice> (accessed 30 November 2021).

52 As above.

53 M Zorob 'The lengthy journey towards a treaty on business and human rights' (2019) *Open Global Rights*, <https://www.openglobalrights.org/the-lengthy-journey-towards-treaty-on-business-and-human-rights/> (accessed 30 November 2021).

Ltd v Reddell,⁵⁴ which found that SLAPP suits are an abuse of process, is considered a significant victory in addressing this challenge, and could also set a precedent for the wider mining and fossil fuels industries.⁵⁵ More importantly, it signals that voices can always be raised in court rooms, where it matters most, by climate defenders in the quest for climate justice of vulnerable populations. Non-binding soft law instruments form part of the emerging norms in international human rights law that are addressing challenges, including by adapting and extending human rights standards and norms that apply between states to the conduct of corporations. This part considers potential human rights obligations for climate change arising from the UNGPs and the African Commission Guidelines and Principles, to supplement the arguments before courts. It should be borne in mind that these are soft law instruments that are not binding on states, much less companies, except to the extent that they restate existing obligations, but they may have persuasive power and could help to develop customary international law.

3.1 The UNGPs and the African Commission Guidelines

The UNGPs, adopted a decade ago, set out guidance to both companies and states to ensure corporate respect for human rights. Yet, they do not explicitly provide any guidance on the climate obligations of companies. The UN Working Group on Business and Human Rights, the body mainly responsible for implementing the UNGPs, has indicated that it plans to formulate a document embodying what the three pillars of the UNGPs signify for states and business enterprises in relation to climate change.⁵⁶ However, at the time of writing this work was not yet available. Other key sources on human rights and climate change recognise the potential role of the UNGPs, but do not discuss them in detail.⁵⁷ The ‘three pillars’

54 *Mineral Sands Resources (Pty) Ltd & Another v Reddell & Others; Mineral Commodities Limited & Another v Dlamini & Another; Mineral Commodities Limited & Another v Clarke* (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22 (9 February 2021).

55 S Bega ‘High Court gives Australian mining company a big SLAPP(P)’ (2021) *Mail & Guardian*, <https://mg.co.za/environment/2021-02-10-high-court-gives-australian-mining-company-a-big-slapp/> (accessed 30 November 2021).

56 Office of the High Commissioner for Human Rights (OHCHR) ‘Climate change and the UNGPs’, <https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change-and-the-UNGPs.aspx> (accessed 30 November 2021).

57 See eg United Nations Environmental Programme (UNEP) ‘Climate change and human rights’ (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf (accessed 30 November 2021); International Bar Association ‘Achieving justice and human rights in an era of climate disruption’ (2014), <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> (accessed 30 November 2021), the latter dedicates two pages in a report of more than 200 pages to the UNGPs

referred to by the UN Working Group as comprising the UNGPs are the state duty to protect human rights, the corporate responsibility to respect and access to a remedy.⁵⁸

The State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter on Human and Peoples' Rights related to the Extractive Industries (Guidelines and Principles)⁵⁹ were adopted by the African Commission in 2018. In addition to containing specific questions that guide state reporting before the Commission, the document contains an extensive 'explanatory note' that provides background on the content of the rights in articles 21 and 24, as well as the resultant entitlements and obligations that flow from these rights. Article 24 of the African Charter provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. While the Guidelines and Principles nowhere refer to climate change, it is evident that a satisfactory environment favourable to development cannot be realised if climate change were to continue unabated and without steps being taken to adapt to the changing climate.

There are a few preliminary considerations before coming to the specific duties of companies in this instrument. One important clarification made by the African Commission that is of relevance to climate change is that the term 'peoples' under article 24 may refer to the entire population of a state, and '[l]ocal communities or individuals who are most immediately affected by activities of extractive industries' can constitute a people.⁶⁰ This draws attention to the unequal burden of impact suffered at different levels in that it suggests that the extent of national as well as localised impacts of climate change linked to extractive industries is relevant and should be taken into account when determining the obligations in relation to human rights violations suffered as a result.

Second, the Guidelines and Principles clarify that the right to a satisfactory environment is not the same as a right to an unpolluted environment, but rather is an environment that is 'clean enough for a safe and secure life and development of individuals and people'.⁶¹ If considered in the climate change context, this is in line with the pragmatic approach

and mainly focuses on the responsibility of states to regulate corporations.

58 United Nations 'Guiding principles on business and human rights' (2011) 1.

59 While the Guidelines and Principles are narrower than the UNGPs in that they focus only on the extractive industries sector, this chapter is limited in its consideration to oil and gas companies, which fall within their ambit.

60 State Reporting Guidelines 11-12.

61 State Reporting Guidelines (n 60), para 27.

followed in the UNFCCC, which has as its objective ‘stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.⁶² Therefore, the obligations on companies from this perspective are not to prevent all activities leading to climate change, but rather to prevent dangerous interference with the climate system.

3.2 State obligations to protect in the context of climate change

The UNGPs, following the conventional state-centric model of human rights,⁶³ set out the responsibility of states to protect the rights of individuals within their jurisdictions. Under this framework, states are expected to protect against abuses by third parties and provide adequate remedies when non-state actors are in breach of human rights.⁶⁴ Roos argues that in the climate change context, this will translate into duties on states to ensure compliance by companies with disclosure obligations, to introduce regulations for companies on GHG emissions, and to enforce human rights accountability.⁶⁵ In relation to state climate change duties under the UNGPs, the International Bar Association recognises states as the main duty bearers and proposes that ‘states need to clarify regulatory mechanisms relating to climate change, including for overseas violations and require increased transparency from corporations by requiring more detailed reporting of GHG emissions’.⁶⁶ These obligations provide an important first level of protection. However, Roos notes that the legal regimes of many states are not adequate to support complaints and adjudication for the prevention and protection of climate change-related corporate harm to human rights.⁶⁷

As in the case of the UNGPs, the African Commission Guidelines place the first obligation to address adverse human rights consequences on the shoulders of states.⁶⁸ State obligations to protect people against third party action include standard setting regarding the protection of

62 UNFCCC art 2.

63 SR Roos ‘Climate change and human rights: What follows for corporate human rights responsibility?’ in OC Ruppel et al (eds) *Climate change: International law and global governance* (2013) 304.

64 UNEP (n 57) 29.

65 For a full exposition of the duties of states under the UNGPs in relation to climate change, see Roos (n 63).

66 International Bar Association (n 57) 148.

67 Roos (n 63) 306.

68 State Reporting Guidelines (n 60) para 56.

the environment, finances and the development of natural resources.⁶⁹ Taking account of the reality in many African countries, the Guidelines also require that measures should be taken to address corruption.⁷⁰ The Guidelines further state that the ‘duty to protect encompasses the laying down of ... criteria for the granting of concession or licences to extractive companies for exploration and extraction of natural resources’ and ‘ensure that the general public and local people are protected from licensing terms that are exploitative’.⁷¹

In the climate change context, the foregoing might potentially mean that states should ensure that funds are equitably allocated for climate interventions and are properly utilised and not misused. It also means that extraction permits for oil, gas and coal purposes are not to be granted uncritically, in order for the world to stay within the temperature increase envisioned in the Paris Agreement.⁷² The State Reporting Guidelines highlight the importance of undertaking human rights, social and environmental impact assessments prior to any activity being undertaken.⁷³ National legislation should be adopted to ensure that such assessments take full account of the contribution of such activities to climate change. A positive precedent was set in this regard in the South African case,⁷⁴ in which the South African High Court held that in taking a decision to build a new coal power station, the government should have carried out a climate change impact assessment.⁷⁵

3.3 Accountability of companies for climate change

The main duty on companies under the UNGPs is to respect human rights, a duty that ‘exists independently of states’ abilities and/or willingness to fulfil their own human rights obligations’.⁷⁶ General Principle (GP) 18 requires corporations to undertake human rights impact assessments. In principle this means that they have a duty to identify and assess actual

69 State Reporting Guidelines (n 60) para 45.

70 As above.

71 State Reporting Guidelines (n 60) para 48.

72 Paris Agreement (n16).

73 State Reporting Guidelines (n 60) para 64.

74 *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others* [2017] JOL 37526 (GP) (2019).

75 See discussion in AO Jegede & W Makulana ‘Climate change interventions in South Africa: The significance of *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others* [2017] JOL 37526 (GP)’ (2019) 15 *Obiter* 399; also see LJ Kotze & A du Plessis ‘Putting Africa on the stand: A bird’s eye view of climate change litigation on the continent’ (2020) 50 *Environmental Law* 627.

76 UNGPs Principle 11.

and potential human rights impacts. This provision can aid climate justice as it suggests that corporations themselves do not wait to be taken to court before determining or calculating the climate change impacts of their operations, but that they should do so preventatively, and take the necessary steps to prevent and address these impacts in communities prone to the adverse consequences of their operations.

The UNGPs explicitly recognise the importance of paying attention to the rights of vulnerable groups.⁷⁷ This is important in the context of climate change that compounds the vulnerability of various groups. Additionally, there is a duty on companies to track the effectiveness of their interventions on vulnerable or marginalised populations. This means that in addition to taking the needs of vulnerable groups into account when doing impact assessments and designing climate change responses, corporations should take follow-up steps to ensure that their measures in fact do not impact negatively or fail to address negative climate consequences for these groups.

Importantly, the UNGPs not only provide for obligations on corporations to prevent human rights impacts from their own activities, but also for activities associated with their operations.⁷⁸ This is relevant in the climate change context, especially in relation to the activities of energy sector/fossil fuel companies. In line with this principle, the burning of fossil fuels in the production of energy or the burning of fuel by vehicles, even if carried out by other companies or individuals, is directly linked to their operations. This is a counterargument for the issue raised before some courts by corporations that their operations are an integral part of modern society and the development of economies around the world, as they have a duty to prevent the human rights consequences, notwithstanding the extent of their contribution to climate change impact.⁷⁹

Another aspect of the UNGPs that is relevant in the climate context is GP 14, which states that human rights obligations apply to all corporations, regardless of their size (among other characteristics). While the top 50 'carbon majors' are responsible for a large proportion of GHG emissions, smaller corporations, including those operating on the African continent, have obligations, proportionate to their contribution to global climate change, which is becoming measurable. This is significant as of

77 UNGPs Principles 11, 18, 20.

78 UNGPs Principle 13.

79 As above.

the 20 largest companies in Africa in terms of turnover, five are related to the energy, petroleum and gas sectors.⁸⁰

An important aspect of the duty to respect is the duty to ‘do no harm’. According to Toft, ‘from the date that the carbon majors first became aware of fossil fuels causing climate change ... they have violated their basic responsibility to do no harm’.⁸¹ While this increases the historic obligations of these largest companies, in today’s world no person or company can claim that they are unaware of the causes or consequences of climate change. Therefore, for ongoing exploitation of fossil fuels and for the active exploration for additional sources, which is prevalent on the continent, all companies involved would be in violation of this obligation. While in the Kenyan case cited above it was the government body rather than the corporation that was sued, this ‘do no harm’ principle might be applied in future cases against corporations seeking to exploit oil and gas resources on the continent.

In terms of corporate obligations for human rights violations, the African Commission Guidelines go beyond the UNGPs to include both positive and negative, direct and indirect obligations. The Guidelines situate the human rights obligations of corporations within article 27(2) of the African Charter which requires that rights and freedoms should be exercised ‘with due regard to the right of others, collective security, morality and common interest’.⁸² Clearly, climate change impacts not only on the rights of others, as discussed above, but also on collective security and common interest, and corporations operating on the continent thus have a duty to exercise their rights within these limits.

As in the case of the UNGPs, the Guidelines recognise a duty on companies to do no harm, by ensuring that their activities do not occasion harm and should avoid intentional acts that may infringe on human rights.⁸³ This correlates with the obligations set out under the UNGPs. In addition to limiting GHG emissions, in the African context a duty to do no harm would include, for example, not exacerbating climate-induced drought by polluting or using up limited water sources for mining purposes.

80 Think Africa ‘Largest companies in Africa: Top 20’, <https://thinkafrica.net/largest-companies-in-africa-top-20/> (accessed 30 November 2021).

81 KH Toft ‘Climate change as a business and human rights issue: A proposal for a moral typology (2020) 5 *Business and Human Rights Journal* 1 11.

82 Art 27(2) African Charter.

83 State Reporting Guidelines (n 60) para 57.

The Guidelines further recognise the duty of due diligence on companies, which require them to be aware of, prevent and rectify negative human rights impacts. Still in keeping with the UNGPs, the Guidelines require companies to undertake human rights, social and environmental impact assessments to ascertain the extent of their impacts and require that they consider the rights of vulnerable groups.⁸⁴ In undertaking such impact assessments, corporations should provide for access to information, and participation of affected persons. Up to this point the same consequences discussed above under the UNGPs would apply.

The Guidelines additionally set out obligations on corporations in relation to 'fiscal and transparency requirements arising from the operations of their activities', including declaring of profits and fees due to the government.⁸⁵ Where a state has put in place carbon tax or caps on emissions, these would have to be reported under this requirement. Transparency would also require that impact assessments and due diligence reports be made public and accessible, along with details of the preventative and reparative measures that have been taken, particularly in relation to most vulnerable groups.

The Guidelines go far beyond that envisioned in the UNGPs, by providing not only for a duty to respect, but also for positive legal obligations to fulfil human rights, in circumscribed circumstances. In particular, it provides for a duty on companies to contribute to the 'development needs of host communities', arguably based on the adverse impacts of the companies on their host communities.⁸⁶ Based on their climate impacts, corporations would have obligations to address the adaptation needs, as part of broader development needs, both at national and local levels. Positive duties to address human rights challenges resulting from climate change may include far-reaching activities, such as assisting host communities in shifting to green energy, assisting drought-stricken communities or communities affected by extreme weather events in accessing food and other necessities, or contributing to medical research into eliminating vector-borne diseases. Such actions would be justified based on the profits that they have made through climate-inducing activities, their relative power in relation to both communities and governments in Africa, as well as their own interests in ensuring a transition to sustainable business activities.

84 State Reporting Guidelines (n 60) paras 58 & 64.

85 State Reporting Guidelines (n 60) para 63.

86 State Reporting Guidelines (n 60) para 65.

Nevertheless, in practice such obligations may pose some serious challenges, not least the fact that through illicit financial flows companies syphon off their profits, which would limit their obligations to contribute to the communities in which they operate. Second, there may be a challenge in determining where government obligations end and corporate obligations start. It is important that states should not turn over all their positive obligations to corporations but should aim to adequately regulate foreign corporations operating in the country. Finally, there is no clear guidance in the document or elsewhere on the level of obligations that would accrue to corporations in relation to development and socio-economic needs of the community. While these challenges may not be insurmountable,⁸⁷ there is a need for further development of these guidelines, also in its general application beyond the climate context.

3.4 Access to remedies in the climate crisis

GPs 15 and 17 require corporations to apply human rights due diligence, to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts'. The UN Working Group considers human rights due diligence to be an important aspect of corporate duties in the context of climate change, and notes that corporations have a duty to 'integrate climate change considerations into their human rights due diligence processes'.⁸⁸ The guidance of the International Bar Association on human rights in climate change interprets this duty to mean that companies must implement due diligence to identify, prevent and address (by minimising or reversing) the actual impacts from its operations on climate change.⁸⁹ This would make due diligence a critically important tool of climate justice, since corporations would have to take positive actions to reverse the effects of climate change from their GHG emissions. This would require that they not only take steps to reduce their future emissions to zero, but that they would have to adopt initiatives, such as planting trees, carbon capture technology, or other ecosystem-renewing activities, to repair some of the damage.

The UNGPs do not require physical proximity alone for accountability. They acknowledge that violations may also result from weaker exercise of control by parent companies.⁹⁰ Hence, it deploys the yardstick of impact, instead of sphere of influence, in defining and determining the scope of

87 D Bilchitz *A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles* (2013) 128-135.

88 OHCHR (n 58).

89 International Bar Association (n 57) 149.

90 Toft (n 81) 19.

corporate responsibility.⁹¹ This means that while corporations may have specific duties towards the people in the area where they operate, their duties are not limited to these. This is crucial in the climate change context where harm often manifests far away from the origins.

One further characteristic of the UNGPs that is important in the context of climate change is the fact that they provide for progressive responsibilities,⁹² including those related to due diligence, human rights impact assessments and the prioritisation of interventions that respond to real and actual negative consequences for human rights.⁹³ This is important, in that human rights often are remedial in that they are concerned with damage that has already manifested. Climate change, as a global dilemma that is manifesting at different speeds in different places, and which will pose a challenge to future generations, requires a forward-looking approach. The UNGPs thus are useful in this regard.

As far as the obligations for remedying breaches are concerned, the African Commission Guidelines place the full responsibility on the corporation to compensate for both material and non-material damages suffered by affected persons even where such damages constitute irreparable harm to health and environment.⁹⁴ This could be a strict application of the polluter-pays principle, based on strict liability. In doing so, it could be argued that they go further than the UNGPs, which require corporations to ‘provide for *or cooperate in their remediation*’.⁹⁵ In a climate context, this becomes complex. Whereas in the case of localised environmental damage it is possible to identify the affected persons in the climate context, all people would in a sense be affected. Would affected people then be limited to those who take cases to court, as has been the practice in jurisprudence thus far? It is difficult to say how ‘affected people’ should be defined. It may be argued, with Toft, that companies have stronger (at least moral) obligations to the people in the area where they operate (proximity argument) even in a climate context.⁹⁶ While only a few of the top 50 fossil fuel companies are headquartered on the African continent, the majority of the other major polluters either have operations on the continent or have expressed an interest in obtaining a share in such operations.⁹⁷ Coupled with the fact that some of the most

91 Roos (n 63) 318.

92 Toft (n 81) 3.

93 UNGPs Principle 24.

94 UNGPs (n 93) para 59.

95 UNGPs (n 93) Principle 22 (my emphasis).

96 Toft (n 81) 19.

97 Saudi Aramco is the largest, and currently is partnering with South Africa’s Central

severe consequences of climate change are being felt on the African continent, this makes a strong case for corporations to have an obligation to compensate people in Africa whose human rights can be proved to have been violated.

While it would not be feasible to do so through individual payments to all Africans, it could impose a duty on corporations at the very least to make damage payments to governments in countries where they operate, to contribute to adaptation measures (as has been seen in some cases in the US) and, additionally, to compensate the local communities where their operations are hosted. Such contributions would likely have to be larger than their contributions to total global climate change, because of the heightened obligations due to proximity. Toft argues for other factors to be considered in determining the forward-looking obligations of corporations, as including their 'power, privilege, interest and collective ability'.⁹⁸ The Guidelines reflect this argument relating to the power of companies by insisting on a high level of duty of care and diligence.⁹⁹

4 Conclusion

This chapter considered two human rights soft law instruments that set out the human rights obligations of companies, namely, the UNGPs and the African Commission Guidelines and Principles, against the background of the increasing and diversifying climate change litigation, particularly against corporations, to determine the extent to which these two soft law instruments strengthen or add to the arguments already being made before courts in relation to the obligations of corporations in the energy sector. By doing so, it contributes to the process of clarifying the climate-related human rights obligations of corporations, an important theme in climate justice, which continues to be a matter of contestation, despite widespread recognition of the need for such obligations as well as the legal and moral bases thereof.

Both the UNGPs and the African Commission Guidelines place the main responsibility in relation to corporate conduct squarely on the shoulders of the state, as the main duty bearer under international human rights law. Thus, many of the obligations of corporations can most

Energy Fund (CEF). Gazprom is another of these largest companies operating on the African continent. Total is developing a large-scale oil operation in Uganda, with one of the longest pipelines, which would also run through Tanzania. Others that have shown an interest include Coal India (South Africa and Mozambique), Shenhua Group (South Africa) and Rosneft (Nigeria).

98 Toft (n 81) 5.

99 State Reporting Guidelines (n 60) para 58.

effectively be fulfilled within a functioning and effective national system. As soft law instruments, the implementation thereof against companies also largely relies on the political will of states, either home states or host states. Nevertheless, as these duties exist separate from the obligations of state, the possibility does exist for corporations to be held accountable in other national courts based on extraterritorial jurisdiction¹⁰⁰ or in international fora.

Furthermore, there is the potential in Africa, similar to that which is ongoing in the US, of state actors at different levels, from cities to countries, suing fossil fuel companies to hold them accountable for climate change damage – both that which has already manifested, and with developing climate science – also for the adaptation to the projected localised climate consequences. Both the UNGPs and the African Commission Guidelines provide for backward-looking duties of due diligence by identifying and paying damages for actual harm resulting from climate change, as well as forward-looking duties to ‘do no harm’, including through conducting human rights impact assessments, making information publicly available and reducing GHG emissions. In these respects, the two soft law instruments support the arguments that have already been made before courts, whether based on human rights obligations or public nuisance, negligence, duty of care and unlawful enrichment. The African Commission Guidelines, however, take the possibility of corporate liability into new territory and beyond the routine duty to respect, by providing for obligations on companies to contribute fairly to the development needs of host communities. While such an approach has not yet been tested in the courts, the scope of responsibility of corporations that courts are willing to accept has been expanding, and it cannot be ruled out that such an approach may one day succeed.

100 See eg the human rights litigation by affected communities in Zambia and Nigeria, respectively, against parent companies in the UK, in the cases of *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe & Others* (Respondents) [2019] UKSC 20 and *Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC 3. A full discussion of extraterritoriality falls beyond the scope of this chapter.

3

HUMAN RIGHTS APPROACH TO CLIMATE JUSTICE IN AFRICA: EXPERIENCES FROM OTHER JURISDICTIONS

Oluwatoyin Adejonwo and Olubunmi Afinowi

Abstract

Climate change has several negative impacts on fundamental rights. It is also an issue of fairness and disproportionality in its effects on the well-being of communities, individuals, governments, and the relationship between states. For such populations, climate justice is required through a 'rights-based approach' that galvanises climate actions. Also, this is no less important in addressing the far-reaching impacts of climate change and its adverse effects, through adaptation and mitigation. Environmental advocates and scholars in other regions have explored, and continue to explore, litigation based on the human rights-based approach as a tool to galvanise climate change justice. An essential aspect of the approach across all levels is the need to safeguard human rights. This chapter analyses the intersections of climate change and human rights and whether climate justice can be achieved through a human rights-based approach. It highlights how climate litigation practices from other jurisdictions may inform a rights-based approach as a tool for climate justice in climate change actions in Africa.

Key words: *climate change; climate justice; climate litigation; human rights*

1 Introduction

Notwithstanding a brief decline in carbon dioxide emissions caused by restrictions on movement due to the COVID-19 pandemic, the United Nations (UN) Environment Programme's 2020 Emissions Gap Report states that global emissions still fall short of the Paris Agreement goals of limiting global warming to well below 2°C and pursuing 1,5°C.¹ The Report further notes that emissions are heading towards a temperature rise of 3°C during this century.² The adverse effects of climate change undoubtedly

1 UNEP et al 'Emission Report Gap 2020', <https://www.unep.org/emissions-gap-report-2020> (accessed 3 March 2021); also see M Allen et al 'Framing and context' in V Masson-Delmotte et al (eds) *Global warming of 1.5°C IPCC Special Report on the impacts of global warming of 1,5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate*, <https://www.ipcc.ch/sr15/> (accessed 2 March 2021).

2 As above.

will affect human activities and, by extension, the fundamental human rights of the members of every society, including their rights to life, self-determination, development, decent living, access to housing, and the right to a safe environment.³ The need to safeguard these and other rights affected by climate change was noted in the Preamble to the Paris Agreement. Specifically, the Paris Agreement noted the need to safeguard the rights of people, especially ‘minorities and vulnerable groups through the concept of climate justice’.⁴

In line with the above, the United Nations High Commissioner for Human Rights (UNHCHR) asserts the necessity of safeguarding the ‘fundamental rights to freedom, equality, and adequate conditions of life within an environment of such quality that permits a life of dignity and well-being’.⁵ Thus, this chapter seeks to analyse the intersections of climate change, human rights and climate action through climate litigation. It highlights how climate change adversely affects human rights, on the one hand, and, on the other, how human rights can be employed as a tool to combat the adverse effects of climate change, particularly the utility of climate litigation in Africa, drawing experiences from other jurisdictions.⁶ Litigation is one of the strategies used in other jurisdictions to ensure that government, government agencies and multinational companies develop and implement effective mitigation and adaptation measures, thereby using the courts to push for concrete action.

3 Report of the Office of the High Commissioner for Human Rights (OHCHR) to the 21st Conference of Parties (COP 21) to the United Nations Framework Convention on Climate Change (November 2015), <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> (accessed 3 March 2021).

4 Preamble to the Paris Agreement FCCC/CP/2015/10/Add.1 Dec. 1/CP.21, <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> (accessed 3 March 2021).

5 A/HRC/10/61 Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights on 15 January 2009, <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> (accessed 3 March 2021).

6 A 2017 UNEP report suggests that climate change litigation will appear with increasing frequency in the Global South. In many instances, this growth may owe simply to the steady proliferation of laws and financial resources focused on mitigation, adaptation, and sustainable development more generally. See United Nations Environment Programme ‘The status of climate change litigation: A global review’, <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf> (accessed 3 March 2021).

2 The intersections of climate change, human rights and climate justice

Climate action stems from an obligation on countries to take necessary steps to mitigate, adapt and reduce resilience to climate change within their jurisdictions. These climate obligations stem from accession to international obligations, such as the United Nations Framework Convention on Climate Change (UNFCCC) and its various Protocols, the Paris Agreement, and international instruments safeguarding human rights, especially the rights to life, property and a safe environment. At the national and sub-national levels there are bill of rights or constitutional provisions safeguarding human rights, legislation, regulations and various frameworks on climate change adaptation and mitigation.

The UN through its Office of the High Commissioner for Human Rights and other mechanisms highlights the links and key impacts of climate change, directly and indirectly, on an array of internationally-guaranteed human rights and have advocated a human rights-based approach to climate change.⁷ More recently a report by the UN Special Rapporteur on Human Rights and the Environment highlights the links and key impacts that climate change has on internationally-guaranteed human rights and the need for a human rights-based approach to climate change.⁸ Also, the Preamble to the Paris Agreement⁹ acknowledges that

climate change is a common concern of humankind. Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with

7 See UN Office of the High Commissioner 'Key messages on human rights and climate change', https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf (accessed 3 March 2021); UN Office of the High Commissioner 'Open letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action', <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf> (accessed 3 March 2021); Human Rights Council Resolution 10/4 Human Rights and Climate Change, http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf (accessed 3 March 2021); and UNFCCC Decision 1/CP.16, <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> ((accessed 3 March 2021).

8 'Safe climate: A report of the Special Rapporteur on Human Rights and the Environment' A / 74/161, <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf> (accessed 3 March 2021).

9 The Paris Agreement was adopted as a decision of the Conference of the Parties to the UNFCCC, and its text is included as an annex to that decision. Conference of the Parties, Draft decision _/CP.21, Adoption of the Paris Agreement 20, UN Doc FCCC/CP/2015/L.9/Rev.1.

disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.¹⁰

Climate change, in addition to other actions, requires a rights-based approach. A significant role of human rights regarding climate change is to safeguard those subject to various degrees of vulnerabilities. However, in addition to this, it must be noted that the human rights-based approach provides a viable avenue to foster government accountability and provides a clear line of action concerning climate change mitigation and adaptation. It further provides frontiers for international cooperation on climate change action and prevents discrimination and inequality, either among nations or concerning groups of vulnerable people within individual states. Furthermore, it sets a 'core minimum' standard for individual states and the international community to tackle issues of climate change.¹¹

To this end, climate action in each state must be situated in the context of the protection and safeguarding of human rights.¹² Thus, climate action must be guided by the principles of human rights,¹³ including the assurance of justice¹⁴ and dignity of the vulnerable members of society. In seeking to situate climate change in the human rights context, Sachs notes that in the course of the Rio Conference, climate change was recognised as being a matter of intergenerational equity.¹⁵ Sachs further argues that in placing the 'polluter-pays principle' within climate change governance, a duty is imposed on high emitters not only to offer compensation but to take obligatory steps to prevent further 'violations of economic, social and cultural rights by adequate protective measures'.¹⁶ This argument is based on the premise that the impacts of climate change are likely to aggravate the living conditions of people, who have contributed little or nothing to historical greenhouse gas emissions, to the extent that their basic rights are jeopardised.¹⁷ It can be deduced from his arguments that the duty

10 See Preamble para 6 Paris Agreement.

11 S McInerney-Lankford et al *Human rights and climate change: A review of the international legal dimensions* (2011) 29.

12 W Adger et al *Adapting to climate change: Thresholds, values, governance* (2009) 9.

13 This is as contained in the constitutions of individual countries and international instruments such as the UN Charter on Human Rights.

14 Each country has a duty to ensure that its courts and other institutions are properly empowered to safeguard and ensure social justice, environmental justice and equity in all matters.

15 W Sachs 'Climate change and human rights' (2008) 51 *Development* 346.

16 Sachs (n 15) 354-359.

17 As above.

to safeguard human rights concerning climate change impacts falls on countries with high greenhouse gas (GHG) emissions, the countries to which those most adversely affected belong, as well as the international community.¹⁸ His position is in line with that of Khan who argues that climate change action is a global public good from which no state or individual should be excluded. Reversing the argument, they point out that both climate change mitigation and adaptation should be applied in sustaining the norms of 'human rights, the right to development and the no-harm rule'.¹⁹

In further highlighting the relevance of human rights in climate action, it is argued that due to the impacts of climate change on social, economic, cultural and developmental aspects of people's lives, it is essential that there should be some form of redistribution of resources to ensure climate justice.²⁰ Human rights help to ensure the appropriate placing of obligations and responsibilities to engender justice. Such obligations and duties include the government's duty to safeguard the environment in line with the people's rights to environmental well-being.²¹ Specifically, the right to environmental well-being can be invoked to ensure that individual states act on the mitigation of climate change, given that climate change could lead to coastal inundation, desertification and other issues of land degradation.²² In turn, state action on climate change is encouraged

18 This is in line with the tenets of the UNFCCC. Specifically, the Convention in its Preamble asserts that the current and historic increase in GHG emissions was a result of activities in developed countries. In line with the observation in its Preamble, art 3 of the Convention highlights the need for nations to act based on the principle of common but differentiated responsibilities and capabilities of individual nations.

19 M Khan 'Climate change, adaptation and international relations theory' in G Sosa-Nunez & E Atkins (eds) *Environment, climate change and international relations* (2016) 21.

20 E Sussman et al 'Climate change adaptation: Fostering progress through law and regulations' (2010) 18 *New York University Law School Environmental Law Journal* 60.

21 This right is couched in different ways depending on individual countries. In the South African Bill of Rights, sec 24 guarantees citizens' rights to environmental safety and well-being. Nigeria, sec 16 of the 1999 Constitution recognises a government obligation to safeguard the environment. However, this obligation is not couched as a right, but rather as an objective that may direct government policies.

22 There are several climate litigation cases in which the right to environmental well-being or the right to a safe environment has been relied upon to make the government live up to this obligation. See UNEP and Sabin Centre for Climate Change Law 'Global Climate Litigation Report: 2020 status review', <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (accessed 3 March 2021). In this regard, cognisance should be taken of the elements of the concept of 'well-being' and how this translates into government obligations. A Nellerand & R Neller 'Environment well-being and human well-being' in R Elliot (ed) *Institutional issues involving ethics and justice 2* describe human well-being as entailing access to 'clean air, a safe and adequate water supply, adequate nutrition and shelter

and fostered by collective regional and transnational climate change governance.

2.1 Regional considerations of human rights in climate change action

In recognising the need to take proactive steps to safeguard the rights of people in relation to climate change and its impacts, the African Commission on Human and Peoples' Rights (African Commission) has passed three Resolutions.²³ Specifically, Resolution 342 states the position of the African Union (AU) on human rights and climate change, which position is premised on the African Charter on Human and Peoples' Rights (African Charter) and the UNFCCC. The position of the AU on climate change and human rights reaffirms the need to take cognisance of the rights of Africans to be protected, including the right to economic, social and cultural development, and the right to a meaningful life in a safe environment.²⁴ Further, the AU affirms the provision of the UNFCCC on the need to safeguard the climate system for present and future generations, thereby taking into consideration inter- and intra-generational equity in climate change action.²⁵ In a more recent Resolution the AU went a step further by taking cognisance of the rights of internally-displaced persons affected as a result of climate change. It urged member states to take steps to safeguard the rights and provide humanitarian protection for those affected by the adverse effects of climate change, especially the particularly vulnerable.²⁶ Most importantly, Resolution 417 requires that member

and a global ecosystem that will continue to provide these services'; J Summerset al 'A review of the elements of human well-being with an emphasis on the contribution of ecosystem services' (2012) 40 *Ambio* 327 define well-being as entailing 'basic human needs, economic needs, environmental needs, and subjective happiness'. In an unpublished work, Knight & Tsuchiya describe human well-being as entailing variables such as contained in the Human Development Index (HDI). Eg, in the case of Nigeria these indicators of the HDI include health, environmental sustainability, inequality, human security, socio-economic sustainability, and so forth. See Nigeria – Human development indicators, <http://hdr.undp.org/en/countries/profiles/NGA> (accessed 3 March 2021).

23 Resolution ACHPR/Res 153(XLVI)09: Resolution on Climate Change and Human Rights and the Need to Study its Impacts in Africa adopted at its 46th session in 2009; ACHPR/Res 271 (2016): Resolution on Climate Change in Africa adopted at its 55th ordinary session in 2014; and ACHPR/Res 342(LVIII)2016: Resolution on Climate Change and Human Rights in Africa; ACHPR/Res 417 (LXIV) 2019: Resolution on the Human Rights Impacts of Extreme Weather in Eastern and Southern Africa due to Climate Change.

24 Arts 22, 24 & 45 African Charter.

25 The Preamble and art 3, para 1 of the United Nations Framework Convention on Climate Change.

26 Para 4 ACHPR/Res 417 (LXIV) 2019 (n 23).

states 'fully integrate climate change considerations and the human and peoples' rights consequences into their broader development plans'.²⁷

2.2 Specific climate change impacts and human rights issues

The human rights that are most affected by climate change include the rights to life, self-determination, development, food, health, water and sanitation, housing, education and the rights of future generations to a safe and sustainable environment.²⁸ In relation to land and access to land, climate change would lead to further scarcity of land due to challenges such as migration, loss of land as a result of flooding, coastal erosion, desertification, and so forth. For instance, many indigenous groups would be faced with the reality of having to migrate from their ancestral homes due to the impacts of climate change.²⁹ Climate action also raises human rights issues of land tenure security, especially as it relates to access to housing and access to land for agriculture, particularly in the case of women who are often deprived of such access based on their gender. Research reveals that women and children form a large percentage of the most vulnerable in society,³⁰ who often bear the brunt of social instabilities and scarcity of resources. In most developing countries most women continue to struggle with issues such as access to housing and land tenure security. Many of these women earn less than their male counterparts and often play multiple roles of being the breadwinner and caregiver in their homes.³¹ These issues render them particularly vulnerable to the adverse socio-economic impacts of climate change. It becomes essential that gender rights be given due consideration in climate change action/governance as a core aspect of human rights.

27 Para 9 ACHPR/Res 417 (LXIV) 2019.

28 Office of the High Commissioner for Human Rights 'Understanding human rights and climate change', <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (accessed 3 May 2021).

29 A case to note here is that of the Ilaje people of Ondo State who over years have endured coastal inundations in their communities. Many have been forced to migrate and many more have lost their sources of livelihood.

30 C Nellemann et al (eds) *Women at the frontline of climate change: Gender risks and hopes. A rapid response assessment* United Nations Environment Programme (2011) 6-7.

31 Research reveals that one in four or between 25% and 30% of households in Africa are headed by females. See A Milazzo & D van de Walle *Women left behind? Poverty and headship in Africa (English)* (2015) Policy Research Working Paper WPS 7331 Washington DC: World Bank Group, <http://documents.worldbank.org/curated/en/277221468189851163/Women-left-behind-poverty-and-headship-in-Africa> (accessed 3 March 2021); World Bank 'Poverty is falling faster for female-headed households in Africa', <https://blogs.worldbank.org/african/poverty-is-falling-faster-for-female-headed-households-in-africa> (accessed 5 May 2021).

The above-highlighted issues make it imperative for action to tackle the environmental and developmental challenges occasioned by climate change, which further deepen pre-existing social inequalities. While various avenues exist to address social inequalities and injustices, a rights-based approach to climate change has become necessary due to the great divide between those who have contributed most to climate change and those who bear the most adverse consequences.³² Climate justice provides an effective tool to address the highlighted and other injustices and inequalities occasioned by the adverse effects of climate change. The principles of climate justice drawn up by the Mary Robison Foundation and the Bali Principles of Climate Justice are based mainly on human rights principles.³³ These principles of climate justice, as do other principles, emphasise the respect and protection of human rights of all persons, especially those most affected by the adverse effects of climate change. The following part discusses environmental justice and the role it has played in engendering climate justice as a tool to ensuring the protection of human rights in relation to climate change.

2.3 Fostering climate justice through a human rights-based approach

Environmental justice as a precursor to climate justice and link to a human rights-based approach has its roots in the fight against social inequalities and injustices that were escalated by unfavourable environmental conditions experienced by the poor and vulnerable members of society.³⁴ Such deprived communities or sectors of society are more exposed to environmental pollution and bear the brunt of various forms of environmental degradation, affecting the quality of life and their dignity as human beings. To this end, environmental justice has been argued as being more human than nature based.³⁵

32 International Bar Association 'Achieving justice and human rights in an era of climate disruption', [https://www.lagbd.org/index.php/Achieving_Justice_and_Human_Rights_in_an_Era_of_Climate_Disruption_\(int\)](https://www.lagbd.org/index.php/Achieving_Justice_and_Human_Rights_in_an_Era_of_Climate_Disruption_(int)) (accessed 5 May 2021). See also C Okereke 'Climate justice and the international regime' (2010) 1 *Wiley Interdisciplinary Reviews: Climate Change* 462; C Okereke & P Coventry 'Climate justice and the international regime: Before, during, and after Paris' (2016) 7 *Wiley Interdisciplinary Reviews: Climate Change* 834.

33 The Bali Principles of Climate Justice were developed at the final preparatory negotiations for the Earth Summit in Bali in June 2002, <https://corpwatch.org/article/bali-principles-climate-justice> (accessed 19 June 2021); Mary Robinson Foundation 'Principles of climate justice', www.mrfcj.org (accessed 19 June 2021).

34 S Harlan et al *Climate justice and inequalities* (2015) 135.

35 D Schlosberg *Defining environmental justice: Theories, movements, and nature* (2007) 6.

Environmental justice is driven by the need for a qualitative environment for all,³⁶ the fair protection of the environment to remove any inequities in the distribution of 'environmental amenities',³⁷ and the equal fulfilment of environmental obligations towards all members of society.³⁸ Based on the fact that poorer members of society mostly experience environmental injustices, environmental justice is aimed at correcting the 'inequitable distribution of environmental risks and governmental protection',³⁹ as well as ensuring the equitable distribution of all environmental costs and benefits. Hence, in so far as climate justice addresses issues of disproportionality, inequity in the causation of and remedy to climate change, it relates to environmental justice. Since environmental justice relates to issues of human rights, the safeguarding of access to resources and infrastructure, distributive inequities, and public participation,⁴⁰ it is not surprising that its frontiers continue to expand and have expanded to accommodate human rights in climate change action.⁴¹ To this end, Taylor et al argue the need for environmental justice in the adaptation to climate change to ensure that no group of people are unfairly exposed to adverse impacts.⁴²

Given the above background, the rights-based approach aims to tackle the inequalities caused by climate change and address the 'disproportionate impact on the poorest and least responsible'.⁴³ Harlan et al note that climate change is a justice issue for several reasons. They argue, first, that climate

36 R Holifield 'Defining environmental justice and environmental racism' (2001) 22 *Urban Geography* 81.

37 H Pearsall & J Pierce 'Urban sustainability and environmental justice: Evaluating the linkages in public planning/policy discourse' (2010) 15 *Local Environment* 570.

38 Para 27 of the Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action states that equitable human settlements are those in which all people, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, have equal access to housing, infrastructure, health services, adequate food and water, education and open spaces, http://www.unhabitat.org/declarations/habitat_agenda.htm (accessed 5 May 2021).

39 D Schlosberg & LB Collins 'From environmental to climate justice: Climate change and the discourse of environmental justice' (2014) 5 *Wiley Interdisciplinary Reviews: Climate Change* 359.

40 As above.

41 According to Schlosberg, environmental justice bridges a number of issues, thereby linking various problems relating to individuals, groups and entire societies. He notes that the 'broad, plural, and inclusive discourse' made it successful. See Schlosberg (n 35) 6.

42 A Taylor et al 'Urban adaptation' in L Kotze et al (eds) *Climate law and governance for low carbon development in South Africa* (2016) 11-17.

43 International Bar Association (n 32) 45.

change is driven by overconsumption, which is closely linked to social inequalities; second, that the impacts of climate change differ based on the economic well-being of individuals, communities and states; and, third, that policies on climate change action do not sufficiently take cognisance of the poor and vulnerable in society.⁴⁴

In line with bridging the inequality gap, climate justice seeks to integrate human rights and equity considerations into climate change action at various levels of governance.⁴⁵ Skillington affirms this point by juxtaposing Rawls's theory of justice to climate justice, arguing that decent societies⁴⁶ have an obligation to assist other societies that may require help in 'overcoming unfavourable conditions'.⁴⁷ Following this standpoint, climate justice iterates the dignity of the human person in line with various international instruments and domestic laws that safeguard human rights. Further, it is argued that climate justice seeks to interrogate how the rights of the vulnerable are affected by climate change and to protect these rights from further violation. In advancing his argument for a human rights-based approach to climate justice, Skillington restates the Mary Robinson principles of climate justice on (i) respecting people's rights to participate in decision-making processes on issues that deeply affect their lives and those of their children; (ii) addressing the root causes of poverty and suffering; (iii) emphasising the equal dignity and worth of all people through the promotion of tolerance, inclusion, non-discrimination and social justice; and (iv) holding all development actors accountable for respecting, protecting, and fulfilling human rights.⁴⁸

The Mary Robinson principles serve to emphasise the need for justice to ensure equity and fairness in climate change. This is particularly necessary as the adverse effects of climate change have been found to portend developmental challenges for a large percentage of the world's population, as most developing countries will face environmental and developmental challenges due to climate change impacts.⁴⁹ As far back as 2011, these adverse effects had been found to hamper the delivery of the Millennium Development Goals (MDGs).⁵⁰ In the same vein, these impacts remain a

44 S Harlan et al 'Climate justice and inequality' in R Dunlap & R Brulle (eds) *Climate change and society: Sociological perspectives* (2015) 127.

45 International Bar Association (n 32) 45.

46 T Skillington *Climate justice and human rights* (2016) 45.

47 As above.

48 Skillington (n 46) 45.

49 C Field (ed) *Managing the risks of extreme events and disasters to advance climate change adaptation: Special report of the Intergovernmental Panel on Climate Change* (2012) 32.

50 S McInerney-Lankford et al *Human rights and climate change: A review of the international legal dimensions* (2011) 1.

bane to the actualisation of the Sustainable Development Goals (SDGs) and are counter-productive for development in most countries.⁵¹

As a consequence of the adverse effects on sustainable development, the negative impacts of climate change ‘undermine the realisation of a range of internationally recognised human rights’.⁵² World Bank studies show that the adverse effects of climate change threaten a range of rights, including the rights to life, food, adequate housing, water and health.⁵³ Further, the study notes that climate change affects not only substantive rights, but also militates against the progressive actualisation of other human rights, especially among more vulnerable states, communities and individual members of society.⁵⁴ Given the far-reaching effects of climate change on human lives and livelihoods, it has been argued that the first step in climate justice ought to be the enhancement and safeguarding of social, economic and environmental well-being.⁵⁵ Climate action through rights-based climate litigation is one of several strategies that can be used in achieving this purpose.

3 The utility of human rights-based climate litigation

Several UN and regional resolutions, comments and documents have settled the conceptual link between human rights and climate change.⁵⁶ These UN and other regional documents have argued that a human rights-based approach can have a significant impact on the international climate change response and galvanise action. Human rights provide an

51 ‘The future we want’ Outcome Document of the United Nations Conference on Sustainable Development (2012) 50, www.sustainabledevelopment.un.org/futurewewant.html (accessed 5 May 2021). See also L Kotze et al ‘Climate change law and governance in South Africa: Setting the scene’ in T Humby et al *Climate change: Law and governance in South Africa* (2016) 1-19.

52 McInerney-Lankford et al (n 50) 2.

53 McInerney-Lankford et al (n 50) 12.

54 McInerney-Lankford (n 50) 18.

55 N Stern *Stern review: The economics of climate change* (2006) 404 430.

56 See UN Human Rights Office of the High Commissioner ‘Key messages on human rights and climate change’, https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf (accessed 5 May 2021); UN Human Rights Office of the High Commissioner ‘Open letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action’, <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf> (accessed 5 May 2021); Human Rights Council Resolution 10/4: Human Rights and Climate Change, http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf (accessed 5 May 2021); UNFCCC Decision 1/CP.16, <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> (accessed 5 May 2021).

accountability framework for damages related to climate change, highlight and concretise state obligations and introduce subjective rights to international climate law.⁵⁷ The human rights-based approach introduces a human dimension to international climate law. It allows courts to concretise principles,⁵⁸ obligations and responsibilities, such as whether a state's duty to reduce greenhouse gas emissions could be derived from human rights law, and how states could be held liable for the harmful consequences of anthropogenic climate change on the grounds of human rights law.

Relying on human rights law, the courts have asserted that governments have obligations to take climate change into consideration in governance at various levels. For instance, in 2020 a group of non-governmental organisations (NGOs) brought an action before the Inter-American Commission on Human Rights about the 'impacts of climate change on the human rights of indigenous peoples, women, children, and rural communities'.⁵⁹ The hearing highlights the fact that states in the region have an obligation to prevent actions that aggravate the impacts of climate change or hamper the enjoyment of human rights and freedoms.⁶⁰ A similar ongoing case is *Centre for Food and Adequate Living Rights & Others v Tanzania and Uganda*⁶¹ before the East African Court of Justice, where the petitioners instituted an action against the governments of Tanzania

57 D Bodansky 'Climate change and human rights: Unpacking the issues' (2010) 38 *Georgia Journal of International and Comparative Law* 511; E Cameron 'Human rights and climate change: Moving from an intrinsic to an instrumental approach' (2010) 38 *Georgia Journal of International and Comparative Law* 673; F Knur 'The United Nations human rights-based approach to climate change – Introducing a human dimension to international climate law' in S von Schorlemer & S Maus (eds) *Climate change as a threat to peace: Impact on cultural heritage and cultural diversity* (2015).

58 According to the UN, the following are necessary elements of a human rights-based approach: assessment and analysis in order to identify human rights claims of rights holders and the corresponding human rights obligations of duty bearers as well as the immediate, underlying, and structural causes of the non-realisation of rights; programmes assess the capacity of rights holders to claim their rights and of duty bearers to fulfil their obligations; they then develop strategies to build these capacities; programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles; and programming is informed by the recommendations of international human rights bodies and mechanisms. See D Olawuyi 'Advancing climate justice in international law: An evaluation of the United Nations human rights-based approach' (2015) 11 *Florida A&M University Law Review* 103.

59 Hearing on climate change before the Inter-American Commission on Human Rights, https://climate-laws.org/geographies/international/litigation_cases/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights (accessed 19 June 2021).

60 As above.

61 https://climate-laws.org/geographies/international/litigation_cases/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda (accessed 19 June 2021).

and Uganda challenging the construction of the East African crude oil pipeline. According to the plaintiffs in the case, the governments of both countries did not give consideration to 'environmental, social, human rights, and climate impact assessments' in the signing of the agreements.⁶² Climate litigation establishes a viable way of ensuring that human rights considerations are not ignored in climate action. It also provides an avenue to ensure that the government performs its obligations and responsibilities, including the duty of care to safeguard the right to life and other human rights while carrying out climate action.⁶³

Environmental advocates, communities, NGOs, business entities and sub-national governments have turned to the courts via litigation as a strategy to highlight and compel action, seek mitigation and adaptation measures and seek relief. The reliefs sought include the enforcement of existing climate laws; the integration of climate action into existing environmental, energy and natural resources laws and strategy; clear definitions of fundamental climate rights and obligations; and compensation for climate harms. This advocacy has led to a body of legal precedents crystallising into an increasingly coherent field of environmental law. Climate litigation has been defined to include cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change, instituted before a range of administrative, judicial and other adjudicatory bodies.⁶⁴

Climate litigation is gradually gaining popularity as one of the strategies to pressure governments, government agencies and policy makers to adopt more concerted efforts in response to climate change and for mitigation of and adaptation to climate change. According to a UNEP report, as of 1 July 2020 at least 1 550 climate change cases have been filed in 38 countries around the world.⁶⁵ The report states that the key trends

62 As above.

63 See the case of *Urgenda Foundation v State of The Netherlands*, https://climate-laws.org/geographies/netherlands/litigation_cases/urgenda-foundation-v-state-of-the-netherlands (accessed 19 June 2021). This case is considered later in the chapter.

64 Climate litigation cases raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts. These cases are typically identified with key words such as climate change, global warming, global change, greenhouse gas, GHGs, and sea level rise, but where cases actually raise issues of law or fact related to climate change but do not use these specific terms, they are also classified as climate litigation. See D Markell & JB Ruhl 'An empirical assessment of climate change in the courts: A new jurisprudence or business as usual?' (2012) 64 *Florida Law Review* 15 27; M Wilensky 'Climate change in the courts: An assessment of non-US climate litigation' (2015) 26 *Duke Environmental Law and Policy Forum* 131 134; United Nations Environment Programme (n 6).

65 There now is a rapid uptake of climate litigation as one of the strategic responses to

identified in those cases include an increase in the number of matters seeking to protect fundamental and human rights; challenging domestic enforcement and non-enforcement of climate-related laws; stopping fossil fuel extraction and use; pushing for corporate liability for climate harms; addressing failures to adapt and the impacts of adaptation measures; and those advocating increased climate disclosures.⁶⁶

Several reasons may be adduced for the popularity of employing litigation as one of the strategies for addressing government action or inaction. These reasons include the growing urgency of the climate crisis;⁶⁷ a rise in sea level causing flooding and displacement of communities and small island nations; heat waves and temperature rise, climate change impacting on agricultural systems and food yields; the frequency of natural disasters; its threat to human health; longer-lasting and more severe droughts; and acidifying oceans. Additionally, the lackluster ambition of the nationally-determined contributions (NDCs) submitted by countries that are parties to the Paris Agreement,⁶⁸ and the inclusion of climate action as one of the 17 SDGs.⁶⁹

The public trust doctrine is one of the main doctrines relied on by environmental advocates and litigants seeking redress in courts for climate action. The doctrine establishes a trustee relationship such that government holds and manages natural resources for the benefit of present and future generations.⁷⁰ The doctrine raises questions, including questions as to

galvanise climate action. In 2017 there were 884 climate change cases brought in 24 countries. In 2020 the number of cases has nearly doubled with at least 1 550 cases filed in 38 countries. See UNEP and Sabin Centre for Climate Change Law 'Global Climate Litigation Report: 2020 status review' (n 22).

66 As above.

67 See R Pachauri & L Meyer (eds) *Climate change 2014: Synthesis report. Contribution of working groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 151.

68 See United Nations Environment Programme Emissions Gap Report 2020, <https://www.unenvironment.org/emissions-gap-report-2020> (accessed 19 June 2021); F Khan 'NDC score card: Measuring the Nationally Determined Contributions (NDCs) under the Paris Agreement' (2019) M-RCBG Associate Working Paper Series 123, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/123_final.pdf (accessed 19 June 2021); N Nhamo 'Auditing the adequacy of NDCs in addressing the climate action sustainable development goal' in G Nhamo et al (eds) *Scaling up SDGs implementation emerging cases from state, development and private sectors* (2020).

69 United Nations 'Transforming our world – The 2030 agenda for sustainable development'. Note that the SDGs also recognise climate change as a cross-cutting issue and that climate action also is a vital, cross-cutting element of many of the other SDGs.

70 See V Nanda & W Ris 'The public trust doctrine: A viable approach to international environmental protection' (1976) 5 *Ecology Law Quarterly* 291; R Sagarin &

an individual's fundamental rights, intergenerational equity, as well as concerns about the balance of powers among the judicial, legislative and executive branches or functions of governments.⁷¹

The international response to climate change, such as the UNFCCC, Kyoto Protocol and, more recently, the Paris Agreement, provides a catalogue of national commitments toward averting average global warming above 1,5°C. Although the various climate change treaties by their terms do not provide litigants with a cause of action or impose enforceable limits on member countries' national emissions, they can be said to be of persuasive effect, and they make it possible to question the action or inaction of their governments, demand environmental responsibility from corporate entities and other private parties in light of these climate change commitments. In addition, several countries have climate legislation, regulations or policies that place implicit obligations on governments, policy makers and sometimes the private sector.⁷²

Climate change advocates have begun to make use of these codifications to support their arguments about the adequacy or inadequacy of efforts by national governments to protect individual rights impacted by climate change. This is so especially because climate change policies have often set targets based on political feasibility rather than the consensus scientific understanding of what is required to stabilise the climate at an acceptable level. Apart from challenging government action or inaction using specific climate change legislation, if it exists, environmental advocates challenge action or inaction using constitutional and statutory provisions not specific to climate change.

3.1 Key trends in climate litigation

The key trends in climate litigation cases include the reliance on and linkage of climate action to fundamental human rights to compel climate action. The fallout from this pushback from environmental advocates and

M Turnipseed 'The public trust doctrine: Where ecology meets natural resources management' (2012) 37 *Annual Review of Environment and Resources* 473; M Blumm & R Guthrie 'Internationalising the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision'(2011-2012) 45 *University of California Davis Law Review* 741; A Blackmore 'The application of and the prospects for the public trust doctrine in South Africa: A brief overview' (2018) 18 *South African Law Journal* 631.

71 United Nations Environment Programme 'The status of climate change litigation: A global review' (2017) (n 6).

72 There currently are about 2 122 climate laws and policies globally, <https://climate-laws.org/> (accessed 19 June 2021).

judicial activism includes accountability demands by citizens on climate change issues; the challenge of non-enforcement of domestic climate-related laws and policies; and a greater demand for climate disclosures by corporate bodies. The UNEP Report identifies trends or types of climate litigation that are grouped, as discussed below.⁷³

3.1.1 Cases seeking to compel governments to implement legislative and policy commitments

These cases seek to hold governments to their legislative and policy commitments and compel governments to accelerate their efforts to implement emission-reduction targets such as those in their NDCs.⁷⁴ In the case of *Urgenda Foundation v The State of The Netherlands*⁷⁵ the Urgenda Foundation and 900 Dutch citizens sued the Dutch government, alleging that the government's recent revision of GHG emission reduction goals amounted to a violation of its constitutionally-imposed duty of care. The Netherlands Supreme Court held that the state had a duty to protect its citizens from 'dangerous climate change' in accordance with its obligations under the European Convention on Human Rights (European Convention). The Court also relied on article 21 of the Dutch Constitution⁷⁶ and the European Union (EU) emission reduction targets. In agreeing with the plaintiffs, the Court ordered the Dutch state to limit GHG emissions to 25 per cent below 1990 levels by 2020, finding the government's existing pledge to reduce emissions by 17 per cent insufficient to meet the state's fair contribution toward the goal, codified in the Paris Agreement.⁷⁷

In the case *Friends of the Irish Environment CLG v Government of Ireland* (known as *Climate Case Ireland*),⁷⁸ the Irish Supreme Court held that the Irish government's National Mitigation Plan was defective and ordered the

73 Note that a comprehensive categorisation of the recurring legal issues in climate litigation is difficult because of the diversity of the world's legal systems, which take varied approaches to the interconnected substantive areas of law that constitute climate change law.

74 *Urgenda Foundation v The State of The Netherlands* Supreme Court of The Netherlands Case 19/00135 (20 December 2019); also see *Leghari v Pakistan* (2015) WP 25501/2015 (Supplemental Decision).

75 [2015] HAZA C/09/00456689.

76 Note that the Court cited art 21 of the Dutch Constitution without directly applying its provisions. Art 21 of the Dutch Constitution states that '[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'. See Constitution of the Kingdom of The Netherlands.

77 United Nations Environment Programme 'The status of climate change litigation: A global review' (n 6).

78 [2020] IESC.

government to produce a more ambitious strategy. The National Mitigation Plan failed to specify how it is proposed to achieve Ireland's transition to 'a low carbon climate-resilient and environmentally sustainable economy by the end of 2050'. Further to the national transition objective, as required by the Climate Action and Low Carbon Development Act (2015 Climate Change Act), rights protected by the European Convention on Human Rights and the Irish Constitution, the Court held that the government must create a new, more ambitious National Mitigation Plan that complies with Ireland's national and international climate obligations.⁷⁹ The *Urgenda* case and *Climate Case Ireland* so far are the only cases in the world, but definitely will not be the last, in which the highest national court of law has required a government to revise its national climate policy to make it more ambitious in light of its legal obligations under national laws and its international commitments, such as those found in climate change agreements and human rights guaranteed under domestic and international law. This case exemplifies the application of the principles of climate justice and human rights-based approach. As seen above, the courts relied on the European Convention and the constitutional duty to take care in environmental issues, including climate change.

3.1.2 Cases seeking to demonstrate the adequacy or otherwise of national greenhouse gas emission goals

In the case of *Leghari v Pakistan*⁸⁰ the petitioner, a citizen of Pakistan, filed public interest litigation to challenge the inaction and delay on the part of the federal government and the government of Punjab to address the challenges and vulnerabilities associated with climate change. The petition stated that despite the National Climate Change Policy, 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) (Framework) there was no progress with regard to the implementation of the action plans and priority areas identified. On 4 September 2015 the Court, citing domestic and international legal principles, determined that the delay and lethargy of the state in implementing the Framework violated the fundamental rights of citizens, including the right to life, the

79 Climate Case Ireland, summary, <https://www.climatecaseireland.ie/amidst-a-climate-and-biodiversity-crisis-hope-emerges-friends-of-the-irish-environment-win-historic-climate-case-ireland-in-the-irish-supreme-court/> (accessed 19 June 2021); 'Global Climate Litigation Report: 2020 status review', <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (accessed 19 June 2021).

80 (2015)WP 25501/2015 (Supplemental Decision). See judgments including supplemental judgment at 'Climate change litigation databases', <http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/?cn-reloaded=1> (accessed 19 June 2021).

right to human dignity, the right to property and the right to information, as provided for under articles 9, 14, 23 and 19A of the Constitution.

The Court held that the constitutional values of political, economic and social justice provided the necessary judicial toolkit to address and monitor the government's response to climate change. As a remedy, the Court directed several government ministries to each nominate a climate change focal person to help ensure the implementation of the Framework and present a list of action points. The Court took steps to actualise its directive by creating a Climate Change Commission, composed of representatives of key ministries, NGOs and technical experts, to monitor the government's progress. It later issued a supplemental decision naming 21 individuals to the Commission and vesting it with various powers.⁸¹

In the same vein, in the case of *Family Farmers and Greenpeace Germany v Germany*⁸² a German court held that the government's climate policy was judicially reviewable and must not be so inadequate as to fail to protect fundamental rights such as the rights to life and property. However, the Court held that the government's failure to adhere to a cabinet decision to reduce greenhouse gas emissions by 40 per cent by 2020 was not legally enforceable.⁸³

There are new trends of cases that question whether governments violate a duty of care to prevent dangerous climate change by failing to attach stringent climate conditions to its coronavirus bailout package granted to companies. In the case of *Greenpeace Netherlands v State of The Netherlands*,⁸⁴ a case filed in October 2020, amid the coronavirus pandemic, Greenpeace Netherlands challenged the Dutch government's bailout package for the airline KLM alleging that it violated the state's duty of care to prevent the high risk of dangerous climate change. The plaintiffs cited the European Convention on Human Rights and the Paris Agreement as establishing that duty of care and the Dutch Supreme Court's *Urgenda* decision as affirming the duty of care. The plaintiffs alleged that by failing

81 As above.

82 (2018) 00271/17/R/SP.

83 In December 2014 the German cabinet set a goal of reducing national greenhouse gas emissions by 40% compared to 1990 levels by the end of 2020 (Climate Protection Plan). According to the government's 2018 official climate protection report, however, the government will likely only achieve a reduction of 32% from 1990 levels by the end of 2020. In October 2018 three German families and Greenpeace Germany filed suit in the Administrative Court of Berlin seeking to compel the German government to adhere to the 40% reduction goal.

84 'Climate change litigation databases', <http://climatecasechart.com/non-us-case/greenpeace-netherlands-v-state-of-the-netherlands/> (accessed 19 June 2021).

to attach binding climate conditions to the €3,4 billion bailout package, the government violated human rights. Greenpeace sought a court order either prohibiting the state from providing financial support or conditioning such support on KLM setting a cap on carbon dioxide emissions by the airline. The Hague District Court judge rejected Greenpeace's claim on the grounds that the state does not have a legally-enforceable obligation to attach climate conditions to the bailout package. According to the Court, the executive has a high discretion in responding to the coronavirus crisis. Such discretion should not be interfered with, except when a positive legal right has been violated. The judge further held that the Paris Agreement and other international climate treaties did not commit parties to reduce emissions from cross-border aviation.

3.1.3 Cases seeking to connect harms to emitters share in global climate change causation

Another interesting trend in climate litigation is the question of the liability of the greenhouse gas emitter for harms arising in different jurisdictions from the warming effects of climate change.⁸⁵ In *Lliuya v RWE AG*⁸⁶ Saul Lliuya, a Peruvian farmer, filed suit in a German court against a German utility company. Lliuya sought damages to offset the costs of protecting his town from melting glaciers, for which he alleged RWE was partly responsible. The case was initially dismissed for several reasons, including that the plaintiff had asked the Court to determine RWE's precise annual contribution to global emissions rather than submitting an estimate, and that no causal chain could be established linking the plaintiff's injury and RWE's emissions. However, the Appeal Court reversed this decision. The case currently is at the evidentiary stage, collecting evidence on, among other issues, the extent of GHG emissions released by the defendant and on how those emissions contribute to the warming of the atmosphere.⁸⁷

In *Smith v Fonterra Co-Operative Group Limited*⁸⁸ the plaintiff sued several major greenhouse gas-emitting facilities in New Zealand, alleging that their emissions amounted to a public nuisance, negligence, and breached an inchoate duty to cease contributing to climate change. The High Court of New Zealand dismissed the first two claims, but not the third. The Court determined that Smith's negligence claim had to fail as he failed to show that the defendants owed him a duty of care, and he could not demonstrate public nuisance because the damage claimed was neither

85 See *Lliuya v RWE AG*, Az 2 O 285/15 Essen Regional Court [2015].

86 As above.

87 *Lliuya* (n 85).

88 [2020] NZHC 419.

particular to him nor the direct consequence of the defendants' actions. However, the Court upheld the third cause of action, which alleged that the defendants had a duty to cease contributing to climate change. The Court found that there were challenges for Smith in persuading the Court that this new duty should be recognised but determined that the relevant issues should be explored at a trial. The Court explained that it was possible to modify the special damage rule in public nuisance and that 'climate change science will lead to an increased ability to model the possible effects of emissions'. However, the Court warned that it would likely be unable to provide the injunctive relief that Smith sought, which would require a 'bespoke emission reduction scheme'.⁸⁹

3.1.4 Cases seeking to bring global climate change concerns to bear on local action

The case of *Plan B Earth & Others v Secretary of State*⁹⁰ is an action by Friends of the Earth and Plan B Earth, a British non-profit organisation, against the Secretary of State for Transport alleging inadequate consideration of climate change impacts regarding the expansion of Heathrow International Airport. The claimants argued that the Secretary's national policy statement supporting the expansion of Heathrow Airport (Airport National Policy Statement) violated the Planning Act 2008 and the Human Rights Act 1998. The case went before the High Court of Justice Queen's Bench Division Administrative Court and the Court of Appeal.⁹¹ On appeal to the UK Supreme Court, the Court overturned the Appellate Court's decision, allowing the approval process for a third runway at Heathrow International Airport to move forward, because the government sufficiently considered climate impacts and duly considered the country's commitment to meeting the Paris Agreement goals.⁹²

This part shows the clear application of the principles of climate justice in litigation, as development actors were made liable for the activities leading to contributions to GHG emissions and climate change. Also, the cases analysed upheld the human rights of citizens to live in a safe

89 *Smith v Fronterra Co-Operative Group Limited* (n 82); see also 'Climate change litigation databases', <http://climatecasechart.com/non-us-case/smith-v-fronterra-co-operative-group-limited/> (accessed 19 June 2021).

90 [2020] EWCA Civ 214.

91 The Appellate Court previously ruled that the government acted unlawfully by approving the expansion without considering the country's commitment to meeting the Paris Agreement goals, <http://climatecasechart.com/non-us-case/plan-b-earth-v-secretary-of-state-for-transport/> (accessed 19 June 2021).

92 As above.

environment, and emphasised the duty of care owed by the government and industry players to take care to mitigate and adapt to climate change.

4 Lessons on the rights-based approach to climate litigation

Climate litigation heralds advancements in climate change governance,⁹³ as it avails the judiciary the opportunity to contribute to or redirect climate action at the national and sub-national levels. It provides an opportunity for the judiciary to re-interpret existing legislation in light of climate change realities.⁹⁴ Ultimately, the lesson from climate litigation is that it pushes the frontiers of conversations on the obligation to take necessary action to mitigate and adapt to climate change. Environmental and, particularly, climate-related litigation is essential as it serves the purpose of compelling governments to implement policies and even encourage the enforcement of those policies.⁹⁵

Africa is one of the regions severely affected by climate change. However, the continent has not yet seen any significant growth in climate litigation.⁹⁶ This could be attributed to the complexity of the judicial processes in developing countries, such as judicial independence and access to courts; the onerous evidential burden and standard of proof required from litigants; the complexity of environmental issues and the fact that those who bear the brunt of environmental degradation are local communities that lack capacity, are poor and most vulnerable; the largely technical and scientific nature of the evidence and the high cost of gathering evidence, which sometimes not only is exclusively within the knowledge of the defendants but also in their custody; and the difficulty of proving causation.⁹⁷ Although climate litigation has not featured prominently in the African judicial landscape, there is an emerging trend and an uptake of climate litigation as a strategy and tool to galvanise climate action.

93 J Peel & J Lin 'Transnational climate litigation: The contribution of the Global South' (2019) 113 *American Journal of International Law* 696.

94 J Setzer & L Benjamin 'Climate change litigation in the Global South: Filling in gaps' (2020) 114 *American Journal of International Law* 59.

95 J Setzer & R Byrnes 'Global trends in climate change litigation: 2020 snapshot' (2020) *Grantham Research Institute for Climate Change and Environment, London School of Economics* 12.

96 L Kotzé & A du Plessis 'Putting Africa on the stand: A bird's eye view of climate change litigation on the continent' (2020) 50 *Environmental Law* 615.

97 See Kotzé and Du Plessis (n 96); O Nsikan-Abasi 'Burden of proof: Real burden in environmental litigation for the Niger-Delta of Nigeria' (2020) 35 *Journal of Environmental Law and Litigation* 194.

Of the four key trends in climate litigation analysed above, it seems that the trend of climate litigation emerging in Africa are cases seeking to compel governments to implement their legislative and policy commitments. In the South African case *Earthlife Africa Johannesburg & Another v Minister of Energy & Others*⁹⁸ the Court held that climate change assessment was essential and would be relevant in other activities where climate change impacts are a consideration. In the Kenyan case of *Save Lamu & Others v National Environmental Management Authority and Amu Power Co Ltd*⁹⁹ the Court was asked to consider whether a coal company's environmental impact assessment adequately considered climate change and other factors. The tribunal found that the Amu Power Company's environmental and social impact assessment was incomplete and scientifically insufficient in violation of the regulations. Applying the precautionary principle, the tribunal found one of the insufficiencies of the assessment was the inadequate consideration of climate change and the Climate Change Act of 2016. The Ugandan case of *Nisi Mbabazi & Others v The Attorney General and The National Environment Management Authority*¹⁰⁰ relied on the Public Trust Doctrine as a tool for challenging the government's inactivity concerning climate change. Also, the courts have invoked inalienable human rights such as the right to life and dignity of the human person as guaranteed by national constitutions and reinforced by international and regional human rights instruments. In the Nigerian case of *Jonah Gbemre v Shell Petroleum Development Company of Nigeria Ltd & Others* the Court held that the flaring of associated gas in the course of the defendant's oil exploration activities in the applicants' community was a gross violation of their fundamental right to life, including a to a healthy environment, and dignity of human person as enshrined in the Constitution of Nigeria.¹⁰¹

98 [2017] ZAWCHC. See also *SDCEA & Groundwork v Minister of Forestry, Fisheries, and the Environment*. This case was filed in 2021 and remains pending before the Court. The plaintiffs allege that the environmental impact assessment of the project included an inadequate assessment of its climate impacts; *Trustees for the Time Being of GroundWork v Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd & Others* [2020] ZAWT 1

99 Tribunal Appeal Net 196 of 2016. Note that Kenya has climate change legislation. See Kenya's Climate Change Act 11 of 2016.

100 Suit 283 of 2012. After a preliminary hearing, the High Court ordered the parties to undertake a 90-day mediation process. There has been no further action and the decision of the Court remains pending.

101 Suit FHC/B/CS/53/05. See also *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Okpabi & Others v Royal Dutch Shell Plc (RDS) & Another* [2021] UKSC 3.

5 Conclusion

Climate justice is imperative in the discussion around actions to address adverse effects of climate change on populations in Africa. Such climate actions stem from expectations and commitments required of states to take necessary steps to mitigate, adapt and build resilience to climate change. The core focus of this chapter is how this can be achieved through the agency of litigation. As has been shown, the notion of environmental justice can inform climate justice and link to a human rights-based approach with a range of utility in addressing impact of climate change on vulnerable populations. As has been illustrated, this is inherent in a range of cases trending on climate litigation, including cases seeking to compel governments to implement legislative and policy commitments. The chapter identifies five trends or types of climate litigation; cases seeking to demonstrate the adequacy or otherwise of national GHG emission goals; cases seeking to connect harms suffered by vulnerable communities to emitters responsible for a share in global climate change causation; and cases seeking to bring global climate change concerns to bear on local action. While climate change litigation is scanty in Africa, experiences from other jurisdictions may help in pushing and shaping its evolution, in particular in pressuring states to take necessary actions to mitigate and adapt to climate change, thereby enhancing climate justice of vulnerable populations in Africa.

4

PROMOTING REPRODUCTIVE RIGHTS AS A PATHWAY TO CLIMATE COMPATIBLE DEVELOPMENT IN AFRICA

Oluwatoyin Adejonwo

Abstract

The largest single threat to the planet now and in the decades to come is the global climate disruption due to anthropogenic greenhouse gases in the atmosphere. Wide-ranging action and response are required to address this threat. There are ongoing international, regional and local responses aimed at addressing the problem by reducing carbon footprint through less consumption and better technology. However, unsustainable human population growth can undermine those efforts. The Intergovernmental Panel on Climate Change estimates that, globally, unsustainable consumption and population growth continue to be the most important drivers of increase in carbon dioxide emission from fossil fuel combustion. Unsustainable population growth and consumption patterns are two complex and interconnected issues that need to be addressed in both developing and developed countries as they both are key drivers of anthropogenic climate change. Low and middle-income countries in Africa are classified as high fertility with relatively low per capita emissions, while high-income countries that primarily are responsible for causing the climate to change are low fertility with high per capita emissions and unsustainable consumption patterns. These dynamics raise long-standing sensitivities around population growth, equity in consumption patterns and climate change response and obligations. The call for a human rights-based approach achieved through sexual and reproductive health and rights can help respond to these concerns. Sustainable population growth in Africa will go a long way in addressing exposure and vulnerabilities of people and ecosystems and their ability to adapt to climate risks.

Key words: *climate change; development; reproductive health; sustainable population*

1 Introduction

Unsustainable population growth and consumption patterns are two complex and interconnected issues that need to be addressed as key drivers of climate change.¹ Population growth is a significant driver² of anthropogenic climate change³ and arguably is the most neglected dimension of climate change.⁴ Population size and growth matter for emission projections over the long term, although the degree of the effect currently is difficult to appraise.⁵ The United Nations (UN) estimates that within little more than a decade there are likely to be around 8,5 billion people on earth, and almost 10 billion by 2050, compared to 7,7 billion as at 2019.⁶ According to demographic estimates, Africa is projected to grow the fastest, followed by Asia, Latin America, North America, Oceania and Europe. Africa and Asia account for nearly all current population growth,

- 1 E Ganivet 'Growth in human population and consumption both need to be addressed to reach an ecologically sustainable future' (2020) *Environment Development and Sustainability* 4979.
- 2 Drivers refer to the overarching socio-economic forces that exert pressures on the state of the climate and the environment. Population growth, consumption patterns, economic development are classified as drivers of environmental change. Mostly, environmental pressures are proportional to the number of people dependent on natural resources.
- 3 The United Nations Framework Convention on Climate Change (UNFCCC) defines climate change as a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods. Reprinted in 31 *ILM* 849 (1992).
- 4 J Bongaarts & B O'Neill 'Global warming policy: Is population left out in the cold?' (2018) 361 *Science* 650; Ganivet (n 1); F MacKellar 'Population and climate change', <https://www.globalpolicyjournal.com/blog/25/09/2018/population-and-climate-change> (accessed 3 March 2021).
- 5 UNFPA 'Population dynamics and climate change', <https://www.unccllearn.org/wp-content/uploads/library/unfpa30.pdf> (accessed 13 January 2021).
- 6 A 10% increase, 26% and 42% increase respectively; see United Nations Department of Economic and Social Affairs Population Division (2019) 'World Population Prospects 2019: Ten key findings'. Note that India is projected to overtake China as the world's most populous country in 2027. See also United Nations Department of Economic and Social Affairs Population Division (2019) 'World population prospects 2019: Highlights' ST/ESA/SER.A/423, <https://population.un.org/wpp/Publications/> (accessed 3 March 2020); United Nations Department of Economic and Social Affairs Population Division (2019) 'World population prospects 2019: Wall chart', <https://population.un.org/wpp/Publications/> (accessed 17 March 2021); J Stephenson et al 'Population dynamics and climate change: What are the links?' (2010) 32 *Journal of Public Health* 150.

although Africa is expected to be the main contributor beyond 2050 with the population of Africa projected to double by 2050 (99 per cent).⁷

The negative impacts of climate change are more pronounced in Africa as the continent has less capacity to mitigate and adapt to climate change variability, exposure, and vulnerabilities of people and ecosystems. Policies aimed at sustainable population growth will go a long way in addressing climate change impact, vulnerabilities and exposure in Africa and address social inequalities and ensure a climate compatible development. According to Grace, links between climate, fertility and reproductive health outcomes in African countries, apart from the direct ecological benefits, include indirect benefits such as nutrition and food security, and resource stability and income.⁸

Understanding the relationship between population and climate change is crucial for designing policies that protect people's rights, particularly their reproductive choices, while preserving the planet. Population growth, especially in countries classified as high fertility, often is cited as a primary driver of climate change. These assumptions are debatable and they reiterate sensitivities between developed and developing countries on the burden of responding to climate change.⁹ In addressing these sensitivities, it is key to recognise that the responsibility for reducing global greenhouse gas (GHG) emissions should not be placed on people, particularly women, in low-emitting countries that contribute very little to the causes of climate change but are highly vulnerable to its effects, while exploring opportunities to strengthen and improve resilience to climate change in Africa. To do otherwise again will be unfair and raises the issue of climate justice for such populations.

In fact, the major driver of climate change is the high emission levels per capita from developed countries with the lowest levels of fertility rates. Countries with the highest fertility rates tend to be countries in Africa with the lowest emission levels and their per capita emissions have contributed the least to the current climate crisis, which again speaks to the justice in sharing the burden of responsibility for addressing climate change. Rapid population growth worsens vulnerability to the negative consequences of climate change, and exposes growing numbers of people to climate

7 United Nations Department of Economic and Social Affairs Population Division (n 6).

8 K Grace 'Considering climate in studies of fertility and reproductive health in poor countries' (2017) 7 *Nature Climate Change* 480.

9 United Nations Population Fund 'Population and climate change', <https://www.unfpa.org/climate-change#readmore-expand> (accessed 4 April 2021).

risk.¹⁰ According to Hunter, research indicates that population size and growth will account for 35 per cent of the global increase in carbon dioxide emissions between 1985 and 2100, and 48 per cent of the increase will emanate from developing nations during that period.¹¹ While the per capita emissions of greenhouse gases in African countries are low, it is projected to rise as these countries pursue economic development.¹² This increases the exposure and vulnerabilities of people and ecosystems and their ability to adapt to climate risks.¹³

The UN Programme of Action at the 1994 International Conference on Population and Development calls for the emphasis on reproductive health and rights over demographic aims. Although there is widespread agreement among governments and international organisations that family-planning programmes are a valuable investment, they often are given low priority.¹⁴ According to O’Sullivan, discussions of the risk that unsustainable growth poses to heightened climate change impacts have not been accorded the required recognition by the UN and development community.¹⁵ This chapter advocates that climate policies that incorporate sexual and reproductive health and rights,¹⁶ including the identification of key action areas, budget allocation to meet set targets, and access to family-

10 Population Action International ‘Why population matters to climate change’, https://pai.org/wp-content/uploads/2012/02/PAI-1293-Climate-Change_compressed.pdf (accessed 3 March 2021).

11 L Hunter *The environmental implications of population dynamics* (2000). The study further notes that as population growth slows during the next century, its contribution to emissions is expected to decline. This decline will be especially large in the context of developing nations. While population-driven emissions from developed nations are estimated to contribute 42% of carbon dioxide emissions between 1985 and 2020, they are expected to contribute only 3% between 2025 and 2100.

12 R Prize ‘The linkages between population change and climate change in Africa’ (2020), <https://opendocs.ids.ac.uk> (accessed 3 March 2021).

13 As above.

14 Prize (n12).

15 J O’Sullivan ‘Synergy between population policy, climate adaptation and mitigation’ in M Hossain et al (eds) *Pathways to a sustainable economy* (2018) 103.

16 The Sexual and Reproductive Health and Rights Continental Policy Framework defines reproductive rights as follows: ‘Reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.’ https://au.int/sites/default/files/documents/30921-doc-srhr_english_0.pdf (accessed 17 April 2021). The Guttmacher-Lancet Commission on Sexual and Reproductive Health and Rights defines SRHR as ‘the state of physical, emotional, mental, and social well-being in relation to sexuality and reproduction, not merely the absence of disease, dysfunction, or infirmity’.

planning pathways, can be used as an important climate adaptation tool in Africa, in addition to other climate response strategies.¹⁷ Furthermore, access to modern contraceptives, meeting people's needs for family planning and reproductive health should be given high priority. Rather than being considered only a health investment, it should be viewed broadly as investment with wide-ranging socio-economic and environmental benefits. Investments and access to modern contraceptives that meet people's needs for family planning and reproductive health should be viewed broadly as an investment with wide-ranging socio-economic and climate benefits. Investments in sexual and reproductive health and rights, including by building more resilient health systems, improving health and sexual and reproductive health and rights services can reduce the impacts of climate change on people. The realisation of sexual and reproductive health and rights increases individuals' resilience to climate change and reduces the inequitable burden of coping with adverse climate change.

2 Climate change hotspots in Africa

Several studies note that Africa is one of the regions most vulnerable to the impacts of climate change although the impacts are not uniform across the region.¹⁸ The climate change hotspots¹⁹ in Africa include arid/semi-arid regions, low-lying deltas and cities in Africa.²⁰ According to Müller et al, regions with the most severe projected climate change impacts usually record high population density and poverty rates.²¹ The different regions in Africa face various climate risks. East Africa is at a higher risk of flooding and concurrent health impacts and infrastructure damages. West Africa is projected to experience severe impacts on food production, including

17 Some of the responses advocated the climate crisis include technological solutions, personal lifestyle changes, policies to end fossil fuel use and develop alternative energy and potentially fundamental changes to economic systems, especially as the timescale for preventing catastrophic climate change is now less than a decade, according to the IPCC. See C Fields et al *IPCC, 2014 Summary for policymakers, Climate change 2014: Impacts, adaptation, and vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 1-32.

18 Fields et al (n 17); Bongaarts & O'Neill (n 4) 650-652; O Serdeczny et al 'Climate change impacts in sub-Saharan Africa: From physical changes to their social repercussions' (2017) 17 *Regional Environmental Change* 1585; Population Action International (n 10).

19 Climate change 'hotspots' are areas with strong climate change signals and a high concentration of vulnerable people.

20 Price (n 12).

21 C Müller et al 'Hotspots of climate change impacts in sub-Saharan Africa and implications for adaptation and development' (2014) 20 *Global change biology* 2505. Eg, cities such Kampala, Dar-es-Salaam, Abuja, Lagos, Addis Ababa and Luanda are all low-lying deltas and cities and typically are heavily populated and face climate vulnerabilities from sea level rise, extreme heat and natural disasters. See Price (n 12).

through declines in oceanic productivity, with severe risks for food security and negative repercussions for human health and employment. South Africa sees the strongest decrease in precipitation with concurrent risks of drought.²²

Rapid population growth worsens vulnerability to the negative impact of climate change, and exposes growing numbers of people to climate risk.²³ Rapid population growth coupled with the impacts of climate change results in an increase in demand and depletion of key natural resources, such as water, fuel and soil fertility, and natural resources that are already compromised and in decline due to environmental variability and climate change. For example, in Nigeria protracted and severe drought, desertification, and scarce water resources for grazing in the northern part of the country have forced herdsmen from rural areas to migrate to the south to seek pasture and water for their cattle. This is fuelling conflicts and clashes between farmers and herdsmen, resulting in conflicts over access to natural resources such as water.²⁴ The increased pressure to migrate either to environmentally marginal or urban areas then results in exploitation of natural resources in an unsustainable way, leading to a vicious cycle of poverty and degradation.

According to Population Action International, population growth is already putting a strain on the world's limited supply of fresh water. It estimates that more than 45 countries currently are experiencing water scarcity or stress, the majority of these countries being in Africa.²⁵ Population Action International's interactive online database, Mapping Population and Climate Change, indicates 26 population and climate change 'hotspots' (see Table 1 below).²⁶ In hotspot countries, about one in four married women would prefer to avoid pregnancy, but are not using modern family planning. Protecting reproductive rights and achieving universal access to reproductive health are critical for addressing these links.

22 Serdeczny et al (n 18) 1585.

23 Population Action International (n 10).

24 A Adeolu 'Climate change and population dynamics in southwest Nigeria' (2019) 13 *Journal of Environmental Science, Toxicology and Food Technology* 39; I Oramah 'The effects of population growth in Nigeria' (2006) 6 *Journal of Applied Sciences* 1332.

25 Population Action International (n 10). See also Food and Agriculture Organisation of the United Nations (FAO) 'Aquastat country database 2015', <http://www.fao.org/nr/water/aquastat/data/query/index.html?lang=en> (accessed 20 December 2020); A Turton & J Warner 'Exploring the population/water resources nexus in the developing world' in G Dabelko (ed) *Finding the source: The linkage between population and water* (2002) 52.

26 Population Action International (n 10).

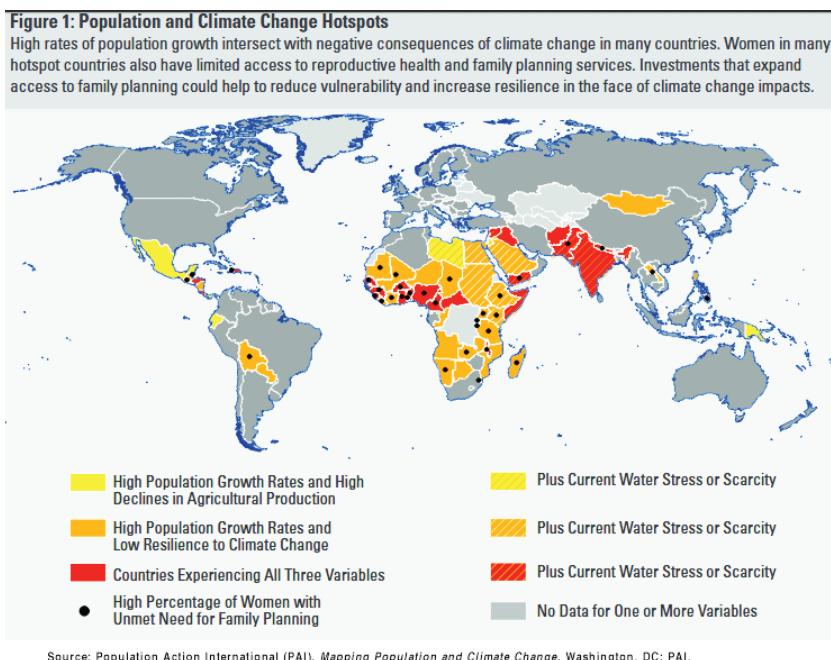


Table 1: Source: Population Action International (PAI), ‘Mapping Population and Climate Change’ (Washington DC: PAI)

3 Sexual and reproductive health and rights in the context of climate change response measures

The UN’s World Population Prospect 2019²⁷ projects that countries in Africa could account for more than half of the growth of the world’s population between 2019 and 2050. Although the growth will be at a slower pace, the region’s population is projected to continue growing through the end of the century. By contrast, populations in Eastern and South-Eastern Asia, Central and Southern Asia, Latin America and the Caribbean and Europe and Northern America are projected to reach peak population size and to begin to decline before the end of this century.²⁸ Rapid population growth in Africa presents mitigation and adaptation capacity challenges and additional challenges in the effort to achieve the sustainable

27 Department of Economic and Social Affairs, Population Division ‘World Population Prospects 2019: Highlights’ https://population.un.org/wpp/Publications/Files/WPP2019_Highlights.pdf (accessed 4 May 2021).

28 As above.

development goals such as the goal on climate action, to eradicate poverty, achieve greater equality, combat hunger and malnutrition, and strengthen the coverage and quality of health and education systems.²⁹

Despite the recent reductions in fertility rate globally, studies³⁰ indicate that women currently have an ‘unmet need’ for family planning and other reproductive health services. The term ‘unmet needs’ is defined as the percentage of women of reproductive age, either married or in a union, who have an unmet need for family planning. Women with unmet needs are those who want to stop or delay childbearing but are not using any method of contraception.³¹ According to the Guttmacher Institute’s factsheet, as of 2017, 1.6 billion women of reproductive age between ages 15 and 49 live in developing regions and about half of these (885 million women) wish to avoid pregnancy. However, only about three-quarters (671 million) of these women have access to modern contraceptives.³² This figure includes 155 million that use no method of contraception and 59 million that rely on traditional methods. The report further highlights that the proportion of women who have an ‘unmet need’ is highest in Africa, at 21 per cent.³³ These women are considered to have an ‘unmet need’ for modern contraceptives because of reduced investment, adequate access to sexual, reproductive and maternal health care, access to sexual and reproductive health information and services, particularly for young

29 SDGs 1, 5, 10, 2, 3 and 4 respectively. United Nations, Department of Economic and Social Affairs, Population Division (n 6); See also K Patterson ‘Making the connection: population dynamics and climate compatible development recommendations from an expert working group’ <https://www.prb.org/wp-content/uploads/2018/03/PHP-population-climate-full-paper.pdf> (accessed 15 March 2021); and Adeolu (n 24).

30 See the following studies: M Vlassoff & M Tsoka ‘Benefits of meeting the contraceptive needs of Malawian women’ <https://www.guttmacher.org/report/benefits-meeting-contraceptive-needs-malawian-women> (accessed 5 May 2021); ‘Adding it up: Investing in contraception and maternal and newborn health in Nigeria, 2018’ <https://www.guttmacher.org/fact-sheet/adding-it-up-contraception-mnh-nigeria> (accessed 15 March 2021); ‘In developing regions, 23 million adolescents at risk of unintended pregnancy, not using modern contraceptives’ <https://www.guttmacher.org/news-release/2016/developing-regions-23-million-adolescents-risk-unintended-pregnancy-not-using> (accessed 15 March 2021).

31 United Nations, Department of Economic and Social Affairs, Population Division (2014) ‘World Contraceptive Use 2014’ https://www.un.org/en/development/desa/population/publications/dataset/contraception/wcu2014/Metadata/WCU2014_UNMET_NEED_metadata.pdf (accessed 1 April 2021).

32 *Adding it up* (n 30).

33 As Above; while the largest absolute number, 70 million women, with unmet needs, live in Southern Asia. Together, Africa and Southern Asia account for 39% of all women in developing regions who want to avoid pregnancy and 57% of women with an unmet need for modern contraception.

people, unmarried women and those living in poorer households.³⁴ Cultural, social and religious factors also affect the use of modern contraceptives in Africa. For example, there are religious beliefs against the use of contraceptives, the practice of polygamy and early marriage, the level of education, poverty, and access to health care.

Studies and data on donor funding for family planning indicate that funding for modern contraceptives and other support for woman of reproductive age declined by at least 50 per cent.³⁵ According to Cilliers, Africa's high fertility rates are a drag on development rather than an advantage, as the region can only expect to enjoy a demographic dividend after mid-century.³⁶ The author further asserts that given the right policy conditions, Africa can accelerate population-driven economic growth by reducing its fertility rate through interventions in education, infrastructure, human capital and, most importantly, women's empowerment.³⁷

4 Reproductive rights as a climate change response in Africa

The UN through its Office of the High Commissioner for Human Rights and other mechanisms highlights the links and key impacts that climate change, directly and indirectly, has on an array of internationally-guaranteed human rights such as the right to life, and has advocated a human rights-based approach to climate change.³⁸ More recently, a report by the UN Special Rapporteur on Human Rights and the Environment

34 (n 33) '... In general, Africa continues to have the world's lowest contraceptive prevalence rate. While the prevalence is low, the proportion of married women who need contraceptives but who are not using any methods is estimated to be 24% in sub-Saharan Africa and 18% in Northern Africa. However, this estimate is conservative as it deals only with married women.' See Sexual and Reproductive Health and Rights Continental Policy Framework. https://au.int/sites/default/files/documents/30921-doc-srhr_english_0.pdf (accessed 4 March 2021).

35 H Zlotnik 'Does population matter for climate change?' in J Guzmán et al (eds) *Population dynamics and climate change* (2009) 45; Bongaarts & O'Neill (n 4).

36 J Cilliers *The future of Africa: challenges and opportunities* (2020) 79.

37 As above.

38 UN Human Rights Office of the High Commissioner 'Key messages on human rights and climate change' https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf (accessed 5 March 2021); UN Human Rights Office of the High Commissioner, 'Open-letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action', <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf> (accessed 5 March 2021); Human Rights Council, Resolution 10/4 'Human Rights and Climate Change' http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf (accessed 5 March 2021.); and UNFCCC Decision 1/CP.16 <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> (accessed 5 March 2021).

acknowledges population as one of the drivers of climate change.³⁹ The IPCC report also linked the increasing frequency of extreme weather events and natural disasters, rising sea levels, floods, heat waves, droughts, desertification, water shortages, and the spread of tropical and vector-borne diseases as posing direct and indirect threats to the full and effective enjoyment of a range of human rights, including the rights to life, health, water and sanitation, as well as food.⁴⁰

A rapid population growth presents challenges for robust economic growth and the attainment of the sustainable development goals.⁴¹ Therefore, national and regional policies that promote reproductive health and rights of women require a rights-based approach. Access to modern contraceptives, and meeting people's needs for family planning and reproductive health, will allow couples and individuals to decide freely and responsibly on the number, spacing and timing of their children and to have the information and the means to do so, and the right to attain the highest standard of sexual and reproductive health and rights.⁴²

Advancing the reproductive rights of women as one of the potentially important policy responses to climate change is but one of the policy options in relation to climate change mitigation and adaptation. It is important to highlight that investments in family planning programmes should not be used as a financial incentive to achieve reductions in countries' population growth, to avoid a repetition of the oppressive population targets and controls that several countries adopted in the past.⁴³ Enhancing the rights of women to education, freedom from sexual violence, rights

39 The Report highlights the links and key impacts that Climate change has, directly and indirectly, on an array of internationally guaranteed human rights such as the right to life, health, food, and have advocated for a human rights-based approach to climate change. 'Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment' A / 74/161 <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf> (accessed 5 March 2021); also see the preamble to the Paris Agreement.

40 R Pachuri & P Ekins *Climate change 2014: synthesis report. Contribution of Working Groups I, II and III to the fifth assessment* (2014) 151.

41 United Nations, Department of Economic and Social Affairs, Population Division (n 6); see also P Ekins et al (eds) *Global Environment Outlook Geo-6: healthy Planet, healthy People* (2019) 30.

42 See the following studies: H Greaves 'Climate change and optimum population' (2019) 102 *The Monist* 42; A Hayes & S Adamo 'Introduction: understanding the links between population dynamics and climate change' (2014) 35 *Population and Environment* 225; J Guzmán et al (eds) *Population dynamics and climate change* (2009).

43 Such as China's one-child policy and India's forced sterilisation in the 70s. UNFPA 'Population dynamics and climate change', <https://www.uncclearn.org/wp-content/uploads/library/unfpa30.pdf> (accessed 5 March 2021).

to bodily integrity and autonomy and, particularly, reproductive rights is essential for achieving climate-compatible development and strengthening resilience to climate change.

Fertility rates can be influenced by policies.⁴⁴ According to Dodson, high population growth, high fertility and high unmet needs for family planning overlap with regions that experience high vulnerability to climate change. Ongoing unmet needs for family planning in these regions can exacerbate vulnerability and make it more difficult for individuals, households and communities to adapt.⁴⁵ Meeting women's needs for family planning and reproductive health has key short and long-term benefits for climate change adaptation efforts and promoting resilience.⁴⁶ According to Mogelgaard and Patterson, some of the short and long-term benefits include slower population growth, which reduces pressure on the local natural resource base and results in fewer people being exposed to climate hazards, and improves health of women and their children – a fundamental building block of resilience to climate change impacts. Women are better empowered through, for example, enhanced educational opportunities and improved earnings and resilience.⁴⁷

4.1 The importance of sexual and reproductive health and rights for climate change action and resiliency

Efforts related to reducing the unmet needs for family planning for climate change mitigation and adaptation require a rights-based approach. While the right to health is the primary reason for promoting sexual and reproductive health and rights, research and data indicate that the realisation of sexual and reproductive health and rights yields a range of benefits for individuals, their families and their communities.⁴⁸ Research

44 J Dodson et al 'Population growth and climate change: Addressing the overlooked threat multiplier' (2020) 748 *Science of the Total Environment* 141; there are many factors that influence fertility rates indirectly (eg average education level, economic growth, urbanisation, child mortality, cultural factors, social norms on ideal family size) and directly (eg presence of family planning programmes, availability of modern contraception and contraception use rates). Collectively these factors determine the fertility levels of a country.

45 As above.

46 K Mogelgaard & K Patterson 'Building resilience through family planning and adaptation finance' (2018) *Policy Brief*, <https://www.prb.org/building-resilience-through-family-planning-and-adaptation-finance/> (accessed 5 March 2021).

47 As above.

48 A Starrs et al 'Accelerate progress – Sexual and reproductive health and rights for all: Report of the Guttmacher-Lancet Commission' (2018) 391 *Lancet* 2642, [http://dx.doi.org/10.1016/S0140-6736\(18\)30293-9](http://dx.doi.org/10.1016/S0140-6736(18)30293-9) (accessed 5 March 2021). See also Women Review 'The link between climate change and sexual and reproductive health

also indicates that the reverse is true, namely, that gaps in the realisation of sexual and reproductive health and rights limit opportunities, particularly for girls and women, to pursue education and improve their livelihoods, access resources and services, and participate in politics and community affairs.⁴⁹ According to Women Deliver, there are persistent economic, governance-related and social barriers that lead to gaps in the realisation of gender and social inequalities and that these gaps can limit people's ability to engage in climate action.⁵⁰

There are existing regional structures and interventions that can promote sexual and reproductive health and rights as a strategy for climate change adaptation in Africa, especially under the platform of the AU.⁵¹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) guarantees comprehensive rights to women, including their sexual and reproductive rights, improved autonomy in their reproductive health decisions, among other rights. Article 14 of the Maputo Protocol provides that reproductive rights include the right to control their fertility; the right to decide whether to have children; the number of children and the spacing of children; the right to choose any method of contraception; the right to self-protection and to be protected against sexually-transmitted infections, including HIV; the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually-transmitted infections, including HIV, in accordance with internationally-recognised standards and best practices; and the right to receive family planning education. This is further reinforced by the African Commission on Human and Peoples' Rights (African Commission) which adopted General Comment 2 to interpret the provisions of article 14 of the African Women's Protocol.⁵²

and rights: An evidence review' (2021), <https://womendeliver.org/wp-content/uploads/2021/02/Climate-Change-Report-1.pdf> (accessed 5 March 2021).

49 Women Review (n 48). See also International Planned Parenthood Federation 'Sexual and reproductive health and rights the key to gender equality and women's empowerment' (2015), <https://www.ippfen.org/sites/ippfen/files/2016-12/Vision%202020%20Gender%20Report.pdf> (accessed 5 March 2021); V le Masson et al 'How violence against women and girls undermines resilience to climate risks in Chad' (2019) 43 *Disasters* 245, <https://doi.org/10.1111/disa.12343>; and Women Deliver and Population Council 'Having a child before becoming an adult: Exploring the economic impact in a multi-country analysis' (2019), <https://womendeliver.org/publications/having-a-child-before-becoming-an-adult-exploring-the-economic-impact-in-a-multi-country-analysis/> (accessed 5 March 2021).

50 Report by Women Review (n 48).

51 Art 4(L) of the Constitutive Act of the African Union (AU) highlights the Gender Equality Principle as one of the guiding principles of the AU, https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf (accessed 5 March 2021).

52 AU Protocol to the African Charter on Human and Peoples' Rights on the Rights

The African Strategy on Climate Change 2020⁵³ defines the main parameters⁵⁴ for an effective, coordinated climate change response for Africa, which builds resilient capacities for adaptation, and unlocks the benefits of the massive mitigation potential. One of the parameters identified by the framework for an effective climate change response in Africa is building resilience and reducing the vulnerability of the African continent to climate change. To achieve this, the Framework identifies prioritising adaptation as a tool for optimal resilience building and vulnerability reduction. The African Strategy on Climate Change 2014 makes several references to the challenges of population growth and how population growth and shifting consumption patterns are putting additional pressure on Africa's natural resources and increasing the vulnerabilities to climate change.⁵⁵ There are a few AU policies that can strengthen the African Strategy objective of prioritising adaptation as a tool for optimal resilience building and vulnerability. Sustainable population growth is an adaptation tool that will go a long way in addressing the vulnerabilities of people and ecosystems to climate change and their ability to address those risks. Furthermore, such policies provide the necessary mechanisms for member states in Africa to integrate and implement such strategies in their national policies and programmes.

The Sexual and Reproductive Health and Rights Continental Policy Framework⁵⁶ and its Maputo Plan of Action (MPoA) for the operationalisation of the Sexual and Reproductive Health and Rights (SRHR) Continental Policy Framework 2016-2030 provides a framework for advocacy and implementation.⁵⁷ The Maputo Plan of Action Review Report 2015, which predates the MPoA, acknowledges the linkages.

of Women in Africa, 11 July 2003; also see General Comment 2 on arts 14(1) (a), (b), (c) and (f) and arts 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, <https://www.achpr.org/legalinstruments/detail?id=13> (accessed 5 March 2021).

- 53 African Climate Change Strategy, https://archive.uneca.org/sites/default/files/uploadeddocuments/ACPC/2020/africa_climate_change_strategy_-_revised_draft_16.10.2020.pdf (accessed 5 March 2021). The overall objective of the Africa Climate Change Strategy is the 'achievement of the Agenda 2063 Vision by building the resilience of the African continent to the impacts of climate change'.
- 54 The parameters are effective institutional capacities to implement climate change strategies; climate change strategies are harmonised; Africa speaks with one voice; resilience built, and vulnerability reduced; and increased access to finance.
- 55 African Strategy on Climate Change 2014, https://www.un.org/en/africa/osaa/pdf/au/cap_draft_aucclimatestrategy_2015.pdf (accessed 7 March 2021).
- 56 Sexual and Reproductive Health and Rights Continental Policy Framework, https://au.int/sites/default/files/documents/30921-doc-srhr_english_0.pdf (accessed 7 March 2021).
- 57 Framework (n 56) paras 18(i)-(ix).

The Review Report acknowledges the linkages between sexual and reproductive rights with cross-cutting issues such as climate change, and as part of its recommendations to African states and the AU, the Review Report advocates mechanisms to consider cross-cutting issues such as climate change. The Framework and the MPoA provide the necessary platform for establishing such linkages.⁵⁸ The MPoA seeks to achieve universal access to comprehensive sexual and reproductive health services in Africa. Its long-term plan for achieving its objective includes political commitment, and investment in the vulnerable and marginalised populations and improved adolescent and youth sexual and reproductive health and rights.⁵⁹

The MPoA identifies key strategies for operationalising the sexual and reproductive health and rights policy framework.⁶⁰ These include improving political commitment, leadership and good governance of the Reproductive, Maternal, Newborn, Child and Adolescent Health (RMNCAH) at the continental, regional and national levels; increasing health financing and investments by improving domestic resource mobilisation for RMNCAH through innovative health financing mechanisms and supporting member states to invest in health infrastructure; and ensuring gender equality, women's and girls' empowerment and respect of human rights by protecting the rights of women, men, adolescents and youth to have control over and decide freely and responsibly on matters related to sexual and reproductive health, free from coercion, discrimination and violence; and promoting social values of equality, non-discrimination, and non-violent conflict resolution. It is important to note that while the primary goal of voluntary family planning is not to achieve a decrease in fertility, it is a tool to allow families, and women in particular, to determine the number, timing and spacing of their children. Integrated policies will be key in harnessing synergies between women's empowerment, girls' education and family planning and reproductive health services in Africa.

5 Conclusion

Reproductive health and population control, although contested concepts between the north and the south, are an important focus in the discussion around climate change response measures. It raises the issue as to whether it is fair to require a continent that is affected disproportionately by climate change to assume further responsibility of taking decisive actions on population control. Yet, as has been shown, the interface of populations

58 Framework (n 56) para 30.

59 Framework (n 56) para 6.

60 Framework (n 56) paras 18(i)-(ix).

with climate change is undeniable. Ultimately, investments and access to modern contraceptives, meeting people's needs for family planning and reproductive health are an investment with wide-ranging socio-economic and environmental benefits rather than solely a health investment. The implementation of policy opportunities and programmes to ensure that universal access to family planning is part of climate compatible development strategies is an imperative. Creating an enabling environment for connecting these issues and advancing these policy opportunities is vital for fostering more cross-sector dialogue and action among health, family planning, climate, and development sectors. Furthermore, improved access to finance, especially financing for family planning in climate compatible development plans, is essential for a robust climate change mitigation and adaptation strategy and for achieving climate compatible development and justice in Africa.

PART II:

**Climate change and regional protection
of human rights**

5

THE ADEQUACY OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD IN THE RISKY TRINITY OF CLIMATE CHANGE, FOOD SECURITY AND CHILDREN

Robert Doya Nanima and Ebenezer Durojaye

Abstract

The African child is very vulnerable to the impacts of climate change and food insecurity. Following an introduction to the working concepts of climate change and food security, this chapter sets the tone by evaluating the normative context of the African Charter on the Rights and Welfare of the Child regarding climate change and food security. This is followed by an evaluation of the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child. At its core, this chapter evaluates the possible use of principles and activities emanating from the work of the African Children's Committee. The contribution then proposes a model that the Children's Committee can utilise to increase its traction in executing its mandate towards the protection of children affected by climate change and food security.

Key words: *climate change; children rights; food security; African Children's Committee*

1 Introduction

This chapter evaluates the vulnerability of the child in the context of climate change and food security. It hints at these two concepts and how the child fits into this conundrum. The African Union (AU) has three main human rights organs, namely, the African Commission on Human and Peoples' Rights (African Commission) established by the African Charter on Human and Peoples' Rights (African Charter)¹ with a mandate to promote and protect human rights;² and the African Court on Human and Peoples' Rights (African Court),³ established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court

1 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, art 30.

2 Art 30 African Charter on Human and Peoples' Rights.

3 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc AU/LEG/EXP/AFCHPR/ PROT (III) art 1 (African Court Protocol).

on Human and Peoples' Rights (African Court Protocol).⁴ The African Court complements the African Commission in the protection of human rights in Africa.⁵ The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is established by the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁶ As will be illustrated shortly, this chapter directs the conversation to the child who is affected by climate change, food security or both.⁷ From this point forward, an evaluation of the argument and the sub-claims as hinted on in the abstract follows.

An evaluation of the normative contexts under African Children's Charter requires one to look at its general and specific mandate. The approach creates a connection between the various provisions that the African Children's Charter presents and how these may be interpreted to inculcate issues of climate change and food security. The subsequent evaluation of the jurisprudence of the African Children's Committee investigates how it may inform the possible interpretation of the various provisions to include matters of climate change and food security. This raises the question of whether the existing jurisprudence is instructive to deal with matters arising. In light of the practical solutions that are evident in the work of the African Children's Committee, this contribution proposes a model that may be adopted to increase the traction towards a deliberate agenda for climate change and food security that does justice to the situation of the African child. This also questions the extent to which the African Children's Committee may improve its execution mandate towards the protection of children affected by climate change and food security.

2 Climate change and food security

For purposes of this contribution, it is important to create an understanding of the concepts of climate change and food security and how these concepts are intrinsically linked to the promotion and protection of the

4 E Badawi 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: Introductory note' (1997) 9 *African Journal of International and Comparative Law* 953.

5 African Court Protocol (n 3) art 2. In the last paragraph of the Preamble to the Protocol, African member states declared their firm conviction that the attainment of the objectives of the African Charter requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission.

6 African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990) art 42.

7 The qualification of the child is made in sec 2.

rights of the child. The conversation under this part contextualises the two aspects (climate change and food security) and how these affect children. It is argued that this is instructive in the creation of a footing to harness the best approach to use in engaging the two concepts.⁸

Climate change continues to affect the enjoyment of human rights in Africa. The most affected are vulnerable populations such as women, children, the elderly, indigenous groups and minorities. While the chapter does not engage indigenous peoples or minorities in the discussion, there are potential aspects that cut across which may be used to learn a few pointers going forward. This is especially because indigenous peoples have not obtained adequate protection from national normative frameworks.⁹ The challenges that children in these communities face include a lack of access to education, and health care.¹⁰ For instance, in Cameroon, only 1,31 per cent of the indigenous Baka children in Salapoumbé district attended primary school in 2006, and the children suffer other challenges such as poor access to health care.¹¹ This has informed the call to use a top-down approach from regional human rights bodies such as the African Commission.¹² In juxtaposition, this reiterates the need to question the extent to which a regional body such as the African Children's Committee is adequately suited (normatively and jurisprudentially) to offer regional direction on critical aspects such as the rights of the child in the context of climate change and the right to food.¹³

It has been documented that climate change is 'an urgent and potentially irreversible threat to human societies and the planet'.¹⁴ It is

8 This evaluation does not investigate the normative frameworks as this is best handled under the discussion on the normative concepts in Section 2 which draws on various human rights instruments.

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

10 Indigenous Peoples in the African Region, 12th session of the UN Permanent Forum on indigenous Issues, <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2/unpfii-twelfth-session.html> (accessed 16 November 2021).

11 United Nations *State of the world's indigenous peoples* (2010) 133; also see United Nations *State of the world's indigenous peoples* (2021).

12 See AO Jegede 'Rights away from home: Climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention' (2016) 16 *African Human Rights Law Journal* 58.

13 Other illustrative literature that may be looked at includes M Addaney 'Strengthening Africa's adaptive capacity to climate change: African Union law and implications of China's Belt and Road Policy' in WL Filho et al (eds) *Climate change, hazards and adaptation options* (2020) 481.

14 AV Sanson, J van Hoorn & SE Burke 'Responding to the impacts of the climate crisis

viewed as the largest global health threat of the twenty-first century.¹⁵ Simply put, climate change refers to the warming of the planet caused by the build-up of greenhouse gases in the atmosphere with increased concentrations of carbon dioxide, methane and nitrous oxide, leading to a rise in global temperatures.¹⁶ The effects on children are quite substantial and include the disruption of the necessities of life, such as shelter, food and water.¹⁷ To this end, the issue of food insecurity becomes but a factor of the effects of climate change in the grand scheme of things.¹⁸ This affects all four dimensions of food security, namely, food availability, food accessibility, food utilisation and food systems stability.¹⁹ As a result, this exacerbates the already-existing challenges in the socio-economic and ecological sphere that lead to global illness and premature deaths.²⁰ The most affected persons are those who suffer from the 80 per cent of the illnesses, injuries and deaths.²¹

According to the United Nations Children's Fund (UNICEF), the consequences of climate change are evident in the form of hurricanes, droughts, floods and wildfires.²² The cumulative effect on children is regarded as threats to their health, education, protection and very survival.²³ It is argued that the best interests of children in terms of their

on children and youth' (2019) 13 *Child Development Perspectives* 201-207.

- 15 A Costello et al 'Managing the health effects of climate change' (2009) 373 *The Lancet* 1693.
- 16 RA Betts et al 'A successful prediction of the record CO₂ rise associated with the 2015/2016 El Nino' (2018) 373 *Philosophical Transactions of the Royal Society B: Biological Sciences* 20170301.
- 17 Costello et al (n 15) 1693.
- 18 It goes without saying that other reasons may be armed conflict – a critical factor in Africa. See A Ujunwa, C Okoyezu & EU Kalu 'Armed conflict and food security in West Africa: Socio-economic perspective' (2019) 46 *International Journal of Social Economics* 182-198. See also S van Weezel 'Food security and armed conflict: A cross-country analysis' (2018) FAO Agricultural Development Economics Working Paper 18-03 (2018).
- 19 A discussion of the four concepts is beyond the scope of this chapter. To read more about this, see WAI & GR Orking 'Climate change and food security: A framework document' 2008, <https://www.fao.org/3/k2595e/k2595e00.pdf> (accessed 16 November 2021).
- 20 As above
- 21 AJ McMichael 'Climate change and children: Health risks of abatement inaction, health gains from action' (2014) 1 *Children* 99.
- 22 UNICEF 'The climate crisis is a child rights crisis', <https://www.unicef.org/media/105376/file/UNICEF-climate-crisis-child-rights-crisis.pdf> (accessed 16 November 2021).
- 23 As above.

holistic survival and development are affected.²⁴ It is based on this reality that the participation of children, the non-discrimination against children, and the engagement of their right to life, survival and development and the use of the best interests of the child are imperative. Statistics indicate the glaring effects of climate change on children. Approximately 503 million children live in areas that are highly susceptible to floods due to extreme weather conditions such as cyclones, hurricanes and storms, as well as rising sea levels. It is reported that between 2009 and 2013, more than 175 000 children were internally displaced, while between 2014 to 2018 another 761 000 children were affected.²⁵ Besides, over 160 million children live in areas where food insecurity in the context of drought is experienced.²⁶ It is argued that children require more food and water per unit of body weight than adults, making them vulnerable to food and water scarcity.²⁷

Other dangers are evident in climate-related displacements and migration that lead to increased vulnerability, separation from family members, violence, exploitation and abuse.²⁸ The girl child is then affected by the increased risk of violence and exploitation, and trafficking during and after extreme weather events.²⁹ A study by UNICEF indicates that these dangers are heightened when collecting food, water and firewood or when staying in temporary shelters or refugee camps.³⁰

Various regions in Africa have recorded the dangers of climate change in different regards. East Africa has suffered acute food shortages due to prolonged droughts and insufficient rainfall.³¹ In West Africa, the

24 MA Akudugu, S Dittoh & ES Mahama 'The implications of climate change on food security and rural livelihoods: Experiences from Northern Ghana' (2012) 2 *Journal of Environment and Earth Science* 21.

25 UNICEF (n 22).

26 As above.

27 UNICEF 'Thirsting for a future', 2017, https://www.unicef.org/media/49621/file/UNICEF_Thirsting_for_a_Future_ENG.pdf (accessed 16 November 2021).

28 UNICEF 'Unless we act now: The impact of climate change on children' (2015), https://www.unicef.org/publications/index_86337.html (accessed 13 February 2021).

29 African Children's Committee 'Continental study on the impact of conflict and crises on children in Africa' (2016), www.acewrc.africa (accessed 1 February 2020) (ACERWC Continental study).

30 UNICEF (n 28); see also Plan International 'Effects of climate change on girls' rights' (2019), <https://plan-international.org/emergencies/effects-of-climate-change-girls-rights#:~:text=Violence,when%20staying%20in%20temporary%20shelters> (accessed 16 November 2021).

31 BS Ngcamu & F Chari 'Drought influences on food insecurity in Africa: A systematic literature review' (2020) 17 *International Journal of Environmental Research and Public*

Sahel region has reported degraded farmland with longer and frequent droughts and floods.³² Southern Africa shows severe food insecurity that has affected approximately 12 million people.³³ The reliance on natural weather patterns has led to the loss of crops, a reliance on markets with escalating food prices, and loss of livestock.³⁴ Humanitarian catastrophes such as cyclones Idai and Kenneth have led to deaths, the destruction of homes, health complications and an increase in gender-based violence.³⁵

The key introspection is the place of the child in the climate change-food security nexus. First, regarding climate change food security, it is argued that climate change often compounds poverty as persons cannot engage in food production. At its core are various factors connected to climate change such as precipitation and evaporation. By 2080 agricultural productivity will decline from 21 to 9 per cent due to climate change in sub-Saharan Africa.³⁶ Most areas where there have been climate change issues in Africa reminisce a lack of food.³⁷ For instance, in the Sahel region the impacts of climate change have translated into acute famine across the various countries. In Mauritania and Chad, droughts and floods have affected populations that rely on agriculture and livestock.³⁸ Second, as far as children are concerned, over 5,9 million children below five years of age suffered from acute malnutrition in 2016 and approximately 550 000 children died due to problems of malnutrition.³⁹ According to

Health 5897.

- 32 R Muggah 'The Sahel is engulfed by violence, climate change, food insecurity and extremists are largely to blame' (2019), <https://www.weforum.org/agenda/2019/01/all-the-warning-signs-are-showing-in-the-sahel-we-must-act-now/> (accessed 16 November 2021).
- 33 United Nations Office for Coordination of Humanitarian Affairs 'Southern Africa: 12 million people are food insecure' (2019), <https://www.aa.com.tr/en/africa/12m-people-face-food-insecurity-in-south-africa/2171514> (accessed 16 November 2021).
- 34 As above.
- 35 Reliefweb 'Mozambique humanitarian response plan revised following cyclones Idai and Kenneth' (November 2018-June 2019), <https://reliefweb.int/report/mozambique/2018-2019-mozambique-humanitarian-response-plan-revised-following-cyclones-idai> (accessed 16 November 2021).
- 36 Food and Agricultural Organisation 'Climate change and food security: Is the link strong enough?', <https://reliefweb.int/report/world/climate-change-and-food-security-link-strong-enough> (accessed 16 November 2021).
- 37 HL Wlokas 'The impacts of climate change on food security and health in Southern Africa', www.scielo.org.za/pdf/jesa/v19n4/04.pdf (accessed 13 February 2021).
- 38 J Mayans 'The Sahel in the midst of climate change' (2020), <https://reliefweb.int/report/chad/sahel-midst-climate-change> (accessed 16 November 2021).
- 39 European Commission: Humanitarian Aid and Civil Protection 'Sahel: Food and nutrition crisis' (2020), https://reliefweb.int/sites/reliefweb.int/files/resources/sahel_en_4.pdf (accessed 16 November 2021).

the European Union (EU), these emergency needs in the Sahel will persist unless the root causes of food insecurity and under nutrition are addressed, and the resilience of the poorest people is strengthened.⁴⁰ These examples illustrate the link between climate change, on the one hand, and food and nutrition, on the other. It leads to the irresistible conclusion that all crises affect a child both directly and indirectly, yet they require protection by caregivers, the community, the state and other domestic and international stakeholders. In the context of the climate change-food security nexus, some children are forced to engage in extreme coping mechanisms such as child labour and trafficking, recruitment as soldiers, early marriage and the attendant dangers to the sexual and reproductive health of the girl child.⁴¹ This contribution takes on a conceptual desktop analysis and evaluates the argument on the effectiveness of the African Children's Committee in protecting the child affected by climate change and food insecurity.

3 African Children's Committee on climate change and food security

Every human rights system requires a developed normative, institutional and jurisprudential framework to remain relevant to its mandate.⁴² Without delving into this detailed explanation, it is widely observed that while the normative framework speaks to the legal principles and the law that the human rights system or organisation uses, the institutional framework is tilted towards the expertise of the human resources such as experts, commissioners or judges. Consequently, the application of the normative frameworks by human resources leads to the development of jurisprudence. The mandate of the African Children's Committee includes the promotional, protective and the interpretative mandate concerning the rights of children.⁴³ In the context of climate change, the provisions of the African Children's Charter must be interpreted by its Committee of

40 The European Union has championed the creation of AGIR, a global alliance to strengthen resilience in West Africa which has set itself a 'Zero hunger' goal by 2032.

41 African Children's Committee 'Continental study on the impact of conflict and crises on children in Africa' (2016), www.acewrc.africa (accessed 1 February 2020).

42 B Thomas 'The normative and institutional evolution of the international human rights' (1997) 19 *Human Rights Quarterly* 703 723.

43 African Children's Charter (n 6).

Experts to ensure a critical balance that underscores the protection of the child in the contours of climate change and food insecurity.

3.1 Climate change and food security in the general mandate of the African Children's Committee

The African Children's Charter does not contain a provision on climate change or food security. However, it contains instructive articles that speak to the need to place climate change on the agenda of the protection of children. The normative framework of the African Children's Committee is based on its specific and general mandate.

In this regard, the general mandate of the African Children's Committee is to promote and protect the rights and welfare of the child.⁴⁴ The relevant provisions on the mandate of the Children's Committee require it to –

- (a) promote and protect the rights enshrined in this Charter and in particular to –
 - (i) collect and document information, commission inter-disciplinary assessments of situations on African problems in the fields of the rights and welfare of the child, organise meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to governments;
 - (ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
 - (iii) cooperate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child;
- (b) monitor the implementation and ensure protection of the rights enshrined in this Charter.
- (c) interpret the provisions of the present Charter at the request of a state party, an institution of the Organisation of African Unity or any other person or institution recognised by the Organisation of African Unity, or any state party;
- (d) perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.⁴⁵

44 As above.

45 Art 42(a)(ii) African Children's Charter.

Arguably, the general mandate of the African Children's Committee is to promote and protect the rights of the child. In so doing, two principles come to the fore: first, to formulate and lay down principles that promote and protect human rights; second, to monitor, implement and ensure the protection of rights as well as to interpret the provisions of the Children's Charter. The mandate is informed by the clear provision of the article. The authors are not aware of an existing record of the drafting history of the African Children's Charter. The failure of the UN Charter on the Rights of the Child to speak to the lived realities of children informed the adoption of the African Children's Committee. As such, the added value that the African Children's Charter brings to the fore, the lived realities of children in Africa, informs the specific mandates. The question is whether the specific mandates speak to climate change and food security. Second, the general mandate is evident in the approach that the African Children's Committee adopts in promoting and protecting children's rights. The Children's Committee uses four principles that underscore its engagement with children's rights. These include the best interests principle;⁴⁶ the right to life, survival and development;⁴⁷ the right to participation;⁴⁸ and the principle of non-discrimination.⁴⁹ In passing, the best interests principle requires that the best interests of the child are of paramount consideration in all matters concerning a child.⁵⁰ The best interests principle requires that all decisions taken concerning the child are in his or her best interests. As such a country's position on climate change and food security should be in the child's best interests. It follows that the right to life, survival and development has to be interpreted in a manner that allows that the child not only enjoys the right to life, but that states adopt principles that speak to the holistic survival and development of a child in all situations.⁵¹ In addition to this, situations, laws and policies that affect this may be interpreted in the context of non-discrimination and the participation of children as critical yardsticks.⁵² Third, the general mandate is discerned in article 46 of the African Children's Charter, which states:

46 Art 4 African Children's Charter.

47 Art 5 African Children's Charter.

48 Arts 12 & 13 African Children's Charter.

49 Art 3 African Children's Charter.

50 Art 4(1) African Children's Charter.

51 Instructive jurisprudence from states interprets the right to life to include the right to a livelihood. See *Salvatori Abuki v the Attorney General Uganda* (2001) 1 LRC 63. This is understood in the context of the child's right to survival and development based on the livelihood of a parent or caregiver.

52 For more on the principle of non-discrimination, see S Besson 'The principle of non-discrimination in the Convention on the Rights of the Child' (2005) 13 *International Journal of Children's Rights* 433; ED Gibbons, F Huebler & E Loaiza 'Child labour, education and the principle of non-discrimination' (2005) 10 *Capitulo* 214; B Abramson

The Committee shall draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

As such, the general mandate of the African Children's Committee extends to matters that, although not provided for in the African Children's Charter, are important in the execution of its mandate. To ensure that the rights of a child are promoted and protected, the African Children's Charter allows the application of other sources of international and regional human rights instruments.⁵³ In the context of climate change, the African Children's Charter allows the application of the United Nations Framework Convention on Climate Change (UNFCCC) where the four underlying principles may be utilised to protect and promote the rights of the child. For instance, the UNFCCC provides that

[t]he parties should protect the climate system for the benefit of present and future generations of humankind, based on equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country parties should take the lead in combating climate change and the adverse effects thereof.⁵⁴

The context of future generations would require that the steps, policies and initiatives that include children are adopted by state parties to ensure that the effects of climate change are mitigated.⁵⁵

As far as food security is concerned, provisions in international human rights law that point to the right to food can be harnessed by the African Children's Committee to ensure that a child-centred approach informs the interpretation of this right. For instance, the International Covenant on

A commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-Discrimination (2008).

53 Art 46 African Children's Charter.

54 Art 3(1) UNFCCC.

55 Further insights on the need to mitigate the effects of climate change for future generations are evident in the 11th preambular paragraph of the UNFCCC; see General Assembly Resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and Resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and 46/169 of 19 December 1991 on the protection of global climate for present and future generations of mankind.

Economic, Social and Cultural Rights (ICESCR) adopts a socio-economic rights approach and requires states to recognise ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’.⁵⁶

This provision and the developed jurisprudence may be utilised to ensure that the best interests of the child and the participation of the child are upheld. In addition, the general mandate of the African Children’s Committee under article 46 of the African Children’s Charter may be used to enable the application of ICESCR as far as it speaks to the improvement of the rights of the child. The same applies to the interpretation by the Children’s Committee of these principles towards the betterment of the right to life, survival and development as well as the right to non-discrimination. This is concretised by the call by the Committee on Economic, Social and Cultural Rights (ESCR Committee) to states to recognise that drastic immediate and urgent steps are necessary to ensure that the fundamental right to freedom from hunger and malnutrition is realised. The ESCR Committee has developed jurisprudence to aid the state’s understanding of the right to food. In its General Comment 12 on the Right to Adequate Food, the ESCR Committee interprets various aspects. First, it lays down the normative context of the right to food. Its realisation lies in the ability of every individual, alone or in community with others, to have physical and economic access to adequate food or a means for its procurement.⁵⁷ Second, it extends the right from a simple food intake which entails a minimum package of calories, proteins and other specific nutrients to a more purposive interpretation.⁵⁸ The purposive interpretation calls for the availability, acceptability and accessibility of adequate food.⁵⁹ The lack of specific provisions on climate change and food security in the African Children’s Charter does not detract from the need to take steps to mitigate the effects of climate change or to avert food insecurity regarding children. Article 46 ensures that legal principles in other international instruments are used. The extent to which the African Children’s Committee allows

56 Art 11(1) ICESCR.

57 General Comment 12 on the Right to Adequate Food, para 6, <https://www.refworld.org/pdfid/4538838c11.pdf> (accessed 13 September 2021).

58 As above.

59 As above.

the application of these principles will determine how they aid in the protection and promotion of the rights of the child.

3.2 Climate change and food security in the specific mandate of the African Children's Committee

The specific mandate of the African Children's Committee elucidates the added value of the African Children's Charter regarding the protection and promotion of the rights of children. The Children's Charter defines a child as a person under the age of 18 with no other qualifications. In contrast, the UN Convention on the Rights of the Child (CRC) defines a child as every human being below the age of 18 years unless, under the law applicable to the child, a majority is attained earlier.⁶⁰ In juxtaposition, the African Children's Charter provides added value by embracing the straight 18-year position of children.⁶¹ This offers a wider platform for the protection of the child even in situations of climate change and food security.

More added value is found in the protection of children from armed conflict to tension and strife. To this end, article 22 of the African Children's Charter deals with the protection of children in situations of armed conflict, tension and strife. It states:

- 1 State Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
- 2 State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
- 3 State Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

It is evident from this provision that the protection of children affected by armed conflict engages both international human rights law and

60 Art 1 CRC; see PE Veerman 'An African and international perspective on children's rights: Interview with Dr Benyam Dawit Mezmur, Chairperson of the African Children's Rights Committee (ACERWC) and for two years (2015–2017) the Chair of the UN CR Committee' (2017) 25 *International Journal of Children's Rights* 672.

61 BD Mezmur 'The African Children's Charter @ 30: A distinction without a difference?' (2020) 28 *International Journal of Children's Rights* 693.

international humanitarian law.⁶² States should ensure that children are not recruited into armed forces. The child is also protected in the context of conflict, tension and strife. While the article does not directly provide for climate change, it offers protection for the child in these three instances.

The question is where climate change and food insecurity fit into the narrative. It is argued that where climate change leads to conflict, tension and strife, the occurrence of these instances leads to the protection of the child. A look at the detailed interpretation of article 22 is instructive. The promotion and protection of the child take on a human rights-based approach, which draws on the children's rights-based principles discussed above under the general mandate. The application of international humanitarian law cannot be used in instances where there is no conflict. Hence, the effects of climate change as a reason for the violation of the rights of a child cannot be invoked for protective measures under humanitarian law. However, this does not stop the use of humanitarian aid from international, regional and national communities to mitigate the impacts of climate change.⁶³ Such humanitarian relief, although not provided for under article 22, can be used to cushion the effects of climate change and food security on children.

The African Children's Charter makes special provision for the protection of refugees and asylum seekers. The requisite article states:⁶⁴

State Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the states are parties.

Article 23 of the African Children's Charter provides for the protection of the refugee child and internally-displaced persons. State parties are called upon to adopt appropriate measures to protect children, both

62 There is no similar provision in CRC. This was solved by the adoption of the Optional Protocol to the CRC on the Recruitment of Child Soldiers. The Optional Protocol, however, places the emphasis on child recruitment into the armed forces.

63 Various organisations have decried the dangers of climate change leading to requiring humanitarian relief; see D Shepard 'Global warming: Severe consequences for Africa', <https://www.un.org/africarenewal/magazine/december-2018-march-2019/global-warming-severe-consequences-africa> (accessed 16 November 2021).

64 Arts 23(1) & (4) African Children's Charter.

unaccompanied and accompanied, seeking refugee status.⁶⁵ States are expected to cooperate with existing international organisations that protect and assist refugees.⁶⁶ This elucidates the possible use of provisions of the Refugee Convention in addition to the African Children's Charter to protect these rights.⁶⁷ It may use its promotional and protective mandate to remind state parties to ensure that girl child refugees enjoy their rights. An examination of the normative framework without a corresponding engagement with other activities of the African Children's Committee presents an incomplete picture. To this end, the authors turn to the jurisprudence of the African Children's Committee.

4 The jurisprudence of the African Children's Committee on climate change and food security

The jurisprudence of the African Children's Committee oscillates in four major aspects. It monitors the implementation of the African Children's Charter through the consideration of communications, state party reporting, investigative visits and the use of recommendations in Concluding Observations.⁶⁸

In the context of communications, the African Children's Committee has handled very few complaints, with no decision on food security and climate change. A look at the website of the Children's Committee indicates the receipt of 16 communications and the conclusion of 10 thereof.⁶⁹ This illustrates the limited use of the communications procedure of the African Children's Committee. However, there are training activities on the communications procedure by the African Children's Committee and civil society organisations, a development that seeks to enhance the use of the communications procedure.⁷⁰ The conclusion of only 10 decisions, in contrast to the African Commission's over 300 decisions, presents a trend

65 Art 23(1) African Children's Charter.

66 Art 23(2) African Children's Charter.

67 Art 23 of the African Children's Charter requires a state party to take all appropriate measures to ensure that a child seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law, whether unaccompanied or accompanied by parents, legal guardians or close relatives, is accorded appropriate protection and humanitarian assistance in the enjoyment of the rights set out therein.

68 Arts 43, 44 & 45 African Children's Charter.

69 African Children's Committee 'Table of communications' (2021), <https://www.acerwc.africa/table-of-communications/> (accessed 13 February 2021).

70 At the time of concluding the contribution, the African Children's Committee and the Dullah Omar Institute for Constitutional Law, Governance and Human Rights were carrying out a virtual training session on the use of the communications procedure.

that requires introspection.⁷¹ Some of the decisions illuminate a thorough engagement and interpretation of the principles concerning the rights of the child. This is evident in the use of the due diligence principle by state parties in the practical protection of the rights of the child.⁷² Due diligence requires a state to account for the promotion and protection of the rights of the child through the result it shows towards the protection of the rights of the child.⁷³ In the two cases of *Institute for Human Rights and Development in Africa and Finders Groups Initiative on behalf of TFA v Cameroon* and *MRGI & Another v Mauritania* this principle is highlighted.⁷⁴ The African Children's Committee is of the view that in the protection of the rights of the child, the state has to show how it has taken practical steps to solve actual violations. This points to the use of due diligence as a result-oriented approach by the state instead of abstract notions often hidden in the existence of laws, policies, legislative, administrative and other initiatives.

In the context of state party reporting, states should report to the African Children's Committee on the various steps taken to promote and protect the rights of children under the African Children's Charter. Some states have submitted reports and have reported on the aspects under study.⁷⁵ Furthermore, the African Children's Committee offers Concluding Observations that speak more to food security than climate change.⁷⁶ For instance, in its Concluding Observations to Benin, the Children's Committee advanced matters of food security. It called on the state to undertake measures to ensure that children are properly nourished from food products that are available at household level through sensitisation of communities about the minimum necessary diet children should

71 HRDA 'Case law analyser', <http://caselaw.ihrda.org/> (accessed 19 December 2020). Such introspection, however, is beyond the scope of this study.

72 See *Institute for Human Rights and Development in Africa and Finders Groups Initiative on behalf of TFA v Cameroon* Communication 006/Com/002/2015; and *MRGI & Another v Mauritania* Communication 007/Com/003/2015 on the use of due diligence and the best interests principle.

73 *Mauritania* (n 72) paras 47-58; *Cameroon* (n 72) paras 46-57.

74 As above.

75 Initial Report of the Republic of Guinea to the ACERWC 2011, https://acerwc.africa/wp-content/uploads/2018/04/Guinea_Initial_Report_under_the_ACRWC.pdf (accessed 16 November 2021). See also First State Party Report of Kenya to the African Union on the implementation of the ACRWC, <https://acerwc.africa/wp-content/uploads/2018/04/Kenya-periodic-Report.pdf> (accessed 16 November 2021) 15, 17, 21.

76 See the two footnotes below.

receive.⁷⁷ In its Concluding Observations on the first state report of Burundi, the African Children's Committee mentioned the existence of challenges concerning food security, through severe malnutrition, cholera outbreaks and the lack of access to clean water.⁷⁸ It is instructive to note that where the Children's Committee has raised issues of the lack of food security and climate change, it has related these to the four principles that underscore its engagement with state parties. For instance, in the previous illustrations of the Concluding Observations to Benin and Burundi, the African Children's Committee referred to the violation of the principles of the right to life, survival and development of children in these states.⁷⁹

Despite the lack of a direct provision on climate change and food security, the wording of the African Children's Charter is sufficient to ensure the protection of the children from the impacts of climate change and food insecurity. Also, arguably, despite the lack of adequate jurisprudence, principles such as due diligence in the communications procedure indicate their applicability to practical challenges in the enjoyment of children's rights. The African Children's Committee has engaged in other activities that have led to the continued and improved protection of the African child. These include continental studies and investigative missions by the African Children's Committee.⁸⁰ For instance, the continental study on the mapping of children on the move indicates that climate change is a strong socio-economic driver of the migration of children.⁸¹ The African Children's Committee has researched the movement of children in Africa. It is established that the drivers of the movement among children in Africa were classified in three categories. These include, first, conflict and insecurity; second, illegal activity; and, third, economic and social conditions. The third driver includes climate as one of the drivers of migration among children.⁸² Africa is more affected by climate change

77 Concluding Observations on the initial report of Benin para 16, https://reporting.acerwc.africa/uploads/4a315297f8a7fb1e729e8db050435953432f4477/statereport/CO_Initial_Report_Benin_Sep_2019_English.pdf (accessed 16 November 2021).

78 Concluding Observations on Burundi's first report to the ACERWC para 16, <https://reporting.acerwc.africa/uploads/d7713aeb5974b7bfd34766c382b48a76d81bdee/statereport/Draft-CO-Burundi-1.pdf> (accessed 16 November 2021).

79 Concluding Observations (n 77); Concluding Observations (n 78).

80 African Children's Committee Continental Study (n 29); see also African Children's Committee Study 'Mapping children on the move within Africa', https://www.acerwc.africa/wp-content/uploads/2019/03/ACERWC_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-_A4_Website-version.pdf (accessed 16 November 2021).

81 African Children's Committee 'Mapping children' (n 80).

82 As above.

as a large sector of the population wallows in poverty.⁸³ Statistics used in this study indicated that between 2008 and 2016 persons in low and middle-income countries were five times more affected than those in high-income countries. Thus, the more affected persons were women, children, indigenous people and other vulnerable groups.⁸⁴

The effect of these movements continues to exacerbate the problem of food insecurity. For instance, desertification and deforestation when combined with droughts and famine lead to the continued existence of food insecurity.⁸⁵ In respect of some countries such as Angola, the African Children's Committee noted that malnutrition of children in the southern region is traceable to climate change.⁸⁶ Other challenges included the lack of access to safe drinking water due to the non-operation of water points, leading to an increase in water-borne diseases.

A similar study by the African Children's Committee on the impact of armed conflict and crises on children in Africa substantiates the various initiatives that have been undertaken.⁸⁷ One of the objectives of this study was to assess the impact of armed conflict on children in the areas of education, health, nutrition/food security and child protection.⁸⁸ This is an indication of the use of other forms of engagement by the African Children's Committee, such as conducting research under article 45. The specificities in this provision are the actions of the Children's Committee by carrying out these functions concerning the child. For instance, the collection and documentation of information are evident in the recent studies about children in areas of armed conflict and the mapping of children on the move. Other acts about the interpretation of the African Children's Charter include the handing down of decisions on communications, and recommendations to state parties by way of Concluding Observations on

83 As above; see also Oxfam 'Uprooted by climate change: Responding to the growing risk of displacement' (2017) 5, https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-uprooted-climate-change-displacement-021117-en.pdf (accessed 16 November 2021).

84 As above.

85 UNICEF 'Protecting children on the move from violence, abuse and exploitation' (2017) 2.

86 Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the initial report of the Republic of Angola on the status of the implementation of the African Charter on the Rights and Welfare of the Child, para 17, https://acerwc.africa/wp-content/uploads/2019/07/Angola_CO_Initial_Report.pdf (accessed 12 December 2021).

87 African Children's Committee 'Stocktake of the African Union responses to child protection in conflict situations', <https://www.acerwc.africa/studies-research/> (accessed 16 November 2021).

88 African Children's Committee Continental Study (n 29).

state party reports. A case in point is the current traction that the African Children's Committee has gained regarding the preparation of a General Comment on the interpretation of article 22 which deals with children affected by armed conflict.⁸⁹ As such, the development of jurisprudence is significantly informed by the children's rights-based approach under the African Children's Charter.

5 A model to increase the traction of the African Children's Committee

The African Children's Committee should increase the traction of the steps it has taken to popularise issues of climate change and food security. All the steps taken should work in tandem with a deliberate attempt to ensure that issues of climate change take centre stage in matters regarding children.

In principle, it is argued that any initiative that seeks to improve the human rights situation in Africa should ask the right African question. For instance, Durojaye and Oluduro argue that when dealing with problems that women face in Africa, one should ask the right African woman question other than merely a woman question.⁹⁰ In the context of the African child in the climate change and food security nexus, one should ask the right question to the right African child who is affected by food insecurity and climate change. This is instructive as it accentuates the lived realities of the African child in situations of climate change and food insecurity. To this end, this investigation leads to asking the right child question to the African child in their space or position of habitation. To engage these questions, at its core, the African Children's Committee should relentlessly utilise the four principles that underscore the child rights-based approach. For instance, regarding climate change and food security, first, how do the conversations embrace the best interests of the child and his or her participation? Second, how do the conversations extend to the practical application of the principle of non-discrimination and their right to life, survival and development? Third, how does the African Children's Committee use other distinct principles such as due diligence to ensure that there is an obligation of result on the part of state parties? These questions would then feed into a child rights-based approach/model that directly deals with these issues.

89 The preparation of the General Comment started with the presentation of the zero draft at the 32 sessions of the Committee in Addis Ababa, Ethiopia, in November 2018. There was a recent validation exercise of the General Comment on 29 and 30 July, 2019 at the University of the Western Cape, South Africa.

90 E Durojaye & O Oluduro 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Feminist Legal Studies* 315.

The successes that the African Children's Charter has registered in dealing with other thematic aspects, such as children affected by armed conflict (CAAC), should be used as a litmus test to guide the engagement in these erstwhile disenchanted waters. The CAAC component has foreseen the use of specific appointments, such as (i) a Special Rapporteur on CAAC; (ii) senior child protection officers on CAAC; (iii) consultants to draft the recently-adopted General Comment on article 22 on children in conflict situations. Furthermore, the advanced discussions on a model law on CAAC speak to initiatives that lead to traction on any issue on which the African Children's Charter deliberately focuses. As such, regarding climate change and food security, it is proposed that this approach be considered. This would mean the appointment of special mechanisms such as a Special Rapporteur or working groups, drawing on expertise from within the Committee and from Africa, to tackle the challenges of climate change and food insecurity from a pan-African perspective.

6 Conclusion

An evaluation of the normative contexts under the African Charter involving the general and the specific mandate of the African Children's Committee has shown that despite the lack of a provision therein, a purposive interpretation should be engaged. As such, the use of article 46 provides solutions to the use of other human rights principles in other instruments. Regarding the development of jurisprudence, there has been the basic use of the state reporting procedure and Concluding Observations on matters of climate change and food security. It is proposed that the African Children's Committee uses more advocacy to disseminate issues of climate change and food security. This will ensure that protection is not informed by another violation, such as armed conflict. Considering the practical solutions, the successes of the African Children's Committee on the CAAC component should be emulated in the deliberate use of practical steps to deal with issues affecting children in the context of climate change and food security.

6

CONNECTING CLIMATE CHANGE AND HUMAN RIGHTS IN AFRICA: THE POTENTIAL ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN THE AFRICAN HUMAN RIGHTS SYSTEM

Ademola Oluborode Jegede

Abstract

The effects of climate change in Africa and elsewhere have led to the call on different actors to take appropriate response measures. Hence, the need for civil society to contribute in the global response to climate change is an important feature of international climate change instruments. In the context of the effects of climate change on human rights, non-governmental organisations have been involved in the work of treaty-monitoring bodies at the United Nations, but are rarely noted for climate change-specific actions under the African human rights system. Generally, at that level, the issue of climate change and its adverse effects on human rights remains a marginal concern, as relatively few organisations have embraced this task as their primary aim. Yet, NGOs have considerable presence and participation in the human rights work of the treaty-monitoring bodies of the African human rights system. Therefore, this chapter examines whether and how NGOs may support the integration of human rights in climate change action through the workings of the African human rights system. It demonstrates that NGOs may utilise the promotional, protective, interpretive and Assembly-related mandates to shape the integration of climate change in the works of the quasi-judicial and judicial treaty-monitoring bodies of the African human rights system.

Key words: *African human rights system; climate change; human rights; NGOs; treaty-monitoring bodies*

1 Introduction

Climate change is a global concern, but its unequal adverse consequences on populations across Africa are well documented.¹ Increasing temperatures and sea levels, altering precipitation patterns and more extreme weather associated with climate change, according to a recent 2020 report published by the World Meteorological Organisation, are threatening human health and safety, food and water security and socio-economic development in

1 P Collier, G Conway & T Venables 'Climate change and Africa' (2008) 24 *Oxford Review of Economic Policy* 337.

Africa.² As a result of the nature of these effects, climate change has been argued as being capable of disrupting the enjoyment of human rights in a number of writings.³ Evidence of the linkage of climate change to human rights is also found in the United Nations (UN) Human Rights Council (UNHRC) Resolutions 10/4 (2009), 18/22 (2011) and 26/33 (2014).⁴ Under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC),⁵ climate change is linked to human rights in the Preamble to the 2015 Paris Agreement which calls on states to take human rights into consideration in climate actions.⁶

The reality of climate change and its adverse effects on rights is a major factor underlying the global call on states and non-governmental organisations (NGOs) for a response to the phenomenon in international instruments, namely, the UNFCCC,⁷ the Kyoto Protocol,⁸ the Paris Agreement,⁹ and the United Nations Sustainable Development Goals (SDGs).¹⁰ For instance, although not visible in the textual provision of the UNFCCC, as non-party stakeholders, the role of civil society in mobilising a strong climate action is evident in both the Preamble and paragraph 134 of the decision that adopted the Paris Agreement.¹¹ Civil society is copiously recognised as an important partner for implementing

- 2 World Meteorological Organisation *State of the climate in Africa* (2019).
- 3 AO Jegede 'Arguing the right to a safe climate under the UN human rights system' (2020) 9 *International Human Rights Law Review* 184; AO Jegede 'Climate change in the work of the African Commission on Human and Peoples' Rights' (2017) 31 *Speculum Juris* 136.
- 4 See the Preamble to the Resolution on Human Rights and Climate Change (Resolution 10/4), adopted 25 March 2009 at the 41st meeting of the Human Rights Council; Preamble to the Resolution on Human Rights and Climate Change (Resolution 18/22), adopted 30 September 2011 at the 37th meeting of the Human Rights Council, A/HRC/Res/18/22; Resolution on Human Rights and Climate Change (Resolution 26L/33), adopted 23 June 2014 at the 26th meeting of the Human Rights Council, A/HRC/26/L.33 1.
- 5 United Nations Framework Convention on Climate Change (1992) 31 *ILM* 851 (UNFCCC).
- 6 Paris Agreement under the United Nations Framework Convention on Climate Change, adopted 30 November-11 December 2015 at the 21st session, Conference of the Parties, FCCC/CP/2015/L.9/ Rev.1 (Paris Agreement 2015).
- 7 UNFCCC (n 5) .
- 8 United Nations Kyoto Protocol to the United Nations Framework Convention on Climate Change UN Doc FCCC/CP/1997/7/Add.1 (10-12-1997) 37 *ILM* 22 (1998).
- 9 Paris Agreement (n 6).
- 10 'Transforming our World: The 2030 Agenda for Sustainable Development' UN GA Res A/RES/70/1 (adopted by the General Assembly, 17th session, 25 September 2015 (SDGs).
- 11 UN Draft Decision 'Adoption of the Paris Agreement' /CP.21, UNFCCC/CP/2015/L.9/Rev.1, Preamble, para 134 (Paris Draft Decision).

all the goals of the SDGs, including Goal 13 on climate action.¹² NGOs are noticeable examples of civil society at the UN level, where they play an important role in the integration of human rights in climate change discourse.¹³ At the level of the regional human rights system, which connotes a set of human rights instruments that are admitted by states as binding and the quasi-judicial and judicial treaty-monitoring bodies,¹⁴ NGOs play major roles in initiating and articulating complaints based on human rights instruments before the quasi-judicial and judicial treaty-monitoring bodies with mandates for the protection and promotion of human rights: the African Commission on Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court), and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).¹⁵ They also participate in the state reporting process, and exert pressure on states to comply with decisions of regional bodies through a combination of strategies.¹⁶

Although there is no empirical finding on the extent of the participation of NGOs, it is evident that there is not yet any communication, for instance, on climate change before any of the complaint mechanisms under the African human rights system. This is unlike the trend in the Inter-American system where, at the very least, pioneering cases on climate change and human rights have been attempted.¹⁷ This development

12 SDGs (n 10) paras 39, 41 & 52.

13 M Limon 'Human rights and climate change: Constructing a case for political action' (2009) 33 *Harvard Environmental Law Review* 439; JH Knox 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 483.

14 F Viljoen *International human rights law in Africa* (2012) 169; M Mutua 'The African human rights system: A critical evaluation', <http://hdr.undp.org/sites/default/files/mutua.pdf> (accessed 20 March 2021).

15 A Motala 'Non-governmental organisations in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights, The system in practice (1986-2000)* (2004) 246-279; Viljoen (n 14) 383.

16 AE Etuvoata 'Towards improved compliance with human rights decisions in the African human rights system: Enhancing the role of civil society' (2020) 21 *Human Rights Review* 415.

17 See, eg, Petition to the Inter-American Commission on Human Rights seeking relief from violations of the rights of Arctic Athabaskan peoples resulting from rapid arctic warming and melting caused by emissions of black carbon by Canada, <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/> (accessed 13 September 2021) (Athabaskan Petition); Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States on behalf of all Inuit of the Arctic regions of the

demonstrates the place of NGOs which, as Habermas argues, is crucial in a deliberative democracy to ‘push topics of general interest and act as advocates for neglected issues and under-represented groups’.¹⁸ As discernible from the trend under the UN in relation to climate change and human rights, potentials do exist within the system that NGOs can engage for that purpose. This chapter examines how NGOs may shape the African human rights system in integrating climate change in its human rights agenda. Following this introduction, part 2 sketches the role of NGOs in relation to climate change and the human rights agenda of key institutions under the auspices of the UN. Part 3 considers the extent of this reality at the African regional level, while part 4 highlights the possible pathways for the involvement of NGOs in the work of the quasi-judicial and judicial treaty-monitoring bodies for addressing the adverse effects of climate change on human rights. Part 5 is the conclusion.

2 NGOs and linking climate change to human rights in the United Nations

There are differing meanings of civil society, but NGOs are generally recognised as part of that space between the state and the family, where organisations, which are neither part of the state nor the market, interact with a view to achieving the common good¹⁹ They form part of the space of ‘associational life’ consisting of various forms of voluntary associations.²⁰ Generally, other authors refer to the civil society as a ‘heterogeneous collection of organisations and initiatives with different roles and functions.’²¹ Civil society is part of the public sphere and plays an important role in the construction of a deliberative democracy by pushing issues of general interest and serving as advocates for neglected issues of the under-represented groups.²² Elster views NGOs as a deliberative tool of exerting pressure and changes on law making and social life.²³ No doubt, the deliberative significance of the civil society is more appropriate in the area of NGOs involvement in the agenda on climate change, human rights and climate justice which over the years have witnessed, in particular, at

United States and Canada, http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (accessed 13 September 2021) (Inuit Petition).

18 J Habermas *Between facts and norms* (1996) 368.

19 M Carbone ‘Theory and practice of participation: Civil society and EU development policy’ (2008) 9 *Perspectives on European Politics and Society* 241.

20 M Edwards *Civil society* (2009) 18.

21 T Brandsen, WA Trommel & B Verschuere ‘The state and the reconstruction of civil society’ (2017) 83 *International Review of the Administrative Sciences* 676.

22 JS Dryzek *Deliberative democracy and beyond: Liberals, critics, contestations* (2000).

23 J Elster *Deliberative democracy* (1998).

the UN negotiation level, the activities of numerous organisations with broad initiatives on the conceptualisation and incorporation of human rights to climate change issues. The functioning of the civil society group at the UN level cannot be overstated. Roberts et al show that there is significant empirical correlation between the participation of NGOs and the willingness of governments to sign and ratify treaties.²⁴ Arguably, this covers climate change legislation process,²⁵ and it is provable through their involvement in discussions centering on climate governance and human rights.

2.1 NGOs, climate and human rights nexus under the UNFCCC process

As role players, NGOs participated in placing climate change on the agenda at the 1988 World Conference on the Changing Atmosphere held in Toronto, Canada.²⁶ They participate as both internal and external players in global climate change discussions.²⁷ Their internal role is justified under the UNFCCC which provides for the participation of civil society organisations (CSOs) in sessions of the Convention bodies as observers.²⁸ Opportunities are also provided for their engagement outside of convention sessions under article 6 which requires state parties to 'promote and facilitate education, training and public awareness at the national, sub-regional and regional levels'.²⁹ This allows NGOs to engage outside official processes. For instance, as Edmondson notes, it is difficult to imagine that the IPCC (Intergovernmental Panel on Climate Change) would have been formed 'without the initiatives of experts and scientists'.³⁰ In demonstrating the pre-eminent role of NGOs in the agenda-setting within the meetings of the Conference of Parties (COP) of the UNFCCC and arguably the Members of Parties (MOP) under the Paris Agreement,

24 J Roberts et al 'Who ratifies environmental treaties and why? Institutionalism, structuralism and participation by 192 nations in 22 treaties' (2004) 4 *Global Environmental Politics* 22.

25 A Montoute, D Mohammed & J Francis 'Prospects and challenges for civil society and climate change engagement in the Caribbean: The case of Trinidad and Tobago' (2019) 47 *Caribbean Studies* 81.

26 MM Betsill 'International climate change policy: Toward the multilevel governance of global warming' in R Axelrod, S van Danveer & DL Downie (eds) *Global environment: Institutions, law and policy* (2011) 111-131.

27 Montoute, Mohammed and Francis (n 25) 90-91.

28 Art 7 UNFCCC (n 5).

29 Art 6 UNFCCC (n 5).

30 E Edmondson 'The Intergovernmental Panel on Climate Change: Beyond monitoring' in B Gleeson & N Low (eds) *Governing for the environment: Global patterns, ethics and democracy* (2001) 47.

Conca concludes that ‘there has been a palpable loss of agenda setting power’ by the states involved in environmental regimes.³¹

No doubt, as the highest political decision-making bodies under the UNFCCC and Kyoto Protocol, the COP and MOP respectively involve heads of states and representatives who are parties to the agreements. However, non-member states have the right to attend as observers.³² Importantly, observer status is extended to other bodies, ‘whether national or international, governmental or non-governmental’, that are qualified in matters within the scope of the UNFCCC.³³ There is an evidence of their participation since COP-1 held in Berlin 1995. As shown by Cabre, the pattern of attendance of NGOs, parties and UN organisations from COP-1 to 15 increased from less than 1,000 at COP-1 to an average of 3,000 at subsequent meetings.³⁴ With the establishment of the Paris Agreement in 2015, the development has not changed, whether in the normative and practical senses. For instance, the decision on the adoption of Paris Agreement recognises the role of non-state parties including NGOs in addressing climate change.³⁵ In particular, article 16(8) of the Paris Agreement views entities including ‘civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples’ as partners in mobilising stronger and more ambitious climate action.³⁶ In the practical sense, as of 2018, over 2,200 NGOs and 130 IGOs have been admitted as observers and participants at meetings of the UNFCCC process.³⁷ It is indeed the lobbying by NGOs, the human rights and environmental academics and UN special procedures mandate holders at the COPs that finally led to the inclusion of the preambular provision in the Paris Agreement which calls on parties to consider their human rights obligations while implementing climate actions.³⁸ The role played by the NGOs in this regard was

31 K Conca ‘Old states in new bottles? The hybridisation of authority in global environmental governance’ in J Barry & R Eckersley (eds) *The state and the global ecological crisis* 202.

32 Art 7(6) UNFCCC (n 5).

33 As above.

34 M Cabre ‘Issue linkages to climate change measured through NGO participation in UNFCCC’ (2011) 11 *Global Environmental Politics* 10-22.

35 Paris Draft Decision (n 15).

36 Paris Agreement (n 6).

37 ‘Overview’, <https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/overview#:~:text=IGOs%20and%20NGOs%20can%20register%20delegates%20once%20they%20have%20received%20observer%20status.&text=As%20of%202018%2C%20over%202%2C200,IGOs%20are%20admitted%20as%20observers> (accessed 21 March 2021).

38 ‘The integration of human rights in the Nationally Determined Contributions in Asia-

necessitated by the lack of interest of some states in linking climate change to human rights, contending that climate change law should have a clear 'climate goal' and not a human rights goal. However, deploying various activism tools and approaches including side events and lobbying, NGOs overcame the various pushbacks.³⁹ Within the UNFCCC process, as a result of the sustained NGO pressure, the Cancun Agreements also include the language of human rights.⁴⁰ The preamble of the Cancun LCA Outcome recognises the connection between human rights and climate change by referencing Human Rights Council (Council) Resolution 10/4 and its findings on the human rights implications of climate change on vulnerability and the effective enjoyment of human rights.⁴¹ This language is significant in that it represents the first recognition of the human rights impacts of climate change in any international climate agreement.⁴² With respect to forest conservation and management, annex I of the Cancun LCA Outcome establishes specific safeguards to be applied in activities related to reducing emissions from deforestation and forest degradation, conservation, sustainable forest management and enhancement of forest carbon stocks (REDD+) in developing countries.⁴³ In 2018, in line with the prevailing thinking of including the NGOs in the deliberative process of the UNFCCC, the Talanoa call for action urges State Parties to work closely with non-Party stakeholders to enhance global ambition on climate change by 2020 and develop long-term, low-emission development strategies. More specifically, it calls upon civil society leaders to mobilise both the public and political will required for driving the action which may include engaging political leadership, influencing and challenging

Pacific to the Paris Agreement on Climate Change, <https://environmentalmigration.iom.int/sites/default/files/Human%20rights%20and%20NDC%20report.pdf> (accessed 20 March 2021).

- 39 B Mayer 'Human rights in the Paris Agreement' (2016) 6 *Climate Law* 109 112; S Adelman 'Human rights in the Paris Agreement: Too little, too late?' (2018) 7 *Transnational Environmental Law* 17.
- 40 UNFCCC 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' (Decision 1/CP.16) FCCC/CP/2010/7/Add.1 (Cancun Decision).
- 41 Cancun Decision (n 40) Preamble.
- 42 Centre for International Environmental Law 'Analysis of human rights language in the Cancun Agreements (UNFCCC 16th Session of the Conference of the Parties)', https://www.ciel.org/wp-content/uploads/2014/11/HR_Language_COP16_Mar11.pdf (accessed 19 March 2021).
- 43 Cancun Decision (n 40) Annex 1.

norms, enhancing awareness, and mobilising action at the regional, state and local level.⁴⁴

2.2 NGOs, climate and human rights nexus under the UNHRC

NGOs are prominent in the HRC process linking human rights to climate change. The first official recognition of a relationship between climate change and human rights at the UNHRC emerged with the adoption of Resolution 10/4 in 2009.⁴⁵ Additionally, on 17 October 2011 the HRC adopted Resolution 18/22 and Resolution 26 L/23 on human rights and climate change, more recently followed by Resolution 47/L.19 of 2021.⁴⁶ Resolution 10/4 was adopted following the report of the Office of the High Commissioner on Human Rights (OHCHR).⁴⁷ The report followed the adoption of Resolution 7/23 of the HRC in 2008,⁴⁸ which requested the office of the OHCHR to carry out 'a detailed analytical study of the relationship between climate change and human rights'.⁴⁹ NGOs were prominent in emphasising the vulnerability of the human population as a ground to connect climate change to human rights. Limon explains that the motivation for their efforts was three-fold. First, it arose from common frustration felt by these groups due to the slow progress in addressing climate change by adopting the conventional politico-scientific approach.⁵⁰ Second, there was a general belief that after overcoming the uncertainty around the existence and impact of climate change, the focus should shift towards the 'victims of the problem'.⁵¹ Finally, groups that are most affected are dissatisfied with the deficit of an accountability mechanism to deal with the human causation and consequences of climate change.

44 'Talanoa call for action', <https://unfccc.int/sites/default/files/resource/Talanoa%20Call%20for%20Action.pdf> (accessed 13 September 2021); also see F Lesniewska & L Siegele 'The Talanoa Dialogue: A crucible to spur ambitious global climate action to stay within the 1,50C limit' (2018) 12 *Carbon and Climate Law Review* 41.

45 Resolution 10/4 (n 4).

46 Resolution 26 L/33 (n 4); Resolution 18/22 (n 4); UNHRC Resolution 'Human rights and climate change' adopted 8 July 2021, A/HRC/47/L.19.

47 Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' A/HRC/10/61 15 January 2009 (OHCHR Report).

48 Human Rights Council 'Human rights and climate change' Res 7/23, UN Doc A/HRC/7/78 (Resolution 7/23).

49 Resolution 7/23 (n 48) para 1.

50 Limon (n 13) 440-444.

51 As above.

Of importance are the submissions made by international organisations such as the Global Forest Coalition,⁵² the International Indian Treaty Council,⁵³ and Friends of the Earth.⁵⁴ The submission by the Global Forest Coalition offers extensive insight into the plight of vulnerable groups in the face of climate change response measures such as reducing emissions from deforestation and forest degradation, conservation, sustainable forest management and enhancement of forest carbon stocks (REDD+) and renewable energy projects, and concludes that climate change has implications for the rights of indigenous peoples.⁵⁵ The International Indian Treaty Council discusses different scenarios of the impacts of climate change on indigenous peoples,⁵⁶ a viewpoint equally affirmed by Friends of the Earth in their conclusion on the need to integrate human rights into the climate policy debate.⁵⁷

Another NGO pathway under the HRC that influenced the debate around climate change and human rights is the Universal Periodic Review (UPR). Established when the HRC was created on 15 March 2006 by the UN General Assembly,⁵⁸ the UPR is a significant innovation based on equal treatment for all countries, which provides an opportunity for all states to pronounce actions they have taken to improve the human rights situations in their countries and to overcome hindrances to the enjoyment of human rights. The UPR process includes experience sharing on best human rights practices around the globe.⁵⁹ Voices of the NGOs have been heard in relation to the limited attention being given by the UPR to the issue of climate change. A 2020 joint statement issued by Global Initiative for Economic, Social and Cultural Rights, with Franciscans International, Amnesty International, the Centre for International Environmental Law

52 'Climate change, forest conservation and indigenous peoples rights' submission by Global Forest People (GFP submission) (2012) 1-8, http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Global_Forest_Coalition_Indigenous_Peoples_ClimateChange.pdf (accessed 20 March 2021).

53 'Climate change, human rights and indigenous peoples' submission to the United Nations High Commissioner for Human Rights by the International Indian Treaty Council (IITC Submission) 20, 21, 49, 50, 51.

54 'Submission to the OHCHR regarding human rights and climate change by Friends of the Earth Australia, the Australian Climate Justice Programme and Climate Action Network Australia' (Friends of the Earth Submission) 4, http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Friends_of_the_Earth_Australia_CANA_ACJP.pdf (accessed 15 March 2021).

55 GFP Submission (n 52).

56 IITC Submission (n 53) 20, 21, 49, 50, 51.

57 Friends of the Earth Submission (n 54) 4.

58 Resolution adopted by the General Assembly on 15 March 2006 (A/60/L.48) 60/251.

59 United Nations Human Rights Council 'Basic facts about the UPR', <https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> (accessed 18 March 2021).

and Earth Justice urged the HRC to include in the UPR process regular, concrete and policy relevant recommendations to all states, particularly the large emitters, on human rights obligations regarding climate mitigation, adaptation and international cooperation.⁶⁰

On 25 September 2020 a significant turn was taken with respect to the role of NGOs in the climate change and human rights interface before the HRC when the Geneva Interfaith Forum for Climate Change, Environment and Human Rights delivered a joint statement calling for the establishment of a special procedures mandate on human rights and climate change. In their view, a new special procedures mandate would ensure a long-term focus on climate change issues at the HRC and bring a human rights dimension into climate change policies. It would promote complementarity between the climate change legal framework and the international human rights regime. Furthermore, it is reasoned that the creation of a new mandate would strongly convey the message that human rights must be integral to climate change discussions.⁶¹ This development illustrates how bold the agenda and involvement of NGOs are in the work of the HRC.

NGOs may, arguably, also bring complaints relating to climate change using the complaints procedure of the HRC. The procedure addresses communications submitted by individuals, groups or NGOs that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations.⁶² There is no record that this route has been followed by NGOs in the context of climate change. However, individuals have filed complaints regarding climate change before human rights treaty-monitoring bodies such as the Human Rights Committee, the treaty-monitoring body of the International Covenant on Civil and Political Rights (ICCPR),⁶³ and the Committee on the Rights of the Child,

60 Franciscans International, Amnesty International, the Centre for International Environmental Law and Earthjustice 'Joint statement' delivered at 43rd session of the Human Rights Council, 15 June 2020, <https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5eea02ce15fa7b5d4c4daf75/1592394447898/FI+statement+-+GD+Item+6+-+Joint1.pdf> (accessed 20 March 2021).

61 'Establishment of a Special Procedures mandate on human rights and climate change', <https://un.op.org/en/node/3430> (accessed 20 March 2021).

62 United Nations Human Rights Council 'Human Rights Council Complaint Procedure', <https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> (accessed 20 March 2021).

63 International Covenant on Civil and Political Rights 999 UNTS 171, 19 December 1966 (entered into force 23 March 1976).

the treaty-monitoring body of the Convention on the Rights of Child.⁶⁴ In *Loane Teitiota v New Zealand* the applicant claimed that the effects of climate change and sea level rise forced him to migrate from the island of Tarawa in the Republic of Kiribati to New Zealand. Two dissenting opinions disagreed with the Committee's position that the facts did not support the conclusion that the author's removal to Kiribati violated his rights relating to life under article 6(1) of ICCPR.⁶⁵ In *Sacchi & Others v Argentina & Others* the applicants requested the Committee to find that climate change was a children's rights crisis.⁶⁶ Although these complaints were lodged by individuals and not NGOs, at the very least, the development indicates that it is not strange for climate change-related complaints to be entertained by the human rights monitoring bodies. It also demonstrates that NGOs can be significant in concretising climate change as a human rights issue where so allowed by the rules and procedures of human rights monitoring bodies. The extent of the visibility of NGOs on the interface of human rights with climate change at the regional level of the African human rights system remains to be examined.

3 African human rights system: NGOs and the deficit of climate change focus

As an important agent in deliberative democracy, NGOs can influence the activities of the monitoring bodies under the African human rights system.⁶⁷ However, unlike the trend on climate change and human rights nexus under the UN level, whereas NGOs are involved in the various activities of the quasi-judicial and judicial treaty-monitoring bodies of the African human rights system, their participation is rare in relation to climate change and human rights agenda. This is unlike the Inter-American human rights system where a human rights approach to complaints relating to climate change is visible in at least two cases: the *Inuit* case and the *Athabaskan* Petition.⁶⁸ Faced with the tragic consequences of climate

64 Convention on the Rights of the Child 1577 UNTS 3, 28 ILM 1456, 20 November 1989 (entered into force 2 September 1990).

65 *Loane Teitiota v New Zealand (advance unedited version)* CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC) 7 January 2020, Annex 1 Individual opinion of Committee member Vasilka Sancin (dissenting) para 7.

66 Chiara Sacchi (Argentina); Catarina Lorenzo (Brazil); Iris Duquesne (France); Raina Ivanova (Germany); Ridhima Pandey (India); David Ackley III, Ranton Anjain and Litokne Kabua (Marshall Islands); Deborah Adegbile (Nigeria); Carlos Manuel (Palau); Ayakha Melithafa (South Africa); Greta Thunberg (Sweden); Raslen Jbeili (Tunisia); *Carl Smith and Alexandria Villasenor (USA) v Argentina, Brazil, France, Germany & Turkey* para 325.

67 Dryzek (n 22).

68 *Inuit* Petition (n 17); *Athabaskan* Petition (n 17).

change, the Inuit alleged that the United States' climate change policy was destroying the Arctic environment, thereby violating a number of their rights, including the rights to health, life and property.⁶⁹ In response, the Inter-American Commission stated that the information supplied in the communication was not sufficient to 'characterise a violation of the rights protected by the American Declaration'.⁷⁰ The *Athabaskan* Petition was filed by an international NGO, Earth Justice, a development that shows that NGOs are a crucial force in utilising the Inter-American human rights system for addressing the adverse effects of climate change on human rights. No doubt, the participation of human rights in the functions of the key institutions under the African human rights system and broader AU institutions is evident.

Since 1988 the African Commission has been granting consultative status to NGOs, the number of which has grown to 504 as at 2016.⁷¹ The contribution of NGOs to human rights promotion and protection has been recognised in a range of AU instruments. The Grand Bay (Mauritius) Declaration and Plan of Action, for instance, acknowledges 'the contribution made by African NGOs to the promotion and protection of human rights in Africa'.⁷² Also, the Kigali Declaration affirms the significant role of civil society organisations (CSOs) in human rights promotion and protection and urges member states and regional institutions to enhance their participation in decision-making processes.⁷³ This instrument suggests that NGOs may be useful in the interface of climate change and human rights deliberative space.

That human rights NGOs form an integral part of the work of the African Commission is supported by Rule 72(1) of the 2020 Rules of Procedure of the Commission which provides that NGOs may be granted observer status with the Commission and notes their rights and

69 As above.

70 Letter from Ariel E Dulitzky, Assistant Executive Secretary, Organisation of American States, to Paul Crowley, Legal Representative (16 November 2006).

71 361 Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organisations working on Human and Peoples' Rights in Africa ACHPR/Res.361(LIX)2016.

72 The Grand Bay (Mauritius) Declaration and Plan of Action, adopted at the 1st Organisation of African Unity (OAU) Ministerial Conference on Human Rights, meeting from 12 to 16 April, 1999, Grand Bay, Mauritius.

73 Kigali Declaration, adopted at the 1st AU Ministerial Conference on Human Rights in Africa, 8 May 2003, Kigali, Rwanda.

obligations.⁷⁴ Articles 5(1) and (3) of the African Court Protocol, and Rule 39(1)(f) of the 2020 Rules of the African Court also empower NGOs with observer status before the Commission to lodge actions before the Court provided the requirements of article 34(6) of the Protocol are met.⁷⁵ Rule 21(2)(r) requires the registrar to develop and keep updated a list of NGO and *pro bono* lawyers that can assist applicants that are parties to matters before the Court. The foregoing provisions are not surprising in that the participation of NGOs has been critical in the growth and consolidation of the African Commission.⁷⁶ Article 44(1) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) mandates the African Children's Committee to receive communications from NGOs 'recognised by the Organisation of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter'.⁷⁷ According to Viljoen, NGOs have participated in the drafting of the African Charter and the development of communication procedures, have drawn attention to human rights problems, proposed resolutions, facilitated missions and lobbied governments to comply with obligations.⁷⁸

Arguably, NGOs have largely failed in discharging their human rights promotion and protection functions in the context of climate change. It is difficult to investigate the mandate of 504 human rights NGOs for auditing their climate change agenda. However, if the name of an organisation is anything to run with, fewer than 10 per cent of these NGOs have 'environment'⁷⁹ or related words such as 'land'⁸⁰ and 'forestry'⁸¹ in

74 Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, adopted by the African Commission on Human and Peoples' Rights during its 27th extraordinary session held in Banjul, The Gambia, 19 February to 4 March 2020.

75 Rules of Court of the African Court on Human and Peoples' Rights 1 September 2020, <http://www.african-court.org/wpafc/wp-content/uploads/2020/10/4-RULES-OF-THE-COURT-25-September-2020.pdf> (accessed 19 March 2021) (Rules of Court).

76 Viljoen (n 14) 383; African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986 (African Charter).

77 See definition section Revised Rules of Procedure of the African Committee on the Rights and Welfare of the Child, <https://www.acerwc.africa/wp-content/uploads/2018/04/Revised-rules-of-procedures-final.pdf> (accessed 21 March 2021) (ACERWC Revised Rules).

78 Viljoen (n 14) 384.

79 'Cameroon Environmental Protection Association', <http://www.achpr.org/network/ngo/362/> (accessed 26 June 2013); 'Citizens for a Better Environment' <http://www.achpr.org/network/ngo/365/> (accessed 20 March 2021).

80 'Arid Lands Institute', <http://www.achpr.org/network/ngo/399/> (accessed 20 March 2021).

81 'Forest Peoples Programme', <http://www.achpr.org/network/ngo/347/> (accessed 20 March 2021); 'Institute of Wildlife, Forestry and Human Development Studies',

their names. There is none with specific names reflecting climate change. In so far as a name offers an insight into the mandate of an NGO, this development signifies that only a few of these organisations with observer status have a specific mandate on climate change, which leaves much to be desired in light of the increasing vulnerability of populations in Africa to its adverse effects.

The paucity of organisations with observer status that have an interest in climate change affects the level of engagement of states while presenting their reports. It undermines a range of activities including the bringing of climate-related issues to the attention of the African Commission, the proposal of relevant resolutions, and the lobbying of government to comply with human rights obligations about climate change. The rarity of their engagement in climate change issues reflects well in the number and nature of resolutions by the Commission on climate change. Thus far, resolutions passed by the Commission neither refer to NGOs nor recognise the role that they can play in the work of the African Commission on climate change. For instance, the assertions in Resolution 342 of 2016 are all directed at member states with one exception that requires the Working Group on Economic and Social Rights to work with the Working Group on Extractive Industries, Environment and Human Rights Violations, to undertake and present within two years a ‘study on the impact of climate change on human rights in Africa’.⁸² None of the 12 Concluding Observations made by the African Commission in Resolution 417 of 2019 dealing with human rights impacts of extreme weather in Eastern and Southern Africa due to climate change designates any role for NGOs.⁸³ Earlier resolutions on the subject are not significantly different. Resolution 153 of 2009, titled ‘Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa’, designates no engagement with NGOs.⁸⁴

Apart from a lack of attention in the foregoing, there is a deficit of activities relating to climate change in the protective mandates of the quasi-judicial and judicial treaty-monitoring bodies. In terms of the rules of the African Commission, the African Court and the African

<http://www.achpr.org/network/ngo/371/> (accessed 20 March 2021).

82 ‘Resolution on Climate Change and Human Rights in Africa’ ACHPR/Res.342(LVIII)2016 African Commission on Human and Peoples’ Rights meeting at its 58th ordinary session, held in Banjul, The Gambia, 6-20 April 2016.

83 ‘Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change’ ACHPR / Res 417 (LXIV) 2019.

84 African Commission of Human and Peoples’ Rights, ACHPR/Res153(XLVI)09: Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, 25 November 2009 (Resolution 153).

Children's Committee, communications can be brought by NGOs, but as yet there is no communication on the human rights implications of climate change presently before any of these monitoring bodies. This is unlike the development under the UN system where at least there have been communications relating to climate change. This situation signifies that climate change issues are yet to have their share in the progress that NGOs have made, at least, in bringing complaints before these main bodies. The lack of communications on climate change issues results in the non-existence of jurisprudence in this area of the law at the regional level. Yet, the fact that climate change can have adverse effects on rights has been hinted at not only in resolutions, but in a major AU instrument, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).⁸⁵ In addition to highlighting the fact that displacement can arise from 'natural or human-made disasters', the Kampala Convention specifically refers to the obligations of states to protect and assist persons displaced by climate change. Article 5(4) of the Convention requires states to take measures to protect and assist persons who have been internally displaced due to natural or human-made disasters, including climate change.⁸⁶

One reason for the lack of engagement with climate change may well be the lack of proper reflection on the part of NGOs on how their work and practices may advance the climate change discussion in the African human rights system. Another reason may be the very nature of environmental rule-making processes where states remain the major rule makers with little or no space for other stakeholders. On the latter point, Hurrell argues that 'the environmental domain has been a laboratory for new modes of governance'; governments remain the rule makers, policy implementers and dispute settlers,⁸⁷ a reason signifying that NGOs may only add another layer of complexity to environmental governance.⁸⁸ Also, the complex and expensive nature of climate litigation and high poverty levels in Africa as well as dwindling funding for NGOs in Africa may be other factors.⁸⁹ Yet, as Hurrell further maintains, NGOs can assist with

85 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted by the Special Summit of the Union held in Kampala, Uganda, 23 October 2009.

86 As above.

87 A Hurrell *On global order: Power, values and the constitution of international society* (2007) 184-187.

88 As above.

89 MW Singh *State responsibility, climate change and human rights under international law* (2019) 140-147.

the shifting of ‘public and political attitudes’ that will lead to solutions.⁹⁰ Similarly, in the climate change context, an increasing presence of NGOs with an environmental mandate will increase political perceptions of the issue and offer promotional and protective value to vulnerable populations across Africa. The next part explores the possible pathways for the involvement of NGOs in the work of the quasi-judicial and judicial treaty-monitoring bodies.

4 Potential pathways and role of NGOs at the regional level

In the African human rights system the African Commission, the African Court and the African Children’s Committee have promotional and protective mandates. In line with the trend at the international level on the link of climate change to human rights, NGOs can engage with these mandates in enhancing the connection of climate change with the rights of vulnerable populations in Africa. Article 45 of the African Charter provides for the functions of the African Commission. These functions can broadly be categorised as promotional, protective, interpretive and Assembly-mandated as listed under articles 45(1), (2), (3) and (4). The African Court complements the protective mandate of the African Commission as it possesses the competence to take final decisions on human rights violations.⁹¹ The African Children’s Committee of the African Children’s Charter⁹² has a general mandate to promote and protect the rights and welfare of the child.⁹³ NGOs operating at the regional level can make the integration of climate change in human rights activities of these organs a focus of their advocacy and engagement. Arguably, as demonstrated in this part, promotional, protective, interpretive and Assembly-related mandates are possible pathways for NGOs to shape the integration of climate change in the works of the quasi-judicial and judicial treaty-monitoring bodies.

4.1 Promotional functions

Articles 45(1)(a), (b), and (c) of the African Charter reflects the promotional functions of the African Commission while articles 42(a)(i) and 43(1)

90 Hurrell (n 87) 227.

91 Arts 2 & 28(2) of the Protocol on the Establishment of an African Court on Human and Peoples’ Rights, adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered force on 25 January 2004.

92 African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990) art 42.

93 Art 42(a)(ii) African Children’s Charter (n 92).

of the African Children's Charter speak to the promotional mandate of the African Children's Committee. These promotional functions entail a range of activities performed through state reporting, special mechanisms, promotional visits, resolutions, seminars and conferences, publications and the dissemination of information.⁹⁴ The African Court has promotional activities and these include its publication and media-related activities aimed at boosting its public image.⁹⁵ These activities offer an opportunity for NGOs to address the climate change gap in the work of these organs. In the Inter-American human rights system, for instance, on 22 May 2020 the Inter-American Commission on Human Rights received presentations from NGOs about the impacts of climate change on the human rights of indigenous peoples, women, children and rural communities, urging states to promote climate policies that protect human rights.⁹⁶ Arguably, there are opportunities for NGOs to aid the promotional functions of monitoring bodies in the African human rights system.

4.1.1 State reporting and Special Rapporteurs

NGOs can participate in the state reporting process before the African Commission and the African Children's Committee. State reporting aims to review at the regional level the extent to which states have complied in their territory with their obligations under relevant human rights instruments. As Viljoen argues, it serves the dual purposes of 'introspection' and 'inspection'.⁹⁷ State reporting serves the purpose of introspection in that it allows the state to 'take the stock of its achievements and failures in making the guarantees under the Charter a reality'.⁹⁸ Its inspection dimension is defined by the reality that it involves an independent or external body that is able to engage the state in an objective dialogue regarding the delivery of obligations under the African Charter.⁹⁹ In terms of article 62 of the African Charter, each party to the Charter is enjoined to file a state report every two years on the legislative or other measures taken to realise the rights guaranteed under the African Charter. Article 43(1) of the African Children's Committee requires every state party to submit to

94 Viljoen (n 14) 349.

95 African Court on Human and Peoples' Rights, <https://www.african-court.org/wpafc/> (accessed 21 March 2021).

96 'Hearing on climate change before the Inter-American Commission on Human Rights', https://climate-laws.org/geographies/international/litigation_cases/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights (accessed 13 September 2021).

97 Viljoen (n 14) 350.

98 As above.

99 As above.

the Committee reports on steps they have adopted and progress made on the enjoyment of rights under the Charter. NGOs can make submissions in relation to the implications of climate change on rights as part of the preparation for the state reporting. They can submit shadow or alternative reports to present to the relevant institutions on the general implications of climate change on human rights and, specifically, on the rights of children. In so doing, they provide the organs with an alternative view to the submissions made by state representatives. In their submissions, NGOs may formulate what human rights are being threatened by climate change and the adequacy or otherwise of the steps being taken. When considered along with the reports of the states, the process offers NGOs an opportunity to shape the Concluding Observations of the African Commission and the African Children's Committee.

The African Commission has established the post of a Special Rapporteur to address a number of substantive provisions of human rights under the African Charter.¹⁰⁰ Examples of Special Rapporteurs established thus far include the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution in Africa; the Special Rapporteur on Prisons and Conditions of Detention in Africa; the Special Rapporteur on the Rights of Women in Africa; the Special Rapporteur on Human Rights Defenders in Africa; the Special Rapporteur on Refugees, Asylum Seekers, and Internally-Displaced Persons in Africa; and the Special Rapporteur on Freedom of Expression in Africa.¹⁰¹ Similarly, the African Children's Committee involves Special Rapporteurs in its work. These Rapporteurs include the Special Rapporteur on Health, Welfare and Development; the Special Rapporteur on Children and Armed Conflict; the Special Rapporteur on Violence Against Children; the Special Rapporteur on Child Participation; the Special Rapporteur on Children in Vulnerable Situations; and the Special Rapporteur on Children on the Move.¹⁰² Thus far, neither the African Commission nor the African Children's Committee has established a mandate holder for environmental protection, let alone climate change. As is currently being mooted at the international level, NGOs at the African regional level can advocate a new Special Rapporteur devoted to the cause of climate change and human rights.

100 Viljoen (n 14) 371.

101 For the establishment and mandate of these Rapporteurs, see generally African Commission on Human and Peoples' Rights 'Special Mechanisms', <http://www.achpr.org/mechanisms/> (accessed 22 March 2021).

102 'Special Rapporteurs', <https://www.acerwc.africa/special-rapporeurs/> (accessed 21 March 2021).

NGOs have always been critical in the establishment of Special Rapporteurs. As illustrated by Viljoen, they are crucial in the creation of a Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution in Africa, a Special Rapporteur on Prisons and Conditions of Detention in Africa, a Special Rapporteur on Prisons and Conditions of Detention in Africa and a Special Rapporteur on the Rights of Women in Africa.¹⁰³ For instance, the initiative to create the position for the Special Rapporteur on Prisons and Conditions of Detention in Africa came from Penal Reform International (PRI),¹⁰⁴ and NGOs such as Women in Law and Development in Africa (WILDAF), consistently advocated the establishment of the Special Rapporteur on the Rights of Women in Africa.¹⁰⁵

Lobbying for the establishment of a new mandate for climate change by NGOs is not incompatible with the provisions of key instruments at the African regional human rights system. It aligns with article 24 of the African Charter on the right to a healthy environment. Importantly, it is justifiable under article 5(4) of the Kampala Convention which enjoins state parties to take 'measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change'. If established, NGOs can make direct submissions to the holder of the mandate on the adverse effects of climate change on vulnerable populations and, in doing so, contribute to the achievement of the objectives of the resolutions passed by the African Commission on climate change and human rights. While the creation of such a new mandate is desirable, the role of NGOs in projecting climate change as a human right concern is not foreclosed by the non-existence of a Special Rapporteur on climate change and human rights. They can still engage existing Special Rapporteurs established under the African Commission and the African Children's Committee in so far as their mandates relate to climate change.

4.1.2 Promotional visits, publication and information dissemination activities'

Embarked upon by commissioners, visits are an important anchor for the other 'promotional activities' of the African Commission.¹⁰⁶ Also, visits can form part of the activities of the African Children's Committee to collect and document information.¹⁰⁷ Through visits, commissioners

103 Viljoen (n 14) 371.

104 F Viljoen 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2003) 27 *Human Rights Quarterly* 125.

105 Viljoen (n 14) 375.

106 Viljoen (n 14) 379.

107 Art 42(a)(i) African Children's Charter.

can sensitise high-ranking officials about the importance of the African Charter, to persuade them to ratify outstanding treaties and to urge them to submit state reports and to comply with resolutions.¹⁰⁸ NGOs can use the opportunity to submit on issues relating to human rights and climate change. In their interaction, they can engage commissioners on the reality of climate in so far as it relates to the purpose of the visits. The agendas of both the African Commission, the African Children's Committee and the African Court contain several references to its aspiration of hosting seminars and organising meetings, delivering speeches, and releasing press statements on a variety of issues.¹⁰⁹

NGOs in collaboration with the African Commission, the African Children's Committee and the African Court can assist with organising workshops and seminars focusing on climate change in the context of human rights.¹¹⁰ In particular, they are well placed to further the elaboration of article 24 of the African Charter on the right to a healthy environment. This may lead to improved enlightenment on the issue and the adoption of a General Comment on the right to a healthy environment and its implications for climate change. Publication and information dissemination (PID) as a promotional activity has the aim of educating and ensuring greater visibility for the three organs in the African human rights system. It is achieved through information supplied on its functioning website and the distribution of information through electronic means to NGOs. There is the possibility through PID that much can be realised by NGOs in responding to the vulnerability of populations to the adverse impacts of climate change. First, PID is useful in interacting with NGOs about the African position on a number of climate-specific issues. Also, through this channel the necessary input of NGOs can trigger or be fed into the future on climate change and human rights of these bodies.

4.1.3 Working groups

The African Commission has established a number of working groups that NGOs can engage on the trend regarding the adverse effects of climate change on human rights. These include the Working Group on Economic, Social and Cultural Rights in Africa¹¹¹ and the Working Group

108 As above.

109 Viljoen (n 14) 382; art 42(a)(i) African Children's Charter.

110 As above.

111 The Working Group on Economic, Social and Cultural Rights, established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 73 at the 36th ordinary session held in Dakar, Senegal, 23 November-7 December 2004.

on Extractive Industries, Environment and Human Rights Violations.¹¹² Climate change has featured in the activities of the Working Group on the Rights of Indigenous or Ethnic Communities in Africa as is evident from its visits to states including the Democratic Republic of the Congo (DRC),¹¹³ Rwanda¹¹⁴ and Kenya.¹¹⁵ During its visit to Kenya, the Working Group reported that environmental degradation and deforestation are the result of poor land use. According to the Working Group, the government of Kenya has over the years discouraged pastoralism or hunting and gathering as a viable way of life and, instead, has been pressurising indigenous peoples to become sedentary farmers.¹¹⁶ Also, during its 35th ordinary session 2020, pursuant to article 38(1) of the African Children's Charter and Rule 58 of its revised Rules of Procedure, the African Children's Committee established three Working Groups, namely, (i) the Working Group on Children's Rights and Business; (ii) the Working Group on Children's Rights and Climate Change; and (iii) the Working Group on Implementation of Decisions and Recommendations.¹¹⁷

The establishment of the Working Group on Children's Rights and Climate Change is particularly notable as it will be crucial to explore the specific impact of climate change on the rights of children. It should be able to do so with an emphasis on climate justice for the African child who suffers a double vulnerability, one for being an African child, and the other for belonging to a continent already disproportionately affected by climate change. An analytical study was commissioned by the UN in relation to rights under the United Nations Convention on the Rights of the Child (CRC), which was submitted to the 35th session of the HRC.¹¹⁸ In conducting the study NGOs, mainly from the north, participated in the study. These include the American Psychological Association; Child

112 The Working Group on Extractive Industries, Environment and Human Rights Violations, established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 148 at the 46th ordinary session held in Banjul, The Gambia, 11-25 November 2009.

113 Report of the Country visit of the Working Group on Indigenous Populations/Communities to the Republic of Congo, 15-24 March 2010 37.

114 Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Rwanda, 1-5 December 2008, adopted by the African Commission at its 47th ordinary session, 12-26 May 2010 30.

115 Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya, 1-19 March 2010, adopted by the African Commission at its 50th ordinary session, 24 October-5 November 2010 37.

116 As above.

117 35th ordinary session (virtual) of the African Committee of Experts on the Rights and Welfare of the Child 31 August to 8 September 2020.

118 Human Rights Council 'Human rights and climate change' A/HRC/RES/32/33, Resolution adopted by the Human Rights Council on 1 July 2016.

Rights International Network; Human Rights Watch; Our Lady of Charity of the Good Shepherd; and Plan International.¹¹⁹ When it fully commences its operation, it is hoped that the Working Group on Children's Rights and Climate Change will involve the voices of NGOs and African experts on the subject. Besides, on the theme, NGOs should be engaged in the activities of the existing Working Groups, such as the Working Group on Economic, Social and Cultural Rights to submit on implications of climate change on the realisation of the social, economic and cultural rights. Similarly, they can engage with the mandate of the Working Group on Extractive Industries, Environment and Human Rights Violations (Working Group on Extractive Industries) 'to undertake research on the violations of human and peoples' rights by non-state actors in Africa',¹²⁰ in the sense that activities in relation to the extractive industry, particularly oil and gas, are linked to climate change.¹²¹ Hence, the Working Group on Extractive Industries offers NGOs an opportunity to advocate the implementation of sustainable projects under these initiatives and present human rights concerns arising in the process.

4.2 Protective mandate of quasi-judicial and judicial treaty-monitoring bodies

The protective mandate of the African Commission is exercisable through the consideration of inter-state and individual communications.¹²² The African Charter is silent on who may bring communications before the African Commission. It only refers to communications relating to human and peoples' rights referred to in article 55 of the African Charter, which allows communications other than those of state parties. The 2020 Rules of the African Commission also does not indicate that NGOs may bring communications. However, general practice before the African Commission is that complaints are allowed from NGOs.¹²³ In the case of the African Court, the establishing Protocol is more specific in that its article 5(3) allows for NGOs with observer status before the African

119 See Inputs received for the Analytical Study on the Impacts of Climate Change on the Rights of the Child, <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/RightsChild.aspx#H> (accessed 21 March 2021).

120 As above.

121 R Ako & O Oluduro 'Bureaucratic rhetoric of climate change in Nigeria: International aspiration versus local realities' in F Maes et al (eds) *Biodiversity and climate change: Linkages at international, national and local levels* (2013) 3-31; AO Jegede 'Trouble in paradise: Prosecution of climate change related laws in Nigeria' in J Gerardu et al (eds) *Compliance strategies to deliver climate benefits* 50-53.

122 Art 60 African Charter.

123 S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

Commission to bring matters before the African Court, if they relate to a state party that has accepted the competence of the Court to receive such complaints in accordance with article 34(6) of the Protocol. Also, article 44(1) of the African Children's Charter allows the African Children's Committee to receive communications from NGOs recognised by the 'Organisation of African Unity, by a member state, or the United Nations'.

The foregoing provisions suggest that NGOs will be crucial in placing individual communications before the African Commission, the African Court and the African Children's Committee on violations of rights linked to climate change. This is not difficult to accept considering that, as mentioned earlier, climate change-related complaints have featured in the work of human rights treaty-monitoring bodies under the UN system, a development which offers a basis for reasoning that a complaint premised on violations of human rights resulting from climate change can be made before the three African regional bodies.

4.3 Interpretive functions

The African Commission, the African Court and the African Children's Committee have interpretive functions as quasi-judicial and judicial treaty-monitoring bodies. The interpretation of every provision of the African Charter may be fulfilled during the consideration of communications by the African Commission, the African Court and the African Children's Committee. Article 45(3) of the African Charter deals with the functions of the African Commission in relation to the interpretation of provisions under the African Charter. There is an implicit legal basis to assume that the interpretive function of the Commission can be aided by a submission of a third party in article 52 of the African Charter, which authorises the African Commission to receive information it deems necessary to resolve a pending matter from the 'states concerned and from other sources', and in article 46, allowing the African Commission to hear from 'any ... person'.¹²⁴ In specific terms, Rule 104(1) of the 2020 Rules of Procedure of the African Commission allows the Commission to 'invite or grant leave to an *amicus curiae*' to make either a written or oral intervention to assist the Court in resolving a factual or legal issue. In terms of Rule 104(2), the *amicus* can be any third party, signifying that NGOs can feature in the process. A similar inference can be made from articles 4(1) and (2) of the African Court Protocol, which allow entities, including recognised African organisations, to offer 'an opinion on any legal matter relating to the Charter or any other relevant human right instruments. Rule 72(1) of

124 F Viljoen & AK Abebe 'Amicus curiae participation before regional human rights bodies in Africa' (2014) 58 *Journal of African Law* 22.

the African Children's Committee's Rules of Procedure equally permits NGOs, if invited, to provide it with expert advice in areas falling within the scope of their activities.¹²⁵

The foregoing rules provide NGOs with a clear focus on climate change the impetus to contribute significantly to the protective mandate of the quasi-judicial and judicial bodies in the African human rights system. NGOs can be invited to give expert opinions on topical issues of climate change regarding questions of attribution or proof, or questions concerning the incorporation of 'rights of nature', and differing impacts of climate change on vulnerable populations that border on climate justice as they interact with article 24 of the African Charter on the right to a healthy environment. They can also provide further clarity on the normative content of other rights contained in the African Charter that can be applied in the context of climate change.

4.4 Assembly-entrusted tasks

Assembly-required tasks are an important avenue for NGOs to influence the work of the quasi-judicial and judicial treaty-monitoring bodies. This is implicit in the task dealing with presentation of activity reports which describe their work progress. Article 45(4) of the African Charter provides that the African Commission may perform 'any other tasks which may be entrusted to it by the Assembly of Heads of State and Government, while Rules 63(1) and (3) of the 2020 African Commission Rules require the Commission to submit 'an activity report of its promotion, protection and other activities to each ordinary session of the Assembly' and demand that, once considered by the Assembly, such a report should be published on the website of the African Commission and transmitted to state parties, AU organs, national and specialised human rights institutions and civil society organisations. Article 31 of the African Court Protocol has a similar provision whereby it requests the African Court to submit to each regular session of the Assembly a report on its work during the previous year. The report shall specify the cases in which a state has not complied with the Court's judgment. This provision is re-emphasised in Rule 14(1)(g) of the 2020 Rules of Court dealing with the functions of the President.¹²⁶ In terms of article 42(d) of the African Children's Charter, the African Children's Committee may also perform tasks required by organs of OAU, including the Assembly of Heads of State and Government. Rule 10(2)(k) of the 2018 Revised Rules offers the insight that such tasks may include the presentation of the activity report to the African Children's Committee.

125 African Children's Committee Revised Rules (n 77).

126 Rules of Court (n 75).

The activity reporting exercise is an important pathway for NGOs to interrogate the activities of the quasi-judicial and judicial bodies within the system on climate change. Where the reports disclose no activity relating to climate change, NGOs can seek clarification on what the African Commission or the African Children's Committee are doing in relation to the subject. They can offer an insight on the attention of similar human rights institutions to the theme. Where activity reports indicate some form of work in the area, NGOs can raise questions in relation to implementation. For instance, where previous resolutions of the African Commission on the need to study the impact of climate change have not yet been achieved, a presentation of activity reports allows NGOs to raise questions about such activities, the current trend and the way forward in integrating climate change into human rights mandates of the quasi-judicial and judicial treaty-monitoring bodies in the African human rights system.

5 Conclusion

The reality of climate change and its adverse effects has propelled the call for actions by stakeholders at all levels of climate governance. The critical role of NGOs has been emphasised in international climate change instruments and is evident in the developments around the integration of human rights and climate change at the UN level. NGOs have been involved in making the climate and human rights nexus under the UNFCCC process and their activities have been prominent in linking climate change to human rights under the UNHRC. This chapter interrogates the extent of the involvement of NGOs at the African human rights system in linking climate change to human rights and possible ways in which this can be achieved in the quasi-judicial and judicial treaty-monitoring bodies. As has been demonstrated, in contrast to the trend on climate change and human rights at the UN level, whereas NGOs are involved in the various activities of the quasi-judicial and judicial treaty-monitoring bodies of the African human rights system, their participation is infrequent in relation to climate change. What then is the way forward? NGOs operating within the African human rights system can engage with the promotional, protective, interpretive and Assembly-related mandates to shape the integration of climate change in the works of its quasi-judicial and judicial treaty-monitoring bodies.

7

CLIMATE TRANSPARENCY IN AFRICA: AN INQUIRY INTO THE ROLE OF THE AFRICAN PEER REVIEW MECHANISM

Mansha Mohee

Abstract

The post-Paris shift to integrating national, transnational and international climate policy making through five-yearly nationally-determined contributions and periodic global stocktakes within an enhanced transparency framework places climate action monitoring and reporting by states at the heart of the global response to climate change. This article explores the role of the African Peer Review Mechanism in climate action and the scope for it to gain more prominence in complementing national capacities for climate action monitoring and reporting. The inquiry is premised on its strategic appeal as a home-grown regional review structure fostering peer learning, accountability, political clout and cohesion, thereby providing opportunities for leveraging best practices, knowledge sharing and the African common position on climate action. It concludes that whereas the expanded mandate of the APRM after its revitalisation since 2017 provides the basis for extending the APRM's purview to climate action, a number of challenges currently impede such a development, among which, most significantly, are unfavourable framing of climate action in its review methodology, the absence of an AU climate instrument defining relevant state duties and delayed progress on its revitalisation programme.

Key words: *Climate Action Monitoring and Reporting; NDC implementation; African Peer Review Mechanism; Paris Agreement; Enhanced Transparency Framework*

1 Introduction

In contrast to prior international climate norms,¹ the Paris Agreement² institutes a bottom-up, multilevel and incremental approach to climate action, centred around nationally-defined measures.³ Under the Agreement, both developed and developing country parties are required to formulate nationally-determined contributions (NDCs),⁴ constituting individual climate policies reflective of domestic circumstances and capabilities in five-year cycles.⁵ NDCs are slated to be progressively scaled up, informed by global stocktakes (GST), the process by which collective progress towards the long-term goals of the Agreement is periodically assessed.⁶ Central to the Paris architecture is an enhanced transparency

- 1 Since the United Nations Framework Convention on Climate Change (UNFCCC) (adopted 9 May 1992, entered into force 21 March 1994) charted the basis for international action against climate change, attempts at negotiating a common agreement on climate action, notably the Kyoto Protocol (adopted 11 December 1997, entered into force 16 February 2005) provided a rigid legally-binding framework conferring burdens on developed countries only, without engaging developing countries in the fight against climate change. For a comprehensive overview of the international climate change regime, see D Bodansky, J Brunnée & L Rajamani *International climate change law* (2017).
- 2 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNFCCC Conference of Parties (UNFCCC COP), Decision 1/CP.21 'Adoption of the Paris Agreement', UN Doc FCCC/CP/2015/10/Add.1, 29 January 2016.
- 3 For an overview of the salient features of the Paris regime, see M Wewerinke-Singh & C Doebbler 'The Paris Agreement: Some critical reflections on process and substance' (2016) 39 *University of New South Wales Law Journal* 1486; D Bodansky 'The Paris climate change agreement: A new hope?' (2016) 110 *American Journal of International Law* 288.
- 4 See the NDC Registry, <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (accessed 10 March 2021). For an overview of the NDCs submitted as at 31 December 2020, see UNFCCC Secretariat 'Nationally determined contributions under the Paris Agreement: Synthesis report' (Initial version) UN Doc FCCC/PA/CMA/2021/2, distributed 6 February 2021, https://unfccc.int/sites/default/files/resource/cma2021_02_adv_0.pdf (accessed 10 March 2021).
- 5 UNFCCC COP, Decision 4/CMA.1 'Further guidance in relation to the mitigation section of decision 1/CP.21' UN Doc FCCC/PA/CMA/2018/3/Add.1, 15 December 2018 (NDC Guidance).
- 6 Art 14 Paris Agreement (n 2).

framework⁷ setting forth rigorous state reporting requirements⁸ necessary to track the implementation of national pledges. A hallmark of the Paris regime, transparency is crucial for effectiveness and accountability, and a corollary to access to information, the latter being an integral part of the freedom of thought, expression and association⁹ and critical to advancing the protection and promotion of other human rights. Transparency as it relates to climate action is particularly pertinent considering state duties resulting from the growing recognition of the nexus between the right to a healthy environment and a safe climate.¹⁰

Whereas developing countries have demonstrated bold commitments in their response to climate change,¹¹ pervasive capacity and knowledge gaps in monitoring and reporting on climate action, including the dearth of climate data and availability, present significant challenges for NDC implementation and bolstering ambition over time.¹² The absence of

7 Art 13 Paris Agreement (n 2). For an analysis of the novel features of the enhanced transparency framework, see J Viñuales 'The Paris climate agreement: An initial examination (Part III of III)' EJIL:Talk 8 February 2016, <https://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-iii-of-iii/> (accessed 10 July 2021). For additional guidance on the transparency framework further to art 13(3) of the Paris Agreement, see UNFCCC COP, Decision18/CMA.1 'Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement', UN Doc FCCC/PA/CMA/2018/3/Add.2, 15 December 2018.

8 Arts 13(7)-(9) Paris Agreement (n 2).

9 Access to information, while not formally recognised as a human right in itself, is mostly commonly construed as part of freedom of expression. Art 19 of the Universal Declaration of Human Rights proclaimed 10 December 1948, UN General Assembly Resolution 217 A(III), states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' See similarly International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, art 19; African Charter on Human and Peoples' Rights (African Charter), adopted 27 June 1981, entered into force 21 October 1986, CAB/LEG/67/3 rev 5, 21 ILM 58, art 9; African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019).

10 UN Special Rapporteur on Human Rights and the Environment 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc A/74/161, distributed 15 July 2019.

11 United Nations Development Programme and UN Climate Change 'The heat is on: Taking stock of global climate ambition' (2019) 14-18, <https://outlook.ndcs.undp.org/> (accessed 1 November 2020).

12 F Röser et al 'Ambition in the making: Analysing the preparation and implementation of process of the nationally determined contributions under the Paris Agreement' (2020) 20 *Climate Policy* 415. For an overview of the enduring capacity challenges faced by developing countries, see Y Dagnet, E Northrop & D Tirpak 'How to strengthen the

a long-running and systematic tradition of developing climate policies, and collecting and reporting climate information¹³ have constrained the elaboration of coherent first-generation African NDCs.¹⁴ Across the continent, countries sparsely avail themselves of national policies, strategies or legislation,¹⁵ or have deployed formal national climate action reporting and monitoring systems.

The Paris Agreement underscores the capacity building of developing countries as a strategic pillar in international cooperation on climate action, including in realising transparency commitments. It includes within its scope '*inter alia*, to implement adaptation and mitigation actions, and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and *the transparent, timely and accurate communication of information*'.¹⁶

Transparency-related capacity building is two-pronged, consisting of governance and information requirements.¹⁷ Capacity building is needed for establishing governance and institutional arrangements for the implementation of the enhanced transparency framework, as well as the enhancement of methodology training and data management to enable countries to meet specific information requirements.

institutional architecture for capacity building to support the post-2020 climate regime' World Resources Institute Working Paper December 2015, https://files.wri.org/d8/s3fs-public/How_to_Strengthen_the_Institutional_Architecture_for_Capacity_Building_to_Support_the_Post-2020_Climate_Regime.pdf (accessed 10 July 2021).

- 13 See VP Nanda 'Global environmental governance and the south' in S Alam et al (eds) *International environmental law and the Global South* (2015) 135; S Singh & S Rajamani 'Issue of environmental compliance in developing countries' (2003) 47 *Water Science and Technology* 301; J Setzer & L Benjamin 'Climate litigation in the Global South: Constraints and innovations' (2020) 9 *Transnational Environmental Law* 77 81.
- 14 African Development Bank 'Gap analysis report: African nationally determined contributions' (2018) 31-53, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/African_NDCs_Gap_Analysis_Report.pdf (accessed 1 November 2020).
- 15 Graham Research Institute on Climate Change and the Environment 'Climate change laws of the world', https://climate-laws.org/legislation_and_policies?region%5B%5D=Sub-Saharan%20Africa&type%5B%5D=executive (accessed 10 March 2021).
- 16 Art 11(1) Paris Agreement (n 2).
- 17 Y Dagnet et al 'Building capacity for the Paris Agreement's enhanced transparency framework: What can we learn from countries' experiences and UNFCCC processes?' World Resources Institute Working Paper March 2019 6, <https://files.wri.org/d8/s3fs-public/building-capacity-paris-agreements-enhanced-transparency-framework.pdf> (accessed 10 July 2021).

The Paris Agreement highlights the potential role of regional approaches to capacity building in implementing the instrument:¹⁸

All parties enhancing the capacity of developing country Parties to implement this Agreement, including through regional, bilateral and multilateral approaches, shall regularly communicate on these actions or measures on capacity-building. Developing country parties should regularly communicate progress made on implementing capacity-building plans, policies, actions or measures to implement this Agreement.

The regional climate regime has provided limited opportunity for transparency-related capacity building. African Union (AU) member states have issued declarations on climate change, highlighting their acknowledgment of its significance.¹⁹ The continental climate change strategy, while having underscored the need for building capacity for monitoring and reporting climate change programmes, does not set actionable targets and sufficiently-identified relevant mechanisms.²⁰ Moreover, regional human rights instruments have not defined state duties relating to the fulfilment, protection and promotion of rights affected by climate change. The African Commission on Human and Peoples' Rights (African Commission) also has not done enough to stress the link between human rights and climate change and to mainstream climate action in state reporting.²¹ On the other hand, climate action is increasingly recognised as a crucial element of development in scholarship,²² yet, the role of the African Peer Review Mechanism (APRM) – Africa's

18 Art 11(4) Paris Agreement (n 2).

19 See notably the AU Climate Change Declaration adopted in 2007; Nairobi Declaration on the African Process to Combat Climate Change adopted in 2009.

20 The Executive Council of the African Union called upon the African Union Commission to draw up an African Strategy on Climate Change in 2009: 'Decision on the African Common Position on Climate Change' Doc EX.CL/Dec.500(XV) Rev.1. A draft strategy was developed in 2014: Draft African Union Strategy on Climate Change (2014) Doc AMCEN-15-REF-11 as well as a draft strategy for 2020-2030 subsequently: Draft Africa Climate Change Strategy 2020-2030, https://archive.uneca.org/sites/default/files/uploaded-documents/ACPC/2020/africa_climate_change_strategy_-_revised_draft_16.10.2020.pdf (accessed 10 July 2021). Conversely, the East African Community (EAC) and the Economic Community of West African States (ECOWAS) adopted a Climate Change Declaration in 2009; the Southern African Development Community (SADC) launched a Climate Change Adaptation Strategy on Water in 2011.

21 AO Jegede 'Climate change in the work of the African Commission on Human and Peoples' Rights' (2017) 31 *Speculum Juris* 135.

22 See notably O Davidson et al 'The development and climate nexus: The case of sub-Saharan Africa' (2003) 3 *Climate Policy* 97; N Grist & CI Speranza 'Climate change and African development' in E Lundsgaarde (ed) *Africa toward 2030: Challenges for development policy* (2012) 105.

development-monitoring initiative – in climate action, while mooted in early commentary,²³ has scarcely been explored.

The APRM was established by the AU in 2003, in the context of the implementation of the New Partnership for Africa's Development (NEPAD), the AU policy framework for accelerating economic cooperation and integration among African countries. It is open for accession by AU member states as a self-monitoring mechanism, encouraging compliance with democratic, economic, corporate and socio-economic governance standards.²⁴ The APRM paradigm can present several advantages in responding to the need to enhance climate transparency, customarily stymied by various technical and political challenges. In the national context, the mechanism favours a better integration of a human rights-based approach to climate justice,²⁵ thus far elusive.²⁶ Through its broad conception of participation, it can bring together civil society, the private sector, vulnerable groups and affected communities, aside from governments. It also offers an effective model of systematic engagement amid diffuse review cycles through bi-annual update reporting and technical support functions such as the development of trackers, database compilation and benchmarking. The APRM is well positioned to facilitate regional integration on climate justice. By fostering dialogue among states and regional stakeholders and serving as a collaborative platform on climate action in Africa, it could encourage a strengthened coordinated regional approach and help reinforce the African common position on climate change.²⁷

- 23 See Seventh African Development Forum: Acting on Climate Change for Sustainable Development in Africa 'Governance and leadership response to climate change' 10-15 October 2010, United Nations Conference Centre, Addis Ababa, Ethiopia; B Unmüßig & S Cramer 'Climate change in Africa' (2008) 2 *GIGA Focus Afrika* 1.
- 24 For an overview of the APRM process, see R Herbert & S Grudz 'The African Peer Review Mechanism: Lessons from the pioneers' South African Institute of International Affairs (2008), <https://saiia.org.za/research/the-african-peer-review-mechanism-lessons-from-the-pioneers/> (accessed 15 July 2021); B Manby 'Development, good governance and south-south cooperation: The African Peer Review Mechanism' in UN *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 217-231.
- 25 S Duyck et al 'Human rights and the Paris Agreement's implementation guidelines: Opportunities to develop a rights-based approach' (2018) 12 *Carbon and Climate Law Review* 191; P Toussaint & A Blanco 'A human rights-based approach to loss and damage under the climate change regime' (2019) 20 *Climate Policy* 1.
- 26 See United Nations Environment Programme 'Climate change and human rights' (2015) 30-31, <https://wedocs.unep.org/bitstream/handle/20.500.11822/9934/Climate-Change-Human-Rights.pdf?sequence=1&isAllowed=y> (accessed 1 November 2020).
- 27 An African common position refers to the definition of common policy goals and a coherent approach for the continent based on shared interests and needs in multilateral

This article seeks to establish the role of the APRM in complementing climate action monitoring and reporting processes in Africa, including as a means for transparency-related capacity building. It is structured in five parts. The first part is the introduction while the second part provides an overview of the African landscape on climate action monitoring and reporting, including the current level of climate transparency under national, regional and international mechanisms. It also highlights the key support mechanisms in climate policy implementation and transparency in Africa. The third part interrogates the role of the APRM in climate action. Notably, it considers the relevance of climate action within its thematic focus areas, as well as in view of its expanded mandate for monitoring and evaluating implementation of the AU Agenda 2063 and UN Agenda 2030.²⁸ The part four of the article identifies opportunities and challenges for the APRM to acquire a prominent role in climate transparency. Part five is the conclusion.

2 The African landscape on climate action monitoring and reporting

This part provides an overview of the extant normative and institutional mechanisms on climate action monitoring and reporting in Africa. Since national mechanisms for monitoring and reporting currently are scarce across most African countries, it is worth investigating the implementation of treaty obligations under regional and international mechanisms relevant to climate action to appreciate the level of state monitoring and reporting. The first piece of this part explores national, regional and international mechanisms for monitoring and reporting climate action. The second portion of the part describes the regional structures supporting climate action monitoring and reporting in Africa.

processes. Notably in the context of international climate negotiations, relevant structures have included the African Ministerial Conference on the Environment (AMCEN); African Group of Negotiators (AGN); and the Committee of African Heads of State on Climate Change (CAHOSCC). In this respect, see notably the Algiers Declaration on Climate Change adopted in 2008 by the Conference of African Ministers of the Environment on Climate Change. For an overview, see W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change (2010) 10 *African Human Rights Law Journal* 1.

28 Agenda 2063: The Africa We Want, <https://au.int/en/agenda2063> (accessed 1 September 2022); Transforming Our World: The 2030 Agenda for Sustainable Development, <https://sdgs.un.org/2030agenda> (accessed 1 September 2022).

2.1 Monitoring and reporting mechanisms

2.1.1 National mechanisms

A few African states have formulated climate and climate-related sectoral policies or strategies to define coordinated national responses to address climate change impacts within the context of economic and sustainable development priorities.²⁹ Most of these instruments underline the need for robust monitoring and reporting systems to collect data, track progress, share information among stakeholders and enhance access to climate information. The Ghana Climate Change Policy (2013), for instance, identifies monitoring and reporting as one of seven systemic pillars to achieve progress towards its objectives.³⁰ The Uganda Climate Change Policy (2015) refers to the strengthening of existing monitoring and evaluation (M&E) systems and the development of a Performance Measurement Framework.³¹ The Kenya Climate Change Framework Policy (2016) outlines a number of measures for the development of a consolidated and integrated monitoring, reporting and verification system in the face of weak and scattered mechanisms.³² Nonetheless, despite the emphasis drawn on monitoring and reporting in emerging climate policy planning, the implementation of these measures generally is stalled, due to inadequate finance strategies, the absence of legal frameworks and incoherent governance systems.³³

29 See notably Revised Nigeria National Climate Change Policy (2021); Uganda National Climate Change Policy (2016); Zimbabwe National Climate Change Response Strategy (2015); Ghana National Climate Change Policy (2013); Tanzania National Climate Change Strategy (2012); South Africa National Climate Change Response Policy (2011). Only Kenya has adopted climate legislation: Kenya Climate Change Act 11 of 2016, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ClimateChangeActNo11of2016.pdf> (accessed 15 July 2021).

30 Ghana National Climate Change Policy (2013) 2-15, <https://www.greengrowthknowledge.org/sites/default/files/downloads/policy-database/GHANA%29%20Ghana%20National%20Climate%20Change%20Policy.pdf> (accessed 15 July 2021).

31 Uganda National Climate Change Policy (2015) 48, <https://www.mwe.go.ug/sites/default/files/library/National%20Climate%20Change%20Policy%20April%202015%20final.pdf> (accessed 15 July 2021).

32 Kenya Climate Change Framework Policy (2016) sec 9.4, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ClimateChangeActNo11of2016.pdf> (accessed 15 July 2021).

33 See, eg, Graham Research Institute on Climate Change and the Environment 'Governance of climate change policy: A case study of South Africa' Policy Brief June 2019, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/06/GRI_Governance-of-climate-change-policy_SA-case-study_policy-brief_8pp.pdf (accessed 15 July 2021).

2.1.2 Regional mechanisms

African Union mechanisms

AU climate plans do not provide for the setting up of a regional climate action monitoring and reporting system.³⁴ Instead, monitoring and reporting mechanisms are spread across various programmes. Under the framework for the implementation of the Africa Regional Strategy for Disaster Risk Reduction (ARSDRR), the African Union Commission (AUC) since 2007 convenes the Africa Regional Platform on Disaster Risk Reduction (AfRP), a biennial forum bringing together African member states, intergovernmental organisations and development partners. It serves as a regional coordination mechanism supporting the monitoring of the implementation of progress of disaster risk reduction policies, strategies and programmes.³⁵ NEPAD is mandated to monitor Africa's progress in meeting key regional and global goals for technical reporting. The promotion of climate resilience is one of its strategic priorities.³⁶ Notably, under the NEPAD Programme on Agriculture and Climate Change, it convenes the Africa Climate-Smart Agriculture Alliance (ACSAA), launched in 2014. ACSAA brings together the public sector, civil society and researchers to review progress on Vision 25x25, the policy framework for scaling up climate-smart agriculture in the continent.³⁷ The Vision lays special emphasis on monitoring and learning.³⁸

Human rights mechanisms

The mandate of the African Commission on Human and Peoples' Rights (African Commission) broadly involves the promotion and protection of human rights through research and the dissemination of information, advisory and interpretative functions and the development of guidelines,

34 Manby (n 24).

35 African Union Commission (AUC) 'Programme of action for the implementation of the Sendai framework for disaster risk reduction 2015-2030 in Africa in line with the Africa Regional Strategy for Disaster Risk Reduction' November 2016 11, https://www.preventionweb.net/files/49455_poaforsendaiimplementationinafrica.pdf (accessed 15 July 2021) ARSDRR was adopted by the AU Heads of State and Government in 2004, https://www.unisdr.org/files/13093_AFRICA_REGIONALDRRSTRATEGYfullPDF.pdf (accessed 15 July 2021).

36 NEPAD website, <https://www.nepad.org/strategic-priorities> (accessed 15 July 2021).

37 NEPAD 'Africa Climate Smart Agriculture Vision 25x25: Africa's strategic approach for food security and nutrition in the face of climate change', <https://www.nepad.org/publication/africa-csa-vision-25x25-africas-strategic-approach-food-security-and-nutrition> (accessed 15 July 2021).

38 UN Special Rapporteur on Human Rights and the Environment Report (n 10) 3,4 & 5.

rules and principles.³⁹ None of the African human rights treaties, including instruments adopted more recently, recognises climate change as an impediment to the realisation of rights. The African Commission has only but exceptionally attempted to close this gap by calling for an inquiry into the human rights implications of climate change in the African context.⁴⁰ Otherwise, thus far it has not made use of special mechanisms such as the Special Rapporteur or Working Group engagement on the subject.⁴¹ It has commissioned no studies or promotional initiatives such as seminars, dialogues or events to foster national responses.⁴² It also has not highlighted the impact of climate change on human rights under the communications procedure.⁴³

A similar gap is noticeable in the state reporting procedure. The African Commission's Guidelines on State Reporting do not identify climate action under any of the provisions of the instruments.⁴⁴ State reports submitted prior to the entry into force of the Paris Agreement, on the rare occasion where they have made reference to climate change, did so in passing without delving into the latter's human rights implications.⁴⁵ Only South Africa has addressed the singular impact of climate change on the vulnerability of women.⁴⁶ This is not impressive

39 African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1981, CAB/LEG/67/3 rev. 5 21 ILM 58, art 45.

40 African Commission 'Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa' adopted at its 46th ordinary session, 11-25 November 2009, Banjul, The Gambia (ACHPR Resolution 153); 'Resolution on Climate Change in Africa' adopted at its 55th ordinary session, Luanda, Angola, 28 April-12 May 2014 (ACHPR Resolution 271); 'Resolution on Climate Change and Human Rights in Africa' adopted at its 58th ordinary session, Banjul, The Gambia, 6-20 April 2016 (ACHPR Resolution 342).

41 See Jegede (n 21) for an overview of the inadequacies of approach of the African Commission to the human rights implications of climate change.

42 As above.

43 As above.

44 African Commission 'Guidelines for National Periodic Reports under the African Charter' (1989), <https://www.achpr.org/legalinstruments/detail?id=4>; 'State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (Tunis guidelines), <https://www.achpr.org/legalinstruments/detail?id=30>; 'Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', file:///C:/Users/user/Downloads/Guidelines%20on%20State%20Reporting%20under%20the%20Maputo%20Protocol_2.pdf (accessed 10 November 2020).

45 See Jegede (n 21) 143.

46 Republic of South Africa 'Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2003-2014)' submitted 10 February 2015 para 505, <http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/>

as it shows that states are not paying adequate attention to how climate change disproportionately affects populations in their reports. Concluding Observations also have not urged states in that direction.⁴⁷ More recently, the last few state reports submitted have more frequently featured references to climate change, especially in the context of mainstreaming climate in new legislation and national frameworks. The last periodic report of Malawi, for instance, identified climate change as a key priority area for its national development strategy for 2017 to 2022.⁴⁸ It referred to climate change management as a policy area in its agriculture and forestry management framework. Similarly, the state report submitted by Niger alludes to institutional programmes for building the resilience of the population to climate change, disaster and crises.⁴⁹ Significantly, the report submitted by Mauritius considered climate action under article 24 of the Charter (right to a satisfactory environment). While stressing its vulnerability to climate impacts as a small island developing state (SIDS), it indicated the range of legislative and institutional mechanisms put in place for climate adaptation and mitigation.⁵⁰ The report from Cameroon highlights the impact of climate change under a number of the Charter rights,⁵¹ including the right to a healthy environment and the right to a healthy and sustainable environment under the Protocol to the African

staterep2_southafrica_2003_2014_eng.pdf (accessed 10 November 2020).

- 47 African Commission 'State reports and Concluding Observations', <https://www.achpr.org/statereportsandconcludingobservations> (accessed 10 November 2020).
- 48 Republic of Malawi 'Combined Second and Third Periodic Report under the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Women in Africa (2015-2019)' submitted 7 February 2020 paras 53, 59, 64 & 66, file:///C:/Users/user/Downloads/Malawi%202nd%20Periodic%20Report,%202015-2019.pdf (accessed 10 November 2020).
- 49 Republic of Niger '15th Periodic Report on the implementation of the African Charter on Human and Peoples' Rights (2017-2019)' submitted 25 November 2019 paras 252, 275, 339 & 340, file:///C:/Users/user/Downloads/NIGER%2015%20%C3%A8me%20RAPPORT%202017-2019-ENG.pdf (accessed 10 November 2020).
- 50 Republic of Mauritius '9th & 10th Combined Periodic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (2016-2019)' submitted 6 February 2020 paras 420-444, file:///C:/Users/user/Downloads/Mauritius%209th-10th%20Combined%20Periodic%20Report%202016-2019.pdf (accessed 10 November 2020).
- 51 Republic of Cameroon '4th, 5th & 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (2015-2019)' submitted 3 January 2020 paras 630-632, 886, 893 & 971-986, file:///C:/Users/user/Downloads/Cameroon%204th-6th%20Periodic%20Report,%202015-2019-ENG.pdf (accessed 10 November 2020).

Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol,⁵² but also in the context of internal displacement under articles 2 and 4 of the Kampala Convention.⁵³ The last report submitted by Zimbabwe referred to climate change under article 24.⁵⁴

Regional economic communities (RECs) mechanisms

The Climate Change Strategy and Action Plan of the Southern African Development Community (SADC CCSAP) underlines the need to establish a standardised monitoring, evaluation and reporting framework for climate change programmes.⁵⁵ It highlights the conduct of regular reviews of climate change programmes and capacity building of member states for the monitoring and evaluation of climate change programmes.⁵⁶ The SADC Climate Services Centre, a World Meteorological Organisation (WMO) Regional Climate Centre, provides operational services for monitoring and prediction of extreme climate events. Similarly, the Climate Change Policy Framework of the East African Community (EAC) emphasises research, monitoring and forecasting.⁵⁷ The Economic Community of West African States (ECOWAS) adopted the Lomé Declaration on Climate Change and Protection of Civilians in West Africa in 2009, calling for a human rights approach to climate change. It is set to launch its Climate Change Strategy at the 2021 United Nations Climate Change Conference (COP26) in November 2021.⁵⁸

52 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol) adopted 11 July 2003, entered into force 25 November 2005.

53 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) adopted 22 October 2009, entered into force 6 December 2012.

54 Republic of Zimbabwe '11th-15th Combined Report under the African Charter on Human and Peoples' Rights and 1st-4th Combined Report under the Maputo Protocol (2007-2019) submitted 1 August 2019 para 22, file:///C:/Users/user/Downloads/ZIMBABWE_11th-15th%20Combined%20Report%202007-2019_ENG.pdf (accessed 10 November 2020).

55 SADC Secretariat 'SADC climate strategy and action plan' (2015) 35, https://www.sadc.int/files/5615/9126/1263/SADC_Climate_Change_Strategy_and_Action_Plan-English.pdf (accessed 15 July 2021).

56 As above.

57 EAC Secretariat 'EAC climate change strategy' (2011-2016) and EAC Climate Change Master Plan (2011-2031), <https://www.eac.int/documents/category/environment-and-natural-resources> (accessed 15 July 2021).

58 Pan African Climate Justice Alliance 'ECOWAS region to launch its climate change strategy in COP26', <https://www.pacja.org/using-joomla/extensions/components/content-component/list-all-categories/85-news/249-ecowas-region-to-launch-its-climate-change-strategy-in-cop-26> (accessed 15 July 2021).

2.1.3 International mechanisms

Universal Periodic Review

The Human Rights Council and the special procedures mechanisms have increasingly sought to address state obligations in responding to the human rights implications of climate change through a number of statements, decisions, Concluding Observations, General Comments and General Recommendations.⁵⁹ Unlike the human rights treaty bodies, the Universal Periodic Review (UPR) reviews state compliance with human rights norms more broadly, beyond one specific treaty. In general, the UPR has generated dialogue on adaptation and mitigation efforts since its first cycle.⁶⁰ However, only a few country reports from African states, save for SIDS, have highlighted climate change impacts or described national climate action. Notably, Comoros referred to the establishment of a ministerial unit for follow up on the United Nations Framework Convention on Climate Change (UNFCCC).⁶¹ The Maldives underscored the island's vulnerability to climate change and the introduction of a Climate Change Council for scrutinising the climate impact of development projects and a Climate Change Fund to enhance the implementation of adaptation and mitigation efforts.⁶² São Tomé and Príncipe indicated the set-up of a four-year project for the development of climate-resilient

- 59 For a comprehensive list of statements, decisions and reports, see Office of the United Nations High Commissioner for Human Rights Human Rights Mechanisms addressing climate change, <https://www.ohchr.org/EN/Issues/HRAAndClimateChange/Pages/HumanRightsMechanisms.aspx> (accessed 10 November 2020). See in particular Human Rights Council Resolution 7/23 (2008); 10/4 (2009); 18/22 (2011); 26/27 (2014); 29/15 (2015); 32/33 (2016); 35/20 (2017); 38/4 (2018); 42/21 (2019) & 44/7 (2020).
- 60 Office of the United Nations High Commissioner for Human Rights 'Mapping human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Individual report on the UN General Assembly and the Human Rights Council, including the Universal Periodic Review Process' (2013) paras 97-122; H van Asselt & R Moncel 'All hands on deck! Mobilising climate change action beyond the UNFCCC' (2012) 21 *Review of European, Comparative and International Environmental Law* 163; The Mary Robinson Foundation and the Centre for International Environmental Law 'Incorporating human rights into climate action data portal', <https://www.mrfcj.org/incorporating-human-rights-into-climate-action/> (accessed 10 November 2020).
- 61 Comoros 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21' submitted 8 November 2013 para 109, A/HRC/WG.6/18/COM/1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/185/29/PDF/G1318529.pdf?OpenElement> (accessed 10 November 2020).
- 62 Maldives 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 14 February 2020 paras 78-87, A/HRC/WG.6/36/MDV/1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/034/21/PDF/G2003421.pdf?OpenElement> (accessed 10 November 2020).

livelihood options.⁶³ Lesotho and Zimbabwe underlined concerns for agricultural production and food security.⁶⁴ Morocco pointed to climate mainstreaming in national frameworks on sustainable development and gender equality.⁶⁵ Nonetheless, whereas the significance of the UPR and special mechanisms has been recognised, their consideration of climate action generally is considered insufficient.⁶⁶

The UN Agenda 2030 Voluntary National Review

The Voluntary National Review (VNR) is a follow-up and review mechanism for tracking progress on the UN Agenda 2030 Sustainable Development Goals (SDGs).⁶⁷ Country reports are reviewed by the High-Level Political Forum on Sustainable Development (HLPF) under the auspices of the Economic and Social Council (ECOSOC).⁶⁸ Pertinently, SDG 13 relates to action to combat climate change and its impacts. Five targets have been identified under the Goal, notably, strengthening resilience and adaptive capacity to climate-related disasters; integrating climate change measures into policy and planning; building knowledge and capacity to meet climate change; implementing the UNFCCC; and promoting mechanisms to raise capacity for planning and management.⁶⁹

63 São Tomé and Príncipe 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 11 November 2015 para 98, A/HRC/WG.6/23/STP/1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/259/10/PDF/G1525910.pdf?OpenElement> (accessed 10 November 2020).

64 Lesotho 'National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 4 November 2019 para 46, A/HRC/WG.6/35/LSO/1, <https://undocs.org/A/HRC/WG.6/35/LSO/1> (accessed 10 November 2020); Zimbabwe 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 22 August 2016 para 125, A/HRC/WG.6/26/ZW E/1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/185/75/PDF/G1618575.pdf?OpenElement> (accessed 10 November 2020).

65 Morocco 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/2' submitted 20 February 2017 paras 28 & 50, A/HRC/WG.6/27/MAR/1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/037/94/PDF/G1703794.pdf?OpenElement> (accessed 10 November 2020).

66 See, eg, Amnesty International 'Environment and climate change issues and recommendations should be integral part of universal periodic review' Joint Oral Statement delivered during item 6 general debate in the 43rd session of the UN Human Rights Council on 15 June 2020, <https://www.amnesty.org/fr/documents/IOR40/2520/2020/fr/> (accessed 10 November 2020).

67 UN General Assembly 'Transforming our world: The 2030 Agenda for Sustainable Development' 21 October 2015, A/RES/70/1 (UN 2030 Agenda).

68 Paras 72-79 UN 2030 Agenda (n 67).

69 Goal 13 UN 2030 Agenda (n 67).

Whereas 46 African countries have thus far submitted VNRs, most have only recently started doing so. In the last five years only 15 African countries reported more than once.⁷⁰ Nonetheless, reporting under the procedure has provided the most comprehensive outlines of African states' climate action among the treaty-monitoring mechanisms.⁷¹

2.2 Support mechanisms

Since the adoption of the Paris Agreement, a proliferation of regional and international institutional programmes provide technical and financial support to African countries in respect of climate action, including NDC implementation, capacity building and monitoring and reporting.

2.2.1 Policy implementation

The United Nations Development Programme (UNDP) runs an NDC support programme providing technical assistance to countries in developing context-specific integrated climate and development solutions, facilitating knowledge sharing among actors at the regional level through the UNDP NDC Solutions Exchange and mobilising political ambition on climate action.⁷² The programme currently serves 11 African countries.⁷³ Furthermore, the German Ministry for the Environment, Nature Conservation and Nuclear Safety set up the NDC Cluster to support developing countries in the implementation of their NDCs. Eight

70 United Nations Department of Economic and Social Affairs High-Level Political Forum on Sustainable Development Voluntary National Reviews, <https://sustainabledevelopment.un.org/vnrs/> (accessed 10 November 2020).

71 See, eg, République du Bénin 'Contribution Nationale Volontaire à la Mise en Œuvre des ODD au Forum Politique de Haut Niveau' New York, Juillet 2020, https://sustainabledevelopment.un.org/content/documents/26282VNR_2020_Benin_Report.pdf (accessed 25 March 2021); Burkina Faso 'Rapport National Volontaire de Mise en Œuvre des Objectifs de Développement Durable (2016-2018)' Juin 2019, https://sustainabledevelopment.un.org/content/documents/23390Burkina_Faso_VNR_FINAL.pdf (accessed 25 March 2021); République du Burundi 'Rapport de l'examen national volontaire sur la mise en œuvre des objectifs de développement durable au Burundi' Avril 2020, <https://sustainabledevelopment.un.org/content/documents/26316RAPPORTDELAMISEENOEUVREDESODDsAUBURUNDI.pdf> (accessed 25 March 2021); République de la Côte d'Ivoire 'Rapport Volontaire d'Examen National de la mise en œuvre des objectifs de développement durable en Côte d'Ivoire' Juin 2019, https://sustainabledevelopment.un.org/content/documents/23327COTE_dIVOIRE_Draft_Rapport_VNR_CIV.pdf (accessed 25 March 2021).

72 UNDP 'NDC support programme', <https://www.ndcs.undp.org/content/ndc-support-programme/en/home/about/our-strategy.html> (accessed 10 November 2020).

73 As above.

African countries are currently part of the initiative. Notably, three of the five focus countries, namely, Kenya, Morocco and Ethiopia, benefiting from close engagement, are African.⁷⁴ The NDC Partnership, a network initiative hosted by the World Resources Institute and the German Office of the United Nations Climate Change, launched in 2016, consists of a coalition of governments and institutions aimed at knowledge sharing and policy coordination across countries. Twenty African countries are partners to the coalition. The National Adaptation Plan (NAP) Global Network, established in 2014, provides support to developing countries in accelerating their adaptation efforts and fosters south-south learning and exchange. It currently runs long-term in-country programmes in Côte d'Ivoire, Ethiopia, Ghana, Guinea, Togo, Uganda and South Africa.⁷⁵

2.2.2 Support on finance

The Africa NDC Hub, launched in 2017 by the African Development Bank (AfDB), is a platform providing financial support for NDC implementation in the context of sustainable development. It serves as a collaboration platform and resource pool geared towards fostering long-term climate action, mobilising means of implementation and promoting coordination, advocacy and partnerships. Its activities are coordinated through a secretariat hosted at the Climate Change and Green Growth Department of the AfDB. Furthermore, the African Risk Capacity (ARC) was established for assisting AU member states in building capacity and gaining access to finance for disaster risk management.⁷⁶ The ARC consists of a specialised agency supervising the development of ARC capacity and services and approving and monitoring the implementation of contingency plans and a financial affiliate acting as an insurance risk pool.

2.2.3 Transparency

The Africa Adaptation Initiative (AAI) was launched in 2015 by the African Ministerial Conference on Environment (AMCEN) to step up adaptation efforts on the continent, including addressing the adaptation financing gap, with flagship programmes in climate information services and risk transfer, the Lake Chad River Basin Early Warning System and knowledge

74 'NDC cluster focus countries', <https://www.ndc-cluster.net/focus-countries> (accessed 15 July 2021).

75 NAP Global Network 'In-country NAP support programmes', <https://napglobalnetwork.org/in-country-support-programs/> (accessed 15 July 2021).

76 Agreement for the Establishment of the African Risk Capacity (ARC) Agency (2016), <https://www.africanriskcapacity.org/wp-content/uploads/2016/11/AUDecisiontoEstablishARCSA-1.pdf> (accessed 10 November 2020).

management for adaptation planning in Africa. Climate Analytics, a Berlin-based organisation founded in 2008, provides independent science-based assessment tracking of countries' implementation of mitigation pledges, notably through the Climate Action Tracker. It currently conducts assessments of climate action in Morocco, Ethiopia, Kenya and South Africa.⁷⁷ Climate Watch, managed by the World Resources Institute, also provides datasets and country profiles tracking national commitments and progress.⁷⁸

3 The African Peer Review Mechanism and climate action: Current role

This part examines the current role of the APRM in climate action. It first provides an overview of the Mechanism, including its organisational structure, mandate, periodic review process and other procedures. It then describes the APRM's role in human rights. Finally, it gives an account of its current role in climate action, and identifies opportunities and challenges for an enhanced role.

3.1 An overview of the APRM

3.1.1 Governance and management

The APRM was created in a bid to advance the continent's socio-economic development through enhanced political and corporate governance practices.⁷⁹ Since its establishment in 2003, it has been recognised as a specialised agency of the AU in 2012.⁸⁰ The Mechanism is open to participation by AU member states through the submission of an expression of interest and the signing of a memorandum of understanding.⁸¹ Participation is granted upon the commitment to submit and facilitate

77 Climate Analytics 'Climate action tracker', <https://climateanalytics.org/what-we-do/climate-action-tracker/> (accessed 15 July 2021).

78 Climate Watch 'NDC tracker', <https://www.climatewatchdata.org/2020-ndc-tracker> (accessed 15 July 2021).

79 The New Partnership for Africa's Development: The African Peer Review Mechanism (APRM Base Document) adopted by the Assembly of Heads of State and Government at the 38th ordinary session of the Organisation of African Unity, Durban, South Africa, 8 July 2002, AHG/235 (XXXVIII) Annex II, <https://www.aprm-au.org/publications/partnership-for-africa-nepad-and-aprm/> (accessed 10 November 2020).

80 Decision on the Integration of the APRM into the African Union, 23rd ordinary session of the AU Assembly of Heads of State and Government, 26-27 June 2014, Malabo, Equatorial Guinea, Doc Assembly AU Dec 527 (XXIII).

81 APRM Base Document (n 79) para 5; Memorandum of Understanding on the African Peer Review Mechanism (2003) Doc NEPAD/HSGIC/03-2003/APRM/MOU.

periodic peer reviews,⁸² and implement review recommendations.⁸³ To date, it counts 40 participating states. Zimbabwe and the Seychelles are the latest to have acceded to the Mechanism in February 2020.

The APRM consists of four governing bodies. The highest decision-making body is the APR Forum, a committee of the Heads of State and Government of participating states.⁸⁴ It considers and adopts country review reports, submits recommendations to the head of state of the country subject to review and follows up on their implementation.⁸⁵ It meets at least twice a year in ordinary session.⁸⁶ Second, the Focal Points Committee, composed of representatives of Heads of State and Government, reviews the budget and work programme of the APRM and oversees processes for resource mobilisation through member states, partners and other donors.⁸⁷ Third, the APR Panel of Eminent Persons, comprising between five and nine African experts appointed by the APR Forum for a term of four years, oversees the review process to ensure its independence, professionalism and credibility, and appoints the country review teams.⁸⁸ The APR Secretariat provides technical, administrative and coordination support for the functioning of the APRM.⁸⁹ National APRM structures include a National Focal Point; the National Governing Council, comprising key governmental, civil society and private sector actors, which provides policy guidance for the implementation of the APRM; a National Secretariat; and national technical research institutions.⁹⁰

3.1.2 *Mandate*

The mandate of the APRM, as defined in its constitutive instrument, was to ensure that the policies and practices of states conform to the standards outlined in the Declaration of Democracy, Political, Economic and Corporate Governance.⁹¹ These standards, objectives and indicators

82 Para 5 APRM Base Document (n 79).

83 Statute of the African Peer Review Mechanism (APRM Statute) adopted at the 25th APR Forum, Nairobi, Kenya, <https://www.aprm-au.org/publications/statute-of-the-aprm/> (accessed 15 July 2021).

84 Art 9 APRM Statute (n 83).

85 Arts 9(9) & (10) APRM Statute (n 83).

86 Art 9(12) APRM Statute (n 83).

87 Art 10 APRM Statute (n 83).

88 Art 11 APRM Statute (n 83).

89 Art 12 APRM Statute (n 83).

90 Arts 14-18 APRM Statute (n 83).

91 New Partnership for Africa's Development: Declaration on Democracy, Political,

are defined under its four thematic focus areas, namely, democracy and political governance; economic governance and management; corporate governance; and socio-economic development. In 2017, further to the revitalisation of the mechanism, its mandate was further extended to include compliance with AU Agenda 2063 and UN Agenda 2030.⁹² Moreover, it was mandated to serve as an early warning tool for conflict prevention in Africa considering its synergies with the African Peace and Security Architecture and the African Governance Architecture.⁹³

3.1.3 Peer review process

Four categories of review can be conducted under the APRM.⁹⁴ A base review is undertaken immediately after a country accedes to the APRM. Thereafter a periodic review is held in two to four-year cycles. A review may also be requested by a participating state outside the framework of mandated reviews. In addition, a review may be commissioned by the APR Forum in instances of impending political and economic crisis in a participating state. The review process consists of a desk review, a country review visit and the development of a country review report, submitted to the APR Forum for adoption and the formulation of recommendations, and finally disseminated to key regional and sub-regional structures such as the Pan-African Parliament (PAP), the African Commission, the AU Peace and Security Council (PSC) and the AU Economic, Social and Cultural Council (ECOSOCC).⁹⁵

Economic and Corporate Governance adopted by the Assembly of the OAU Heads of State and Government at the 38th ordinary session, Durban, South Africa, 8 July 2002, Doc AHG/235 (XXXVIII) Annex II, <https://www.un.org/en/africa/osaa/pdf/aprm-declaration.pdf> (accessed 10 November 2020). The comprehensive body of relevant standards under each of the four areas of the Declaration were identified in 'Objectives, standards, criteria and indicators for the African Peer Review Mechanism' (2003), <https://www.aprm-au.org/publications/objectives-standards-criteria-and-indicators/> (accessed 15 July 2021).

92 Decision on the Revitalisation of the African Peer Review Mechanism, 28th ordinary session of the Assembly of the AU Heads of State and Government, Addis Ababa, Ethiopia, 30-31 January 2017, Doc Assembly/AU/Dec.631(XXVIII).

93 Decision on the Report of the African Peer Review Mechanism, 30th ordinary session of the Assembly of the AU Heads of State and Government, Addis Ababa, Ethiopia, 28-29 January 2018, Doc Assembly/AU/Dec.686(XXX).

94 Para 14 APRM Base Document (n 79).

95 Arts 18-25 APRM Base Document (n 79). The review process is further described in APRM 'Guidelines for countries to prepare for and to participate in the African Peer Review Mechanism', <https://www.aprm-au.org/publications/aprm-guidelines/> (accessed 15 July 2021).

The desk review involves the development of an issues paper by the APR Secretariat based on desk research, including relevant legislation, treaty ratifications and development plans; a country self-assessment questionnaire; and a national programme of action filled by national stakeholders of the country under review, identified by the APR Focal Point. The country review visit is a two to three week-long mission whereby a country review team, under the leadership of the APR Panel, conducts wide-ranging consultations with national stakeholders including the government, political parties, the media, academia and the private sector. Using the background study prepared by the APR Secretariat and further field information, the country review team produces a country review report which is discussed with the government. The latter's responses are appended to the report. The review report is sent to the APR Forum for consideration and formulation of recommendations to the government. The APR Forum engages in 'constructive dialogue'⁹⁶ with the government, whereby participating states deliberate to identify technical and financial support needs and solutions to assist the country to respond to the deficiencies highlighted in the report. The report is then made publicly available. After the country review, the country's plan of action is monitored by the Governing Council at the national level. Implementation or progress reports are submitted annually to the APR Secretariat.

3.2 The African Peer Review Mechanism and human rights

The APRM monitors compliance with a number of human rights instruments under its four thematic focus areas, namely, democracy and political governance, economic governance, corporate governance and socio-economic development.⁹⁷ It has been likened to other human rights-monitoring mechanisms such as the African Commission.⁹⁸ A rights-based approach has been further embedded in the Mechanism's purview following its integration as an autonomous entity within the AU system, its revitalisation and a growing recognition of its linkages with other human rights frameworks. The more recently adopted APRM Statute (2016) broadens the mandate of the APRM to include compliance with an expansive range of instruments:

96 The concept is further described under part 4.1.1.

97 The Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (n 91) includes reference to a comprehensive range of human rights instruments as well as questions relating to respect for human rights, the rule of law and democracy under the scope of the governance areas pertinent to the review process.

98 M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41, 55, 73.

The APRM has the mandate to promote and facilitate self-monitoring by the participating states, and to ensure that their policies and practices conform to the agreed political, economic, corporate governance and socio-economic values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance; and the African Charter on Democracy, Elections and Governance, as well as other relevant treaties, conventions and instruments adopted by participating states whether through the AU or through other international platforms.⁹⁹

The guiding principles explicitly include ‘good political, economic, social and corporate governance; democracy; the rule of law; respect for human rights; and peaceful resolution of conflicts’¹⁰⁰ and civil society participation.¹⁰¹ Furthermore, the first Ten-Year Implementation Plan of AU Agenda 2063 identifies APRM implementation as a key indicator of the second priority area ‘human rights, justice and the rule of law’ under Goal 11 ‘Democratic values, practices, universal principles of human rights, justice and the rule of law entrenched’.¹⁰² It is further recognised as a tool for accountability, communications and capacity building in the framework of the implementation of AU Agenda 2063.¹⁰³

3.3 The APRM and climate action

3.3.1 Expanded mandate

Among the salient measures taken to revitalise the APRM is its monitoring and evaluation role of AU Agenda 2063 and UN Agenda 2030.¹⁰⁴ Both development frameworks include climate action as priority goals. AU Agenda 2063 Aspiration 1 ‘A prosperous Africa based on inclusive growth and sustainable development’ underlines commitments for adaptation to climate change.¹⁰⁵

99 Art 4(1) APRM Statute (n 83).

100 Art 5(3) APRM Statute (n 83).

101 Art 5(4) APRM Statute (n 83).

102 AU Agenda 2063 ‘First ten-year implementation plan 2014-2023’ (2015) 69, <https://www.tralac.org/documents/resources/african-union/1135-agenda-2063-first-ten-year-implementation-plan-2014-2023/file.html> (accessed 15 July 2021).

103 AU Agenda 2063 Implementation (n 102) 87, 94, 95.

104 Decision on the Revitalisation of the African Peer Review Mechanism (n 93) paras 7(i) and (v).

105 African Union Commission ‘Agenda 2063 Framework Document’ (2015) 29, 30 & 34-35, <https://www.nepad.org/publication/agenda-2063-framework-document> (accessed 15 July 2021).

The Africa of 2063 envisioned under this aspiration is a prosperous continent where the citizens have a high standard of living, are well educated with a skilled labour force, transformed economies, productive agriculture and healthy ecosystems, with well-preserved environment and a continent resilient to climate change.

Aside from a goal, climate resilience features as a cross-cutting issue in the framework in view of Africa's marked vulnerability to climate impacts. It is described as a risk factor likely to affect the attainment of the Agenda goals,¹⁰⁶ notably a challenge for addressing hunger,¹⁰⁷ a threat to the blue economy¹⁰⁸ and peace and security.¹⁰⁹ AU Agenda 2063 also highlights capacity needs in climate action.¹¹⁰ Furthermore, as highlighted in the previous part, Sustainable Development Goal 13 of UN Agenda 2030 relates to climate action.¹¹¹ The expanded mandate of the APRM therefore now explicitly includes the review of climate action.

3.3.2 *Revised country self-assessment questionnaire*

The country self-assessment questionnaire¹¹² was revised following the extension of the APRM's mandate to reflect new standards, relevant to the targets of AU Agenda 2063 and UN Agenda 2030, under its focus areas. In the revised questionnaire¹¹³ climate action features under the broad-based sustainable socio-economic development and the corporate governance thematic focus areas. Under the former, countries are required to report on climate action in the context of 'environmental sustainability and accountability' by describing measures put in place for combating climate change, specifying, among others:

- protection of the environment with regard to the key objectives and action plans of the Johannesburg World Summit on Sustainable Development and the Kyoto Summit aimed at combating climate change;

106 Ch 5 Agenda 2063 Framework Document (n 105).

107 Agenda 2063 Framework Document (n 105) 53.

108 Agenda 2063 Framework Document (n 105) 69.

109 Agenda 2063 Framework Document (n 105) 82.

110 Agenda 2063 Framework Document (n 105) 127.

111 UN Agenda 2030 (n 68) Goal 13.

112 'Country self-assessment questionnaire for the African Peer Review Mechanism', https://sarpm.org/documents/d0000974/P1092-APRM_questions.pdf (accessed 15 July 2021).

113 'Revised country self-assessment questionnaire for the African Peer Review Mechanism', <https://www.aprmtoolkit.saiia.org.za/documents/official-documents/456-revised-aprm-questionnaire/file> (accessed 15 July 2021) (revised assessment questionnaire).

- implementation of bold policies for diversification of energy sources, using renewable energies such as biomass, solar and facilitating their access by the majority of citizens from all social backgrounds.¹¹⁴

The call for measures that consider ‘citizens from all social backgrounds’ in the thematic area underscores the sensitivity of the APRM to respond to equity concern in climate change.

Under the corporate governance thematic area, question 3 deals with the following: ‘How are organisations complying with environmental regulations in your country and conducting business in an environmentally friendly manner?’ Also, under the objective ‘Ensuring that organisations act as good corporate citizens’, information is required on the measures adopted by organisations to address climate change or for the control of carbon trading and emissions.¹¹⁵

An analysis of the country review process after the revitalisation reforms of the APRM¹¹⁶ reveals reference to climate risks and impacts, without adequate formulation of climate action measures. The first country review report for Uganda in 2008 had identified climate change as a significant challenge to be addressed by the government.¹¹⁷ Upon its second review, the country self-assessment for Uganda in 2017 highlighted the effects of climate change on food insecurity, disease prevalence, land degradation and soil erosion.¹¹⁸ The country review mission noted the impact of climate change on resource availability for ethnic minorities.¹¹⁹ The APR Panel recommended that more efforts are made towards durable solutions to climate change through global arrangements.¹²⁰ Uganda’s updated national plan of action does not identify relevant activities undertaken in the fulfilment of climate-related objectives.¹²¹ It remains otherwise difficult to assess the scope of review of climate action in recent

114 Revised assessment questionnaire (n 113) 78.

115 Revised assessment questionnaire (n 113) 68.

116 The Uganda Country Review Report is the only post-2017 review report made publicly available.

117 APRM ‘Country Review Report No 7: Republic of Uganda’ (January 2009) (Uganda Country Review Report) paras 805 & 807, <https://www.aprm-au.org/publications/country-review-report-no-7-uganda/> (accessed 15 July 2021).

118 Cited in APRM ‘Second country review report: Republic of Uganda’ (January 2018) para 529, <https://www.aprm-au.org/publications/uganda-second-country-review-report/> (accessed 10 November 2020) (Uganda 2nd Report).

119 Para 170 Uganda 2nd Report (n 118).

120 Para 533 Uganda 2nd Report (n 118).

121 Uganda Country Review Report (n 116) Annex II, 438, 439, 470.

country reviews or implementation progress reports due to delays in the publication of reports.¹²²

4 The African Peer Review Mechanism and climate action: Opportunities and challenges for an expanded role

This part describes the opportunities and challenges for an enhanced role of the APRM in climate action monitoring and reporting. It sets out the features making the APRM a particularly compelling stakeholder in climate action monitoring and reporting and highlights the relevant procedures for achieving a more active role, while identifying prevailing challenges.

4.1 Opportunities for an expanded role

The APRM country review process shares some similarities with the current climate paradigm, notably, NDC implementation and the enhanced transparency framework. Akin to the Paris regime, the APRM process is country-driven and lays special emphasis on national ownership and leadership. It also supports constructive dialogue and participatory approaches along with other procedural avenues, which are all opportunities for the APRM for an expanded role on climate reporting and monitoring.

APRM reviews draw from country self-assessments, nationally-defined and updated programmes of action. The principle of differentiated capacities and progress timeframes is embedded in the APRM's operational framework:¹²³

Given the differences of historical context and stages of development, countries will start from different base lines, and will not be expected to reach their highest level of performance at the same time. The rate of progress will also depend critically on the level of commitment and political will of each country to take deliberate steps to realise its vision.

122 The lack of access to information in APRM implementation has on numerous occasions been criticised. See eg Manby (n 24) 28; Y Turianskyi 'African peer review: Progress is being made, but there are problems' *The Conversation* 12 March 2019, <https://theconversation.com/african-peer-review-progress-is-being-made-but-there-are-problems-113048> (accessed 10 November 2020).

123 Para 1.4 Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (n 91).

In practice, this is reflected in the provision for a base review within 18 months of the accession of a new participating state, which allows the country to develop its plan of action based on its particular circumstances.¹²⁴ Participation in APRM review processes would therefore be particularly apt to refine and sophisticate African states' implementation of NDCs and transparency-related obligations under the Paris regime. In this wise, the participation of vulnerable populations disproportionately affected by climate change is crucial as it will enable them to share their lived experiences in relation to climate change and how they wish it to be addressed, a possibility that can bring climate justice and human rights to the centre of the process.

Also, a similar feature to the Paris regime is the APRM's leaning to capacity building and support needs. The review process rests on 'constructive dialogue' among participating states: 'Participating countries will encourage and support each other and exercise constructive peer dialogue and persuasion where necessary to ensure that all countries achieve full compliance by a mutually agreed date.'¹²⁵ In fact, ARM Forum deliberations on country review reports often involve discussions of the financial support needs of countries for the implementation of targets and the identification of appropriate financial options. The opportunity for peer exchange on shared challenges, solutions and climate data, through 'constructive dialogue', would also be beneficial to consolidate the African common position on climate change, especially on red-line issues such as loss and damage and compensation.

As described in the introduction to this chapter, climate transparency-related capacity building hinges upon governance and information requirements. Weak governance systems and the lack of political will have proven to hinder NDC implementation and monitoring and reporting on climate commitments. As a mechanism seeking to enhance governance practices across the continent, the APRM would be useful for understanding country-specific structural issues impeding progress.

Civil society participation constituting one of its guiding principles,¹²⁶ hence the APRM process provides the rare opportunity for a multi-stakeholder approach to climate action monitoring and reporting.

124 Para 17 APRM Base Document (n 79).

125 Para 1.4 Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (n 91).

126 Para 1.3 Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (n 91); APRM Guidelines for countries to prepare for and to participate in the African Peer Review Mechanism (n 95) para 13.

Prepared under the guidance of the NGC, numerous national actors are involved in the development of the country self-assessment, including national research institutions.¹²⁷ Country review visits also include consultations with civil society organisations and the private sector.¹²⁸ The participation of various stakeholders in the review process promotes enhanced synergies, likely to boost coordination and coherence in climate action and mainstream human rights implications in the review. Other procedures under the APRM can be relevant in further integrating climate action monitoring and reporting. These include targeted thematic reviews, capacity building and early warning.

The APRM undertakes targeted reviews on specific governance topics in countries. In 2019, for instance, Senegal and Djibouti underwent reviews focusing on mineral resources at the heart of the restructuring of the Senegalese economy and matters relating to decentralisation in Djibouti respectively.¹²⁹ The APRM has identified climate action as a crucial parameter for transformative leadership in Africa;¹³⁰ thematic reviews could serve to further glean relevant issues and measures. The APRM's long-standing partnership with other review mechanisms makes it a strategic actor on climate action monitoring and reporting amidst various international mechanisms. In 2018, for instance, the APRM participated in the UN High-Level Political Forum for the preparation of UN Agenda 2030 VNRs.¹³¹ In this respect, it could play an enhanced role in building countries' technical capacities in implementing national monitoring and reporting mechanisms.

In addition, the PSC has recognised the nexus between climate change and peace and security in Africa. It recently urged the AUC to reinforce climate action mainstreaming in its activities, particularly in early warning and prevention of conflicts and violent crises.¹³² As the APRM has been

127 Revised Assessment Questionnaire (n 113) 3.

128 APRM Base Document (n 79) para 18.

129 APRM 'Annual Continental Report 2018' para 10, <https://www.aprm-au.org/wp-content/uploads/2019/08/APRMANNUALREPORT2018.pdf> (accessed 10 November 2021).

130 APRM & AGA 'The Africa governance report: Promoting African Union shared values' (2019), https://au.int/sites/default/files/documents/36418-doc-eng_the_africa_governance_report_2019_final-1.pdf (accessed 15 July 2021), ch 3 Transformative Leadership 23.

131 Para 31 APRM Annual Continental Report (n 129).

132 PSC 'Report of the PSC on its activities and the state of peace and security in Africa, for the period from February 2019 to February 2020' 33rd ordinary session, 9-10 February 2020, Addis Ababa, Ethiopia, para 208.

mandated to serve as the early warning tool for conflict prevention,¹³³ it would need to undertake a systematic review of climate risks and impacts.

4.2 Challenges against an expanded role

Despite the opportunities, a number of challenges currently preclude a more active role of the APRM in climate action monitoring and reporting. These include the framing of climate issues, the absence of a regional climate instrument, and the lack of effective APRM implementation.

The two tools for facilitating climate action monitoring and reporting in country reviews, the country-self assessment questionnaire and the plan of action, currently do not sufficiently integrate climate action. The latter constitutes only a minor, barely discernible, indicator within environmental management,¹³⁴ neither is it featured among examples of cross-cutting issues, which countries are encouraged to describe in a stand-alone chapter to their self-assessments, and build into their responses under every thematic area.¹³⁵ For the APRM to complement national monitoring and reporting on climate action, climate action should be made more prominent, and relevant targets and indicators, drawn from UN Agenda 2030 SDG 13 and AU Agenda 2063, could be formulated to urge and further enable countries to formulate pertinent responses and actions.

As underlined in part 3.2, the APRM is mandated to review compliance with an expansive range of instruments, including treaties adopted through the AU and other international platforms. Since the APRM is recognised as an AU entity, a regional climate instrument defining relevant state duties would further justify a review of its implementation and allow for further climate action monitoring and reporting. Moreover, even after its revitalisation, concerns over the slow pace of the Mechanism persist. Country reviews continue to be delayed and inconsistent. Nonetheless, the APRM's growing membership and steady political support point to its enduring relevance in the region. The APRM should build upon this momentum, review targets reached under its revitalisation programme for restoration, reinvigoration and renewal and revisit strategic orientations.¹³⁶

133 Decision on the Report of the African Peer Review Mechanism (n 80).

134 Revised Assessment Questionnaire (n 113) 78.

135 Revised Assessment Questionnaire (n 113) 5.

136 'APRM Strategic Plan 2016-2020', <https://www.aprm-au.org/publications/aprm-strategic-plan-2016-2020/> (accessed 15 July 2021).

5 Conclusion

The chapter sought to appreciate the role of the APRM in climate action and determine its prospects as a regional body for enhancing capacity for as well as complementing climate action monitoring and reporting in Africa. It first outlined the climate action monitoring and reporting landscape in Africa, providing a snapshot of national, regional and international mechanisms relevant to African countries. National mechanisms, while underscored in national policies, are not widely implemented. The regional climate regime is fragmented at best, and the lack of a regional treaty as well as the absence of the elaboration of the link between human rights and climate change by the African Commission preclude the setting up of a robust regional mechanism for monitoring and reporting climate action. A number of support mechanisms assist countries in policy implementation and, financing and tracking progress on commitments. However, such support is available to some countries only and can only go so far, if governance systems in climate action remain weak. While at the time of the establishment of the APRM as an initiative tuned to development in Africa, climate action was not foreseen as a priority area, the more recent expansion of its mandate and the recognition of the nexus between development and climate resilience have brought about a definite opportunity for review of climate action by the APRM. The most recent country review report published indicates that climate action has still not featured sufficiently in the country self-assessment, national programme of action or recommendations.

The APRM can be a useful tool for climate action monitoring and reporting, as it mirrors mechanisms under the current international climate architecture. The APRM review process is country-driven and relies on nationally-defined implementation plans and timelines. It is also geared towards capacity building and early warning. In addition to country reviews, the APRM could further mainstream climate action in its thematic reviews, emphasise issues of significance to climate justice and human rights, act as a partner in designing and setting up national monitoring and reporting mechanisms and reinforce its monitoring mandate in the context of the peace and security-nexus.

PART III:

**Domestic regulatory frameworks on
climate change and emerging jurisprudence**

8

CLIMATE FINANCE IN AFRICA THROUGH A HUMAN RIGHTS LENS: A CASE STUDY OF THE TURKANA PEOPLE IN KENYA

Attiya Waris, Afshin Nazir and Parita Shah

Abstract

For decades, climate change has been perceived as a purely environmental problem, but a variety of recent events have made it clear that this is not the case. The problem has an impact on multiple areas, including finance and human rights. Although the majority of the emissions that contribute to climate change are from developed countries, it is the developing countries, especially those from Africa, that are the most vulnerable to the impacts of climate change. Despite this reality, literature on the human rights implications of climate change in Africa remains uncharted. This chapter seeks to remedy the situation by examining the effects of climate change in Africa through a human rights lens, with a special focus on the Turkana region in Kenya as it is one of the areas worst hit by climate change in Africa. The chapter explores the linkages between climate change, finance and human rights for the Turkana people.

Key words: *climate; finance; climate change; human rights; indigenous people; Turkana; Kenya*

1 Introduction

One of the severe threats facing humanity today is climate change. The impact of climate change is more visible today than it was in the past. Scientists had decades ago prognosticated the harm that the continued combustion of fossil fuels would cause to the environment and human beings. However, these warnings continue to be unheeded in search of greater profits. Until recently, climate change has been perceived to be a purely environmental problem. However, with the Planetary and One Earth Approach, it has been proven that climate change has a wider impact, including that on human rights and the economy.¹

To combat climate change, financial support and resource mobilisation are key, especially in developing countries. The aim is to enable vulnerable communities to be uplifted from poverty and enhance their human rights.

1 S Harrison et al 'EcoHealth and One Health: A theory-focused review in response to calls for convergence' (2019) 132 *Environment International* 105.

In many countries it has been observed that the top-down climate finance interventions do not include local stakeholders, resulting in the failure to sustain climate finance projects.² Local communities most often are not aware of the climate policy due to uneven access to information. Research has indicated that most of the vulnerable livelihoods, such as pastoralism and fishing, are at high risk partly due to misunderstanding, inappropriate or unfair application of laws by the state.³ It has also been observed that due to remote locations and weak community organisations, the fear factor as well as the lack of confidence make it difficult for these communities to demand their rights.⁴

Climate finance has often been an issue globally including at international climate negotiations. Climate support is formulated based on human rights, poverty and principles of development. Support for climate finance is a mechanism aimed at adapting best practices for agriculture and livestock rearing amid climate change, going green through the use of renewable energy and practising afforestation and reforestation programmes. Communities are either assisted through education and awareness, credit facilitation or reduced prices of seeds and other accessories. The Paris Agreement of 2015 acknowledges the link of human rights to climate change as follows:⁵

Acknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

The Paris Agreement is being linked to international laws that are already in existence and is captured into individual country laws for implementation with a special emphasis on the relationship between climate change and human rights. The Agreement reflects on the human rights elements of access to a safe and clean environment, which

- 2 H Reid et al 'Vulnerable communities: climate adaptation that works for the poor' November 2015, IIED Briefing <http://pubs.iied.org/17329IIED> (accessed 16 June 2021).
- 3 IPCC 'Fifth assessment report: Impacts, adaptation, and vulnerability' (2014), <https://www.ipcc.ch/assessment-report/ar5/> (accessed 16 June 2021).
- 4 Reid et al (n 2).
- 5 Paris Agreement under the United Nations Framework Convention on Climate Change 2015, FCCC/CP/ 2015/L.9/Rev.1. adopted by Conference of the Parties, 21st session Paris, 30 November-11 December 2015 Preamble.

include food, water, health and shelter, all of which are a component of ecosystems and depend on the climate for their functioning and continuous provision. These rights have been provided for under the international human rights instruments, including the Universal Declaration of Human Rights (Universal Declaration);⁶ International Covenant on Civil and Political Rights (ICCPR);⁷ the Constitution of the World Health Organisation;⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹ Furthermore, the Committee on Economic, Social and Cultural Rights (ESCR Committee) has stated that the right to health 'extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and portable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.'¹⁰ At the continental level, the African Charter on Human and Peoples' Rights (African Charter) provides for the right to a safe environment,¹¹ including socio-economic rights such as the right to health.¹² The Sustainable Development Goals (SDGs) of the United Nations (UN) also reflect on climate action as a strategy to combat the inevitable changes affecting the environment and people. SDG 13 on climate action requires countries to take steps to combat the climate crisis.¹³ Target 13A highlights the importance of finance in this regard. It focuses on the implementation of the commitment undertaken by developed country parties to the United Nations Framework Convention on Climate Change (UNFCCC) to mobilise US \$100 billion by 2020 to address the needs of developing countries and to operationalise the Green Climate Fund (GCF).¹⁴

6 UN General Assembly Universal Declaration of Human Rights 217 A (III) (10 December 1948).

7 International Covenant on Civil and Political Rights 999 UNTS 171, 19 December 1966 (entered into force 23 March 1976) art 6.

8 Constitution of the World Health Organisation (1 November 1946).

9 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3, 6 ILM 360, 16 December 1966 (entered into force 3 January 1976) art 12.

10 ESCR Committee General Comment 14 'The right to the highest attainable standard of health (art 4)', E/C.12/2000/4.

11 OAU African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 ILM 58, 27 June 1981 (entered force 21 October 1986) art 24.

12 Art 16 African Charter Charter.

13 UNDP 'Goal 13: Climate action', <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-13-climate-action.html> (accessed 16 March 2021).

14 OECD and Climate Policy Initiative 'Climate finance in 2013-14 and the USD 100 billion goal' (2015).

With the ongoing climate crisis and the certainty of the reports of the Intergovernmental Panel Climate Change (IPCC) on the anthropogenic effects of climate change, it is unacceptable that the voices of the vulnerable are not being heard. This was put across in 2007 by the then President of the Republic of the Maldives, Maumoon Gayoom, at the Royal Commonwealth Society meeting where he highlighted the plight of climate change on the vulnerable communities by asking: ‘Is there a right to a safe environment?’¹⁵ The whole predicament revolves around the way in which to bring greater resilience to climate change on vulnerable communities by keeping human rights as a lens to offer climate finance as a solution in order to help in the transition of communities that are at the forefront of vulnerability to climate change.

In line with this, the chapter discusses the link between climate finance and human rights with a focus on the Turkana people of Kenya. The Turkana people have been selected based on their location in an arid and semi-arid region and deforested area and with an economy that is mainly dependent on pastoralism, and the community’s vulnerability to climate change. The Turkana people have become victims of climate change with consistent droughts despite various measures to overcome this problem. One such measure was to provide them with water by way of boreholes. However, the reality is that this water infrastructure was provided to the community without their involvement. This has led to greater challenges as the borehole water have high levels of fluoride resulting in skeletal fluorosis.¹⁶ This is indicative of the lack of public participation in addressing their needs.

The chapter is divided into four parts. Part 1 introduces the issue. Part 2 delves into the nexus between climate change, finance and human rights. Part 3 explores climate finance in Kenya and the plight of the Turkana people. Part 4 sets out the recommendations and provides a conclusion.

2 Climate change, finance and human rights nexus

Climate change, human rights and finance are inextricably linked, owing to the fact that there is a link between climate change and finance to human rights. Climate change is related to human rights as it affects communities

15 M Gayoom ‘Speech by His Excellency Mr Maumoon Abdul Gayoom, President of the Republic of Maldives, “Is there a right to a safe environment” at the Royal Commonwealth Society’ 17 July 2007, <https://presidency.gov.mv/Press/Article/21937?term=5> (accessed 12 March 2021).

16 G Fabreau et al ‘Skeletal fluorosis in a resettled refugee from Kakuma refugee camp’ (2019) 393 *Lancet* 223.

and individuals and their basic rights such as those to food, water, shelter and health, and climate finance is needed to assist vulnerable communities with the effects of climate change by helping them to enjoy their basic rights, which are factored into human rights.

To assist in combating climate change, empower disadvantaged populations to cope with disproportionate impact of climate change and achieve human rights, finance is a key measure. Financing will help vulnerable communities to adapt to climate change and ensure that all people enjoy their human rights by obtaining the basics for a decent living. Climate finance was adopted at the Convention on Climate Change in Rio de Janeiro in 1992 where it was agreed that developed countries would contribute financially towards climate adaptation in developing countries.¹⁷ In 2009 at the Climate Change Summit in Copenhagen, developed countries promised to provide \$30 billion for the period of 2010 to 2012 and by 2020, they were expected to have contributed \$100 billion towards supporting climate finance.¹⁸ At the Paris Agreement of 2015, middle-income countries, namely, South Korea, Mexico and Chile, also joined the donor country list to financially support developing countries to combat the impacts of climate change.¹⁹ Climate finance indicates alignment with the principles of ‘common but differentiated responsibility’ and the polluter-pays principle.²⁰ International advocacy organisations and developing countries have argued that developed countries emitting large quantities of greenhouse gases into the atmosphere owe developing countries a climate debt, which can be paid through climate finance and a reduction in emissions.²¹ Hence, they ought to take the lead in climate finance. The basis for this assertion is that developed countries have emitted more than their fair share of greenhouse gas emissions into the atmosphere, which are now constraining the ability of poorer developing countries to develop, the latter being particularly vulnerable to the impacts of climate change.²² Reduced emissions and climate finance, therefore, can aid developing countries to put in place adaptation and mitigation mechanisms and technologies.²³

17 AS Kyrkan ‘International climate finance from a human rights perspective policy brief’ February 2020, https://www.svenskakyrkan.se/filer/8385_SK20032-MR-och-klimatfinansiering-eng_utskrift.pdf?id=1997150 (accessed 21 March 2021).

18 As above.

19 Gayoom (n 15).

20 J Pickering & C Barry ‘On the concept of climate debt: Its moral and political value’ (2012) 15 *Critical Review of International Social and Political Philosophy* 667.

21 As above.

22 As above.

23 As above.

Although there is no universally-agreed upon definition of climate finance, it can be described as ‘local, national or transnational financing – drawn from public, private and alternative sources of financing – that seeks to support mitigation and adaptation actions that will address climate change’.²⁴ Kenya’s Climate Change Act defines climate finance as ‘monies available for or mobilised by government or non-government entities to finance climate change mitigation and adaptation actions and interventions’.²⁵ The alternative sources of finance are key as they bring in more funds. This is mainly channelled through bilateral support from one country to the other or through multilateral support where a country channels funds to a global development bank or funds with an aim to provide climate support for developing countries. Multilateral support is done through organisations such as the UN and the World Bank that have environmental funds, such as the GCF, Global Environment Facility (GEF) and the Adaptation Fund.²⁶ The donor countries are eager to have different types of flows in the definition of climate finance which include loans, aid, export credit and guarantees. At the same time, recipient countries are pushing for the inclusion of the principle of additionality so that climate finance would consist of new funds in addition to aid.²⁷

The Paris Agreement encourages developing country parties to mobilise climate finance from different sources, instruments and channels.²⁸ Article 11 highlights facilitation of access to climate finance as an effective climate change action that developing country parties – especially those with the least capacity and greater vulnerability to the negative impacts of climate change – should take. Climate finance is essential as adaptation and mitigation measures are becoming increasingly urgent, and mobilisation of funds is required to put such measures in place.²⁹ The United Nations Environment Programme (UNEP) estimates the cost of adaptation measures in developing countries to amount to between US \$140 billion and US \$300 billion annually by 2030.³⁰

Climate finance should adhere to the notion of justice to ensure social welfare. Ibn Khaldun, a North African scholar, advocates social

24 UNFCCC ‘Introduction to climate finance’, <https://unfccc.int/topics/climate-finance/the-big-picture/introduction-to-climate-finance> (accessed 12 March 2021).

25 Sec 2 Climate Change Act 11 of 2016.

26 Kyrkan (n 17).

27 As above.

28 Art 9(3) Paris Agreement (n 5).

29 UNEP ‘The adaptation finance gap report’ (2016), <https://wedocs.unep.org/handle/20.500.11822/32865?show=full> (accessed 21 March 2021).

30 As above .

welfare through fairness and justice. In this regard, he states that ‘making decisions and dispensing justice ... in all actions brings well-being to the subjects’.³¹ Modern scholars and laws surrounding climate finance echo this proposition. Waris, for instance, includes fairness and justice in her formulation of the principles of fiscal legitimacy.³² The Kenyan Constitution sets out principles of public finance including public participation, fairness, equitable development through special provision for marginalised groups and areas, among others.³³ Similarly, some of the guiding principles under the National Policy on Climate Finance include inclusiveness, equitable access to finance, equal benefit sharing, environmental and social protection, sustainable development and special needs and circumstances.³⁴ These laws will be discussed further in subsequent parts of this chapter.

Regarding the link between finance and human rights, Waris postulates that tax scholars seldom refer to human rights, and human rights scholars largely ignore fiscal requirements for the realisation of human rights. She calls for the application of human rights in the redistribution of fiscal resources in a state.³⁵ This is an indicator that the link between finance and human rights often is ignored. Human rights require public financing, although it has been argued that social and economic rights require more funding than civil and political rights.³⁶ Socio-economic rights, which are achieved progressively and require the allocation of financial resources, are more affected by climate change. Waris and Latif assert that three major steps are necessary in the progressive realisation of socio-economic rights, namely, the enactment of legislation, the allocation of adequate financial resources, and the setting up of the required infrastructure. They further posit that states misinterpret the concept of progressive realisation as an obligation they should fulfil once they acquire adequate resources. However, they are required to take appropriate steps immediately to ensure the fulfilment of these rights.³⁷ Additionally, states must prioritise

31 I Khaldun *The Muqaddimah* (2015).

32 A Waris ‘Developing fiscal legitimacy by building state-societal trust in African countries’ (2018) 4 *Journal of Tax Administration* 103.

33 Art 201 Constitution of Kenya 2010.

34 Republic of Kenya ‘National policy on climate finance’ December 2016, <http://www.environment.go.ke/wp-content/uploads/2018/05/The-National-Climate-Finance-Policy-Kenya-2017-1.pdf> (accessed 21 March 2021).

35 A Waris *Tax and development: Solving Kenya’s fiscal crisis through human rights: A case study of Kenya’s constituency development fund* (2013).

36 A Waris ‘Taxes, tax injustice and the fight against inequality: An African perspective’ (2020) *Os Impostos e o combate as desigualdades* 43.

37 A Waris & LA Latif ‘Financing the progressive realisation of socio-economic rights in Kenya’ (2015) 8 *University of Nairobi Law Journal* 1.

protection of the poor, marginalised and disadvantaged.³⁸ According to the authors,

the Committee on [ESCR] has vide its General Comment No 3 ... reiterated the minimum core obligation of all states parties to ensure the satisfaction of, at the very least, minimum levels of each of the rights. This imposes on Kenya an immediate obligation as far as realisation of the minimum levels [of] socio-economic rights by those who are most (or totally) deprived are concerned.

The realisation of socio-economic rights, therefore, should not be disregarded due to the 'limitation of resources' argument. Fiscal discussions should engage human rights issues, as well as climate issues, as the realisation of human rights and the subsequent alleviation of the condition of groups such as the Turkana require financial muscle.

In 2017 the United Nations Human Rights Council³⁹ and the United Nations Office of the High Commissioner for Human Rights (OHCHR)⁴⁰ called for the consideration of climate finance concerns through a human rights lens. This is important as climate finance projects are not always flawless. For example, a financed renewable energy plant, which is a form of climate change response, may lead to the displacement of local communities and a breach of their rights to food and livelihood. All climate action measures, including climate finance, therefore, need to consider the impact of projects on local communities and their human rights. A human rights-based approach is important for numerous reasons: first, it assists in circumventing the risk that climate finance is used to support projects that contribute to or result in human rights violations;⁴¹ second, it ensures policy coherence as governments' obligations under the international human rights framework extend to climate action and climate finance;⁴² third, it takes into account the complete picture as it considers the impacts of projects on vulnerable and marginalised groups, which promotes equitability and sustainability as marginalised groups are not further exposed to poverty and discrimination;⁴³ fourth, it promotes

38 As above.

39 UNGA Review of progress in the implementation of the right to development 'Promoting rights-based climate finance for people and planet' A/HRC/WG.2/19/CRP.4, 18 April 2018, https://www.ohchr.org/Documents/Issues/Development/Session19/A_HRC_WG.2_19_CRP.4.pdf (accessed 21 March 2021).

40 OHCHR & Heinrich Böll Stiftung North America 'Promoting rights-based climate finance for people and planet', https://us.boell.org/sites/default/files/promoting_rights-based_climate_finance_for_people_and_planet.pdf (accessed 21 March 2021).

41 UNGA Review (n 39).

42 As above.

43 As above.

public support for climate finance projects; fifth, it fosters climate justice;⁴⁴ and, finally, it helps to unpack the rights and responsibilities of various actors with regard to climate finance.⁴⁵

3 Kenya and the Turkana people

Kenya receives international climate finance from at least 15 different public agencies, including the World Bank and the African Development Bank (AfDB).⁴⁶ The main sources under the financial mechanism of the UNFCCC include the Green Climate Fund (GCF) and the Global Environment Facility (GEF).⁴⁷ Other mechanisms under the UNFCCC include the Special Climate Change Fund (SCCF), the Adaptation Fund and the REDD+ mechanism.⁴⁸ The country is a recipient of climate finance readiness support from the Africa Climate Change Fund (ACCF) of the AfDB. There are also other bilateral financial partners supporting climate change activities in Kenya. Some major partners are the United Kingdom's Department for International Development (DFID); the German International Development Agency (GIZ); and the Swedish International Development Co-operation Agency (SIDA), among a few others.⁴⁹

At the global level, Kenya has ratified the Paris Agreement which provides a basis for climate finance.⁵⁰ Article 11 highlights the facilitation of access to climate finance as an effective climate change action that developing country parties – especially those with the least capacity and greater vulnerability to the negative impacts of climate change – should take. Kenya is one such country as 85 per cent of its land mass is vulnerable to the effects of climate change.⁵¹ At the continental level, Kenya is part

44 OHCHR 'Key messages on human rights and climate change', https://www.ohchr.org/Documents/Issues/ClimateChange/keyMessages_on_HR_CC.pdf (accessed 21 March 2021).

45 UNGA Review (n 39).

46 National Policy on Climate Finance (n 34).

47 Republic of Kenya 'National Climate Change Action Plan (NCCAP) 2018-2022: Volume I' (2018).

48 As above.

49 NCCAP (n 47) 14.

50 Ministry of Environment and Forestry 'Kenya ratifies Paris Agreement on climate change', <http://www.environment.go.ke/?p=3001> (accessed 18 November 2020).

51 P Odhengo et al 'Climate finance in Kenya: Review and future outlook' August 2019, <https://www.adaconsortium.org/index.php/component/k2/item/397-climate-finance-in-kenya-review-and-future-outlook> (accessed 21 March 2021).

of the AU which has formulated the AU-Agenda 2063.⁵² This Agenda is committed to mobilising funding streams to support member countries in their efforts to address climate change.⁵³ Regional financial bodies, including the AfDB and East Africa Development Bank, also play an imperative part by financing sustainable management of natural resources and sustainable infrastructure. The AfDB has developed a framework to engage in fostering climate action to support Africa's transition towards green growth.⁵⁴ At the regional level, Kenya is part of the East African Community (EAC) which developed a Climate Change Policy and Strategy 2010 which, among other items, explores the establishment of an alliance on climate finance.⁵⁵

3.1 Policy and legal frameworks on climate finance in Kenya

At the national level, climate finance has trickled down into a plethora of laws, policies and documents. The most important are discussed below.

3.1.1 Constitution of Kenya 2010

The Constitution of Kenya provides for principles of public finance, including openness; accountability; public participation; fairness; equitable development through special provision for marginalised groups and areas; responsible financial management; and clear fiscal reporting.⁵⁶ The application of these principles also extends to climate finance matters.

3.1.2 Climate Change Act 2016

The Climate Change Act constitutes the main legal framework to address climate change issues in the country.⁵⁷ The Act provides for the mobilisation of funds from different streams and sets out structures to devolve these funds to county level. The Act defines climate finance and provides for the Climate Change Fund as a financing mechanism for climate change actions which are approved by the National Climate Change Council.⁵⁸ The Council administers the Fund, while the principal secretary for climate change affairs manages it. The Fund is vested in the

52 Agenda 2063: The Africa we want', https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf (accessed 20 January 2022).

53 As above.

54 Odhengo et al (n 51).

55 NCCAP (n 47) 36.

56 Art 201 Constitution of Kenya.

57 Climate Change Act (n 25).

58 Secs 5 & 25 Climate Change Act.

national treasury and the following monies are directed towards it: monies appropriated from the Consolidated Fund; donations, endowments, grants and gifts; and monies under an Act payable to the Fund.⁵⁹ The Council is also responsible for the approval of funding requests and decision making on funding allocation.⁶⁰ The Act provides that the Fund can be used for the following purposes: the provision of grants for climate change research and innovation; the provision of grants and loans to various stakeholders for the development of innovative initiatives to benefit Kenya's climate change responses; financing of climate change adaptation and mitigation actions through grants and loans; and the provision of technical assistance to county governments.⁶¹

3.1.3 National Policy on Climate Finance 2018

The National Policy on Climate Finance recognises that climate finance is an imperative tool to advance Kenya's Vision 2030 by increasing adaptive capacity and resilience to climate change, and fostering low carbon growth. The policy aims to assist in the achievement of Kenya's national goals by enhancing the mobilisation of climate finance. The policy elaborates on what it constitutes – budget allocations, grants, loans, private sector investment and climate change funds – and highlights tools that the government possesses to generate carbon finance.⁶² To ensure policy coherence, it lists out guiding principles that are based on the entire legal framework surrounding climate change, including transparency and accountability; inclusiveness; equitable access to finance; effectiveness; predictability; equal benefit sharing; environmental and social protection; sustainable development; and special needs and circumstances. Human rights are expressly mentioned at only one point in the policy. Under the legal basis of the policy, the provisions of the Constitution on the rights to health, water, food and a clean and healthy environment are discussed. It is then acknowledged that climate finance investments are necessary as these rights are connected to adaptation and mitigation needs.⁶³ This reinforces the proposition discussed in part 2 that climate change, finance and human rights are interlinked.

59 Secs 25(2) & 25(3) Climate Change Act (n 25).

60 Sec 25(6) Climate Change Act.

61 Sec 25(8) Climate Change Act.

62 National Policy on Climate Finance (n 34).

63 As above.

3.1.4 National Climate Change Action Plan 2018-2022

The National Climate Change Action Plan focuses on resource mobilisation for climate finance to ensure its availability for key sectors, and for the 'Big Four Agenda'.⁶⁴ In this regard, the Plan sets out a number of priority actions on climate finance, including operationalising the Climate Change Fund to be overseen by the National Climate Change Council, linking the National Climate Change Fund (NCCF) to County Climate Change Funds (CCCFs) and capacity building of the national treasury as the national designated authority to the GCF. The Plan also states that tracking and reporting on climate finance, as well as the results of mitigation and adaptation projects, will be of assistance in ensuring that climate finance reaches those who need it the most, including women, the youth, marginalised and minority communities.⁶⁵ The Plan requires the national treasury to formulate a climate finance resource mobilisation strategy and states that climate finance reporting will be done at national level. Additionally, the Plan elucidates that the national treasury will work with financial institutions to increase their understanding of climate finance and develop a climate risk index and funding schemes in high risk areas.⁶⁶

3.1.5 Public Finance Management Act 2012

Although this statute does not expressly provide for climate finance or human rights, it contains provisions on management and control of public finances by national and county governments, which extend to climate finance. The Act ensures the efficient and effective management of all revenue, expenditure, assets and liabilities. It also regulates the budget process, public borrowing, financial reporting, accounting and debt management.⁶⁷

3.2 Turkana people and climate change

The oldest ancestors to modern human beings were found in Turkana, thus earning the region its name as the cradle of mankind. While the region is extremely rich in history, today it is no more than a barren

64 The 'Big Four Agenda' is the government's popular development blueprint established by President Uhuru Kenyatta. Under this Agenda the President has committed to execute four pillars before the end of his term. These pillars include food security, affordable housing, universal health care, and manufacturing and job creation.

65 NCCAP (n 47).

66 As above.

67 Public Finance Management Act 18 of 2012; National Policy on Climate Finance (n 25).

wasteland due to droughts, land degradation and other climate-related vagaries. At the same time it has one of the poorest and fastest-growing populations in Kenya.⁶⁸ Since the time of history, the Turkana people have been marginalised and are among the most impoverished in sub-Saharan Africa and the world.⁶⁹

Climate change has resulted in an increase of 2 to 3 degrees Celsius in the area over the past few decades.⁷⁰ This figure is significantly higher than the global mean temperature increase of around 0,8 degrees Celsius. Average rainfall levels have dropped and remain low, with the rainy seasons becoming unpredictable. However, when the rains come, they bring in violent storms causing flash floods.⁷¹ The main economic activities in the area include fishing and pastoralism, which illustrate the reliance on natural resources for livelihood. Pastoralism depends highly on the climate – pasture, water, livestock and the surroundings. As a result, the impact of climate change on the county's environment has affected the people's rights to food, water, education, health care, a clean and healthy environment and security.⁷²

Although the realisation of a wide range of rights is inhibited by climate change, socio-economic rights are those most affected. Article 43 of the Constitution of Kenya sets out a number of socio-economic rights, including the rights to the highest attainable standard of health, adequate food of acceptable quality, clean and safe water in adequate quantities, education and social security.⁷³ Climate change has impaired the realisation of the Turkana people's socio-economic rights to water, food and livelihood, health and education, as well as their right to security. Lake Turkana is the largest desert lake in the world, but the local population cannot consume water from it due to its high salinity levels. Forming part of the arid and semi-arid lands, there are very few permanent rivers in the area. These are the rivers Turkwel, Kerio, Nabwanyang and

68 Human Rights Watch 'There is no time left: Climate change, environmental threats, and human rights in Turkana County, Kenya' 15 October 2015, <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> (accessed 21 March 2021).

69 V Vemuru et al 'Refugee impacts on Turkana hosts' November (2016).

70 J Njoka et al 'Kenya: Country situation assessment' (2016).

71 These floods are worsened by the El Nino phenomenon. The El Nino phenomenon is a climate pattern in the Pacific ocean that affects the weather globally. In East Africa, it brings extreme droughts followed by violent floods.

72 Human Rights Watch (n 68); J Asaka 'Water-energy-food nexus and human security in northwestern Kenya' in A Koulouri & N Mouraviev (eds) *Policy and governance in the water-energy-food nexus: A relational equity approach* (2019) 77.

73 Art 43 Constitution of Kenya 2010.

Nawoyawoi. Thus, accessing potable water in the area is cumbersome as the locals dig riverbeds to obtain water from the seasonal rivers and walk long distances to fetch water. As seasonal rivers are also becoming scarce, the locals have resolved to digging wells and boreholes. Women and girls often spend hours walking to fetch water. Increased temperatures, prolonged droughts and unpredictable rainy seasons caused by climate change have exacerbated this already fragile situation.⁷⁴ Most of this water is not potable resulting in high chances of water-borne diseases. As of 2019, only 32,4 per cent of the population had access to safe water.⁷⁵

With Lake Turkana and the permanent rivers decreasing in size and rivers becoming seasonal due to climate change, the main economic activities of the Turkana people are adversely affected – pastoralism, as the livestock herds do not have adequate water and pasture for consumption and fishing due to the decreasing water levels in the lake and rivers. Pastoralism is the primary livelihood of the community with over 64 per cent of the population directly depending on it, and 16 per cent dependent on agro-pastoral activities for their welfare.⁷⁶ This indicates that pastoralism is the main source of employment and income for most people. With massive losses of cattle due to the vagaries of climate change, many households have been forced to move towards the western shoreline of the lake in the hope of fishing and pasture for the livestock. This is a challenge as the loss of the fish habitat around the Ferguson bay is very high due to the impact of drought, forcing people to rely on food aid or to look for alternatives.⁷⁷

Some locals are engaged in farming and have not been getting sufficient food or profits due to the droughts.⁷⁸ Inadequate water and grazing land for the livestock have resulted in reduced numbers of livestock, weaker livestock that are prone to disease, a decrease in milk production and a reduction in birth rates. Death of livestock has a huge negative impact

74 Human Rights Watch (n 68).

75 Government of Kenya & Turkana County Government 'Turkana County smart nutrition surveys' (2019), <http://www.nutritionhealth.or.ke/wp-content/uploads/SMART%20Survey%20Reports/Turkana%20County%20SMART%20Survey%20Report%20-%20June%202019.pdf> (accessed 21 March 2021).

76 REGLAP Secretariat 'Key statistics on the drylands of Kenya, Uganda and Ethiopia' (October 2012).

77 C Carr 'Turkana survival systems at Lake Turkana: Vulnerability to collapse from Omo Basin development' in CJ Carr (ed) *River basin development and human rights in Eastern Africa: A policy crossroads* (2017) 157.

78 D Welle 'Climate change threatens Kenya's Turkana communities', <https://www.dw.com/en/climate-change-threatens-kenyas-turkana-communities/a-18816731> (accessed 12 March 2021).

on the diet of the locals who rely on meat and milk from the livestock. The risk of starvation in the area is high – many parents have complained about the loss of their children due to starvation. Adults also fear that they might run out of water and food when the lake recedes and their animals die.⁷⁹ Moreover, the effects of climate change have increased cattle rustling between the Turkana and neighbouring communities. This is a further risk to the availability of food and a threat to livelihoods.⁸⁰

Due to the acute food shortage, it is not uncommon to find children having milk as a meal, straight from animals' udders. Water and food have become scarce due to changing climate patterns, making it a struggle for the Turkana people to obtain necessities. This acute shortage of food and water is expected to increase with the droughts, with the potential to cause devastating impacts on the people's rights to life, food, water and health. The Turkana people have hence become reliant on food aid.⁸¹ Records of February 2019 also indicate that the county was embroiled in a dire food insecurity situation.⁸² The effect of climate change on the right to life of the populations is well captured. According to one writing:⁸³

Droughts which before occurred every four of five years, are now almost constant ... It is becoming more and more difficult to access the grazing land and the water needed for the goats, so that herds are completely decimated, with families now possessing only two or three goats compared to the past when they used to have hundreds.

The Turkana region has a history of chronic malnutrition, poor health and modest investment in health care as the county has been neglected for a long time, as the situation is worsened by climate change. Residents face multiple health problems that have been aggravated by droughts and floods. These problems include stomach aches, diarrhoea, trachoma, malaria and malnutrition. The malnutrition levels in the county stand at 26 per cent,⁸⁴ with child deaths due to malnutrition being at 53 per cent.⁸⁵

79 Human Rights Watch (n 68).

80 Ministry of Water Services, Environment and Mineral Resources: Turkana County Government 'Turkana County Climate Change Policy 2020 Draft I' 10 June 2020, <https://www.turkana.go.ke/wp-content/uploads/2020/06/Turkana-County-Climate-Change-Policy-Draft-2-17th-June-2020.pdf> (accessed 21 March 2021).

81 Welle (n 78).

82 Ministry of Water Services, Environment and Mineral Resources: Turkana County Government (n 80).

83 Welle (n 78).

84 As above.

85 Pragma 'Conflict assessment: Northern Kenya', https://www.pragma.org/doc/Conflict_Assessment_Report.pdf (accessed 21 March 2021).

To make matters worse, the local people walk long distances to receive medical assistance at the clinics, which also are very few and most people can hardly afford these. With food and water becoming even more scarce, health complications are likely to arise. Furthermore, scientists have found indications that climate change contributes to the spread of vector-borne and infectious diseases such as malaria and dengue fever, which pose a threat to health and life expectancy in Africa.⁸⁶ Poor sanitation and the use of water that is unsafe for consumption also increase the risk of outbreaks of water-borne diseases such as cholera and typhoid,⁸⁷ which can be fatal in the area due to the underdeveloped healthcare system. Water-borne diseases such as diarrhea are on the increase as open defecation among the community is at 75 per cent.⁸⁸

Climate change has aggravated security issues in the region. Decreased resources, including water, grazing land and livestock, have led to increased competition for the limited resources. Raids from other ethnic groups, including the Pokot and Daasanach, are a common occurrence, leading to a loss of livestock and insecurity. These raids have become more frequent and dangerous with the changing climate. Some residents have been displaced due to their inability to defend themselves against the raids.⁸⁹ One example is that of the Kainuk division in Turkana county which in one single month during 2011 experienced 27 attacks from the neighbouring Pokot community. Under these 27 attacks, 13 people were killed while 17 were wounded. These attacks were due to resource-based conflicts that included water and pasture for livestock.⁹⁰ Insecurity and resource-based conflicts are expected to increase with the receding of Lake Turkana as the lake acts as a barrier between the Turkana people and other ethnic groups. Kenyan security in the region, even at the Ethiopian border to prevent the entry of the Daasanach, is understaffed and under-resourced.⁹¹

86 Human Rights Watch (n 68); OHCHR 'Climate change and the full and effective enjoyment of the rights of the child' A/HRC/35/13, <https://www.ohchr.org/Documents/Issues/ClimateChange/RightsChild/ChildrenOnePager.pdf> (accessed 21 March 2021).

87 Human Rights Watch (n 68).

88 Ministry of Water Services, Environment and Mineral Resources: Turkana County Government (n 81).

89 Human Rights Watch (n 68).

90 Pragya (n 85).

91 Human Rights Watch (n 68); J Asaka & T Smucker 'Assessing the role of mobile phone communication in drought-related mobility pattern of Samburu pastoralists' (2016) 128 *Journal of Arid Environments* 12.

Children are vulnerable to the impacts of climate change due to their physiology and development needs.⁹² Their rights to life, food, water, health, education, among other rights, are threatened. Climate change affects children in various ways. For example, water and food scarcity leads to stunted growth; the spread of diseases due to climate change poses risks to their health; and traumatic stress associated with climate change can lead to mental health complications.⁹³ Research reveals that the county has the highest rate of stunting globally, which is at 19,7 per cent.⁹⁴ Further, children miss out on education as they deal with more urgent issues such as obtaining water and food. This has increased school drop-outs, increased child labour and encouraged the out-migration of the youth.⁹⁵ For women pastoralists, climate change has aggravated the situation and forced them to make extensive changes to their lives. Women, even those who are close to delivery, struggle to access water and to take care of their families and their animals.⁹⁶ Girls and women face the risk of sexual assault and attacks as they fetch water. Some girls miss school as they have no time to complete their homework, which affects their right to education, while others settle for men from areas that have access to water.⁹⁷

3.2.1 Turkana County Climate Change Draft Policy (2020)

The Turkana County Climate Change Policy, although in its draft form, aims at supporting the indigenous and marginalised community to overcome problems related to climate change through climate financing.⁹⁸ The people of this county have been greatly affected by the effects of climate change on their health, water and food security and livelihoods. This has increased poverty and the socio-economic situation is worsening. Furthermore, the traditional coping strategies also are not sufficient. All this is a result of climate-related vagaries such as droughts having become intense, and since the majority of the people are pastoralists, survival

92 OHCHR (n 86).

93 As above.

94 Ministry of Water Services, Environment and Mineral Resources: Turkana County Government (n 80).

95 As above.

96 Human Rights Watch 'Kenya: Climate change threatens rights' 15 October 2015, <https://www.hrw.org/news/2015/10/15/kenya-climate-change-threatens-rights> (accessed 12 March 2021).

97 SB Jeffrey 'Women pastoralists feel the heat of climate change' 7 August 2019, <https://www.un.org/africarenewal/magazine/august-november-2019/women-pastoralists-feel-heat-climate-change> (accessed 12 March 2021).

98 Ministry of Water Services, Environment and Mineral Resources: Turkana County Government (n 80).

is difficult as pasture and water shortfall are on the increase. Moreover, the county is faced with environmental problems such as poor natural resource management, illegal firewood collection and unsustainable land management practices.⁹⁹ This is worsening the degradation of the already fragile ecosystem. Based on these facts, the policy focuses on using climate finance as a strategy to reduce the negative impact of climate change on its people.¹⁰⁰ This policy is an outcome of the National Climate Change Action Plan (NCCAP) 2013-2017,¹⁰¹ which emphasises a climate-resilient pathway. The NCCAP also calls for mainstreaming climate change actions into various sectors. Through the NCCAP, the Climate Change Act of 2016 was set up. This Act enforces the setting up of county action plans and county policies.

With climate financing, the county hopes to facilitate the social and economic well-being of its citizens by using natural resources in a sustainable manner so as to ensure a higher quality of life for the citizens. It also aims to achieve the government's Big Four Agenda which focuses on the human rights issues of housing, food, security and affordable health care. The policy has identified the involvement of micro-finance institutions at the local and national level to support livelihoods to build resilience to climate change and variability. At the same time, the policy aims to implement smart climate agriculture whereby the county would establish mechanisms to obtain affordable finances for small-scale farmers, especially women. As per the draft policy, the county aims at providing affordable finance to livestock traders and producers with a focus on women, the youth and people living with disabilities.¹⁰² To obtain the finance, the policy has recommended the establishment of the Turkana Climate Change Fund. To facilitate the Fund, the county will commit 2 per cent of its annual budget. To manage the Fund, a private-public partnership will be created. To increase the funds, the policy suggests domestic carbon taxes with the concept of the polluter-pays principle.¹⁰³ This will be critical with regard to the oil mining in the county and a good start to increase the funds from the non-renewable resources sector. This will also make the funds self-sufficient and reduce borrowing of funds in the long run.

99 Turkana County Government 'Turkana County: County Integrated Development Plan (CIDP)' (2018-2022).

100 Ministry of Water Services, Environment and Mineral Resources: Turkana County Government (n 80).

101 NCCAP (n 48).

102 Ministry of Water Services, Environment and Mineral Resources: Turkana County Government (n 80).

103 As above.

With climate finance, it is expected that there will be a win-win situation for the people of Turkana as the vulnerability to climate change will decrease. It will lead the county to move towards sustainable economic and social development. There are plans to have land tenure and land use for pasture and water for the livestock so that they are not affected by the constant droughts. Once this strategy is achieved, food security is automatically ensured, reducing the migration of the youth and ensuring family stability. There are donor projects to this effect, such as the Department for International Development (DFID)/ International Development Research Centre (IDRC) which have been funding the Enhancing Adaptation to Climate Change programme.¹⁰⁴ There is the Practical Action which is implementing the Resilient Pastoralist Livelihoods Project. Another example is the National Drought Management Authority (NDMA) which aims to implement the Hunger Safety Net Programme (HSNP) at household levels.¹⁰⁵ There is the Trócaire Kenya which has received funding from the DFID and is working on a project entitled Promoting Ecosystem-based Adaptation Approaches to Climate Change and Governance in Turkana County, which is geared towards the provision of food and livestock security for the people.¹⁰⁶ The UN's Food and Agricultural Organisation (FAO) is working on the Land Governance Programme which aims at improving food security through better land management practices. The foregoing climate financing helps build the capacity of the Turkana people towards better natural resource management strategies and maintain their dignity and human rights.

4 Conclusion

Climate finance has largely been perceived as funds that are to be used for adaptation and mitigation projects to address the impacts of climate change. The Turkana people have been marginalised and are among the most impoverished in sub-Saharan Africa and the world. Due to their existing vulnerabilities, they bear the brunt of climate change, with several adverse impacts on the realisation of their human rights. With climate financing, the county hopes to facilitate the social and economic well-being of its citizens using natural resources in a sustainable manner to ensure a higher quality of life for the citizens. However, the lack of consultation and participation are precipitants of exploitation of and discrimination against these populations, a development that worsens their social, economic and environmental vulnerabilities. Their needs are not always fairly represented in the political and institutional arenas. Climate finance

104 As above.

105 As above.

106 As above.

is essential to address this issue as adaptation and mitigation measures are becoming increasingly urgent, and the mobilisation of funds is required to put such measures in place. However, climate finance must be approached from a human rights lens as climate change not only has environmental, but also human rights and economic impacts. In this light, there is a need to re-think what climate finance is and what it should be. Meaningful consultation and participation of local populations in climate finance decisions is pivotal in ensuring the success of climate finance projects. There are several avenues that can be used to raise climate finance that remain untapped. These can broaden the net for the acquisition of climate finance. In addition, climate finance should involve all stakeholders and be human rights driven.

9

LOW CARBON ENERGY SOURCES AS A TOOL IN ACTUALISING THE RIGHT TO DEVELOPMENT IN AFRICA: A NIGERIAN CASE STUDY

Jumoke Akinbusoye

Abstract

Climate change and energy poverty are critical development issues affecting Africa's development agenda. A transiting from carbon-intensive energy sources to more environmentally-friendly, low carbon energy sources, such as solar, wind and hydro, provides a ready solution to addressing the twin challenges, hence the present attention on the low carbon development model as a viable option for development in Africa. Energy is vital to the realisation of the right to development. Shortages in access to energy services in Africa increasingly are gaining attention as a potential human rights issue and a fundamental component of the right to development. National policies and laws are crucial in promoting equitable and affordable energy access, but it is not clear to what extent states can be held accountable for their failure to respect, protect and fulfil emerging economic and social rights such as access to energy services. This chapter explores the possibility of state accountability for the provision of energy services in actualising the right to development using Nigeria as a case study. It argues that although the jurisprudence on the right to energy access is yet to be developed, the low carbon model of development serves as a fundamental tool in driving universal access to energy and energy services, thus performing a vital role towards fulfilling the controversial right to development.

Key words: *development; energy; right to development; low carbon*

1 Introduction

A shared quality among human beings of diverse backgrounds and geographical locations is the impetus to attain better living standards and satisfy individual and collective needs. As seen in the International Bill of Rights and several other United Nations (UN) treaties, a central underlying theme is to free humanity from want in all its forms.¹ Thus, at

1 The International Bill of Rights consists of five key human right treaties that are central to human freedom and the fulfilment of economic and social rights, namely, the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Optional Protocol to the International Covenant on Civil and Political Rights; and

the individual, family, national and global levels, the continuous strive to actualise aspirations and the subsequent changes that occur within these units points towards development. For countries on the African continent, the quest for rapid 'development' is pressing.

Development as a concept has evolved and at present may be interpreted to mean an integrated approach to economic, social, human and institutional advancement, which can further be broken into components such as health, infrastructure and education. The question arises as to what type of development is a priority for African countries. Agenda 2063 of the African Union (AU) (Agenda) summarises Africa's priority objective as the achievement of economic growth driven by inclusive and sustainable development.² Enumerated in the Agenda are goals such as a better standard of living, better health, education, increased agricultural productivity, environmental sustainability and increased energy access.³ A key expected outcome is to improve the standards of living of the African people by increasing access to electricity supply.⁴

Through the African Renewable Energy Initiative (AREI) and in line with the African Regional Flagship Programme on Sustainable Energy, African countries are to expect support from the AU in developing their energy sectors through low carbon energy systems. The advantages of such low carbon sources include an ease in reaching people off-grid; increased competition; local content; and diversification in ownership base due to an increase in the number of energy service providers. Low carbon or renewable energy sources also increase energy source options and overall-improved energy access, thus improving population welfare and opportunities for Africans to fulfil their right to development.⁵

On the international scene, Agenda 2030 reveals global development priority goals from a contemporary interpretation of development, that is,

the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty. International Bill of Human Rights, <https://www.eschr-net.org/resources/international-bill-human-rights> (accessed 7 July 2021). See also A Sengupta 'Right to development as a human right' (2001) 36 *Economic and Political Weekly* 2527.

- 2 'Agenda 2063: The Africa we want', <https://au.int/en/agenda2063/overview> (accessed 20 March 2021).
- 3 Goals and Priority Areas of Agenda 2063, <https://au.int/agenda2063/goals> (accessed 9 January 2021).
- 4 Key Transformational Outcomes of Agenda 2063, <https://au.int/agenda2063/outcomes> (accessed 18 March 2021).
- 5 Africa Renewable Energy Initiative, http://www.arei.org/wp-content/uploads/2016/09/AREI-Summary-english_web.pdf (accessed January 2021).

a sustainable low carbon development perspective. Agenda 2030 recognises the gaps in actualising the erstwhile Millennium Development Goals (MDGs) and sets out a wider range of economic, social and environmental objectives to be achieved. Identified in Agenda 2030 are 17 Sustainable Development Goals (SDGs), which the international community has committed to achieving within 15 years. SDG 7 aims to achieve universal access to energy services by 2030. Energy, therefore, is a key subject in the global development and climate change agenda. In this chapter the description of energy access as 'access to clean, reliable and affordable energy services for cooking and heating, lighting, communications and productive uses' given by the United Nations (UN) Secretary General's Advisory Group on Energy and Climate Change (AGECC) is adopted.⁶

The AU and global agenda, both of soft law nature, call for more sustainable development models. The low carbon development model attempts to achieve economic development, in line with sustainable practices, through low carbon energy sources to achieve wider energy access and address climate change concerns.

Omorogbe notes the crucial role that energy plays in any development strategy, stating that energy is the most critical component of any development strategy.⁷ She is of the view that energy hitherto has been completely overlooked in development planning.⁸ This observation holds, especially in African countries. A disintegrated approach to development planning in African countries has until recent times set the vital ingredient of energy planning at the back-burner. Presently, initiatives in Africa are pushing the renewable energy (low carbon) agenda forward. As a result, improvements are being witnessed in the quality of life and overall well-being. This is especially true in the medical sector and the educational sector, as shown in Nigeria's illustrations below.

The chapter examines upcoming low carbon development (LCD) initiatives under the AU. It subsequently looks closely at a few positive

6 United Nations Secretary-General's Advisory Group on Energy and Climate Change Energy for a sustainable future: Report and recommendations 28 April 2010 13, [www.un.org/millenniumgoals/pdf/AGECCsummaryreport\[1\].pdf](http://www.un.org/millenniumgoals/pdf/AGECCsummaryreport[1].pdf) (accessed 28 October 2020).

7 O Omorogbe 'Promoting sustainable development through the use of renewable energy: The role of the law' in D Zillman et al (eds) *Beyond the carbon economy: Energy law in transition* (2008) 41-43; see also O Owoye 'Access to energy in sub-Saharan Africa: A human rights approach to the climate change benefits of energy access' (2016) 18 *Environmental Law Review* 295; A Bradbrook et al 'A human dimension to the energy debate: Access to modern energy services' (2008) 26 *Journal of Energy and Natural Resources Law* 526.

8 Omorogbe (n 7).

strides taken in Nigeria against the backdrop of fulfilling the right to development. It notes that an opportunity exists for advocates on the African continent to seek to enforce the right to development through the requirements of the African Charter on Human and Peoples' Rights (Africa Charter), which is the only hard law document conferring a legally-binding right to development on individuals and peoples.⁹ The chapter finds that with the appropriate regulatory and legislative framework, adequate implementation and political will, the LCD model can serve as a viable tool in actualising the right to development in Nigeria.

2 Climate change, low carbon development and energy nexus

Access to energy services is essential for the attainment of better living standards.¹⁰ The unchecked combustion of fossil-based energy sources without factoring environmental and social costs has resulted in irreversible environmental consequences, one of which is the climate change crisis. Most countries classified as 'developed' today followed aggressive development models powered by high carbon fossil-based energy sources with a focus on economic development, causing ecological and environmental damage and in some cases damage to human and other living species.¹¹ At the time, states paid scant attention to the harmful implications of their economic development activities on their environment, and on other states, a development that necessarily raises the question regarding the equity in expecting present African states to participate in the LCD. However, presently it is widely accepted that to address climate change, 'all societies, including those in Africa, need to transition to low and zero carbon energy systems' by embracing LCD.¹² Thus, scaling up low carbon energy sources in Africa will support global efforts to address climate change as well as tackle the problem of energy poverty.

The LCD model is a component of sustainable development which could be instrumental in advancing the cause of development and the right to development in developing countries. It focuses on the reduction of greenhouse gases and carbon emissions while increasing economic

9 O Oduwole 'International law and the right to development: A pragmatic approach for Africa' Inaugural lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015 delivered on 20 May 2014 at the International Institute of Social Studies, The Hague, The Netherlands 4.

10 A Ayoade 'Bridging the gap between climate change and energy policy options: What next for Nigeria?' in P Kameri-Mbote et al (eds) *Law | Environment | Africa* (2019) 84.

11 H Daly & J Farley *Ecological economics: Principles and applications* (2003).

12 Africa Renewable Energy Initiative (n 5).

development. Addressing the challenge of energy poverty through low carbon innovations will positively impact socio-economic development in African countries. Additionally, there is a strong economic case in favour of low carbon investments for developing countries to meet the needs of rapidly-growing populations and their development aspirations as falling costs of renewable technologies are opening new prospects for transformation in the energy sector.¹³ The LCD model calls for an integrated approach to development which is more likely to produce multiple sustainable development outcomes.¹⁴

3 Development as a right: The right to development

‘All human rights and fundamental freedoms are indivisible and interdependent.’¹⁵ Eleanor Roosevelt, a former first lady of the United States, is credited for identifying and advocating a right to development during the drafting of the Universal Declaration on Human Rights (Universal Declaration) in 1948.¹⁶ Most strongly, the push for a right to development came from newly-independent, struggling developing countries seeking a new international economic order in which they would enjoy better trade terms with colonialists that had dominated the international market, leaving them mostly import dependent.¹⁷

In 1986 the United Nations Declaration on the Right to Development (UNDRTD) was adopted with one dissenting vote from the United States. However, it was the first indication of the international cooperation necessary to ‘free the entire human race from want’.¹⁸ The UNDRTD affirms the right to development as an inalienable human right at the centre of which is the human person, the main beneficiary of development. Also, it recognises the concept of ‘people’, which connotes that people everywhere are eligible to partake in and benefit from economic, social, cultural and political development in which all human rights and essential

13 S Colenbrander et al ‘The economic case for low-carbon development in rapidly growing developing world cities: A case study of Palembang, Indonesia’ (2015) 25 *Energy Policy* 80.

14 Ayoade (n 10) 100-101; see also P Newell et al ‘The political economy of low carbon energy in Kenya’ Institute of Development Studies, Working Paper (2014) 7-8.

15 UN Declaration on the Right to Development Resolution 41/128 art 6(2).

16 Declaration of Human Rights by Eleanor Roosevelt, <https://www.unmultimedia.org/avlibrary/asset/1093/1093412/> (accessed 5 January 2021).

17 Sengupta (n 1).

18 UN Declaration on the Right to Development (n 15).

liberties can be fully realised.¹⁹ The right to development, therefore, comprises the fulfilment of the International Covenant on Economic Social and Cultural Rights (ICESCR) as well as the International Covenant on Civil and Political Rights (ICCPR).²⁰

The right holders thus are every human person and all peoples, while the duty bearers are states both at the national and international levels. States at the national level primarily are responsible for the development of their citizens and people. States bear the responsibility of ensuring the respect, protection and fulfilment of the right to development by formulating appropriate national development policies.²¹ In the *SERAC* case²² the African Commission on Human and Peoples' Rights (African Commission) made profound pronouncements relating to states' responsibility to respect and protect the socio-economic rights of the Ogoni people. According to the African Commission, states have an obligation to encourage the satisfaction of all human rights and ensure that people can exercise their rights and freedoms through positive action, including actions such as building infrastructure. The African Commission has also upheld a right to cultural development,²³ a right to equal treatment²⁴ and a right to choice and personal liberty as being part of the right to development as contained in article 22 of the African Charter.²⁵

Internationally, states are obliged to cooperate to facilitate the realisation of the right to development.²⁶ As contained in the preamble to the UNDRTD, the overarching thought is to aid in achieving the purpose of the UN, which is promoting international cooperation in addressing 'international problems of economic, social, cultural or humanitarian nature'.²⁷ However, the soft law nature of the UNDRTD has hindered progress in the advancement of the right to development. As various

19 Art 1 Declaration on the Right to Development (n 15).

20 Art 2 Declaration on the Right to Development (n 15).

21 Art 2(3) Declaration on the Right to Development (n 15).

22 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

23 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

24 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), <https://www.refworld.org/cases,ACHPR,51b890c24.html> (accessed 10 January 2021).

25 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009), <https://www.refworld.org/cases,ACHPR,4b8275a12.html> (accessed 10 January 2021).

26 Sengupta (n 1).

27 Declaration on the Right to Development (n 15) Preamble.

scholars have noted, further obstacles to progress in actualising a right to development, especially at the international level, lie in the unclear definition of the extent of states' responsibilities and the scope of the right itself.²⁸ The question remains as to how far the right to development can be expanded and to what extent states can be held responsible by their people for a failure to provide basic social amenities, such as medical services, access to electricity, good housing and education, in the pursuit of economic development. At the national level, this question may be more easily resolved as state constitutions contain clearer provisions on what is justiciable and what is not.

Despite these clogs in the wheel, the right to development has continued to evolve, enjoying unanimous consensus. At the Second UN World Conference on Human Rights in 1993, the right was affirmed as an integral part of fundamental human rights and thus began to receive greater attention as an important part of the UN Agenda. Following this was the articulation of core aspects of the right to development by the Working Group on the Right to Development appointed by the UN Economic and Social Council (ECOSOC) to include peoples' rights to the constant improvement of their well-being and to a national and global milieu favourable to just, equitable human-centred development respectful of all human rights.²⁹ The global consensus in actualising development efforts and the right to development was manifest in the Millennium Summit where the Millennium Development Goals were adopted in the year 2000. Due to the soft law nature of the UNDRTD, its provisions are not enforceable as they have more a hortatory and persuasive nature than an obligatory nature. On the other hand, article 22 of the African Charter with similar provisions confers a 'hard law' status on the right to development.

Energy is a basic resource that is vital to the realisation of the right to development. Access to energy is an inseparable aspect of international economic, social and cultural rights.³⁰ Thus, states are obliged to ensure the creation of conditions that will support access to energy as a socio-economic right. Although the right to development is yet to be fully recognised as an enforceable human right internationally, African jurisprudence lends credence to the position that the right to development

28 Oduwole describes the RTD as nebulous 'in terms of concrete entitlements and obligations, justiciability and enforcement'; see Oduwole (n 9) 4; see also Sengupta (n 1).

29 'Right to development' Report of the high-level task force on the implementation of the right to development on its sixth session, Geneva, Switzerland 14–22 January 2010, A/HRC/15/WG.2/TF/2.

30 Owwoeye (n 7) 295.

is enforceable under the African Charter. Applying the reasoning of the Court in *Gbemre*, it is possible to institute legal proceedings against state parties to the African Charter for failure to meet their economic and social obligations, including access to energy, as energy access is crucial to the maximum standard of health care and, invariably, the right to life.³¹

4 LCD initiatives and the right to development in Africa

LCD is a concept rooted in the United Nations Framework Convention on Climate Change (UNFCCC).³² Embedded in the LCD model is the need to increase opportunities for better energy access by expanding energy sources for power generation. Attempts at addressing the energy challenge in Africa are yet to yield fully tangible fruits and with the absence of adequate energy services.³³ Described as low emission development strategies under the UNFCCC, LCD involves aligning climate change priorities with economic development to advance national policy in a more coordinated manner.³⁴

In terms of its population, the African continent is the second most populated in the world.³⁵ Snail-paced development in the energy services sector has failed to meet the increase in demand for energy services, leading to severe energy shortages, best described as energy poverty.³⁶ The situation has hindered economic and human development in no small measure with grave and sometimes fatal implications for industries, the health sector, education, agriculture and domestic life, to mention a few. The present challenge, therefore, is not merely to provide energy but to provide affordable, clean and accessible energy.³⁷ The LCD model provides a platform to address this challenge as the model addresses energy poverty and environmental pollution from carbon-intensive sources.

31 *Gbemre v Shell* (2005) AHRLR 151 (NgHC 2005).

32 United Nations Framework Convention on Climate Change 9 May 1992 1771 UNTS 107, 165; S Treaty Doc 102-38 (1992); UN Doc A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

33 Omorogbe, (n 7) 43, Africa Energy Outlook 2019, International Energy Agency, <https://webstore.iea.org/download/direct/2892> (accessed 18 March 2021).

34 C Clapp et al 'Low emissions development strategies: Technical, institutional and policy lessons' OECD, IEA, COM/ENV/EPOC/IEA/SLT (2010) 2.

35 African countries with the largest population as of 2021, <https://www.statista.com/statistics/1121246/population-in-africa-by-country/> (accessed 22 March 2021).

36 Africa Energy Outlook 2019 (n 33) 21.

37 K Kaygusuz 'Energy for sustainable development: A case of developing countries' (2012) 16 *Renewable and Sustainable Energy Review* 1116.

The concept is yet to have a formal, generally-agreed definition. However, various attempts have been made to define the model. Yuan et al consider LCD as a three-stage process that starts from a low carbon economy to a low carbon society and then a low carbon world. They also identify related concepts such as low-carbon economy, low-carbon society, low-carbon city, low-carbon community, and low-carbon life as being part of LCD.³⁸ Eleri et al refer to LCD as a synergy between climate change (environmental concerns) and sustainable development, which involves the mainstreaming of climate change concerns in development practices.³⁹

LCD is inextricably linked to the SDGs. A major essence of the global Agenda 2030, as summarised in the SDGs, is eradicating all forms of poverty, including energy poverty.⁴⁰ The AU's response to the climate and energy challenge may be said to be increasing in momentum as seen in Agenda 2063. Other related programmes exist, including the African Regional Programme on Sustainable Energy; the Programme for Infrastructure Development in Africa (PIDA); the African Bioenergy Policy Framework and Guidelines; Renewable Energy in African Island States; Developing the Potential of Small Hydropower Plants in Africa; and the Geothermal Risk Mitigation Facility – to increase renewable energy usage. These initiatives, though laudable, have had limited impacts so far as they are yet to be fully implemented. Furthermore, they are yet to attract the type of support needed to speed up investments into large-scale energy programmes.⁴¹ The AREI framework document and action plan summarises the position and direction for the AU in assisting member countries in the transition to LCD between 2016 and 2030.⁴² The AREI seeks to align with the renewable energy components of other existing initiatives, such as the PIDA; Sustainable Energy for All (SE4ALL); Power Africa; the Africa-EU Energy Partnership; and the Africa Clean Energy Corridor of the International Renewable Energy Agency (IRENA).⁴³

38 H Yuan et al 'What is low-carbon development? A conceptual analysis' (2011) 5 *Energy Procedia* 1707-1708.

39 E Eleri et al 'Making progress towards low carbon development' The SUNGAS Project, International Institute for Environment and Development (2013) 6.

40 The 2030 Agenda for sustainable development UN General Assembly Transforming our world: The 2030 Agenda for Sustainable Development, 21 October 2015 A/RES/70/1 <https://www.refworld.org/docid/57b6e3e44.html> (accessed 10 January 2021).

41 African Green Stimulus Programme, <https://wedocs.unep.org/bitstream/handle/20.500.11822/34409/AGSP.pdf?sequence=3> (accessed 19 March 2021).

42 Africa Renewable Energy Initiative (n 5).

43 As above.

The Department of Infrastructure and Energy is the coordinating body for achieving the energy and infrastructure goals and projects under the AU's Agenda 2063. The African Energy Commission (AFREC), an agency under the Department of Infrastructure and Energy, oversees the coordination, development and integration of energy resources on the African continent. According to Agenda 2063, a critical energy project to be achieved is the Grand Inga dam projects of the Democratic Republic of the Congo (DRC). Proposed to be the world's greatest hydropower scheme, the Grand Inga dam will harness up to 43 200 megawatts from the Congo river, exported to South Africa, Nigeria and other African countries.⁴⁴ The African Union Commission (AUC) has recently partnered with the International Renewable Energy Agency (IRENA) to assist in some of the initiatives mentioned above, such as the PIDA) the African Bioenergy Policy Framework and Guidelines, and Renewable Energy in African Island States. The partnership also seeks to improve access to energy in Africa in response to the COVID-19 pandemic. This partnership is designed to support Africa in responding to the pandemic by positioning low carbon energy sources to support the provision of essential social services, including clean water and healthcare services.⁴⁵

The European Union (EU), United Kingdom, Germany, United States and other developed countries are also rising to the occasion to support the vision for better access to energy and development in African countries through partnerships, grants and training opportunities to support renewable energy projects in Africa.⁴⁶ USAID Power Africa is an example of such partnerships. The programme provides finance, technical assistance and grants to local investors involved in renewable energy projects in sub-Saharan Africa. International and regional organisations, such as the World Bank and the African Development Bank (AfDB) also play a role as development partners. Worth noting is the partnership between the World Bank and the Rural Electrification Agency (REA) in executing the Nigerian Electrification Project (NEP).⁴⁷ The Green Climate Fund (GCF), which was established to fund climate change projects, also provides support and funding opportunities for low carbon technologies

44 Flagship Projects of Agenda 2063, <https://au.int/agenda2063/flagship-projects> (accessed 19 March 2021).

45 African Union and IRENA to Advance Renewables in Response to COVID-19, <https://www.irena.org/newsroom/pressreleases/2020/Apr/African-Union-and-IRENA-to-Advance-Renewables-in-Response-to-Covid19> (accessed 19 March 2021).

46 The USAID Power Africa Initiative is an example; Power Africa, <https://www.usaid.gov/powerafrica> (accessed 19 March 2021).

47 Nigerian Electrification project overview 2018, <http://rea.gov.ng/wp-content/uploads/2018/08/OVERVIEW-OF-THE-NIGERIA-ELECTRIFICATION-PROJECT-NEP.pdf> (accessed 9 January 2021).

for climate change mitigation and adaptation. African countries are benefiting from GCF funds, with renewable energy projects ongoing in the DRC, Kenya, Niger, Zimbabwe, Namibia, Nigeria, Ghana, Sudan and Ethiopia.⁴⁸ An example is the solar mini-grid pilot projects in DRC which is expected to generate 30 megawatts of power by 2024, thus supporting the country in meeting its clean energy targets by reducing reliance on diesel-powered generators and the consequent carbon emissions.⁴⁹

The current global push towards a zero-carbon future indicates that a transition to low carbon development is imminent in most countries. This integrated approach shows that inter-state cooperation and global partnerships are becoming a reality.

5 Low carbon development as a tool in actualising the right to development in Nigeria

Chapter 2 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) contains the government's economic, political and social objectives.⁵⁰ The overriding purpose of the Nigerian government is to promote the security and welfare of the Nigerian people.⁵¹ Thus, the Nigerian state is expected to facilitate planned and balanced economic development to ensure that adequate shelter, adequate food, reasonable national minimum wages and other social services are provided for all citizens.⁵² Although energy access is not expressly contained in the list of social objectives, as Owoeye argues, access to modern energy services may be implied in the right to an adequate standard of living, food and housing.⁵³ Furthermore, energy access is fundamental in promoting the welfare of Nigerian people and achieving balanced economic development.

The omission of energy access in chapter 2 of the Nigerian Constitution may be a crucial missing link in fulfilling the government's social and economic development responsibilities as without energy access, social and economic development will remain a mirage. However, the social, political and economic objectives contained in chapter 2 are

48 GCF Data Interactive map on programme and project-level data by country, https://unfccc.int/climatefinance/gcf/gcf_data (accessed 10 December 2021).

49 'DRC green mini-grid programme', <https://www.greenclimate.fund/project/fp096> (accessed 8 July 2021).

50 1999 Constitution of the Federal Republic of Nigeria (as amended) CAP. C23 L.F.N. 2004.

51 Sec 14(2)(b) 1999 Constitution of the Federal Republic of Nigeria.

52 Sec 16(2)(a) 1999 Constitution of the Federal Republic of Nigeria.

53 Owoeye (n 7) 294.

non-justiciable under section 6(6)(c) of the Constitution. Oguogua has criticised the non-justiciability of social and economic rights under the Nigerian Constitution as an obstruction to development.⁵⁴

Nigerian courts have shown judicial activism in interpreting first generation rights, such as the right to life and dignity of a human person guaranteed under the Nigerian Constitution, to include otherwise non-justiciable rights such as the right to a healthy environment. In *Gbemre v Shell Petroleum Development Company Nigeria & ors*⁵⁵ the Federal High Court affirmed the plaintiffs' right to a clean environment by relying on sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria as reinforced by articles 4, 16 and 24 (right to life, right to health and right to environment, respectively) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁵⁶ Thus, social and economic rights, although not explicitly guaranteed by the Nigerian Constitution, may be inferred by the courts to have been violated in certain circumstances, as seen in the case above.

The Nigerian economy has for a long time been solely dependent on oil to meet its development aspirations.⁵⁷ In 2018 the World Bank estimated that approximately 43,5 per cent of Nigeria's population is without energy access.⁵⁸ Many of the people without energy access live in off-grid areas. Natural gas is the dominant energy source for grid electricity, supplying approximately 80 per cent. However, gas generation and supply are faced with many challenges, including poor gas infrastructure, gas supply interruptions, and related challenges within the electricity value chain.⁵⁹ The government planned to increase electricity access from the 2015 level of 40 per cent to 75 and 90 per cent by 2020 and 2030, respectively. So far, this target has not been met and renewable energy sources have not been sufficiently explored.⁶⁰

54 O Ikepeze 'Non-justiciability of chapter II of the Nigerian Constitution as an impediment to economic rights and development' (2015) *Developing Country Studies* 48.

55 *Gbemre* (n 31).

56 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9, Vol 1, LFN 2004.

57 National Energy Policy (Draft Revised Edition) Energy Commission of Nigeria 2018 4.

58 Access to electricity (%) of population: Nigeria, <https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS?locations=NG> (accessed 19 March 2021).

59 National Energy Policy (n 57).

60 Rural Electrification Strategy and Implementation Plan approved July 2016 8, <http://rea.gov.ng/wp-content/uploads/2017/09/RESIP.pdf> (accessed January 2021); see also the 2016 Renewable Energy for All Action Agenda (SEE4ALL-AA) adopted

Although efforts are yet to yield the desired results, low carbon energy options, including renewable energy expansion and energy efficiency, are increasingly making socio-economic development a reality in Nigeria. Progress towards LCD is being witnessed against the existing backdrop of renewable energy policies more out of necessity than any other driving force. Some outstanding low carbon innovations, which are promoting the right to development in Nigeria, are examined below.

5.1 Educational sector initiatives

In the education sector, low carbon solutions are assisting to address the situation of energy poverty, improve the quality of research, enhance technical capacity and educational productivity.⁶¹ Recently, the federal government introduced an Energising Education Programme, which is anticipated to provide clean energy to 37 federal universities and seven teaching hospitals. The Rural Electrification Agency (REA) is handling the project, which is to be developed in phases with power generated from solar hybrid/and or gas-fired captive power plants. The project is to benefit 127 000 students and 28 000 staff at universities, 4 700 staff in teaching hospitals (including 819 doctors), power 2 850 streetlights, and result in the abandonment of hundreds of power generators.⁶² The programme has kicked off with an 8.25 megawatt solar hybrid power plant at the Federal University of Agriculture Makurdi. Its implementation incorporates gender mainstreaming and capacity building by targeting female students for training in renewable energy power plant deployment.

5.2 Health sector initiatives

The 2020 COVID-19 pandemic brought to the fore the intricate link between energy and health, and particularly revealed weaknesses in the current energy system, thus paving the way for alternative energy interventions. In seeking fast and reliable options for immediate deployment of electricity to the emergency isolation centres, solar mini grid-powered systems were

by the Inter-Ministerial Committee on Renewable Energy and Energy Efficiency (ICREEE), https://www.seforall.org/sites/default/files/NIGERIA_SE4ALL_ACTION_AGENDA_FINAL.pdf (accessed 9 January 2021).

61 Power for all factsheet 'Decentralised renewables: Education', https://www.powerforall.org/application/files/3815/3314/7452/Power_For_All_Fact_DRE_Education.pdf (accessed 8 July 2021).

62 'Powering Nigeria's universities', <https://rea.gov.ng/powering-nigerias-universities-thisday/> (accessed 10 January 2021).

assessed to be the fastest and best option.⁶³ Locations such as Abuja, Lagos and Ogun state witnessed interventions of over 70 kilowatt of energy powered by solar power.⁶⁴ These interventions were made possible through partnerships between the World Bank, the African Development Bank and the REA under the Rural Electrification Project as national objectives met with international opportunities.⁶⁵

Due to the project's success, it is expected that the NEP will provide energy access to more healthcare facilities in the country as other pipeline projects are meant to take off. These efforts are being implemented in conjunction with the Federal Ministry of Health, the National Centre for Disease Control and the National Primary Health Care Development Agency.⁶⁶

5.3 Public-private partnership

Increased private sector involvement in the energy industry has been made possible through the provision of incentives to private sector investors involved in low carbon, renewable energy technology, particularly investors involved in off-grid projects. Under the NEP, private investors involved in providing electricity access to households, public institutions and local enterprises have an opportunity to access partial grants to support their electrification projects.⁶⁷ As a result, several renewable energy companies have received government support in bridging the gaps in energy access.

5.4 Emerging low carbon development interventions and benefits

The success being achieved, particularly in the health sector, has inspired more government buy-in. In response to the pandemic, the government announced its economic stimulation plan, which includes the Solar Power Naija Project plan to provide five million households located off-grid with

63 World Bank Energy Sector Management Assistance Programme: Mini grids for half a billion people: Market outlook and handbook for decision makers ESMAP Technical Report; 014/19 (2019), <https://openknowledge.worldbank.org/handle/10986/31926> 'f (accessed 10 January 2021).

64 'Nigeria: Rural Electrification Agency provides relief amid COVID-19', <https://www.esi-africa.com/industry-sectors/renewable-energy/nigeria-rural-electrification-agency-provides-relief-amid-covid-19/> (accessed 10 January 2021) .

65 As above.

66 As above.

67 'The Nigeria electrification project', <https://rea.gov.ng/nigeria-electrification-project-nep/> (accessed 8 January 2021).

electricity supply powered by solar energy.⁶⁸ The programme commenced in April 2021 and is to take the form of public-private-partnerships.⁶⁹ A key objective of the project is to expand energy access to 25 million individuals. Co-benefits expected from the project include local capacity building; health and environmental benefits; import substitution in the renewable energy industry; and the plan to create approximately 250 000 jobs in the energy sector.⁷⁰

6 Conclusion

The provision of energy services and energy access is essential, if not the most critical feature, in stimulating development in Africa. The current challenges of energy poverty and climate change present opportunities for innovative responses. As with the SDGs, the LCD model supports an integrated approach to development involving vertical and horizontal synergies across government sectors. An integrated approach to development potentially is a winning approach, as seen through recent low carbon initiatives in Nigeria. A close look at the other SDGs and Agenda 2063 reveals that they are interdependent. Without access to energy services, hunger, poor health, poor-quality education, poor infrastructural development and gender inequality are likely to persist. Recent initiatives in line with LCD in Nigeria lend support to the position of LCD to help achieve sustainable development and actualise the right to development. With appropriate national policies, regulations and laws in place, a LCD model can yield rapid economic and social benefits as is needed on the African continent. The main components of the right to development, including international cooperation and financial assistance, as well as appropriate national policies and regulations, are falling in place, thus making a strong case for African countries to continue or commence the journey towards LCD. Stronger international cooperation and an increase in political will being witnessed in Africa under the AU are additional opportunities for willing countries and their people to embrace a low carbon pathway towards the right to development.

68 'Nigeria's Economic Sustainability Plan 2020', <https://media.premiumtimesng.com/wp-content/files/2020/06/ESC-Plan-compressed-1.pdf> (accessed 8 January 2021).

69 'Solar roll out for 25 million Nigerians to begin', <https://www.esi-africa.com/industry-sectors/generation/solar/solar-rollout-for-25m-nigerians-to-begin/> (accessed 8 July 2021).

70 'What you need to know about the Nigeria economic sustainability plan', <https://statehouse.gov.ng/news/what-you-need-to-know-about-the-nigeria-economic-sustainability-plan/> (accessed 8 July 2021).

10

PROMOTING AND PROTECTING HUMAN RIGHTS THROUGH IMPLEMENTATION OF THE PARIS AGREEMENT IN KENYA

David Acheru Mufuayia

Abstract

Climate change poses a significant threat to key human rights, including the rights to life, health, food, an adequate standard of living and a clean and healthy environment. The Constitution of Kenya 2010 guarantees the human right to a clean and healthy environment and this right is currently being threatened by the adverse impacts of climate change. The 2015 Paris Agreement seeks to reduce global warming and greenhouse gas emissions as a response to climate change and, therefore, it is critically important in protecting and promoting human rights. Kenya, as a signatory to the Paris Agreement, is expected to implement its provisions. The country has undertaken impressive legal, institutional and strategic measures, earning it an exceptional rating as one of the few countries likely to meet its targets under the Paris Agreement of reducing global warming to below 2°C above preindustrial levels by 2030. However, poor political will, poor implementation of the legal framework, inadequate financing, low stakeholder engagement and corruption in climate change governance are a major restraint in the effective implementation of the Agreement. Good governance of climate change response initiatives will be a step forward towards meeting Kenya's obligation under the Paris Agreement, and consequently mitigating against the negative impact of climate change on the enjoyment of the citizens' human rights.

Key words: *climate change; human rights; Kenya; Paris Agreement*

1 Introduction

The world met in 2015 to determine remedial measures as a result of the alarming statistics on the adverse impacts of climate change.¹ Climate change effects that are of concern include threats to human health, food insecurity, displacements, and increased floods, droughts, heat waves, wildfires and tropical cyclones.² At the 2015 meeting, almost 200 nations

1 UNFCCC Climate Change 2014: Impacts, Adaptation and vulnerability' (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf (accessed 22 July 2021).

2 World Meteorological Organization 'Multi-agency report highlights increasing signs

signed a historic climate change agreement committing to cut their greenhouse gas emissions, thereby slowing global warming. This came to be known as the Paris Agreement. The Agreement was adopted on 12 December 2015 and entered into force on 4 November 2016. Kenya signed the Agreement on 22 April 2016 and became party to the Agreement on 28 December 2016.

The signing of the Paris Agreement was a positive commitment by the Kenyan government towards guiding its adaptation and mitigation measures to address the adverse impacts of climate change. Effective response measures to climate change are eventually bound to improve the enjoyment of the citizens' basic rights, including the rights to life, health, food, an adequate standard of living and a clean and healthy environment.³ The measures undertaken by the Kenyan state in implementing the Paris Agreement include the enactment of effective legal, institutional and structural frameworks to address climate change, and the allocation of financial and technical resources for the set initiatives. Owing to these actions, Kenya has been rated as one of the few member states to the Paris Agreement that is highly likely to meet its set targets under the Agreement.⁴

However, poor political will, poor implementation of legal framework, inadequate financing, low stakeholder engagement and corruption in climate change governance are a major restraint in effectively implementing the Paris Agreement.⁵ The consequence of these challenges has greatly threatened the enjoyment of Kenyans' fundamental rights. Kenya loses 3 to 5 per cent of its gross domestic product (GDP) to climate change each year. Kenya's GDP for 2019 amounted to \$95,5 billion, which translates to between \$2,9 and \$4,8 billion from socio-economic losses emanating from climate change.⁶ The National Climate Change Action Plan 2018-2022 highlights the climate change adverse impacts to include high levels of multi-dimensional poverty, particularly in the arid and semi-arid lands; gender inequality; environmental degradation; a decline in the national

and impacts of climate change in atmosphere, land and oceans' (2020), <https://public.wmo.int/en/media/press-release/multi-agency-report-highlights-increasing-signs-and-impacts-of-climate-change> (accessed 22 July 2021).

3 M Burger 'Climate change and human rights' (2015), <http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf> (accessed 22 July 2021).

4 Climate Action Tracker 'Kenya' (2020), <https://climateactiontracker.org/countries/kenya/> (accessed 22 July 2021).

5 As above.

6 O Lmawi 'Kenyans paying heavy price due to climate change' *Business Daily* 11 March 2021, <https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/kenyans-paying-heavy-price-due-to-climate-change-3318626> (accessed 2 May 2021).

economy and local livelihoods that depend on rain-fed agriculture; a high level of water scarcity and mismanagement of water resources; insecure land tenure and land fragmentation; population growth and migration to urban areas; and a heavy disease burden and limited access to quality health care, particularly in rural and remote areas.⁷

Based on the unfavourable climate change effects previously noted,⁸ citizens face the threat of actualising their rights to adequate standards of living, equality and non-discrimination based on gender, a clean and healthy environment, sustainable livelihoods, clean and quality water, property and security of tenure, health and sanitation, among others. Good governance of climate change response initiatives will be a step forward towards meeting Kenya's obligation under the Paris Agreement, consequently mitigating the negative impact of climate change on the enjoyment of the citizens' basic human rights.

This chapter seeks to determine the extent to which Kenya has promoted and protected the rights of its citizens through its efforts to domesticate the provisions of the Paris Agreement. In so doing, it analyses the measures that the government has put in place to adhere to the Agreement, the challenges faced in these attempts, their impact on human rights and the recommended measures the government ought to take to promote human rights and fully integrate the provisions of the Paris Agreement in its climate change actions. The next part covers the provisions of the Paris Agreement and their role in promoting human rights. It then highlights the challenges that Kenya faces in the domestication of the Paris Agreement, following which the value of domestication of the PA as an important medium of protecting human rights in Kenya is elaborated. The chapter concludes with a summary of key issues highlighted in the main content and recommendations.

2 The relevance of the Paris Agreement in promoting human rights

Climate change is a change in global climate patterns mainly attributed to increased levels of atmospheric carbon dioxide. It affects all aspects of human rights and all spheres of existence, including poverty, economic development, population growth, sustainable development and resource management.⁹ Consequently, nearly 200 nations signed the Paris

7 Government of Kenya National Climate Change Action Plan (Kenya): 2018-2022 (2018).

8 As above.

9 Burger (n 3).

Agreement in 2015, committing to cut their greenhouse gas (GHG) emissions and slow global warming.

The Paris Agreement is instrumental in the promotion of human rights. It reaffirms the need for governments to respect and promote human rights, including the rights of indigenous peoples, gender equality and the empowerment of women, the fundamental priority of safeguarding food security, the importance of public participation and access to information, the imperatives of a just transition and creation of decent work, and the importance of securing ecosystem integrity.¹⁰

Human rights are threatened and increasingly undermined by the impacts of anthropogenic warming intensity. According to Alderman, the right to life, a precondition to all other human rights, is threatened by systemic risks from extreme weather events resulting in severe infrastructural damage to electricity, water supplies, and health and emergency services.¹¹ The increased frequency in malnutrition then results from diminished food production. The right to health is also undermined by increased risks from vector-borne diseases. Ecosystems face heightened risks of abrupt and irreversible change that undermines food and water security, and triggers new poverty traps. The right to food is threatened as food security is undermined. Rural livelihoods and incomes are harmed by insufficient access to water for drinking, irrigation and sanitation, resulting in reduced agricultural productivity.¹²

The basic human rights threatened by adverse climate change as deduced from Alderman's analysis include the rights to life, water, health, safety and security, food security, nutrition, secure livelihoods, a clean and safe environment, sanitation and suitable standards of living.

In this regard, the importance of applying a human rights-based approach in addressing climate change effects cannot be gainsaid. The Paris Agreement seems to be alive to this reality in its Preamble test, which notes the following:¹³

10 S Duyck et al 'Delivering on the Paris promises: Combating climate change while protecting rights recommendations for the negotiations of the Paris Rule Book', <https://unfccc.int/sites/default/files/903.pdf> (accessed 22 July 2021).

11 S Alderman 'Human rights in the Paris Agreement: Too little, too late?' (2018) 7 *Transnational Environmental Law* 17.

12 O Quirico & M Boumghar (eds) *Climate change and human rights: An international and comparative law perspective* (2016) 2.

13 Paris Agreement recital 12.

Acknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

Article 12 of the Paris Agreement requires that measures should be taken by states to promote public participation and access to information as essential parts of climate actions. It further urges for the enhancement of climate change education, training and public awareness.¹⁴ The Agreement further promotes the right to information and to self-determination in engaging in climate change processes affecting individuals and communities. Articles 7(5) and 11(2) require public participation to be promoted in all adaptation and capacity-building efforts further buttress the right to self-determination.

Two articles of the Paris Agreement acknowledge that adaptation action and capacity building should be 'gender-responsive'.¹⁵ This is a key catalyst to the promotion of gender rights – rights to equality and non-discrimination. Article 2 of the Agreement, which emphasises that climate action must not undermine food production,¹⁶ clearly highlights the importance of promoting the right to food security. It stresses the importance of sustainable development and eradication of poverty to global measures in addressing climate change.¹⁷ Hence, it calls for the need to prioritise a bundle of rights, including the rights to suitable living standards, food, health, education and sanitation, all of which would be enjoyed with the eradication of poverty.¹⁸

The Paris Agreement contains stand-alone articles on reducing emissions resulting in deforestation and forest degradation¹⁹ and loss and damage.²⁰ These provisions together with the Preamble call for the protection of 'biodiversity', alluding to priority in protecting environmental rights that are also secured under articles 42 and 70 the Constitution of

14 Paris Agreement recital 15.

15 Arts 7(5) & 11(2) Paris Agreement.

16 Art 2(1)(b) Paris Agreement.

17 Art 2(1) Paris Agreement

18 As above.

19 Art 5 Paris Agreement.

20 Art 8 Paris Agreement.

Kenya 2010.²¹ It has been argued that although the Paris Agreement has only expressly mentioned human rights in its Preamble, human rights are integrated throughout the agreement through the principle of sustainable development.²²

However, the legal force of a recital as opposed to an operative clause may be questioned. The Preamble to a treaty may be incapable of creating rights or obligations on its own, even though it could contribute to the formation of a customary norm.²³ Because the Paris Agreement specifies no concrete measures, its direct impact on the protection of human rights in climate action remains to be established.²⁴ Consequently, it is argued that the Paris Agreement does not adequately address the magnitude of the threat posed by climate-related harm to human rights.²⁵

3 Kenya's implementation of the Paris Agreement

The frequency and magnitude of extreme climate events, such as droughts, storms and floods, leading to a loss of lives, diminished livelihoods, reduced production, and damaged infrastructure, make climate change a significant concern for Kenya,²⁶ despite the country contributing only 0,1 per cent of global GHG emissions.²⁷ The 2019 estimated climate change losses amounted to between \$2,9 and \$4,8 billion.²⁸ Climate change in the country has further led to the curtailment of the enjoyment of human rights, including the right to adequate standards of living, equality and non-discrimination based on gender, a clean and healthy environment, sustainable livelihoods, clean and quality water, property and security of tenure, health and sanitation.²⁹ Kenya signed the Paris Agreement on 22 April 2016 and became party to the Agreement on 28 December 2016.

21 Government of Kenya 'The Constitution of Kenya 2010' (2010).

22 Centre for International Governance Innovation Implementing the Paris Agreement: The relevance of human rights to climate action' (2016).'

23 B Mayer 'Human rights in the Paris Agreement' (2016) 1 *Climate Law* 109-117.

24 M Wood 'The second report on identification of customary international law' (2014).

25 Adelman (n 11) 17.

26 Government of Kenya National Climate Change Action Plan (Kenya) 2018-2022 (2018).

27 J McCarthy 'Kenya calls on rich countries to fund \$62 billion climate plan' *Global Citizen* 8 January 2021, <https://www.globalcitizen.org/en/content/kenyas-climate-plan-paris-climate-agreement/> (accessed 11 March 2021); Republic of Kenya Background report on national climate change priorities and relevant capacity development goals and initiatives in Kenya (2020); Government of Kenya; Government of Kenya UN CC: Learn Climate Change Learning Programme June 2020 (2020).

28 World Meteorological Organisation (n 2).

29 Climate Action Tracker (n 4).

As a member state, Kenya is expected to domesticate the provisions of the Agreement through legal, institutional, structural and other measures.

Kenya's national political commitment towards the implementation of the Paris Agreement is evident. President Uhuru Kenyatta has shown a certain level of commitment to supporting climate mitigation measures. At a roundtable discussion on 'Don't drop climate efforts' at the Paris Peace Forum 2018 in France, he announced Kenya's target 'to attain 100 per cent green energy sufficiency by 2020'.³⁰ This was recently reiterated in a presidential speech on the aggravation of COVID-19 on the vulnerability of Africa to climate change.³¹

An important instrument for implementing the Paris Agreement is the nationally-determined contribution (NDC) as the national climate action plan.³² Other instruments include the Mid-Century Long-Term Low Greenhouse Gas Emission Development Strategy, also known as Long-Term Strategy (LTS); and the National Adaptation Plan (NAP) which aims to identify climate risks, and implement adequate risk prevention, reduction and adaptation measures to increase climate resilience, particularly for the most vulnerable people. The Paris Rulebook is important³³ as it contains rules and guidelines on transparency, accountability, development and communication of parties' climate action plans, and review of parties' progress, individually and collectively, with a view to upgrading NDCs every five years until the long-term goals of the Paris Agreement are met.

In line with the Paris Agreement progress reporting provisions, Kenya submitted its updated NDC on 24 December 2020. The Kenyan NDC commits to 'abating GHG emissions by 32% by 2030 relative to the BAU scenario of 143 MtCO₂eq by 2030, with milestone targets at 2025'.³⁴ Kenya's Paris Agreement target is one of the few that are rated as 2°C

30 As above.

31 Presidential Press 'COVID-19 has aggravated Africa's vulnerability to climate change, says President Kenyatta' Government of Kenya 6 April 2021, <https://www.president.go.ke/2021/04/06/covid-19-has-aggravated-africas-vulnerability-to-climate-change-president-kenyatta-says/> (accessed 1 May 2021).

32 ACT Alliance 'Towards the ambitious implementation of the Paris Agreement: A toolkit for national level advocacy' (2018).

33 N Cogswell & Y Dagnet 'Why does the Paris Climate Agreement need a rulebook? Seven questions and answers' World Resource Institute 13 June 2019, <https://www.wri.org/blog/2019/06/why-does-paris-climate-agreement-need-rulebook-7-questions-and-answers> (accessed 11 March 2021).

34 Republic of Kenya 'Kenya's updated nationally determined contribution' (2020), [https://www4.unfccc.int/ndcstaging/PublishedDocuments/Kenya%2520First/Kenya%2527s%2520First%2520%2520NDC%2520\(updated%2520version\).pdf](https://www4.unfccc.int/ndcstaging/PublishedDocuments/Kenya%2520First/Kenya%2527s%2520First%2520%2520NDC%2520(updated%2520version).pdf) (accessed 15 March 2021).

compatible.³⁵ This rating indicates that Kenya's current policies are within the range of what is a fair share of global effort.

However, these plans are not yet fully consistent with the Paris Agreement.³⁶ For instance, while the Agreement requires member states to set a 2021-2030 carbon budget, Kenya has none. Although the NDC is considered an important part of Kenya's process of transforming to a low-emission society by 2050, no net-zero or other specific target is aligned to 1,5°C. While Kenya has established financial estimates for both conditional and unconditional targets, no details on actions and outcomes from international financial support are provided. The 2020 NDC mentions mitigation activities and sector plans without presenting further details or targets. Besides mitigation and adaptation co-benefits and the intention to match these to Sustainable Development Goals (SDGs), it does not mention cross-sectoral approaches and does not provide additional information on how these measures align with SDGs.³⁷ The exceptional achievement by Kenya in implementing the Paris Agreement is demonstrated in its enactment of relevant policies, laws and regulations that align with the provisions of the Paris Agreement. The Constitution of Kenya 2010³⁸ provides the basis for an elaborate legal framework. Articles 10 and 42 outline 'sustainable development' as a national value and provides for the right to a 'clean and healthy environment'.

Relevant legal frameworks enacted towards domesticating the Paris Agreement are the Climate Change Act, 2016;³⁹ the Energy Act, 2019;⁴⁰ the National Climate Change Framework Policy 2018;⁴¹ the National Policy on Climate Finance 2016;⁴² the National Disaster Risk Management Policy 2017;⁴³ and the National Policy on Gender and Development 2000. Key national plans and strategies that contribute significantly to the domestication of the Paris Agreement include the National Climate

35 Climate Action Tracker (n 4).

36 As above.

37 WWF 'NDC checklist: Kenya analysis' (2021), https://wwfint.awsassets.panda.org/downloads/ndcs_we_want_checklist___kenya.pdf (accessed 22 July 2021).

38 Constitution of Kenya 2010 (n 21).

39 Republic of Kenya The Climate Change Act 2016, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ClimateChangeActNo1of2016.pdf> (accessed 11 March 2021).

40 Republic of Kenya Energy Act 2019, https://kplc.co.ke/img/full/o8wccHsFPaZ3_ENERGY%2520ACT%25202019.pdf (accessed 10 March 2021).

41 Republic of Kenya Sessional Paper 5 of 2016. National Climate Change Policy Framework Policy.

42 Republic of Kenya National Policy on Climate Finance 2016.

43 PreventionWeb 'Kenya: National policy for disaster management' (2009), <http://preventionweb.net/go/60199> (accessed 16 November 2021).

Change Response Strategy 2010; the National Climate Change Action Plan (2018-2022);⁴⁴ the National Adaptation Plan (2015-2030);⁴⁵ the Kenya Climate Change Knowledge Portal;⁴⁶ and the National Climate Change Learning Strategy.⁴⁷

In terms of sectoral initiatives, the county governments have mainstreamed climate change in their Integrated Development Plans and Annual Development Plans, in line with the provisions of the Paris Agreement.⁴⁸ The Ministry of Agriculture has enacted the Kenya Climate Smart Agriculture Strategy (2017-2026)⁴⁹ to enable adaptation to climate change, build the resilience of agricultural systems for enhanced food and nutritional security and improved livelihoods, while minimising emissions. It is implemented through a framework.⁵⁰ Other noteworthy initiatives are the Green Economy Strategy and Implementation Plan 2016-2030;⁵¹ the Kenya National Forest Programme (2016-2030);⁵² and the Disaster Risk Financing Strategy (2018-2022).⁵³ It is also worth noting that the Climate

44 Ministry of Environment and Forestry National Climate Change Action Plan (NCCAP) 2018-2022 (2008), <https://climatelaws.org/cclow/geographies/kenya/policies/nationalclimate-change-action-plan-2018-2022-nccap> (accessed 9 March 2021).

45 Republic of Kenya National Adaptation Plan 2015-2030 (2016), https://www4.unfccc.int/sites/NAPC/Documents%2520NAP/Kenya_NAP_Final.pdf (accessed 12 March 2021).

46 'Kenya Climate Change Knowledge portal', <https://www.kckcp.go/ke> (accessed 11 March 2021).

47 UN CC: Learn 'The journey begins towards developing Kenya's National Climate Change Learning Strategy' 22 July 2021, <https://www.uncclern.org/news/the-journey-begins-towards-developing-kenyas-national-climate-change-learning-strategy/> (accessed 15 March 2021).

48 M Chudhury et al 'Mainstreaming climate change adaptation in Kenya: Lessons from Makuani and Wajir counties' World Resources Institute Working Paper (2020), www.wri.org/publication/mainstreaming-adaptation-kenya (accessed 15 March 2021).

49 Ministry of Agriculture, Livestock and Fisheries 'Kenya climate smart agriculture implementation Framework 2017-2026' (2018), <https://www.adaptation-undp.org/resources/plansand-policies-relevance-naps-least-developedcountries-ldcs/kenya-climate-smart> (accessed 9 March 2021).

50 As above.

51 Government of Kenya Green economy strategy and implementation plan 2016-2030 (2016).

52 Republic of Kenya National Forest Programme 2016-2030 (2016), <https://kwkakenya.com/download/kenya-national-forest-programme-2016-2030/> (accessed 15 March 2021).

53 Republic of Kenya National Disaster Risk Financing 2018-2022 (2019), <https://www.treasury.go.ke/media-centre/speeches/category/176-speeches-for-mombasa-workshop-25-29-november-2019> (accessed 15 March 2021).

Change Act 2016 has established the Climate Fund which is a financing mechanism for priority climate change actions and interventions.⁵⁴

Key institutions have been established to implement the legal frameworks, strategies, plans and programmes to achieve set climate change goals, including the domestication of the provisions of the Paris Agreement. These institutions include the National Climate Change Council (chaired by the President); the Climate Change Directorate which leads on setting national climate change plans and mitigation actions; the Ministry of Environment and Forestry which is responsible for the coordination of climate change response in Kenya and national focal point for the United Nations Framework Convention on Climate Change (UNFCCC); the Ministry of Energy (MoE); the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works; and the National Environment Management Authority (NEMA) which is responsible for monitoring and enforcing compliance of public and private entities regarding climate change duties and targets.

In terms of the enforcement of the fundamental rights under the initiatives to implement the Paris Agreement, Kenya has the Environment and Land Court which hears and determines complaints related to land and environment. The Environment and Land Court is a crucial judicial entity that was created following a backlog of cases at the judiciary related to land and environment. So far, the entity has helped in resolving a number of land and environmental disputes, including the encroachment of Karura Forest, Uhuru Park, Nairobi Game Park, and cases involving development in riparian areas, which endangers Kenya's ecosystem, among others.

Despite these numerous measures, Kenya is yet to achieve the full implementation of the provisions of the Paris Agreement and, by implication, there remains the continued inhibition in the enjoyment of the basic human rights curtailed by the adverse impacts of climate change. This is due to a myriad of challenges. Contrary to the express presidential commitment to addressing climate change, the country supports projects such as the Lamu coal-fired power plant.⁵⁵ This undermines the

54 V Orindi et al *The county climate change funds in Kenya. Real practice in collaborative climate action* (2020).

55 'Power, politics and economy of the coal-fired plant in Lamu' *Daily Nation* 2018, <https://www.nation.co.ke/news/Power--politics-economy-of-coal-fired-plant-in-Lamu-/1056-4379590-112cm0xz/index.html> (accessed 15 March 2021).

country's plan to 100 per cent green energy sufficiency by 2020.⁵⁶ Climate change receives limited priority within the national political agenda. It is not part of the Vision 2030 and the Big Four Agenda.⁵⁷ The two development blueprints entail a lot of industrial development plans that have the potential of impacting climate change, for example, through increased manufacturing operations and hydrocarbon extraction that may lead to increased greenhouse gases emissions. The implementation of policies, strategies and other institutional frameworks, tools to support mainstreaming climate adaptation in Kenya has also lagged behind.⁵⁸ The Climate Change Act 2016 does not include a quantitative emission reductions target. This needs to be set in law to enhance the urgency, resource provision and actions towards meeting Paris Agreement targets.

The Ministry of Energy's Least Cost Power Development Plan (LCPDP) 2017-2037 neither prioritises climate-related issues nor considers the NDC target, notwithstanding the significant role of the Ministry in reducing GHG emissions and transitioning the country to green energy.⁵⁹ Despite submitting its updated NDC, the country is yet to develop long-term emission reduction strategies and targets. Worse still, the country plans to exploit fossil fuel resources to expand its electricity demand, as outlined in its development blueprint, Vision 2030. The introduction of taxes on clean cooking and solar energy products is also counter-productive.⁶⁰ These measures are bound to lead to increased GHG emissions and global warming contrary to its set NDC.

The transparency frameworks in the climate law are not widely applied across sectors, making it difficult to assess the progress of their actions towards meeting climate change action targets.⁶¹ Coordination between ministries, and between national and county levels, is not yet effective, thus sectoral plans and strategies do not meet national climate mitigation targets. Despite key ministries appointing climate change officers or establishing climate change funds, these entities rarely consider climate

56 Standard Media 'Kenya eyes 100 percent green energy in two years' *The Standard* 2018, <https://www.standardmedia.co.ke/amp/sci-tech/article/2001302510/kenya-eyes-100-percent-green-energy-in-two-years> (accessed 15 March 2021).

57 The Presidency 'The big four' (2019), <http://www.president.go.ke/> (accessed 1 March 2021).

58 McCarthy (n 27).

59 As above.

60 'Experts oppose tax proposal on solar and cook stoves product' *The Standard* 2020, <https://www.standardmedia.co.ke/business/article/2001374607/experts-oppose-tax-proposal-on-solarand-cookstoves-product> (accessed 7 March 2021).

61 Climate Action Tracker (n 4).

change in sectoral strategy plans.⁶² There is also inadequate communication between county and national governments as well as confusion regarding the functions and mandates of different levels of government.⁶³ Of the 47 counties in Kenya, only five (Garissa, Isiolo, Kitui, Makueni, and Wajir) have made meaningful strides towards mainstreaming climate change into county processes,⁶⁴ implying that national initiatives are not replicated at the grassroots level.

Resource constraints are significant barriers to effective climate governance and in the past impeded developing countries.⁶⁵ In this regard, Kenya is not exempt.⁶⁶ The National Climate Fund, a financing mechanism for priority climate change actions that was established by the 2016 Act, is not yet operational.⁶⁷ While the national climate change lead agency has qualified staff, its budget is insufficient to perform some statutory tasks, such as the analytical support to sector ministries.⁶⁸ The institutions responsible for mobilising climate finance are being asked to deliver resources for COVID-19.⁶⁹ This implies a shortage of Kenya's anticipated climate change financial support. Kenya has an estimated implementation cost of US \$4,4 billion per year out of which the country 'can realistically mobilise domestic resources to meet 13% of this cost, we would need our external partners to support us fund the remaining 87%', according to the President.⁷⁰

There reportedly is a low level awareness and insufficient public participation and sensitisation on climate change.⁷¹ Climate change issues are not fully integrated into the formal education system. There is inadequate capacity for policy makers on climate change mainstreaming.⁷²

62 McCarthy (n 27).

63 J Bellali et al *Multi-level climate governance in Kenya. Activating mechanisms for climate action* (2018).

64 I Nyadera 'Evolution of Kenya's political system and challenges to democracy' in A Farazmand (ed) *Global encyclopedia of public administration, public policy, and governance* (2018).

65 Constitution of Kenya 2010 (n 21).

66 Burger (n 3).

67 A Dzebo et al *Coordinating climate finance in Kenya: Technical measures or political change?* (2020).

68 Constitution of Kenya 2010 (n 21).

69 M Igoe 'DevExplains: The climate finance challenge' 2020, <https://www.google.com/amp/s/www.devex.com/news/devexplains-the-climate-finance-challenge-98235/amp> (accessed 11 March 2021).

70 Presidential Press (n 31).

71 Constitution of Kenya 2010 (n 21).

72 As above.

The Kenya Climate Change Knowledge Portal, the Climate Change Directorate's 'one-stop repository of climate change information' has not published any reports or blogs on its website since May 2019.⁷³ There is an analysis indicating that the current dissemination practices of the Kenyan government are not effectively reaching grassroots communities because of socio-economic and language barriers.⁷⁴ A lack of capacity, conflicting media priorities and inadequate funding to train and support journalists also contribute to poor coverage and publicity of climate change issues.⁷⁵

4 The challenges of implementation of the Paris Agreement and human rights

The lack of priority by the government of Kenya to integrate a human rights-based approach in the implementation of climate change measures presents a hurdle in fully implementing the provisions of the Paris Agreement which, in turn, inhibits the enjoyment of human rights. The human rights associated with the effects of climate change, as earlier elaborated, include rights to adequate standards of living; equality and non-discrimination based on gender; a clean and healthy environment; sustainable livelihoods, clean and quality water; property and security of tenure; and health and sanitation respectively.⁷⁶

The insistence of the government to go ahead with the Lamu coal plant violates the rights of community members around and beyond the proposed project site. It further contravenes the Paris Agreement obligation to reduce GHG and global warming by all state parties. According to a submission to the United Nations Universal Periodic Review Committee,

the project raises great concerns about its impact on the environment regarding toxic pollution from coal and ash, carbon emissions by the coal power plant and rising sea levels due to climate change. The bigger problem is that the NEMA granted an Environmental Impact Assessment (EIA) Licence to Amu Power/Centum Investments together with Gulf Energy to undertake the project. There was insufficient public participation in the EIA Report and only the findings were shared with the affected Community. Besides, the final report did not consider the contents of the Climate Change Act, 2016 and

73 World Meteorological Organisation (n 2).

74 As above.

75 Presidential Press (n 31).

76 Ministry of Environment and Forestry (n 44).

thus ignored Kenya's commitments to international treaties and the Paris Agreement which require a managed decline of fossil fuel production.⁷⁷

The projected impacts of the Lamu coal plants are expected to multiply exponentially by the targeted increase in oil and gas (fossil fuel) extraction in Turkana county. The exploration for more hydrocarbon resources is also on the rise.⁷⁸ As it is, the government's climate change policies, strategies and plans acknowledge the prolonged droughts, the increased intensity of floods. The increased frequency of both phenomena is a result of climate change. The government further outlines the negative impacts these have in securing the rights of people, including the right to food security, health, water, sanitation, housing and livelihoods.⁷⁹

The lack of transparency, awareness, public participation and information goes contrary to the provisions of the Paris Agreement which calls for public participation, capacity building and gender mainstreaming. This challenge translates into a violation of a number of rights, including the right to self-determination, as expressed through people's engagement in climate change processes that affect their welfare. It further violates the right of access to information. These two rights are recognised under the Constitution of Kenya in articles 35 and 174. The right to public participation is highlighted under articles 69, 118, 196 and 201 of the Constitution.⁸⁰

Human Rights Watch (HRW) reports that the adverse effects of climate change in Kenya and the failure to put in place adequate responses have led to environmental and economic development challenges, which in turn have negatively impacted people's ability to access food, water, health and security. Prolonged and more frequent droughts have caused many water sources to become arid, making every day a struggle of survival for people and their livestock. Women and girls are forced to walk extremely long distances to dig for water in dry riverbeds. Many children have become ill because their families are unable to provide them with sufficient food and clean water. This development confirms the reality that climate change disproportionately affects populations in Kenya, a feature which should be taken into consideration when addressing its effects on these populations.

77 OHCHR 'Kenya CSO report to the UPR' (2020), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?3Ffilename%3D7329%26file%3DEnglishTranslation> (accessed 1 May 2021).

78 National Oil Kenya 'Kenya now a proven opportunity in oil and gas exploration' (2012) *Energised Bulletin Issue* 002, https://nationaloil.co.ke/pdf/NOCK_Newsletter.pdf (accessed 21 July 2021).

79 Ministry of Environment and Forestry (n 44); Republic of Kenya (n 41).

80 Constitution of Kenya 2010 (n 21).

Human Rights Watch has urged the Kenyan government to ensure that the rights to food, security, water, health, and non-discrimination are upheld in both its national climate change strategy and response plan.⁸¹ Trocaire notes that unaddressed adverse climate change continues to pose a threat to the right to food security, access to water, gender equality (due to the disproportionate impact on women and girls, compared to men and boys), health and environmental rights.⁸²

Minority Rights Group International reports that the impact of climate change is worsening the situation of child marriage among the Maasai. The prolonged droughts are forcing many families into desperate situations of hunger and young girls, as young as 12 years, are being given away as brides in exchange for cattle. The long walk in search of water exposes young girls to the danger of sexual abuse and resulting pregnancies.⁸³ This contravenes the rights to food, education, health and sexual reproductive health, as well as freedom from torture and child labour. Early child marriages are prohibited under the Children's Act 2001.

Indigenous peoples such as the Endorois and Ogiek communities, who happen to be minorities in Kenya, have suffered because of the inability to continue with their cultural way of life based on hunting and gathering, fishing and pastoralism due to the environmental effects of climate change. The inadequate action to appropriately address climate change causes a threat to their cultural lifestyle and thus to their right to culture.⁸⁴ Climate change threatens the right to security and safety given its likelihood to aggravate existing conflicts over water, land and resources in parts of the country, where such resources already are subjected to intense competition.⁸⁵

81 Human Rights Watch 'There is no time left. Climate change, environmental threats, and human rights in Turkana county, Kenya', <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> (accessed 1 May 2021).

82 Trocaire 'Kenya climate change case', <https://www.trocaire.org/sites/default/files/resources/policy/kenya-climate-change-case-study.pdf> (accessed 1 May 2021).

83 Minority Rights Group International Kenya 'The impact of climate change is worsening the situation of child marriage among the Maasai', <https://minorityrights.org/trends2019/kenya/> (accessed 1 May 2021).

84 P Kameri-Mbote & E Nyukuri 'Climate change, law, and indigenous peoples in Kenya: Ogiek and Maasai narratives' (2017), <http://www.ielrc.org/content/a1308.pdf> (accessed 1 May 2021).

85 E Parry et al *Climate risks vulnerability and governance in Kenya: A review* (2012).

5 Conclusion

Climate change either directly or indirectly affects all human rights and all spheres of human life. This highlights the importance of the Paris Agreement which aims to reduce the adverse effects of climate change. The Paris Agreement, signed in December 2015, obligates parties, including Kenya, to implement its provisions in their national climate change responses. Kenya has made significant strides in setting up supporting legal and strategic frameworks, plans and targets that are requisite in meeting its targets of GHG emission reductions as outlined in its updated NDC submitted to the UNFCCC in the year 2020. These and other initiatives by the country have gained it a rare rating as one of the few countries that will meet the Paris Agreement target of reducing global warming below two degrees Celsius (2°C) above pre-industrial levels by 2030.

However, the initiatives undertaken by the Kenyan government still are not yet fully consistent with the Paris Agreement. This has consequently put to threat the citizens' rights to food, education, health and sexual reproductive health, housing, food security, water, gender equality, a clean and healthy environment, livelihoods, sufficient standards of living, self-determination, culture, safety and security, and access to information. It has triggered child labour, early childhood marriages and gender-based discrimination, in violation of the rights of the vulnerable.

This calls for full implementation of the Paris Agreement by the Kenyan government by addressing the gaps identified above. Hence, the following recommended actions should be implemented:

- (i) The Kenyan state should review existing strategies and planned initiatives and adopt a human rights-based approach in all climate change and justice-related actions. The guiding factor on implementation of the Paris Agreement should be duty bearer (state) and rights holders (citizens).
- (ii) Human rights, climate change and climate justice should be a cluster of reporting under Kenya's Universal Periodic Review and other human rights reporting mechanisms.
- (iii) Climate change should be declared a national disaster and accorded significant focus. While Kenya regularly declares drought-related outcomes such as hunger as national disasters, the approach simply focuses on the symptoms and not the cause, in this case adverse climate change effects. Consequently, the focus should be on declaring climate change the national disaster given that this is what causes droughts and floods.

- (iv) The institutional and systematic approach of addressing climate change in Kenya is fragmented, disjointed and, therefore, ineffective. This is exhibited by the mandate of each ministry to plan and implement its own autonomous climate change effects. The alternative is to set up a dedicated ministry to focus on the government's climate change initiatives. This would then vet, approve and oversee the other ministries' climate change actions, ensuring that they contribute to an overall climate change strategy and plan developed by the Ministry of Climate Change.
- (v) To sustainably finance climate change response actions, the government should introduce a climate change levy targeting the largest emitters of greenhouse gases. The latter would also serve as a deterrent against activities that lead to increased global warming.
- (vi) The government should reconsider its stance on giving approval to the implementation of the Lamu coal plant, as this is likely to have more negative impacts on communities living around the project and the general protection of their human rights.
- (vii) There should be increased awareness on climate change issues, including the incorporation of climate change in the academic curriculum to be taught in schools and colleges; putting in place adequate responses to climate change calamities such as droughts, floods and insect infestation, and ensuring that its interventions respond to the disproportionate impact of climate change on populations, among others.
- (viii) The government should continue with the plans for 10 per cent forestation as a national initiative in line with its Vision 2030.

11

CLIMATE CHANGE AND HUMAN RIGHTS IN THE DEMOCRATIC REPUBLIC OF THE CONGO: REDD+ AND THE PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES

Lassana Koné

Abstract

The Democratic Republic of the Congo has accomplished several milestones in the reducing emissions from deforestation and forest degradation (REDD+) process, but its implementation remains limited. This chapter examines some of the issues faced in the emission reduction programme in Mai Ndombe province, one of the world's most advanced jurisdictional REDD+ programmes, and finds that the current legal and regulatory framework, as well as public policies on climate and REDD+ strategies in the DRC have failed to enhance the realisation and protection of substantive human rights of indigenous peoples and local communities. The implementation of the REDD+ programme is challenged by a legal crisis, which impacts the enjoyment of the rights of indigenous peoples and local communities. This chapter argues that the regulatory framework does not adequately protect indigenous people's land tenure and use, as well as other substantive and procedural rights, including the rights to participation and free, prior informed consent. It then highlights the legal windows available locally to secure traditional forests occupied customarily, including the application of effective compliance mechanisms of the REDD+ programme and the relevant human rights treaties ratified at the regional or international level in the DRC.

Key words: *climate change; indigenous peoples; local communities; Mai Ndombe; REDD+; rights-based approach*

1 Introduction

Climate change impacts include extreme weather events (such as floods, cyclones and droughts); increasing temperatures; rising sea levels; changes in precipitation patterns; melting permafrost; receding coastlines; and loss of territory. It has direct impacts on human populations – affecting core rights such as the right to health, the right to an adequate standard of living, the right to work, and the right to culture. The enjoyment of these rights is affected not only by the adverse consequences of climate change,

but also by states' mitigation and adaptation responses.¹ The emergence of reducing emissions from deforestation and forest degradation (REDD+), perceived as a quick and cheap option for taking early action toward limiting global warming to 2°C, has generated significant interest, but it has also sparked concern about potential adverse impacts on indigenous peoples and community rights and livelihoods. The negative impacts include increased centralisation of forest management, inequitable benefit sharing, lack of real participation and lack of free, prior informed consent.²

The Democratic Republic of the Congo (DRC) hosts approximately half of the second-largest tropical humid forest in the world. It has a forest cover of around 100 million hectares, with an estimated 40 million people relying on forests for their livelihoods, among which 600 000 to 700 000 are indigenous people.³ These people who suffer poverty, inequality, weak livelihood conditions and a lack of recognition of collective customary ownership, are regularly exposed to human rights violations, and continue to be neglected regarding forest governance issues.⁴ Over the last decade the DRC has been continually active in the ongoing international climate negotiations and has accomplished several milestones towards readiness for the implementation phase of REDD+.⁵ The country has attracted pilot investments in the region, while also receiving technical and financial support from multilateral and bilateral donors. It also adopted a national REDD+ framework strategy in 2012, including a REDD+ national fund and national REDD+ social and environmental standards; a national forest monitoring system; and a national REDD+ registry to document information about REDD+ projects in DRC.⁶ Despite these important advancements, REDD+ governance in DRC may be limited by several structural shortcomings and deficiencies since they have the potential to affect indigenous peoples' and local communities' livelihoods and rights

- 1 S Jodoin & K Lofts (eds) *Economic, social, and cultural rights and climate change: A legal reference guide* (2013) 5.
- 2 A Angelsen et al *Analysing REDD+: Challenges and choices* (2012) 1-2.
- 3 Indigenous peoples in DRC are known in anthropological literature by different names, including Twa, Batwa, Mbuti, Bambuti, Basua, Efe or Asua. They consider their generic appellation of 'pygmies' as derogative and discriminatory. They are also referred to as *peuples autochtones* in French, which means indigenous peoples.
- 4 ACHPR & IWGIA 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Research and Information Visit to the Democratic Republic of Congo' (2011) adopted by the African Commission on Human and Peoples' Rights at its 49th ordinary session, 2011 21-31.
- 5 Democratic Republic of the Congo's Minister of Environment, Nature Conservation and Tourism (MECNT) 'REDD readiness Plan 2008–2012 R-PP Version Finale (v.3.1)' (2010) 157.
- 6 K Fobissie et al 'REDD+ policy approaches in the Congo Basin: A comparative analysis of Cameroon and the Democratic Republic of Congo' (2014) 5 *Forests* 2403.

by imposing new restrictions on access to valuable resources, by removing decision-making autonomy on resource use and by undermining long-established traditional forest management regimes.⁷ Similarly, the fundamental rights of indigenous peoples are routinely violated despite these rights being recognised in several international conventions ratified by the state. The land insecurity creates risks of dispossession and increasing poverty for local communities and indigenous peoples. In the absence of legal clarity on land tenure, discrimination against rural and indigenous women, who lack access to key lands and resources, persists in DRC. Challenges for the effective implementation of REDD+ include the lack of adequate benefit-sharing mechanisms between the state and local communities, weak compliance safeguards standards, lack of effective grievance mechanisms and the exclusion of marginalised indigenous peoples in decision-making processes at both national and local levels.

This chapter analyses the interface of climate policies and mitigation measures with the rights of indigenous peoples and local communities in DRC. In examining the extent of protection available to indigenous peoples and local communities under the climate change regulatory framework in DRC, the chapter finds gaps between the national and regional or international frameworks in relation to the protection of land tenure, and a lack of a prescriptive human rights framework to enhance REDD+ implementation at the local level. It contributes to the reflection on the human rights dimension of climate change in DRC, where the realisation of the rights of indigenous peoples and local communities remains problematic mainly due to insecure tenure, and lack of political will. Against the foregoing backdrop, the chapter calls for a move beyond mere commitment and ‘nice talks’ to achieve effective compliance with regional and international human rights treaties ratified by DRC, with a specific focus on the rights of indigenous peoples and local communities. Following a brief introductory discussion of key concepts in relation to climate change and human rights, the chapter proceeds with the background to REDD+ in DRC and demonstrates how REDD+ interventions have undermined or violated specific rights of indigenous peoples or local communities. It critically examines weaknesses and gaps in the national climate change regulatory framework, including conservation in relation to the rights of indigenous peoples and local communities. The chapter proposes what could be used as an opportunity to secure indigenous peoples’ and local communities’ land tenure and ensure that forest-dependent communities remain the primary beneficiaries of REDD+ initiatives in DRC.

7 R Jesse & A Larson ‘Reducing REDD risks: Affirmative policy on an uneven playing field’ (2012) 6 *International Journal of the Commons* 233.

2 Climate change and human rights: Conceptual basis and theoretical analysis

The environment and climate policies have for long been perceived as a human rights-free zone, and most governments are not responsive to address human rights, climate and the environment in an integrated way. The concern about these risks has prompted the enactment of safeguards under the United Nations (UN) Framework Convention on Climate Change (UNFCCC) and the development of safeguards by donor initiatives.⁸ Considering its link with the realisation of human rights, the UNFCCC provides consensual and cooperative approaches to address climate change.⁹ Bodansky argues that the UNFCCC, like other environmental instruments, seeks consensus building rather than the bindingness of law.¹⁰ Posner demonstrates leading arguments for the preference for a consensual political environment such as allowed under the UNFCCC and not human rights as a conceptual basis for addressing climate change. According to the author, engaging human rights ‘would not lead to a desirable outcome’,¹¹ and its usage as a conceptual basis will affect economic development, a critical concern of developing nations.¹² The Paris Agreement, argues Sands, does not contain ‘legally-binding

- 8 Under the UNFCCC, the December 2010 COP-16 meeting produced the Cancun Agreement, including a set of social and environmental safeguards for climate mitigation and sustainable forest management activities. While recognised as an important step, many indigenous peoples’ organisations have stressed that there is space for improvement to adequately address their concerns and interests in a final legal framework. Indigenous peoples ask for the recognition of key rights: the right to lands, territories and resources; the recognition of traditional knowledge and traditional practices; and respect for indigenous peoples’ own governance structure and equitable benefit sharing. The Cancun Agreement only considers the UN Declaration on the Rights of Indigenous Peoples, although this is considered a crucial and comprehensive instrument by indigenous peoples. At the UNFCCC Durban Conference (COP-17) member states agreed to establish a Social and Environmental Safeguards information system.
- 9 EA Posner ‘Climate change and international human rights litigation: A critical appraisal’ (2007) 155 *University of Pennsylvania Law Review* 1925; EA Posner & CR Sunstein ‘Climate change justice’ (2008) 96 *Georgetown Law Journal* 1565; also see J Gupta ‘Legal steps outside the climate convention: Litigation as a tool to address climate change’ (2007) 16 *Review of European Community and International Environmental Law (RECIEL)* 76; M Allen ‘Liability for climate change: Will it ever be possible to sue anyone for damaging the climate?’ (2003) 421 *Commentary in Nature* 891.
- 10 D Bodansky ‘Introduction: Climate change and human rights: Unpacking the issues’ (2010) 38 *Georgia Journal of International and Comparative Law* 511 516.
- 11 EA Posner ‘Climate change and international human rights litigation: A critical appraisal’ (2007) 155 *University of Pennsylvania Law Review* 1925.
- 12 As above.

provisions that require countries to take domestic legal action'.¹³ In particular, pointing to the fact that its provision on human rights obligations is embodied in the Preamble, other authors express the probability that the Paris Agreement is not intended to impose a legally-binding human rights obligation on parties.¹⁴ The application of human rights to the subject of climate change is novel and contested,¹⁵ because it is controversial whether a human rights framework and not an environmental law framework is the appropriate conceptual basis for addressing the adverse effects of climate change.¹⁶

While most of these arguments are welcomed by state governments and private actors globally, in the Congo Basin since the 1990s there has been an increasing realisation in the field of development that the traditional needs-based approach to development is not sufficient. There is the need for a paradigm shift to the rights-based approach to enable individuals (rights holders) to demand and exercise rights and the state and non-state actors (duty bearers) to deliver those rights.¹⁷ A rights-based approach encourages rights holders to claim rights and to be the active players in their own development. According to Sen, the capacity development notion of the rights-based approach empowers individuals (or communities) to demand justice as a right rather than a charity.¹⁸ In terms of development projects, the inclusion and participation of indigenous peoples and local communities is important, not only because it makes development more equitable, but also because it has the potential to guarantee a protected space to the marginalised groups disallowing the monopolisation of development policies and practices by elites.¹⁹ Hamm understands development and human rights as being interdependent. She argues that a human rights-based approach to development recognises

13 P Sands 'Climate change and the rule of law: Adjudicating the future in international law' (2016) 28 *Journal of Environmental Law* 19 22.

14 B Mayer 'Human rights in the Paris Agreement' (2016) 6 *Climate Law* 109 114; R Cléménçon 'The two sides of the Paris climate Agreement: Dismal failure or historic breakthrough?' (2016) 25 *Journal of Environment and Development* 3 8.

15 A Jegede *The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications* (2016) 29; M Limon 'Human rights and climate change: Constructing a case for political action' (2009) 33 *Harvard Environmental Law Review* 439; JH Knox 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 483.

16 D Hart 'Is climate change a human rights issue?' (2012) 24 *Environmental Law and Management* 76; Bodansky (n 10) 511 516.

17 A Cornwall & C Nyamu-Musembi 'Putting the "rights-based approach" to development into perspective' (2004) 25 *Third World Quarterly* 1415.

18 A Sen 'Human rights and capabilities' (2005) 6 *Journal of Human Development* 151.

19 OHCHR 'High Commissioner's Strategic Management Plan' (2006) 2006-2007.

primarily the legal obligations of members of human rights treaties to development cooperation and development efforts and so goes beyond human rights as the content of development policy.²⁰ Although the operationalisation of human rights (rights-in-practice) towards economic benefits and social justice has been less evident than the theoretical discourse,²¹ this chapter advances that a rights-based legal or regulatory framework coupled with effective compliance and practical application of relevant human rights standards can achieve sustainable benefits for affected marginalised communities.

A human rights framework generally allows for the protection of the environment, and there is mounting evidence that secure community forest land and resource tenure helps promote environmental objectives (including environmental services) and can result in better forest outcomes than the increasingly outdated (and conflict-prone) development and conservation model where community rights are excluded.²² The evidence illustrates the concerns over the regulatory framework established by the international climate regime, especially in relation to REDD+, which does not adequately protect indigenous peoples' rights to land tenure and use. Environment and climate policies encourage a consensual political approach rather than a prescriptive framework. REDD+ may have implications for human rights,²³ as the protection of forests is critical to combating climate change, and must be done in ways that respect and protect the rights of those who have long depended on those forests.²⁴

The emergence of REDD+ has generated significant interest in its potential to mitigate the impact of global warming, but it has also sparked

20 BI Hamm 'A human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005.

21 J Grugel & N Piper 'Do rights promote development?' (2009) 9 *Global Social Policy* 79.

22 A Chhatre & A Agrawal 'Trade-offs and synergies between carbon storage and livelihood benefits from forest commons' (2009) 106 *PNAS* 17667-17670; A Nelson & KM Chomitz 'Effectiveness of strict vs multiple use protected areas in reducing tropical forest fires: A global analysis using matching methods' (2011) 6 *PLoS ONE* e22722; L Porter-Bolland et al 'Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics' (2011) 502 *Forest Ecology and Management*; E Ostrom *Governing the commons: The evolution of institutions for collective action* (2015); A Agrawal 'Common property institutions and sustainable governance of resources' (2001) 29 *World Development* 1649; A Agrawal & E Ostrom 'Collective action, property rights, and decentralisation in resource use in India and Nepal' (2001) 29 *Politics and Society* 485; D Gilmour 'Forty years of community-based forestry' FAO forestry paper (2016) 176.

23 J Quan & N Dyer 'Climate change and land tenure: The implications of climate change for land tenure and land policy' (2008) 2 *Land Tenure Working Paper* 7-8.

24 Jegede (n 15) vii.

concern about potential adverse impacts on indigenous peoples' and communities' rights and livelihoods, such as negative impacts on land and resource rights, increased centralisation of forest management, inequitable benefit sharing, lack of effective participation of marginalised communities and free, prior informed consent. Their rights to land and natural resources are regularly sidelined.²⁵ In the context of climate change governance, a rights-based approach seeks to ensure that responses to climate change protect, respect and fulfil human rights obligations throughout the various stages of climate responses (including planning, funding, implementation, monitoring and evaluation).²⁶ Indigenous peoples' lands are intrinsically related to other rights, including their rights to property, to cultural integrity, and free, prior informed consent.²⁷

Free, prior informed consent has emerged as a well-established principle in law,²⁸ in order to protect indigenous peoples (and other local communities) from losing their livelihoods, culture, and sense of people by recognising their rights to give or withhold consent to proposed development (and other) projects that may affect the lands they traditionally own, occupy, or otherwise use. It is a process that requires informed, non-coercive consultations, discussions, negotiations, and meetings between investors, companies, governments and indigenous peoples prior to the development and establishment of projects on customary lands. It is designed to allow indigenous peoples to reach consensus and make decisions according to their own customary systems of decision making.²⁹ From this perspective, free, prior informed consent appears to be an articulation of the right to self-determination. Subsequently, prior to undertaking any project development, the government or the local company have an obligation to consult indigenous peoples and local communities in advance, on a fully-informed and free basis, based on which those peoples may give or withhold their consent, in relation to planned activities that will affect their

25 UNCHR (Sub-Commission) 'Indigenous peoples and their relationship to land' Final Working Paper prepared by the Special Rapporteur E-I A Daes' (2001) UN Doc E/CN.4/Sub.2/2001/21 para 67.

26 Jodoin & Lofts (n 1) 5-6.

27 IFAD *Land tenure security and poverty reduction* (2008); IFAD *How to do: Seeking free, prior and informed consent in IFAD investment projects* (2015).

28 The principle is affirmed in the UN Declaration on the Rights of Indigenous Peoples.

29 M Colchester 'Free, prior and informed consent: Making FPIC work for forests and peoples' (2010) 11 *The Forest Dialogues Research Paper* 18-19; FAO 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' (2014) *Governance of Tenure Technical Guide 3*; UN-REDD Programme 'UN-REDD Programme guidelines on free, prior and informed consent' (2013); P Anderson 'Free, prior, and informed consent: Principles and approaches for policy and project development' (2011).

rights to their customary lands, territories and other resources. As will be illustrated later, this is not the case in the context of REDD+ planning in DRC, where the pilot projects have been outlined in consultation with the national government but without seeking proper free, prior informed consent from potentially-affected communities.

Indigenous peoples have a distinctive perception of land tenure and use relevant for adaptation and mitigation purposes.³⁰ The lack of formal recognition of indigenous peoples' land claims makes REDD+ harmful to indigenous peoples. The lack of land rights limits the potential for communities to participate in REDD+ initiatives.³¹ For example, where lands claimed by indigenous communities are not yet secured or titled, they could be allocated to private concessions to work on REDD+. According to Sen, all forms of deprivation (including dispossession of land) and social, economic, political, and cultural exclusion directly result in poverty.³² From a tenure perspective, REDD+ does introduce some new elements – such as rights to the carbon values of forests – as well as specific challenges, including the problem of private speculators interested in profiting from potential carbon markets, who negotiate unfair contracts with local communities. Normally, REDD+ projects are designed to provide fair and equitable access to benefits in a manner that is inclusive, particularly with respect to marginalised and vulnerable groups. Benefit sharing has been defined as the distribution of both the monetary and the non-monetary benefits generated through the implementation of REDD+ projects and programmes.³³ The legal concept of 'benefit sharing', developed under the Convention on Biological Diversity,³⁴ appears to be increasingly called upon as an inherent component of the human rights of indigenous peoples and local communities that may be affected by traditional forms of natural resource extraction and by nature conservation

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

31 CIHR 'Rights-based approaches to REDD+' Report of a Conservation Initiative on Human Rights Workshop' (2012) 3.

32 A Sen *Development as freedom* (1999).

33 PT Thuy et al 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries' (2013) CIFOR Working paper 108 1.

34 E Morgera & E Tsioumani 'The evolution of benefit-sharing: Linking biodiversity and community livelihoods' (2010) 20 *RECIEL* 150.

measures.³⁵ In a legal sense, an approach to benefit allocation refers to the way in which the basis for a benefit claim is established (whether by a legislative instrument or contract). Given that carbon is a natural resource intrinsically linked to land, the rights to own or use the carbon resource (referred to as ‘carbon rights’) need to be clear. In fact, the legal basis for establishing benefit claims begins by clearly defining ‘carbon rights’,³⁶ as well as non-carbon benefits.

3 Climate change and human rights in DRC: REDD+ in context

REDD+ has been through an intensive process of conceptualisation, design and implementation – even if it is still far from realising its fundamental goal, namely, large-scale emission reductions.³⁷ Voluntary REDD projects have started round the world in the absence of a formal mechanism for REDD+.³⁸ As home to the second-largest forest in the world, DRC has attracted pilot investments in the region, including from multilateral and bilateral donors as well as from international non-governmental organisations (NGOs), while also receiving technical and financial support of the Forest Carbon Partnership Facility (FCPF), the UN-REDD+ programme, and the Congo Basin Forest Fund (CBFF) of the African Development Bank.³⁹ It is the first African country to launch a national forest monitoring system and a REDD+ National Registry for the monitoring of REDD+ projects. DRC adopted a National REDD+ Framework strategy in 2012, including a REDD+ National Fund, a national REDD+ social and environmental standards and a REDD+ investment plan.⁴⁰

35 E Morgera ‘From corporate social responsibility to accountability mechanisms’ in PM Dupuy & J Viñuales (eds) *Harnessing foreign investment to promote environmental protection: Incentives and safeguards* (2013) 32.

36 S Chapman & AM Wilder ‘Defining the legal elements of benefit sharing in the context of REDD+’ REDD+ Law Project Working Paper (2014) 5.

37 Angelsen (n 2) 1-2.

38 TAP West et al ‘Overstated carbon emission reductions from voluntary REDD+ projects in the Brazilian Amazon’ (2020) 17 *PNAS* 24188; also see IIED ‘REDD: Protecting climate, forests and livelihoods’, <https://www.iied.org/redd-protecting-climate-forests-livelihoods> (accessed 22 January 2022).

39 PC Gondo ‘A review of forest financing in Africa’, https://www.un.org/esa/forests/wp-content/uploads/2014/12/Forest_Financing_Africa_Gondo.pdf (accessed 22 January 2022).

40 Democratic Republic of the Congo ‘REDD+ Investment Plan (2015-2020)’ (DRC Investment plan), https://redd.unfccc.int/uploads/3262_4_redd_investment_plan_eng.pdf (accessed 22 January 2022).

The investment plan aims at two major impacts: emission reductions and improved livelihoods, especially through increasing the income of the population among the poorest and most vulnerable worldwide.⁴¹ To this end, the investment plan includes a portfolio of REDD+ programmes across the country that covers major structural and policy reforms, such as land tenure reform to secure rural tenure, and a land use planning policy.⁴² It includes an improvement in governance and increases in agricultural productivity that promotes activities in savannahs as well as investments at provincial level to drive a sustainable, inclusive model of rural development and create new socio-economic opportunities for local communities, farmers and smallholders.⁴³

The National REDD+ Fund (FONAREDD) was designed as a tool for cross-sectoral coordination, mobilisation of funding and monitoring of the fiduciary implementation of projects related to REDD+ and climate change mitigation in DRC.⁴⁴ Since 2013, it has served as a financial vehicle for the implementation of the REDD+ strategy. Both the REDD+ national strategy and investment plan describe the objectives of FONAREDD. The investment plan, evaluated at \$1 078 million over the period 2016-2020, sets out in operational terms of how to achieve this stabilisation objective by identifying activities, sectoral projects, policies and reforms to be implemented to address the various drivers of deforestation.⁴⁵ All these objectives are brought together in the Integrated REDD Projects (PIREDD).⁴⁶ The investment plan anticipates one PIREDD for each of the 26 provinces.⁴⁷ In 2016 the FCPF approved the DRC Emissions Reduction Programme (ERP) for the province of Mai-Ndombe, which covers 12,3 million hectares, including 9,8 million hectares of forest. Logging, livestock and conservation concessions and protected areas account for 30 per cent of the total area of the province, leaving 70 per cent of the territory to the communities.⁴⁸ Indigenous peoples constitute 3 per cent of the province's population. According to the Emission

41 As above.

42 As above.

43 As above.

44 The DRC REDD+ National Fund (FONAREDD), <https://www.cafi.org/countries/democratic-republic-congo/drc-redd-national-fund> (accessed 22 January 2022).

45 DRC Investment plan (n 40).

46 'The DRC REDD+ National Fund', <https://www1.undp.org/content/cafi/en/home/partner-countries/democratic-republic-of-the-congo/the-drc-redd-national-fund.html> (accessed 22 January 2022).

47 DRC Investment plan (n 40).

48 Rights and Resources Initiative *Mai-Ndombe: Will the REDD+ laboratory benefit indigenous peoples and local communities? Analysis of the cumulative impacts and risks of REDD+ initiatives* (2018).

Reductions Programme Document (ERPD), Mai-Ndombe is a first step in implementing the country's national REDD+ strategy at jurisdictional level, as a model for green development in the Congo Basin, an important test of climate action on the African continent and for REDD+ results-based payments in high forest cover low deforestation (HFLD) countries.⁴⁹ The background to REDD+ in DRC and reflections on negative impacts on the rights of indigenous peoples and local communities are discussed below. Issues such as land tenure and use, carbon rights, compensation and benefit sharing by indigenous peoples have implications for the right to property under the African Charter on Human and Peoples' Rights (African Charter).⁵⁰

3.1 A controversial diagnosis on the drivers of deforestation

Shifting cultivation drives the current patterns of forest cover loss according to the REDD+ strategy plan,⁵¹ and the Mai Ndombe ERP identifies slash-and-burn agriculture as the main direct drivers of deforestation and forest degradation in the programme area. The analysis of drivers blames most deforestation on poor shifting cultivators when this does not appear to be supported by the data presented.⁵² Indeed, other studies highlight the impact of the expansion of commercial agriculture, illegal industrial logging and mineral extraction driven by global demand.⁵³ In the absence of reliable information for planning, mainly in relation to human activity and its interaction with the environment, it seems that political decision makers resort to the use of preconceived notions.⁵⁴ These preconceived notions include the use of a 'shifting slash and burn agriculture' by forest communities. The preconceived idea is that this type of agriculture has a

49 RA Asare & D Gohil 'The evolution of forest finance in five African countries: Lessons learned from the REDDX initiative in Africa' (2016) 2 10; also see KE Enongene & K Fobissie 'The potential of REDD+ in supporting the transition to a Green Economy in the Congo Basin' (2016) 18 *International Forestry Review* 29.29.

50 Jegede (n 15) 221-223.

51 Stratégie-cadre nationale REDD de la République Démocratique du Congo (2012) 23.

52 Environmental Investigation Agency (EIA) 'Preliminary comments by the Environmental Investigation Agency on the Democratic Republic of the Congo's Emission Reduction Programme Document for the World Bank Forest Carbon Partnership Facility' (2016) 2, <https://www.forestcarbonpartnership.org/system/files/documents/EIA%20Comments%20DRC%20ER-PD.pdf> (accessed 19 September 2021).

53 A Ickowitz et al 'Agriculture and deforestation in the Democratic Republic of the Congo: A synthesis of the current state of knowledge' (2015) Occasional Paper 119; Chatham House *Illegal logging in the Democratic Republic of the Congo* (2014).

54 Ideas and explanations admitted as true by the public or experts of a given domain. These ideas and explanations, though widely popular, often do not lie on any logical basis and are not verifiable in practice.

destructive and irreversible effect on the forest. However, the observation under the Rights and Resources Initiatives (RRI) tenure reference study (ERT)⁵⁵ does not allow for a trustful conclusion that the practices (i) prevail at an extensive scale as often suggested by some stakeholders; and (ii) their impact is in such a dimension to necessitate political decisions in the absence of in-depth research sustaining the thesis and its possible impact.⁵⁶ Yet, the preconceived idea concerning the impact of shifting and slash and burn farming has led planners, inspired by the REDD+ strategy, to opt for two policy directions that might have consequences for the communities living in the forest and in the savanna.⁵⁷ It is essential that the programme be targeted at the correct drivers of deforestation, especially the indirect causes of forest loss, including the issues of insecure tenure, poor governance and policy incoherence. Otherwise, there are risks that the emission reduction programmes will not address the real drivers of deforestation, but rather unfairly blame and place undue restrictions on communities and their forest use activities, and that forest communities at the front lines of forest protection will face unnecessary and unjust limits on their rights and livelihoods and will not have access to the benefits and incentives associated with REDD+.⁵⁸

3.2 Lack of free, prior informed consent and effective participation of affected communities

The principle of participation holds that every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights can be realised.⁵⁹ Participation is important in the implementation of projects under the international climate change regulatory framework at the national level. It is important, for instance, in the formulation of the proposal on REDD+, and the development of a benefit-sharing plan. There are relevant norms on participation

55 Rights and Resources Initiative (RRI) 'Étude de référence sur la tenure en République Démocratique du Congo' (2019) https://rightsandresources.org/wp-content/uploads/2019/05/Etude-de-Reference-RDC_RRI_2019.pdf (accessed 13 December 2020).

56 P de Wit 'Planification de l'utilisation des terres: Impact sur les droits communautaires' in RRI, *Étude de référence sur la tenure en République Démocratique du Congo* (2019) 114.

57 As above.

58 FPP 'Comments on the Forest Carbon Partnership Facility (FCPF) Emission Reductions Programme Document (ER-PD) on the Mai-Ndombe Emission Reduction Programme in the Democratic Republic of Congo' 2017.

59 L VeneKlasen et al 'Rights-based approaches and beyond: Challenges of linking rights and participation' IDS Working Paper 235 (December 2004) 5.

and inclusion as core principles in human rights that can help address indigenous peoples' claims in respect of rights to lands in a climate change context.⁶⁰ Indigenous peoples and local communities can ground the claim for effective engagement in climate change negotiation on the right to participation. They can use this principle in drawing attention to the importance of recognising their land rights, and claiming monetary or non-monetary benefits. In DRC there is a shockingly low level of inclusion and ownership in communities supposed to be implementing REDD+ activities, particularly among women.⁶¹ Local development committees set up to interface with the projects do not properly represent communities, their members are not sufficiently informed of what REDD+ is, and often lack the necessary resources to implement REDD+ activities.⁶²

The discussions about the potential impacts of REDD+ have converged in stressing the need for the participation of forest communities within REDD+ projects but have neglected the fundamental question of whether communities wanted REDD+ pilots in the first place.⁶³ Legitimate concerns about the potentially harmful social effects of REDD+ articulated by indigenous communities were side-lined.⁶⁴ Free, prior informed consent is a specific right that pertains to indigenous peoples recognised by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)⁶⁵ which allows them to give or withhold consent to a project that may affect their rights, including their lands, territories, and resources that they have traditionally owned, occupied or otherwise used or acquired.⁶⁶ The right to give or withhold free, prior informed consent

60 Jegede (n 15) 223 225.

61 The Rainforest Foundation 'REDD-Minus: The rhetoric and reality of the Mai Ndombe REDD+ programme' (2020) 1.

62 As above.

63 J Dehm 'Indigenous peoples and REDD+ safeguards: Rights as resistance or as disciplinary inclusion in the green economy?' (2016) 7 *Journal of Human Rights and the Environment* 180.

64 These concerns, including the exclusionary and top-down approach to REDD+, are acute in the context of DRC where the state claims ownership rights over forest lands, disregarding the customary right of people living there. Under such circumstances it is easier for private actors to gain regulatory approval from the national government to implement their future projects.

65 UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295) (2007).

66 UN Declaration on the Rights of Indigenous Peoples, arts 10, 19, 28, 29 & 32.

has been highlighted by indigenous peoples as a fundamental element of the exercise of their right to self-determination.⁶⁷ A *Ministerial Arrêté*⁶⁸ was adopted in 2017 to set up the legal framework for the right to free, prior informed consent in the context of REDD+ in DRC. However, REDD+ pilot initiatives have been established as a predetermined outcome where proposed projects have been described as a win-win opportunity that will benefit both communities and companies, and in most cases REDD+ developers failed to seek free, prior informed consent before the start of operations, leading to confusion and conflict in the project areas.⁶⁹ In the Mai Ndombe emission reduction programme, free, prior informed consent is applied partially and unevenly. Marginalised communities were not included in the design of projects and were poorly informed about the processes that have mainly been conducted in the capital city of Kinshasa.⁷⁰

3.3 Lack of recognition of the carbon rights

Carbon rights have been a distinct asset that can be disentangled from the complex bundles of rights associated with land, forests and other natural resources or ecosystem services.⁷¹ In the context of REDD+, the law can play an important role in clearly outlining who owns the carbon stored in trees. Clear land tenure and forest tenure are prerequisites for the effective implementation of REDD+ initiatives, while unclear tenure can create confusion regarding who is responsible for forest conservation and who is entitled to benefits.⁷² However, in DRC carbon rights are not explicitly referenced in the country's legislation,⁷³ and there is no clear definition except in the context of administrative procedural law laid down in a ministerial regulation establishing the approval procedure for REDD+ projects.⁷⁴ The state has ultimate ownership rights to all

67 See eg art 20 of the African Charter on Human and Peoples' Rights.

68 DRC 'Arrêté Ministériel' N. 026/CAB/MIN/EDD/AAN/KTT/04/2017 du 8 novembre 2017 fixant le cadre des directives nationales sur le CLIP dans le cadre de la mise en œuvre de la REDD+ en RDC.

69 RFUK 'REDD-Minus: The rhetoric and reality of the Mai Ndombe REDD+ programme' (2020) 9.

70 Rights and Resources Initiative (RRI) (n 55) 25.

71 RRI & Ateneo School of Government *Status of forest carbon rights and implications for communities, the Carbon Trade, and REDD+ Investments* (2014).

72 P Wieland 'Building carbon rights infrastructure with REDD+ incentives: A multi-scale analysis in the Peruvian Amazon' (2013) 43 *Environmental Law Reporter* 10275.

73 A Mpoyi et al 'REDD+ en RDC: Cadre juridique et institutionnel de mise en œuvre de la REDD+ en RDC' (2013).

74 Arrêté Ministériel N 004/CAB/MIN/ECN-T/012 du 12 février 2012 fixant la procédure d'homologation des projets REDD+. In a separate context, that is, the

resources, adjudicating land use rights and revoking these if public interest so demands. Community rights, although weak, are acknowledged in a dual system of tenure and resource rights.⁷⁵ The state is the owner of the land, forests, soil and subsoil, and consequently it has the rights to regulate carbon credits. However, it has not yet established a robust legal structure for the international sale of carbon assets. While there are clear legal provisions for private sector access and resource use rights, this is not the case when it comes to community rights, particularly for the regulatory ecosystem services that carbon provides (for example, climate change mitigation).⁷⁶ In 1973 the land law provided that a presidential ordinance would regulate the rights of rural communities to use their land.⁷⁷ Although the Land Law was revised in 1980, the Ordinance was never drafted – an oversight that has never since been addressed by the various governments.⁷⁸ This situation creates a vacuum and legal insecurity that is detrimental to all the communities that depend on the forest for their livelihood.⁷⁹ The government currently adjudicates carbon rights using the current legal framework which, as explained below, contains serious gaps and loopholes. As the Carbon Fund prepares to buy emission reduction units,⁸⁰ there are concerns that the DRC government will simply choose to nationalise carbon rights as a practical way forward, thereby weakening the prospects of much-needed tenure reform for forest dependent communities. Therefore, there is a need for clarity on carbon rights, and a legal instrument is needed to specify whether and how carbon rights can be acquired or transferred by indigenous peoples.⁸¹

recently-adopted Nature Conservation Law (Loi No 14/003 du 11 février 2014 relative à la conservation de la nature) a legislative reference to the ‘potential value of forest carbon stocks’ and the need for its consideration by the government under both the national conservation strategy and the national forest programme can be found (art 8) but the provision does not state any legal particularities.

75 IIED ‘REDD+ and rights: Extending carbon rights in the DRC to climate-regulating services’ (2013) Briefing, https://www.researchgate.net/publication/300132610_REDD_and_rights_extending_carbon_rights_in_the_DRC_to_climate-regulating_services (accessed 18 December 2020).

76 RRI & Ateneo School of Government (n 71) 3.

77 DRC Loi n° 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés telle que modifiée et complétée par la loi n° 80-008 du 18 juillet 1980 (1973) art 389.

78 J Batory & T Vircoulon ‘Les pouvoirs coutumiers en RDC: Institutionnalisation, politisation et resilience’(2020) *Notes de l’Ifri* 12.

79 L Koné ‘Garantir les droits fonciers coutumiers en République démocratique du Congo : Guide Pratique à l’intention des acteurs impliqués dans le processus de la réforme foncière’ (2017) 28.

80 RRI ‘Looking for leadership: New inspiration and momentum amidst crisis’ (2015), RRI4087_AR2014r11B3.pdf (rightsandresources.org) (accessed 18 December 2020).

81 RRI & Ateneo School of Government (n 71) 5.

4 Inadequate national climate change regulatory framework

Weak guarantees in the climate institutional and regulatory framework at the national level have implications for the right to property as guaranteed under the African Charter.⁸²

4.1 Denial of customary ownership

In DRC forests are owned by the state, which recognises local communities' customary user rights to land and forest resources.⁸³ Land tenure in DRC has evolved without formal recognition of communities' customary property rights over the forest lands they have occupied and used for generations, although traditional practices and customs remain widespread. While the state claims ownership of all forest lands, in rural areas customary institutions govern forest and land resources in practice.⁸⁴ *De facto* customary ownership by local communities and indigenous peoples has continued largely uninterrupted, while statutory law denied forest peoples formal legal title to their traditional lands, and the state exercised *de jure* control over land and forests. Most of the land (70 per cent) in DRC is owned customarily, but without proper recognition of customary rights to land, there is no customary forest legally owned by communities under current law. As in the case of the colonial legislature, post-independence laws have dispossessed communities and indigenous peoples of their customary rights. The legal setting is meant to perpetuate and protect the interests and property rights of the government, foreign companies and investments.⁸⁵ The Congolese land law⁸⁶ gives the state a free rein as 'sole owner'⁸⁷ of the land to dispossess the communities of their land and make the land available to investors in the name of

82 Jegede (n 15) 221-223.

83 A Mpoyi et al 'Le contexte de la REDD+ en République Démocratique du Congo: Causes, agents et institutions' (2013) CIFOR, Document occasionnel 84; SM Mbala & A Karsenty 'Forest revenue decentralisation and profits redistribution in the Democratic Republic of Congo' in LA German, A Karsenty & A Tiani (eds) *Governing Africa's forest in a globalised world* (2010) 160.

84 L Debroux et al 'Forests in post-conflict Democratic Republic of Congo: Analysis of a priority agenda' (2007).

85 IG Shivji 'The rights of people to self-determination: An African perspective' in W Twining (ed) *Issues of self-determination* (1989) 19.

86 DRC Land Law (1973), Loi No 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés, telle que modifiée et complétée par la Loi N 80-008 du 18 juillet 1980.

87 Art 53 of DRC Land Law.

public interest.⁸⁸ The collective and informal form of land ownership that characterises indigenous peoples is ineffective in the context of REDD+ in DRC. This is inconsistent with the spirit and letter of the African Charter which guarantees the rights to property. It means that indigenous peoples in DRC are not entitled to the protection of collective rights under the African Charter, as clearly stated in the *Endorois* case.⁸⁹ Indigenous peoples and local communities may only acquire enjoyment rights over land within the state's private domain through the so-called 'concession' process⁹⁰ or within the community forest concessions⁹¹ provided for by the 2002 Forest Code.⁹² Rural communities do not enjoy sufficient legal guarantees to safeguard their customary lands from damages (losses or restrictions) that could result from the state's allocation processes, particularly in the REDD+ process.⁹³ The 2006 Constitution recognises local communities' land rights and guarantees the right to individual or collective property acquired in accordance with the law or custom. It also recognises customary authority.⁹⁴ However, in the absence of regulations or a legal mechanism to secure customary rights held by local communities, these rights remain inapplicable in practice.⁹⁵ DRC is in a situation of legal and institutional dualism, with a strong contradiction between the legal and legitimate, the norm and the practice in land appropriation mechanisms.⁹⁶ The consequence of this legal situation is that tenure rights are unsecured for indigenous peoples and local communities, leaving them vulnerable to land speculation. Due to insecure tenure, indigenous peoples and local communities face major challenges including poverty, inequality, food insecurity and a poor business climate.

88 P Kipalu et al 'Securing forest peoples' rights and tackling deforestation in the Democratic Republic of Congo: Deforestation drivers, local impacts and rights-based solutions' (2016) 12-17.

89 *Centre for Minority Rights Development & Others v Kenya* (2000) AHRLR 75 (ACHPR 2009) 22 (*Endorois*).

90 See arts 57 and 61 of the Land Law.

91 Art 22 of DRC Forest Code provides statutory opportunities to secure some customary rights over forests and forest lands.

92 DRC Forest Code (2002), Loi n° 11/2002 du 29 août 2002.

93 A Mpoyi 'Amélioration de la gouvernance du secteur foncier en République démocratique du Congo: La mise en œuvre du cadre d'évaluation de la gouvernance foncière' (2013).

94 Constitution of the Democratic Republic of Congo (2006) arts 34 & 207; La Constitution de la République Démocratique du Congo telle que modifiée par la loi n° 11/002 du 20 janvier 2011 portant révision de certains articles de la Constitution de la République Démocratique du Congo du 18 février 2006.

95 DRC 'National REDD+ strategic environmental and social assessment report' 57.

96 E le Roy 'Les pluralismes juridiques' (2003) Paris, Karthala.

In the absence of the proper recognition of indigenous people's collective customary tenure formulated in the national legal framework, the proposed measures to address land tenure insecurity in REDD+ programmes are vague and do not seem to be rooted in actions that will lead to permanent legal recognition of community and indigenous lands, rather towards sanctioning temporary land uses through local development plans ratified by provincial authorities.⁹⁷ Globally, when REDD+ was first proposed, indigenous peoples, forest-dependent communities and civil society groups immediately articulated serious concerns about REDD+'s potentially harmful social effects. These included the risk that those living in and around forested areas would be dispossessed of their land if REDD+ promoted a global 'land grab' for carbon sequestration.⁹⁸ These concerns are acute in the context of DRC where the state claims ownership rights over forest lands, disregarding the customary rights of people living there.

4.2 Weak enforcement of human rights obligations

DRC has legal obligations under international instruments it has ratified, including the International Covenant on Civil and Political Rights (ICCPR);⁹⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁰⁰ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁰¹ the African Charter,¹⁰² the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁰³ and the Convention on Biological Diversity (CBD).¹⁰⁴ The country also voted in favour of the UN Declaration on the Rights of Indigenous Peoples¹⁰⁵ (UNDRIP) in 2007 and signed the African Convention on the Conservation of Nature and Natural Resources.¹⁰⁶ Under the country's Constitution, 'international treaties and agreements which have been duly concluded have, upon publication, precedence over [national] laws, subject to each treaty or agreement application by the other party'.¹⁰⁷ In a pure monist state such as DRC,

97 Environmental Implementation Agency (n 48) 2.

98 T Griffiths 'Seeing "RED"? "Avoided deforestation", and the rights of indigenous and local communities' (2007) Forest Peoples Programme.

99 Ratified 1 November 1976.

100 Ratified 1 November 1976.

101 Ratified 21 April 1976.

102 Ratified 20 July 1987.

103 Ratified 17 October 1986.

104 Ratified 3 December 1994.

105 United Nations Declaration on the Rights of Indigenous Persons (n 61)

106 Signed on 29 June 2008.

107 Art 215 DRC Constitution 2006.

following French constitutional law,¹⁰⁸ once a treaty has been ratified and published ‘externally’ it becomes part of internal law. At least in theory, no legislative action is needed to lower the second storey level of international law norms to the ground floor level of national law. In line with this tradition, international human rights law is ‘directly incorporated’ into and made an ‘integral part’ of national law in most of civil law Africa, either in the Preamble to or elsewhere in the Constitution.¹⁰⁹ According to international law, the provisions of international human rights law should enjoy a privileged status under the DRC legal framework, at least in theory. However, the reality is different in practice.

The DRC government has shown the highest political presence at the international climate negotiations but has invested more in the size of its delegation and side events rather than in the implementation of its obligations under the international regime.¹¹⁰ For example, the African Charter, which recognises individual and collective rights, is the most effective instrument at the regional level to assess the protection of indigenous peoples’ land rights in the context of adverse effects of climate change.¹¹¹ However, the DRC land law does not explicitly recognise collective ownership for indigenous peoples and local communities, leaving them vulnerable to land speculation, land grabbing and other forms of land dispossession. In relation to collective rights, in addition to providing in article 24 for the right to a satisfactory environment, other collective rights in the African Charter include the rights to existence and self-determination,¹¹² free disposal of wealth and natural resources,¹¹³ and economic, social and cultural development.¹¹⁴ The Mai Ndombe ER Programme, as an example of REDD+ pilot project in the DRC, essentially relies on existing DRC laws to achieve its expected results. However, as discussed earlier, there are serious deficiencies and loopholes in the existing framework that will undermine communities’ access to land and resources.¹¹⁵

REDD+ is intended to drive social benefits through improved livelihoods (including from carbon payments), clarification of land tenure, and stronger governance of forests arising from ‘REDD readiness’

108 Art 55 Constitution of France 1958.

109 F Viljoen *International human rights law in Africa* (2007) 531.

110 Fobissie et al (n 6).

111 Jegede (n 15) 20.

112 Art 20 African Charter.

113 Art 21 African Charter.

114 Art 22 African Charter.

115 Fobissie et al (n 6).

activities. Projects are also required to apply national and international safeguards to minimise social risks from emission reduction activities.¹¹⁶ The Paris Agreement¹¹⁷ recognised REDD+ as a key policy instrument for climate change mitigation and explicitly recognised the need to respect human rights in all climate actions. Under this Agreement, state parties agreed that they should have regard to human rights in climate interventions.¹¹⁸ A social safeguard policy to mitigate negative impacts of REDD+ has been developed under the DRC national REDD+ strategy, but existing requirements on safeguards are not legally binding, making consideration for rights difficult to achieve.

4.3 REDD+ and conservation policy threaten forest peoples' rights

DRC is home to 60 per cent of the forests of the Congo Basin and is rich in biodiversity. The conservation of this dense forest heritage is of crucial importance to the Congolese authorities. Approximately 11 per cent of the national territory is currently covered by protected areas,¹¹⁹ and the Congolese state aims to formally protect at least 17 per cent¹²⁰ of the country's surface area soon.¹²¹ However, conservation areas often overlap with territories inhabited and claimed by indigenous peoples and local communities and prohibit access and use of resources by communities that for centuries have lived in harmony and interdependently with these rich ecosystems. The DRC's conservation policy is essentially based on the forest classification process and the creation of national parks and protected areas, a process implemented without addressing indigenous peoples' rights to free, prior informed consent. The policy, which aims to protect biodiversity, threatens indigenous and local communities' rights to their customary forest lands and resources and is not based on the science

116 UNFCCC 'Cancun Agreements' (2011) adopted by the Conference of the Parties, 16th session Cancun, 29 November-10 December 2010, Decision 1/CP.16.

117 Paris Agreement under the United Nations Framework Convention on Climate Change 2015, adopted by Conference of the Parties, 21st session Paris, 30 November-11 December 2015/FCCC/CP/2015/L.9/Rev.1.

118 Paris Agreement (n 117) Preamble.

119 A protected area is a geographically-defined area which is designated or regulated and managed to achieve specific conservation objectives. For a definition, see the Convention on Biological Diversity art 2.

120 According to art 14 of the 2002 Forest Code 'Classified forests must represent at least 15% of the total surface area of the national territory'. During the Conference of the Parties to the CBD in Nagoya, in Japan, in 2011, the Congolese government committed to raising this threshold to 17%.

121 DRC 'Stratégie nationale de conservation de la biodiversité dans les aires protégées de la République Démocratique du Congo' (2012).

that now clearly recognises the key role that ancestral communities can play in protecting and sustaining their ecosystems when they have security of tenure and agree to conservation conditions.

The DRC law prohibits indigenous communities' subsistence activities in national parks and other protected areas, including traditional hunting or fishing.¹²² Following the creation of national parks and protected areas, numerous forest communities have been evicted from their customary lands and prohibited access to the forest without compensation. For example, in 2006 the then Ministry of Environment, Nature Conservation, Waters and Forests signed a ministerial *arrêté*¹²³ establishing a primate reserve, *réserve des primates de Kisimba-Ikobo* (RPKI) in Pinga, North Kivu province. Article 1 of the Ordinance Law of 22 August 1969 on the conservation of nature¹²⁴ constitutes the basis for the creation of the RPKI, as it provides that any part of the DRC territory may be established by ordinance as an 'integral nature reserve' when the conservation of nature is of special interest and it is important to protect this environment from any intervention likely to alter its appearance, composition and evolution. The 'public interest' and 'necessity' argument invoked to establish the primate reserve is dubious. Balancing human rights under international law is grounded in the central premise that the adjudication of fundamental rights claims must consider other competing rights or public interests. This means that most human rights are not absolute and there are some circumstances when they must give way for the achievement of other goods or to balance with other human rights. In the *Endorois* case¹²⁵ the African Commission on Human and Peoples' Rights (African Commission) noted that encroachment was not a violation of the African Charter, if it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'.¹²⁶

122 DRC Loi No 14/003 du 11 février 2014 relative à la conservation de la nature, arts 70, 71, 77 ; DRC Law (2014) No. 14/003 on Nature Conservation, arts 70, 71, 77.

123 Arrêté ministériel no. 013/CAB MIN/ECN-EF/2006 du 03 avril 2006 portant création d'une réserve naturelle dénommée réserve des primates de Kisimba-Ikobo en abrégé « RPKI ».

124 The Ordinance Law of 22 August 1969 has been repealed and replaced by the Law of 11 February 2014 on the conservation of nature.

125 *Endorois* (n 81) para 211.

126 The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

In its own assessment on whether the restriction imposed upon a right does not override the rights of indigenous peoples to their ancestral lands, the African Commission noted that

any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present Communication, the African Commission holds the view that in the pursuit of creating a Game Reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.¹²⁷

In another seminal case the African Commission stressed that ‘the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.’¹²⁸

In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that *consent* be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property.¹²⁹ In the case of the RPKI primate reserve, the test laid out in article 14 was not met because the encroachment was not carried out in the interests of the community as they were not consulted prior to the creation of the reserve, and potential impacts on their livelihoods were not properly explained to them.

The conservation policy as currently applied risks exacerbating the impoverishment of indigenous communities, ironically excluding from or restricting access to the very people who have traditionally inhabited forests sustainably.¹³⁰ Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, and John Knox, UN Special Rapporteur on Human Rights and the Environment have reported on human rights and conservation.¹³¹ They stress that human rights obligations ‘apply not

127 *Endorois* (n 81) para 214.

128 *Constitutional Rights Project & Others v Nigeria* (2000) AHRLJ 227 (ACHPR 1999) para 42.

129 *Endorois* (n 81) para 226.

130 Kipalu et al (n 88) 34.

131 Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, A/71/229, 29 July 2016 (UNSR on Indigenous Peoples); and

only to measures aimed at exploitation of resources, but also to those aimed at conservation', and duty bearers have enhanced obligations to respect the rights of 'those who have long-standing, close relationships with their ancestral territories'.¹³² They also emphasise the interdependent and indivisible nature of healthy ecosystems and the enjoyment of human rights and, conversely, the essential importance of human rights guarantees for protecting ecosystems, particularly in the case of indigenous peoples.¹³³ In this regard, they highlight that respecting human rights is not only a legal obligation, but also often is the best or only way to ensure the protection of biodiversity.¹³⁴

Protected areas have the potential of safeguarding biodiversity for the benefit of all humanity. However, these have also been associated with human rights violations against indigenous peoples in many parts of the world, including in DRC. For over a century, conservation was carried out with the aim of vacating protected areas of all human presence, leading to cultural destruction and large-scale displacements of indigenous peoples from their ancestral lands in the name of conservation and causing multiple violations of the collective human rights of indigenous peoples.¹³⁵ Conservation protected areas were initially established through the expropriation of the lands and territories of indigenous peoples and local communities. Such protected areas assumed that they should be created and governed by states, and uninhabited and without human use of natural resources. Coercive force was considered legally and morally justified to remove resident peoples and protect biodiversity.¹³⁶

In October 2018 a group of indigenous Batwa, frustrated by their predicament and extreme poverty following their eviction of the Kahuzi Biega forest, decided to return to their ancestral forests. Since then, they have regularly clashed with eco-guards,¹³⁷ sometimes resulting in loss of

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/34/49, 19 January 2017 (UNSR Report on environment).

132 UNSR Report on environment (n 131) para 58.

133 UNSR Report on environment (n 131) para 5.

134 F MacKay 'Indigenous peoples' rights and conservation: Recent trends in human rights jurisprudence' (2017) Moreton-in-Marsh, UK: Forest Peoples' Programme.

135 UNSR on Indigenous Peoples (n 131) para 13.

136 S Stevens *Indigenous peoples, national parks and protected areas: A new paradigm linking conservation, culture and rights* (2014).

137 The ecoguards are the Congolese Institute for Nature Conservation (ICCN) paramilitary forces in charge of monitoring flora and fauna in protected areas. It is the term used to designate 'rangers' in the Congo Basin countries. Their salaries are usually financed by multilateral donors who support this model of conservation.

life.¹³⁸ On 30 November 2020 a group of Batwa demonstrators went out in the territory of Kabare, in South Kivu, to protest about the lack of land they face since their eviction from the park and against the exactions of the security forces. The demonstration resulted in a clash between Batwa demonstrators and members of the DRC army (FARDC). Four people, three Batwa and one soldier, were killed during the incident.¹³⁹

In April 2019 the World Wide Fund For Nature (WWF) appointed an Independent Panel of Experts consisting of Judge Navi Pillay (Chairperson), Professor John H Knox and Dr Kathy MacKinnon to lead an independent review into WWF's role in connection with alleged human rights abuses in and around protected areas supported by the WWF in Cameroon, the Central African Republic, the DRC, the Republic of Congo, Nepal and India. The alleged abuses included instances of murder, rape, torture and physical beatings committed by eco-guards and other law enforcement agents acting under the authority of governments, which were described in a series of articles published in *BuzzFeed News*¹⁴⁰ in March 2019.¹⁴¹

The report stresses that conservation enterprises 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.¹⁴² The DRC-specific findings revealed that 'WWF has not fulfilled its human rights commitments in relation to activities it supports in Salonga National Park'.¹⁴³ The WWF has worked in Salonga National Park¹⁴⁴ since 2005. In August 2015 it

138 WRM 'Les riverains autochtones Batwa et le retour sur leurs terres ancestrales dans le Parc National de Kahuzi Biega, Est de la RD Congo' 2020, <https://wrm.org.uy/fr/les-articles-du-bulletin-wrm/section1/les-riverains-autochtones-batwa-et-le-retour-sur-leurs-terres-ancestrales-dans-le-parc-national-de-kahuzi-biega-est-de-la-rd-congo/> (accessed 7 December 2020).

139 Desk Nature 'La société civile exige des enquêtes sur la mort de 3 autochtones pygmées et 1 soldat autour du Parc national de Kahuzi-Biega' 2020, <https://desknature.com/foret-la-societe-civile-exige-des-enquetes-sur-la-mort-de-3-pygmees-et-un-soldat-autour-du-parc-de-kahuzi-biega/> (accessed 13 December 2020).

140 BuzzFeed News 'WWF's secret war: WWF funds guards who have tortured and killed people' 2020, <https://www.buzzfeednews.com/article/tomwarren/wwf-world-wide-fund-nature-parks-torture-death> (accessed 13 December 2020).

141 Report of the Independent Panel of Experts of the Independent Review of allegations raised in the media regarding human rights violations in the context of WWF's conservation work 'Embedding human rights in nature conservation: from intent to action' (2020) November 2020 1.

142 United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) 14.

143 UN Guiding Principles (n 142) 6.

144 Salonga National Park is in Western Central DRC in the central basin of the Congo

entered into a co-management agreement with the Institut Congolais pour la Conservation de la Nature (ICCN),¹⁴⁵ which has authority over national parks in DRC. In DRC conservation policies have been traditionally state-centric and based on the expropriation of lands. Indigenous peoples were displaced, denied self-governance, deprived of access to natural resources for their livelihood and their traditional and spiritual links to ancestral land were disrupted.¹⁴⁶ Marginalised and impoverished indigenous peoples continue to struggle for access to their ancestral territories, resulting in enduring friction and conflict.¹⁴⁷

4.4 REDD+ as a space for realising land tenure rights

REDD+ is an opportunity to avoid increased deforestation and forest degradation while also delivering co-benefits such as reducing poverty. It can be an opportunity to improve the legal framework and secure genuine recognition of customary ownership of forest for indigenous communities. The lack of rights and tenure is directly related to poverty and if communities are to benefit from REDD+, the legal framework needs to be improved to secure clear tenure rights for local and indigenous communities. Forest-dependent communities, including indigenous peoples and local communities, can use the community forestry process¹⁴⁸ to secure their lands. Under Decree 14/018 of 2014¹⁴⁹ a local community's forest concession is a forest granted to a community by the state, based on customary ownership, for every form of use necessary to meet its vital needs, subject to the obligation to apply the rules and practices of sustainable management. Community forest concessions for local communities (CFCL) are allocated upon the request of the community, free of charge

river. Covering approximately 33 676 square kilometres, Salonga is the second-largest protected rainforest in the world and the largest forest national park in Africa. It is the habitat for many endangered species, including the bonobo (pygmy chimpanzee), the forest elephant and the Congo peacock. The park was expanded to its current state in 1970, designated a UNESCO World Heritage site in 1984, and added to the List of World Heritage Sites in Danger in 1999.

145 ICCN is the agency with responsibility for protected areas in DRC. It is a public enterprise under the supervision of the Ministry of the Environment, Nature Conservation, Waters and Forests.

146 See eg Concluding Observations on the 8th periodic report of the Democratic Republic of the Congo adopted by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) at its 73rd session (1-19 July 2019).

147 UNSR on Indigenous Peoples (n 131) para 16.

148 The process through which communities can register forest concessions based on their traditional occupation.

149 DRC (2014), Décret no 14/018 du 02 août 2014 fixant les modalités d'attribution des concessions forestières aux communautés locales.

and in perpetuity.¹⁵⁰ CFCL will have benefits of securing customary tenure and enabling indigenous communities to manage their own REDD+ projects. Indigenous peoples and local communities recognised as owners of their lands and forests will prove to be more efficient custodians of the forest biodiversity. Legally-recognised indigenous and community forests are associated with lower rates of deforestation and store more carbon than forests managed by either public or private entities. Where rights are recognised, the difference is even greater.¹⁵¹ The opportunity of the legal reforms supported by the REDD+ mechanisms can also be used to resolve the uncertainty of the legal dualism and recognise indigenous communities' informal tenure within formal legal framework. The land law should legalise what is legitimate. This means that the legitimate traditional owners of the forests need to see their customary tenure formally recognised through a simplified recognition mechanism.¹⁵²

It is also crucial to capitalise on land use planning,¹⁵³ which is part of REDD+ piloting, to secure customary rights in protected areas. Land use planning¹⁵⁴ can influence the zoning of the area to clarify boundaries and establish zones of community access and use in and around the park, to reflect customary rights and to accommodate local needs. There also is some legal opening offered by the 2014 law on nature conservation¹⁵⁵ which provides for limitations to strict conservation. Indeed, the public body in charge of the management of protected areas (ICCN) can, exceptionally, grant exemptions in the protected areas it manages, notably in the interest of public health and security, as well as the food security of the populations living near the protected areas.¹⁵⁶

150 Art 2(2).

151 RRI 'A global baseline of carbon storage in collective lands: Indigenous and local community contributions to climate change mitigation' (2018) Rights and Resources Initiatives.

152 Kipalu et al (n 88) 42.

153 Land use planning is a systematic and iterative process conducted to create an enabling environment for the sustainable development of land resources to meet the needs and demands of the people. It assesses the physical, socio-economic, institutional and legal potentials and constraints for optimal and sustainable use of land resources and provides decision makers and populations with the opportunity to make decisions on how to allocate these resources. Adapted definition from FAO and UNEP (1999) 'The future of our land: Facing the challenge'.

154 P de Wit 'Land use planning: Impact on community rights, baseline study on tenure in the Democratic Republic of Congo' (2019) 107.

155 DRC (2014), Loi n° 14/003 du 11 février 2014 relative à la conservation de la nature.

156 DRC (2014) (n 155) art 20.

5 Conclusion

The chapter analyses the interface of climate policies and mitigation measures with the rights of indigenous peoples and local communities in DRC. What emerges from this analysis is that the DRC regulatory framework does not adequately protect indigenous peoples (and local communities) land tenure and use. In addition to the denial of customary ownership, the failure to put in place adequate legislation at the national level negatively affects a range of land-related rights of indigenous peoples, including the rights to property, participation, free, prior informed consent, self-determination, and rights to enjoy the socio-economic benefits that are set out under regional and international human rights instruments.¹⁵⁷ While both the REDD+ strategy and the Mai Ndombe emission reduction plan identify 'shifting slash and burn agriculture' by forest communities as the major driver of deforestation, other studies and grassroots research initiatives highlight the impact of the expansion of commercial agriculture, illegal industrial logging and minerals extraction driven by global demand.¹⁵⁸ The REDD+ projects reviewed in this chapter did not obtain the free, prior and informed consent of impacted communities for REDD+ activities, leading to confusion and conflict in the project areas. International best practices on participation and inclusion of marginalised communities as well as relevant norms of human rights were insufficiently integrated in the design of the REDD+ programme. Monetary and non-monetary benefits, including carbon rights and tenure security, are not explicitly referenced in the country's legislation. Potential benefits generated through the implementation of REDD+ projects are likely to create confusion regarding the identification of legitimate beneficiaries. The DRC government has demonstrated little commitment towards the implementation of regional and international human rights norms. In fact, political interest and institutional reforms in DRC favours private sector investments in REDD+ programmes, while investment and support for indigenous peoples is marginal.¹⁵⁹ However, in the context of REDD+, insufficient efforts to clarify and strengthen the tenure security of indigenous peoples and local communities will increase communities' vulnerability to land speculation. In addition to that, part 5 showed that conservation policies also threaten forest peoples' rights.

The current legislation is inadequate to protect the land-related rights of indigenous peoples and local communities in the context of REDD+.

157 Jegede (n 15) 279.

158 Ickowitz et al (n 53).

159 Fobissie (n 6).

and is incompatible with DRC obligations under regional and international human rights instruments and rights guaranteed thereunder. A rights-based approach to REDD+ requires engagement with indigenous peoples as rights holders, rather than as project beneficiaries. Filling the gaps of the current REDD+ programmes through compliance with relevant human rights norms and international best standards and practices can help achieve more substantive results. Indigenous communities affected by REDD+ initiatives or inadequately treated during implementation must have access to remedies to protect and enforce their rights. This is essential both to ensure the rule of law and respect for the rights of affected people, but also in the interests of achieving the objectives of REDD+.

12

THE HUMAN RIGHT TO A CLEAN OR HEALTHY ENVIRONMENT AS AN INTERVENTION TO CLIMATE CHANGE IN MAURITIUS

Roopanand Mahadew

Abstract

This chapter argues for the potential of incorporating the right to a clean or healthy environment in Mauritian law as a basis of combating climate change. It starts by giving an overview on the effects of climate change in Mauritius and proceeds to highlight salient existing features in the normative and legal framework on climate change. This exercise serves as a critical basis from which the argument of having a human right to a clean or healthy environment is then articulated. The study finds that there are several considerable advantages in adopting a human rights-based approach with a focus on the right to a clean or healthy environment for addressing climate change in Mauritius.

Key words: *Mauritius; climate change; right to a clean or healthy environment; laws; policies; regulations*

1 Introduction

Over the last ten years the impact of climate change has been felt in Mauritius in a significant manner.¹ The island state located in the Indian ocean is expected to face increased food insecurity, deterioration in coastal conditions through erosion of beaches and coral bleaching and a rise in sea levels exacerbating inundation, storm surge and other coastal hazards.² This will threaten vital infrastructure, settlements and facilities that support the livelihood of island communities. Unexpected flash floods in 2008 and 2013 resulting in the loss of lives, unseasonal rainy periods, an unpredictable rise of the sea level (3,8 millimetres per year the last five years), extremely hot summers and bitter winters are the impact of climate change which were never before experienced in Mauritius.³

- 1 United Nations Environment Programme 'Reducing climate change and disaster risk in Mauritius', <https://www.unep.org/news-and-stories/story/reducing-climate-change-and-disaster-risk-mauritius> (accessed 2 August 2021).
- 2 Relief Web 'Mauritians unprepared for effects of climate change', <https://reliefweb.int/report/mauritius/mauritians-unprepared-effects-climate-change> (accessed 10 January 2021).
- 3 R Davies 'Flash floods in south east after 400mm of rain in 24 hours' FloodList,

In response, the state of Mauritius has taken various legislative and administrative measures. The Environment Protection Act contains provisions that are indirectly geared towards combating climate change, and the forthcoming Climate Change Bill (presented to the National Assembly in 2019 for first reading) addresses the matter in a more direct way.⁴ A Climate Change Division was set up in 2010 within the Ministry of Environment and Sustainable Development with the main aim of developing a climate change mitigation and adaptation framework.⁵ A Disaster Risk Reduction and Management Strategic Framework and Action Plan have also been developed under the Africa Adaptation Programme in order to reduce the impacts and effects of climate change. Additionally, the Technology Action Plans have been designed to implement feasible technologies to reduce greenhouse gas emissions.⁶

From the above, Mauritius has made a considerable effort to combat climate change. However, in the critical absence of a human right to a clean or healthy environment enshrined in the Constitution or directly provided for in legislative acts, the efforts may fall short and be insufficient. In fact, the lack of enforceability and justiciability of the action plans and administrative measures taken by the state of Mauritius is proving to be inefficient in combating climate change. This chapter uses Mauritius as a case study to examine the efficacy and potential of the human right to a clean or healthy environment as an intervention to climate change. The suitability of Mauritius as the case study is explained by the fact that it is a country that is in dire need of concrete measures to overcome or at least minimise the effects of climate change. Despite a myriad of measures taken by the state, the absence of the human right to a clean or healthy environment is proving to be a major impediment.

The chapter provides for a comprehensive overview of the impact of climate change in Mauritius. It subsequently focuses on the theoretical

<http://floodlist.com/africa/mauritius-flash-floods-april-2021> (accessed 20 April 2021); *BBCNews* 'Deadly floods hit Mauritius capital Port Louis', <https://www.bbc.com/news/world-africa-21989070> (accessed 22 April 2021).

- 4 Mauritius National Assembly 'The Climate Change Bill No XIV of 2020', <https://mauritiusassembly.govmu.org/Documents/Bills/intro/2020/bill142020.pdf> (accessed 20 March 2021).
- 5 Ministry of Environment Solid Waste Management and Climate Change 'Climate change division', <https://environment.govmu.org/Pages/Climate-Change-Division.aspx> (accessed 20 March 2021).
- 6 Republic of Mauritius 'National disaster risk reduction and management policy, strategic framework and action plan to be developed soon' 13 October 2013, <http://www.govmu.org/English/News/Pages/National-Disaster-Risk-Reduction-and-Management-policy,-strategic-framework-and-action-plan-to-be-developed-soon.aspx> (accessed 20 March 2021).

framework of the right to a clean or healthy environment as a human right. The normative and legislative framework on climate change in Mauritius is then discussed, preceding the part that argues for the human right to a clean or healthy environment as a basis for combating climate change in Mauritius. The chapter concludes with key recommendations.

2 An overview of the impact of climate change in Mauritius

As in most island states, climate change poses serious risks for Mauritius. In one of its assessment reports, the Intergovernmental Panel on Climate Change (IPCC) noted that ‘small islands, whether located in the tropics or higher latitudes, have characteristics which make them especially vulnerable to the effects of climate change, sea-level rise, and extreme events’.⁷ The report underlined that both commercial agriculture and tourism will be adversely affected.⁸ The situation has become significantly more alarming since these are two key sectors of the Mauritian economy. Mauritius is a small island developing state (SIDS) vulnerable to drastic meteorological events and natural disasters such as cyclones, torrential rains, storms and tidal surges, floods and flash floods, tsunamis, landslides and other man-induced disasters.⁹ According to the World Risk Report 2020, Mauritius is today ranked fifty-third with the highest disaster risk, and tenth of the nations most exposed to natural hazards.¹⁰ The monitoring body of the United Nations (UN) Framework Convention on Climate Change (UNFCCC) has explicitly highlighted the dangers and the daunting challenges that the country is set to face in the near future regarding its climate.¹¹ Some of the impacts of climate change are briefly discussed below.

Mauritius is exposed to highly-intense tropical cyclones that can generate gusts of wind that go beyond 260 kilometres per hour, often accompanied by days of torrential rains likely to exceed 400 millimetres of rain. Such tropical cyclones have often resulted in the loss of human lives, severe damage to infrastructure, agriculture and farming, and beach

7 N Mimura et al ‘Small islands’ in *Climate Change 2007: Impacts, adaptation and vulnerability Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 12.

8 As above.

9 Ministry of Local Government and Disaster Risk Management ‘National Disaster Risk Reduction and Management Centre’ 21 February 2021, <https://ndrrmc.govmu.org/SitePages/Index.aspx> (accessed 20 April 2021).

10 BE Hilft *World risk report 2020* (2020) 59.

11 UNFCCC ‘Vulnerability and adaptation: Mauritius’, <https://unfccc.int/resource/docs/natc/maunc1/chap3/chapter3.htm> (accessed 20 April 2021).

erosion through wave surges.¹² Additionally, past records indicated that the occurrence of more intense cyclones lasting much longer has been recorded in the south-west Indian Ocean area.¹³ Tropical cyclones of a very high intensity, with average surface winds reaching up to 212 kilometres per hour with a more enlarged diameter have been located over the past 20 years, such as cyclones Bansi and Eunice in 2015.¹⁴ In terms of future projections, long-term annual average rainfall, previously measured at 2 010 millimetres, will decline, accentuating the challenge that the country is already facing regarding sparse and uneven distribution of rainfall.¹⁵ Indeed, the central plateau region receives an average of 4 000 millimetres annually whereas the western region is limited to 900 millimetres. Technical reports of the Mauritius Meteorological Services reveal that there have been and will continue to be frequent episodes of drought with significant deficiency in rainfall as noted from 1983 to 1984, 1998 to 1999 and 2011 to 2012.¹⁶ It has been forecast by the IPCC that the mean annual rainfall will decrease by 8 per cent whereas, on the other hand, flash floods will be more frequent.¹⁷ On 30 March 2013, 11 people were killed in the capital city of Port Louis by flash floods that resulted in 152 millimetres of rainfall in a very short span of time.¹⁸ Regions such as Chittrakoot, La Butte, Quatre Soeurs and Montagen Ory have experienced unusually heavy rainfalls resulting in landslides.¹⁹

The IPCC has forecast that sea level will rise between 18 and 59 centimetres by the year 2100.²⁰ It has been noted and reported that the sea level in Mauritius has risen by 7,8 centimetres whereas that of Rodrigues (an island belonging to Mauritius) has experienced a rise of 6,7 centimetres based on a long-term average of tidal gauge records spanning over 50 years from 1950 to 2001.²¹ Such tendency is likely to result in the erosion

12 S Sobhee & J Blocher 'Using migration to develop resilience against climate change in Mauritius' (2015) 11 *Migration, Environment and Climate Change: Policy Brief Series 2*.

13 Mauritius Meteorological Services 'Climate change', metservice.intnet.mu/climate-services/climate-change.php (accessed 20 April 2021).

14 See Mauritius Meteorological Services 'Technical report CS 28 cyclone season of the South West Indian Ocean 2006-2007' (2008) 7.

15 Mimura et al (n 7) 698-706.

16 See Sobhee & Blocher (n 12) 2.

17 Mimura et al (n 7).

18 Government Information System Newsletter 'Eleven die in flash floods', https://publications.iom.int/system/files/pdf/policy_brief_series_issue11.pdf (accessed 20 April 2021).

19 National Disaster Risk Reduction and Management Centre 'Landslides in Mauritius', <https://ndrrmc.govmu.org/pages/landslides.aspx> (accessed 20 April 2021).

20 Mimura et al (n 7).

21 See Ministry of Environment and Sustainable Development 'Maurice Ile Durable:

of the beaches, the loss of bays and severe damage to built-up areas along the coastline. The rise of the sea level has accentuated the effects of storm surges, thereby representing a threat to the beautiful coastal landscape in only a few years.²² In recent times it is common for summer rains to start in January, whereas in the 1960s and 1970s the rains usually started in November.²³

According to surveys conducted by the International Organisation for Migration (IOM) and the government of Mauritius at a village in Mauritius called Rivière des Gallets, which is in the south-west and is highly sensitive to sea level rise and storm surges, elderly persons have been opposed to the idea of being relocated because of the strong ancestral ties that they have with their area, while young citizens for their part have expressed their willingness to be relocated.²⁴ Another relocation plan affects the south-east of the island, in the village of Quatre Soeurs, where there are significant risks of landslides resulting from heavy rainfall. The government has relocated 11 households to Camp Ithier as their houses were threatened of crackdown. All these households agreed to be relocated to the proposed location because of the degree of severity of this natural calamity.²⁵

3 A healthy environment as a human right

The nexus between human life and the environment is an inseparable one. Clean air, potable water, nutritious food to eat and a place to live in and sleep are the basics that are required by human beings to survive. If these crucial elements are contaminated, destroyed, polluted or eliminated, life may cease to exist. Therefore, it is essential that the natural environmental life support system is protected and maintained to protect human life. One way to achieve this is to create a substantive right to a clean or healthy environment. In the past 20 years or so, researchers and academics have debated and discussed the existence of a human right to a clean or healthy environment. According to Thorme, ‘these debates have varied from generalised notions of what to include within the term environment

Policy, strategy and action plan’, www.govmu.org/portal/sites/mid/file/full%20report%20midpolicy.pdf (accessed 20 April 2021).

22 See Government of Mauritius ‘Third international conference on Small Island Developing State – National report of the Republic of Mauritius’ (2014), www.sids2014.org/content/documents/215Mauritius%20National%20Report.pdf (accessed 20 April 2021).

23 International Organisation for Migration ‘Environmental changes and migration in Mauritius’ (2011) 39.

24 As above.

25 Sobhee & Blocher (n 12) 3.

to actual proposals for amendments to multinational human rights conventions'.²⁶ However, the importance attached to this debate over the years has not ended in any substantial conclusion towards the legal recognition of the right to a clean or healthy environment.

The principle question with which the scholastic community has been grappling is to understand the concept of environment as a human right. It therefore is apposite to first understand what a human right is and then to argue whether the environment can fit in the definition of a human right. Cranston has defined a human right as follows:²⁷

A human right by definition is a universal moral right, something which all people everywhere at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human.

Alston has added more precision and content to the definition of a human right in the following terms:²⁸

Human rights are also legal rights which possess one or more of the following characteristics: appurtenance to the human person or group; essential for international order; essential to human life, security, survival, dignity, liberty, and equality; essential as a place within the conscience of mankind; essential for the protection of vulnerable groups; and universality.

Based on the above definitions, Thorne argues that the human right to a clean or healthy environment possesses all the characteristics as illustrated above to be recognised as a human right.²⁹ In addition, in accordance with Marks's features of 'a right to the new generation', namely, the elaboration of a specialised body of international environmental law; an easily-identifiable international legislative process; incorporation of the right as a human right within municipal legal systems; and the need for concerted efforts of all social actors, the human right to a clean or healthy environment should gain legal recognition.³⁰

26 M Thorne 'Establishing environment as a human rights' (2020) 19 *Denver Journal of International Law and Policy* 301.

27 M Cranston 'What are human rights' (1973) 36.

28 P Alston 'Conjuring up new human rights: A proposal for quality control' (1986) 78 *American Journal of International Law* 615.

29 See Thorne (n 26) 302.

30 S Marks 'Emerging human rights: A new generation for the 1980's?' (1981) 33 *Rutgers Law Review* 442-443.

The right to a clean environment was first recognised by the UN in June 1972 through the UN Conference on the Human Environment which stated that ‘man has a fundamental right to freedom, equality, and adequate conditions of life in an environment of quality that permits a life of dignity and well-being’.³¹ In addition, the 1972 Consultative Assembly of the Council of Europe adopted a decision for the setting up of a Committee of Experts with the mandate to ‘consider, in the light of the conclusions reached at the United Nations Conference in Stockholm and the Council of Europe Conference on the Human Environment, whether the right to an adequate environment should be raised to the level of a human right, and [to] devise an appropriate legal instrument to protect this new right’.³²

At the UN level, bodies such as the Sub-Commission on Prevention of Discrimination and Protection of Minorities as well as the Human Rights Commission have recognised a clear link between human rights and the environment and have even mandated members to explore the possibility of the establishment of a human right to a clean or healthy environment despite the fact that the work is far from completed.³³ As Weiss rightly said, ‘if there is to be a human right to a decent environment, there is disagreement over how to treat it’.³⁴

Various scholars placed the right to clean or a healthy environment in differing human rights categories. Some include it as a fundamental human right, whereas others claim that it falls within the doctrine of basic human needs. Others classify it as a ‘third generation’ human right.³⁵ There is the possibility of deriving the right to a clean or healthy environment from other human rights as a corollary right. Sohn argued that the human right to a clean or healthy environment may already exist as part of customary international law or under the law of the UN given that this right can easily and readily be derived and intercepted from the Universal Declaration of Human Rights (Universal Declaration), the UN Charter and international covenants on human rights.³⁶ Despite all the

31 Un Report of the UN Conference on the Human Environment Stockholm, UN Doc A/CONF.48/14/Rev. 1 (1974) 4.

32 W Gormley ‘The right of individuals to be guaranteed a pure, clean and decent environment: Future programmes of the Council of Europe’ (1975) 23 *Legal Issues in European Integration* 52.

33 Thorne (n 26) 308.

34 E Weiss *In fairness to future generations: International law, common patrimony and intergenerational equity* (1989) 116.

35 Thorne (n 26) 317.

36 L Sohn ‘The new international law: Protection of the rights of individuals rather than states’ (1982) 32 *American University Law Review* 62.

positive developments at the UN level regarding the development of a human right to a clean or healthy environment, the right also is not legally recognised and provided for by treaty laws.

The above situation is in sharp contrast to what exists at the African level and, more specifically, under the African Charter on Human and Peoples' Rights (African Charter). Indeed, article 24 of the African Charter provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development'. This right was interpreted in the *SERAC* case.³⁷ In this matter the Ogoni communities in Nigeria alleged that environmental degradation and health issues were the result of an oil consortium's contamination of the environment. They alleged that the oil consortium's exploitation of oil reserves in Ogoniland resulted in the contamination of water, soil and air and had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, an increased risk of cancer, and neurological and reproductive problems.³⁸ Interpreting article 24 of the African Charter, the African Commission on Human and Peoples' Rights (African Commission) stated that articles 16 and 24 of the African Charter

recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.³⁹

A comprehensive review of the African Commission's decision clearly indicates that the human right to a clean or healthy environment is not only recognised but also justiciable and enforceable under the African Charter.⁴⁰ This statement is directly applicable to the state of Mauritius given that the country has ratified the Charter albeit without domestication. Its relevance and importance will be discussed later in the chapter.

At the domestic level, the human right to a clean or healthy environment has perhaps been more clearly and directly articulated in constitutions.

37 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).

38 *SERAC* (n 37) para 2.

39 *SERAC* (n 37) para 51.

40 K Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 149.

Indeed, proponents of the right to a clean or healthy environment have indicated the acceptance and incorporation of this right into more than 60 national constitutions.⁴¹ In some states, constitutional provisions on the right to clean or a healthy environment are declaratory of the state's duty to pursue development that is environmentally sound, the utilisation of natural resources in a sustainable manner and maintaining a safe and healthy environment for citizens. In other states the constitutions provide for the right to a clean and healthy environment of citizens and the duty of individuals to protect and conserve the environment and natural resources. Interestingly, in some states these two approaches are employed in a combined fashion.⁴² Despite the loose interpretation and provision of the human right to a clean or healthy environment at the UN level, it is generally accepted that such a right does exist in the African human rights architecture and in several other jurisdictions. Therefore, this can be used as guidance for Mauritius in an attempt to incorporate and implement the human right to a clean or healthy environment as a tool for combating the effects of climate change, as will be discussed after an overview of the normative and legal framework on climate change in Mauritius discussed in the following part.

4 The legal framework on climate change in Mauritius: An overview

This part provides an overview of the normative and legislative framework on climate change. Laws, regulations, policies and norms created by the various governments since independence will be presented which in the subsequent part will allow for a critical assessment as to whether or not the regulatory framework is compatible with a human right to a clean or healthy environment. It is apposite to begin with the Ministry of Environment, Solid Waste Management and Climate Change (Ministry of Environment) and its 'mission and vision' statement. The vision of the Ministry of Environment is

to achieve a cleaner, greener and safer Mauritius in a sustainable manner, through protection and management of our environmental assets, mainstreaming sustainable development principles in different sectors of the

41 United Nations (UN) Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Human rights and the environment' E/CN.4/Sub.2/1994/9/Corr.1 para 117.

42 Weiss (n 34) 306.

economy, solid and hazardous waste management, enhanced resilience to disasters, and conservation and rehabilitation of beaches.⁴³

Although the term ‘climate change’ is not clearly mentioned in the vision statement of the Ministry of Environment, the vision of a greener Mauritius and the emphasis on sustainable development give an indication that climate change no doubt is firmly on the agenda. That said, in the mission statement the concept of climate change is explicitly referred to in the following terms:⁴⁴

Devise appropriate legal and policy framework regarding environment related issues such as climate change, solid and hazardous waste management, disaster risk reduction and beach management to effectively respond to emerging challenges; incorporate climate change adaptation and mitigation measures to ensure sustainable development initiatives.

In view of materialising the vision and mission, the Ministry of Environment in March 2010 established the Climate Change Division (CCD). The main objective of the CCD is to ‘lead efforts in response to the challenges of climate change faced by the country and to enhance the country’s resilience to climate change’.⁴⁵ More precisely, the responsibility of the CCD is to coordinate and implement climate change adaptation and mitigation policies, programmes and initiatives. Additionally, the CCD has a duty to keep abreast with regional and international climate negotiations and to ensure compliance with international obligations taken by state of Mauritius under the UNFCCC and the Kyoto Protocol. Some notable works have been undertaken by the CCD, including the Development of a National Climate Change Adaptation Policy Framework for the Republic of Mauritius; and the formulation of a technology needs assessment identifying and prioritising relevant technologies for adaptation to and mitigation of climate change impacts. Other works include reporting on greenhouse gas emission; the preparation and submission of the intended nationally-determined contributions to the UNFCCC; the preparation and submission of the third national communication on climate change to the UNFCCC; the development of a Mauritius 2050 Pathways Calculator; the development of user-friendly sector-wise excel-based mitigation toolkits and accompanying manuals for sectors such as energy, transport,

43 See Ministry of Environment, Solid Waste Management and Climate Change ‘Vision and mission’, <https://environment.govmu.org/Pages/Mission-and-Vision-Statement.aspx> (accessed 26 April 2021).

44 As above.

45 Ministry of Environment Solid Waste Management and Climate Change ‘Climate Change Division’, <https://environment.govmu.org/Pages/Climate-Change-Division.aspx> (accessed 26 April 2021).

solid and liquid wastes, agriculture including livestock and crop, and forestry, the operationalisation of a Climate Change Information Centre and the promotion of research, capacity building and awareness raising.⁴⁶ In terms of works in the pipeline, the CCD is formulating a Low Carbon Development Strategy and Nationally Appropriate Mitigation Actions (NAMAs) for Mauritius and is also preparing an Initial Biennial Update Report (BUR) for the Republic of Mauritius.⁴⁷

A Climate Change Information Centre (CCIC) has also been established at the level of the Ministry of Environment with the support of the UNDP, the Inter-Regional Technical Support Component of AAP and Japan International Cooperation Agency under the Africa Adaptation Programme funded by the government of Japan.⁴⁸ As part of its key functions, the CCIC acts as a data repository for climate change information with the mandate of disseminating information and reports on climate change for informed decision making. It acts as a knowledge-based platform directing to links such as NASA, the World Meteorological Organisation and National Centre for Atmospheric Research. The CCIC also provides for digital toolkits with the goal of strengthening adaptation skills in key sectors.

In terms of legislation, Mauritius enacted the Energy Efficiency Act 2011 which establishes an Energy Efficiency Management Office with the objectives of promoting the efficient use of energy and national awareness for the efficient use of energy as a means to reduce carbon emissions and protect the environment.⁴⁹ The three major functions of the Energy Efficiency Management Office are to (i) develop and implement strategies, programmes and action plans, including pilot projects, for the efficient use of energy; (ii) establish procedures to monitor energy efficiency and consumption; and (iii) issue guidelines for energy efficiency and conservation in all sectors of the economy.⁵⁰ Another important function is to 'encourage and assist project developers in applying for carbon credits for energy efficiency projects using the Clean Development Mechanism'.⁵¹ In line with the principle of mitigation of the effects of climate change, section 19 of the Energy Efficiency Act 2011 provides for an energy

46 As above.

47 As above.

48 Ministry of Environment, Solid Waste Management and Climate Change 'Climate Change Information Centre', <https://environment.govmu.org/Pages/CCIC.aspx> (accessed 26 April 2021).

49 Sec 5 Energy Efficiency Act 2011.

50 Sec 6 Energy Efficiency Act 2011.

51 Sec 6(j) Energy Efficiency Act 2011.

audit which is defined as the verification, monitoring and analysis of use of energy, including the submission of a technical report containing recommendations for improving energy efficiency with economic and cost analysis and an action plan to reduce energy consumption.⁵²

The Energy Efficiency Act provides for regulations to be adopted by the minister in charge in terms of (i) the minimum energy performance standards for any equipment, machine or appliance that is imported, manufactured or sold in Mauritius; (ii) the labelling requirements and specifications for any equipment, machine or appliance that is imported, manufactured or sold in Mauritius; (iii) the criteria to classify energy consumers; (iv) the minimum qualification standards for certification of energy auditors and related procedures for energy audits; (v) any other matter related to energy efficiency; and (vi) any person who contravenes these commits an offence and, on conviction, shall be liable to a fine not exceeding 100 000 rupees.⁵³

Another notable piece of legislation that is directly linked with climate change in Mauritius is the Renewable Energy Agency Act 2015 which establishes the Mauritius Renewable Energy Agency.⁵⁴ The Agency's missions are to (i) promote the adoption and use of renewable energy with a view to achieving sustainable development goals; (ii) advise on possible uses of liquid natural gas; (iii) create an enabling environment for the development of renewable energy; (iv) increase the share of renewable energy in the national energy mix; (v) share information and experience on renewable energy research and technology; and (vi) foster collaboration and networking, at regional and international levels, with institutions promoting renewable energy.⁵⁵ In terms of regulations, a notable and indirectly applicable regulation to climate change is the Environment Protection (Banning of Plastic Bags) Regulations 2020. According to this regulation, no person can possess, use, distribute, sell, export, import, manufacture or supply a plastic bag.⁵⁶

52 Sec 2 Energy Efficiency Act 2011.

53 Grantham Research Institute on Climate Change and the Environment 'Mauritius – Energy Efficiency Act 2011', <https://www.climate-laws.org/geographies/mauritius/laws/energy-efficiency-act> (accessed 26 April 2021).

54 Sec 3 Mauritius Renewable Energy Agency Act 2015.

55 Grantham Research Institute on Climate Change and the Environment 'Mauritius – Renewable Energy Agency Act 2015', <https://www.climate-laws.org/geographies/mauritius/laws/renewable-energy-agency-act-2015-no-11-of-2015> (accessed 26 April 2021).

56 Sec 4 Environment Protection (Banning of Plastic Bags) Regulations 2020.

In August 2019 the Ministry of Energy and Public Utilities presented the Renewable Energy Roadmap 2030 for the Electricity Sector (Roadmap). This Roadmap was developed after the national pledge taken by the Mauritian government at the Conference of Parties 2015 was a reduction of 30 per cent of its emissions by the year 2030.⁵⁷ One of the essential mitigation factors proposed was the ‘expansion in solar, wind and biomass energy production and other renewable energy’.⁵⁸ The Roadmap highlighted that a target of 35 per cent renewable energy in the electricity mix would be achieved by 2025.⁵⁹ The regulation provides for very strict fines imposed on individuals breaching the law, such as fines and terms of imprisonment not exceeding up to 250 000 Mauritian rupees and two years respectively.⁶⁰

Passed in 2009, the Long-Term Energy Strategy of the government of Mauritius delineates the country’s vision over the medium and long term with a particular emphasis on environmental sustainability. It calls for energy security; encourages energy efficiency through legal, communicational, administrative and sectoral actions; enhances demand side management; incentivises the uptake of sustainable buildings; and fostering the production and use of renewable resources, including wind, solar, bagasse and hydro. An energy strategy for the transport sector is presented to promote the use of buses and promote low emission vehicles and fuels. Financial incentives, including carbon financing, are discussed.⁶¹

Another policy that aligns with actions against climate change is the National Environment Policy 2007. The aim of this policy is to consolidate several sectoral and cross-sectoral policy goals under one common approach to environmental management. The impacts of climate change are among the several challenges considered by the policy to achieve resilience. Among the national targets concerning the built environment is the establishment of new constructions and building standards in the context of climate change. The policy further aims at enhancing the preparedness of Mauritius in addressing the effects of extreme weather events, climate change, including sea level rise, and other environmental disasters. The policy additionally aims at fostering the

57 Ministry of Energy and Public Utilities ‘Renewable Energy Roadmap 2030 for the Electricity Sector’ (2019) 2.

58 As above.

59 Renewable Energy Roadmap 2030 (n 57).

60 Sec 14 Environment Protection (Banning of Plastic Bags) Regulations 2020.

61 Grantham Research Institute on Climate Change and the Environment ‘Mauritius – Long-term energy strategy’, <https://www.climate-laws.org/geographies/mauritius/policies/long-term-energy-strategy> (accessed 26 April 2021).

production of renewable energy and the efficiency of energy. Targets to be achieved in the combat against climate change can be categorised as both economy and energy-oriented. While one target is economy-oriented, four are energy-oriented. In terms of energy targets, the targets are to achieve 35 per cent of renewable energy by 2035; 10 per cent of energy efficiency gains in the electric sector by 2025; a reduction in energy consumption of the public sector to half the current level by 2025; and to have 50 per cent of households and businesses to use solar-powered water heating systems by 2012 (a target not yet achieved). There is also the economy-oriented target of a 30 per cent reduction in greenhouse gas (GHG) emissions by 2030.⁶²

5 The right to healthy environment as a climate change intervention

5.1 The deficit of the right to environment

Before embarking on the argument of having the human right to a clean or healthy environment as a basis for combating climate change, it is important to highlight a critical legislative development in the field of climate change that is in the pipeline in Mauritius. This concerns the Climate Change Bill XIV of 2020 (Bill). In accordance with the explanatory memorandum of the Bill, its main object is

to implement, with a view to addressing the adverse effects of climate change and developing Mauritius into a greener economy, the obligations of Mauritius under the United Nations Framework Convention on Climate Change, the Kyoto Protocol, the Paris Agreement and any other related instrument on climate change.⁶³

To achieve the above, the Bill sets out to establish a legal framework with the aim of making Mauritius a climate-resilient and low-emission country by providing the following:

- (a) the setting up of an Inter-Ministerial Council on Climate Change which, on the recommendation of the Minister to whom responsibility for the subject of climate change is assigned, shall make climate change policies and set priorities for climate change adaptation and mitigation, and

62 Renewable Energy Roadmap 2030 (n 57).

63 Climate Change Bill (n 4).

- monitor and review the progress made by government departments on climate change projects and programmes;
- (b) a Department of Climate Change which, among others, shall develop policies, programmes and action plans relating to climate change and coordinate research relating to climate change;
 - (c) the establishment of a climate change committee which shall coordinate the preparation of reports relating to climate change and the implementation of activities related to greenhouse gas inventories, greenhouse gas emission reduction, climate change vulnerability assessments and adaptation to climate change;
 - (d) the conduct of an annual inventory of greenhouse emission by sources and removal by sinks;
 - (e) the monitoring and reporting with respect to greenhouse gas emissions, including the implementation of sectoral climate change adaptation and mitigation measures;
 - (f) the ministry responsible for the subject of climate change to be compliant to the fiduciary standards set by the Adaptation Fund Board, the Green Climate Fund and such other international climate-related funds and to act as a national implementing entity with a view to seeking direct access to climate funding.⁶⁴

Despite the aim of the Bill to make Mauritius climate change-resilient and a low emission country, little has been provided for in the Bill to meet these objectives. There are no clear time-bound targets and a directive to set a baseline from which to move towards the target. The Bill fails to consider policies, strategies and actions on climate change since 2007, a development that negates continuity and undermines the maturing process of a normative framework. For instance, no reference whatsoever is made to the emission reduction pledge taken at the COP in 2015 which provided for a reduction of 30 per cent by 2030. This may be considered a missed opportunity to provide for a legal and enforceable basis to implement this reduction target.

In general, the Bill fails to provide for any comprehensive legal framework based on which its overarching aim can be achieved. What it primarily focuses on is yet more creation of councils, departments and committees without any meaningful substance. In addition, no link has been made with climate change and economic growth in terms of taking economic measures to halt a single-minded economic growth that affects the environment. Regarding international standards on climate change, such as the Agenda 2030, the SDGs and the Sendai Framework on Disaster Risk 2015-2030, the Bill seems to make no connection or

64 As above.

link even in the most indirect manner. This results in a serious lack of norms, standards and policies that underpin the legislation and a basis for inter-ministerial, public-private sector collaboration and an intersectional approach to combat climate change. The Bill is devoid of a human rights-based approach to climate change, let alone the recognition of the right to healthy environment. There is no clear recognition of the impact of climate change on human rights and how the reverse philosophy of respecting and protecting human rights passes through the protection of the human environment first and to which effect, it is crucial to combat climate change.

The above argument of a lack of a human rights-based approach to climate change in Mauritius is not only peculiar to the Bill. The legal framework described in the previous part is almost completely devoid of such an approach. There is no policy or legislation in Mauritius that adopts such an approach to climate change. As a consequence, the lack of regard for climate change targets by businesses, government or any other person cannot be challenged as constituting a human rights abuse or infringement. Another associated hurdle posed by this reality is that judicial and quasi-judicial bodies cannot be anticipated as a means to access remedies relating to actions and inactions of government relating to climate change. To illustrate this point, the Supreme Court of Mauritius, which is tasked with the interpretation of the Bill of Rights of the Constitution of Mauritius, as well as other quasi-judicial bodies such as the National Human Rights Commission and the Equal Opportunities Commission are devoid of any direct mandate to interpret climate change-related legislation from a human rights perspective. Also, the annual reports of the National Human Rights Commission do not cover the subject matter of climate change from the perspective of human rights since there is no mandate to do so. Concerning the judiciary, the conservative nature of the Supreme Court and its lack of judicial activism, as discussed elsewhere, do not allow for the possibility of applying the implied rights theory, allowing for the interpretation of human rights, such as the right to life, through the lens of the environment and climate change.⁶⁵

5.2 Incorporating the human right to clean or a healthy environment in Mauritius

Against the above backdrop, there is a critical need for a human right to a clean or healthy environment to be incorporated in the approaches to

65 R Mahadew 'The right to health in Mauritius: Is the state doing enough or is the constitutional protection of the right to health still required?' in E Durojaye et al (eds) *Litigating the right to health in Africa* (2021) 170-171.

address climate change in Mauritius. Part 3 of this chapter has shown that there is still a lack of clarity and content regarding the human right to a clean or healthy environment at the global (UN) level. However, it has been underlined that various domestic jurisdictions have already incorporated such a right in their constitutions and other legislation. It is contended that there is a critical need for Mauritius to adopt a similar approach and to enshrine the human right to a clean or healthy environment in the Constitution of Mauritius. The potential benefits of a constitutional human right to a clean or healthy environment has been argued as being stronger environmental laws and policies; improved implementation and enforcement; greater citizen participation in environmental decision making; increased accountability; a reduction in environmental injustices; and a level playing field with social and economic rights and better environmental performance.⁶⁶ Incorporating the human right to a clean or healthy environment in the Mauritian Constitution will provide a legal basis for interested parties to bring cases before the Supreme Court against the acts of government, businesses and other entities that are contributing to climate change. In addition, it will serve as a yardstick for assessing compatibility with human rights of legislation and other soft laws on climate change. This will allow for the creation of a corpus of jurisprudence on the subject matter, the opportunity for the judiciary to use international standards on climate change to interpret climate change-related laws and the need for policy makers and the government to eventually align all domestic legislations on climate change with the international legal framework on the matter.

In the context of Mauritius, another legal advantage flowing from the constitutional recognition of the human right to a clean or healthy environment is that it may halt the weakening of laws and policies relating to climate change. Courts have adjudicated that, based on the human right to a clean or healthy environment, current and existing environmental legislation represents a baseline that can be improved but not weakened.⁶⁷ This concept, often referred to as the standstill principle in Belgium, has been recognised in South Africa, Hungary and several other Latin American states. In the French jurisdiction, the principle is called the 'ratchet effect' or 'non-regression'.⁶⁸ Authorities in Belgium are prohibited from weakening levels of environmental protection except in

66 D Boyd 'The effectiveness of constitutional environmental rights' (2013) Yale UNITAR Workshop 5.

67 L Lavrysen 'Presentation of Aarhus-related cases of the Belgian Constitutional Court' (2007) 2 *Environmental Law Network International Review* 5-8.

68 M Prieur 'De L'urgente Necessité de Reconnaître le Principe de Non-Regression en Droit de l'environnement' (2011) 1 *IUCN Academy of Environmental Law E-Journal* 26-45.

isolated cases with a significant and compelling public interest.⁶⁹ As a matter of illustration, on the basis of the principle, a proposal for motor racing by reducing standards for air and noise pollution was rejected by the Council of State.⁷⁰ Similarly, the Constitutional Court of Hungary rejected an endeavour to privatise publicly-owned forests as a result of weaker environmental standards governing private land.⁷¹

Constitutional provisions on the human right to a clean or healthy environment can substantially increase and emphasise the role of the public in environmental governance. The human right to a clean or healthy environment has consistently been interpreted as including procedural environmental rights such as access to justice and information, and participation in decision making. Citizens are utilising these rights in an increasingly significant and consequential manner. In many states the recognition of the right to a clean or healthy environment, administrative processes and courthouse avenues are now open and accessible to citizens even though they lack a traditional economic or personal interest and are only seeking to protect society's collective interest abating climate change.

The possibility of a level playing field with competing economic and social rights is another advantage of the constitutional right to a clean or healthy environment. Environmental laws sometimes limit the exercise of the right to property, for instance, recognising that there are instances in which the public interest takes precedence over private interests. In several states with the human right to a clean or healthy environment articulated in constitutions, challenges of allegations by plaintiffs that their property rights have been infringed by environmental laws have been rejected by courts. For instance, the Constitutional Court of Slovenia upheld a water pollution tax based on the constitutional interest in protecting the environment.⁷² In Belgium, as Lavrysen observes, 'courts are no longer inclined when facing conflicting interests, to automatically sacrifice environmental interests in favour of economic interests'.⁷³

Therefore, it is clear that there are many benefits in incorporating a human right to a clean or healthy environment in the Constitution of Mauritius for the effective combating of climate change. Looking at

69 Lavrysen (n 67) 5-8.

70 *Jacobs v Flemish Region* (1999) Council of State 80.018, 29 April 1999; *Venter* (1999) Council of State 82.130, 20 August 1999.

71 Constitutional Court of Hungary 1994. Judgment 28, V. 20 AB, p.1919.

72 *Pavel Ocepek, Breg pri Komendi* (1999) Up-344/96, 04/01/1999 (Constitutional Court).

73 L Lavrysen 'Belgium' in L Kotze & A Paterson (eds) *The role of the judiciary in environmental governance: Comparative perspectives* (2009) 114.

the relatively weak legal framework on environment in general, which is reactive rather than proactive, a constitutional guarantee seems to be the most appropriate legal way to counter the adverse effects of climate change and strengthen its existing legislative framework.

6 Conclusion

There is enough scientific certainty that Mauritius has begun to face and will continue to be exposed to the immense and life-threatening consequences of climate change. While there have been legislative and normative responses to climate change in Mauritius, it would certainly not be an exaggeration to say that these responses have so far not been sufficiently effective. Therefore, there is a crucial need for a new approach to be adopted to deal with the danger of climate change that is hovering over the country. While there are scores of approaches and dimensions that can be given to the combating of climate change in Mauritius, this chapter advocates a human rights-based approach, with particularly emphasis on the incorporation of the right to a clean or healthy environment in the Constitution of Mauritius. For a more holistic approach to climate change from a human rights perspective, in addition to the recommendation, there is the critical need to operationalise standards on climate change in instruments such as the UNFCCC and the Paris Agreement in Mauritius so that they could be invoked before national courts. There is also the need for civil society organisations to be more proactive regarding strategic litigation related to climate change issues. The idea of combating climate change using the human right to a clean or healthy environment has benefits, as has been shown. Importantly, it imposes the obligation regarding climate change quite clearly and decisively on the government and it will shape the protection of rights holders in Mauritius against the adverse effects of climate change.

SELECTED BIBLIOGRAPHY

Books

- Abramson, B *A commentary on the United Nations Convention on the Rights of the Child, Article 2: The right of non-discrimination* (Brill 2002)
- ACT Alliance *Towards the ambitious implementation of the Paris Agreement: A toolkit for national level advocacy* (Act Alliance 2018)
- Adelman, S *Human rights in the Paris Agreement: Too little, too late?* (Cambridge University Press 2017)
- Adger, WN, Lorenzoni, I & O'Brien, KL (eds) *Adapting to climate change: Thresholds, values, governance* (Cambridge University Press 2009)
- Angelsen, A, Brockhaus, M, Sunderlin, WD & Verchot, LV *Analysing REDD+: Challenges and choices* (CIFOR 2012)
- Bellali, J, Strauch, L, Oremo, F & Ochieng, B *Multi-level climate governance in Kenya: Activating mechanisms for climate action* (Adelphi and ILEG 2018)
- Bilchitz, D *A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's framework and the guiding principles* (Cambridge University Press 2013)
- Bodansky, D, Brunnée, J & Rajamani, L *International climate change law* (Oxford University Press 2017)
- Centre for International Governance Innovation *Implementing the Paris Agreement: The relevance of human rights to climate action* (CIGI 2016)
- Cilliers, J *The future of Africa: Challenges and opportunities* (Palgrave Macmillan 2020)
- Cranston, M *What are human rights* (Taplinger Publishing Company 1973)
- Daly, H & Farley, J *Ecological economics: Principles and applications* (Island Press 2004)
- Dunlap, RE & Brulle RJ (eds) *Climate change and society: Sociological perspectives*, (Oxford University Press 2015)
- Ekins, P et al (eds) *Global environment outlook Geo-6: Healthy planet, healthy people* (Cambridge University Press 2019)
- Eleri, E et al 'Making progress towards low carbon development' The SUNGAS Project, International Institute for Environment and Development (IIED 2013)
- Field, CB et al (eds) *Managing the risks of extreme events and disasters to advance climate change adaptation: Special report of the intergovernmental panel on climate change* (Cambridge University Press 2012)
- Field, CB et al (eds) *Climate change 2014: Impacts, adaptation, and vulnerability. Part A: Global and sectoral aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014)
- Hunter, L *The environmental implications of population dynamics* (Santa Monica: Rand 2000)
- Hurrell, A *On global order: Power, values and the constitution of international society* (Oxford Scholarship 2007)

- Jegede, A *The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications* (Pretoria University Law Press 2016)
- Jodoin, S & Lofts, K *Economic, social, and cultural rights and climate change: A legal reference guide* (New Haven 2013)
- Le Roy, E *Les pluralismes juridiques* (Karthala 2003)
- McInerney-Lankford, S, Darrow, M & Rajamani, L *Human rights and climate change* (World Bank Studies 2011)
- Milazzo, A & Van de Walle, D *Women left behind? Poverty and headship in Africa* (World Bank 2015)
- Nixon, R *Slow violence and the environmentalism of the poor* (Harvard University Press 2011)
- Orindi, V et al *The county climate change funds in Kenya. Real practice in collaborative climate action* (Adelphi 2020)
- Ostrom, E *Governing the commons: The evolution of institutions for collective action* (Cambridge University Press 2015)
- Pachaur, RK & Meyer, LA (eds) *Climate change 2014: Synthesis report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014)
- Parry, E, Echeverria, D, Dekens, J & Maitima, J *Climate risks! Vulnerability and governance in Kenya: A review* (UNDP 2012)
- Quirico, O & Boumghar, M (eds) *Climate change and human rights: An international and comparative law perspective* (Routledge 2016)
- Schlosberg, D *Defining environmental justice: Theories, movements, and nature* (Oxford University Press 2009)
- Sen, A *Development as freedom* (Oxford University Press 1999)
- Skillington, T *Climate justice and human rights* (Springer 2016)
- Stern, NH *The economics of climate change: The Stern review* (Cambridge University Press 2007)
- Stevens, S *Indigenous peoples, national parks and protected areas: A new paradigm linking conservation, culture and rights* (University of Arizona Press 2014)
- Vemuru, V, Oka, R, Rieti, G & Lee, G *Refugee impacts on Turkana hosts: A social impact analysis for Kakuma town and refugee camp Turkana county, Kenya* (The World Bank Group 2016)
- Viljoen, F *International human rights law in Africa* (Oxford University Press 2012)
- Waris, A *Tax and development: Solving Kenya's fiscal crisis through human rights: A case study of Kenya's constituency development fund* (LawAfrica 2013)
- Weiss, E *In fairness to future generations: International law, common patrimony and intergenerational equity* (Transnational Publishers 1988)
- World Meteorological Organisation *State of the climate in Africa* (WMO 2019)

Chapters in books

- Addaney, M 'Strengthening Africa's adaptive capacity to climate change: African Union law and implications of China's belt and road policy' in Filho, WL *Climate change, hazards and adaptation options* (Springer 2020)
- Ako, R & Oluduro, O 'Bureaucratic rhetoric of climate change in Nigeria: International aspiration versus local realities' in Maes, F et al (eds) *Biodiversity and climate change: Linkages at international, national and local levels*

- (Edward Elgar 2013)
- Asaka, JO 'Water-energy-food nexus and human security in Northwestern Kenya' in Koulouri, A & Mouraviev, N (eds) *Policy and governance in the water-energy-food nexus: A relational equity approach* (Routledge 2019)
- Ayoade, A 'Bridging the gap between climate change and energy policy options: What next for Nigeria?' in Kameri-Mbote, P et al (eds) *Law and constitution in Africa* (4th Scientific Conference of the Association of Environmental Law Lecturers from African Universities in cooperation with the Climate Policy and Energy Security Programme for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung and UN Environment 2018)
- Betsil, MM 'International climate change policy: Toward the multilevel governance of global warming' in Axelrod, R, Van Danveer, S & Downie, DL (eds) *Global environment: Institutions law and policy* (Sage Publishing 2011)
- Carr, CJ 'Turkana survival systems at Lake Turkana: Vulnerability to collapse from Omo Basin development' in Carr, CJ (ed) *River basin development and human rights in Eastern Africa – A policy crossroads* (Springer 2017)
- Conca, K 'Old states in new bottles? The hybridisation of authority in global environmental governance' in Barry, J & Eckersley, R (eds) *The state and the global ecological crisis* (The MIT Press 2005)
- Edmondson, E 'The Intergovernmental Panel on Climate Change: Beyond monitoring' in Gleeson, B & Low, N (eds) *Governing for the environment: Global patterns, ethics and democracy* (Palgrave 2001)
- Grist, N & Speranza, CI 'Climate change and African development' in Lundsgaarde, E (ed) *Africa toward 2030: Challenges for development policy* (Palgrave Macmillan 2012)
- Harlan, SL et al 'Climate justice and inequality' in Riley, ED & Brulle, RJ *Climate change and society: Sociological perspectives* (Oxford University Press 2015)
- Jegede, AO 'Trouble in paradise: Prosecution of climate change related laws in Nigeria' in Gerardu, J et al (eds) *Compliance strategies to deliver climate benefits* (INECE 2013)
- Knur, F 'The United Nations human rights-based approach to climate change – Introducing a human dimension to international climate law' in Von Schorlemer, S & Maus, S (eds) *Climate change as a threat to peace: Impact on cultural heritage and cultural diversity* (Dresden Papers on Law and Policy of the United Nations 2015)
- Kotze, L et al 'Climate change law and governance in South Africa: Setting the scene' in Humby, TL et al (eds) *Climate change: Law and governance in South Africa* (Juta 2016)
- Lavrysen, L 'Belgium' in Kotze, L & Paterson, A (eds) *The role of the judiciary in environmental governance: Comparative perspectives* (Wolters Kluwer 2009)
- Mahadew, R 'The right to health in Mauritius: Is the state doing enough or is the constitutional protection of the right to health still required' in Durojaye, E et al (eds) *Litigating the right to health in Africa* (Nomos 2015)
- Manby, B 'Development, good governance and South-South cooperation: The African Peer Review Mechanism' in OHCHR *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (OHCHR 2013)
- Mbala, SM & Karsenty, A 'Forest revenue decentralisation and profits redistribution in the Democratic Republic of Congo' in German, LA,

- Karsenty, A & Tiani, A (eds) *Governing Africa's forest in a globalised world* (Earthscan 2010)
- Mizan, RK 'Climate change, adaptation and international relations theory' in Sosa-Nunez, G & Atkins, ED (eds) *Environment, climate change and international relations* (E-International Relations Publishing 2016)
- Morgera, E 'From corporate social responsibility to accountability mechanisms' in Dupuy, PM & Viñuales, J (eds) *Harnessing foreign investment to promote environmental protection: Incentives and safeguards* (Cambridge University Press 2013)
- Motala, A 'Non-governmental organisations in the African system' in Evans, M & Murray, R (eds) *The African Charter on Human and People's Rights, The system in practice (1986-2000)* (Cambridge University Press 2008)
- Nairobi, GN 'Auditing the adequacy of NDCs in addressing the climate action sustainable development goal' in Nhamo, G et al (eds) *Scaling up SDGs implementation: Emerging cases from state, development and private sectors* (Springer 2020)
- Nanda, VP 'Global environmental governance and the south' in Alam, S, Atapattu, S, Gonzalez, CG & Razaque, J (eds) *International environmental law and the Global South* (Cambridge University Press 2015)
- Nyadera, IN, Agwanda, B & Maulani, N 'Evolution of Kenya's political system and challenges to democracy' in Farazmand, A (ed) *Global encyclopedia of public administration, public policy, and governance* (Springer 2020)
- O'Sullivan, JN 'Synergy between population policy, climate adaptation and mitigation' in Hossain, M, Hales, R & Sarker, T (eds) *Pathways to a sustainable economy: Bridging the gap between Paris climate change commitments and net zero emissions* (Springer 2018)
- Omorogbe, O 'Promoting sustainable development through the use of renewable energy: The role of the law' in Zillman, D et al (eds) *Beyond the carbon economy: Energy law in transition* (Oxford Scholarship Online 2008)
- Robledo, C, Blaser, J & Byrne, S 'Climate change: What are its implications for forest governance?' in German, LA, Karsenty, A & Tiani, A (eds) *Governing Africa's forest in a globalised world* (Earthscan 2010)
- Roos, SR 'Climate change and human rights: What follows for corporate human rights responsibility?' in Ruppel, OC et al (eds) *Climate change: International law and global governance* (Nomos Verlagsgesellschaft mbH 2013)
- Shivji, IG 'The rights of people to self-determination: An African perspective' in Twining, W (ed) *Issues of self-determination* (Aberdeen University Press 1991)
- Turton, A & Warner, J 'Exploring the population/water resources nexus in the developing world' in Dabelko, G (ed) *Finding the source: The linkage between population and water* (The Woodrow Wilson Centre Environmental Change and Security Project 2002)
- Zlotnik, H 'Does population matter for climate change?' in Guzmán, J et al (ed) *Population dynamics and climate change* (UNFPA & IIED 2009)

Journal articles

- Adeolu, A 'Climate change and population dynamics in Southwest Nigeria' (2019) 13 *Journal of Environmental Science, Toxicology and Food Technology* 39
- Agrawal, A & Ostrom, E 'Collective action, property rights, and decentralisation in resource use in India and Nepal' (2001) 29 *Politics and Society* 485
- Agrawal, A 'Common property institutions and sustainable governance of resources' (2001) 29 *World Development* 1649
- Akudugu, MA, Dittoh, S & Mahama, ES 'The implications of climate change on food security and rural livelihoods: Experiences from Northern Ghana' (2012) 2 *Journal of Environment and Earth Science* 21
- Allen, M 'Liability for climate change: Will it ever be possible to sue anyone for damaging the climate?' (2003) 421 *Commentary in Nature* 891
- Alston, P 'Conjuring up new human rights: A proposal for quality control' (1986) 78 *American Journal of International Law* 615
- Asaka, JO & Smucker, TA 'Assessing the role of mobile phone communication in drought-related mobility pattern of Samburu pastoralists' (2016) 128 *Journal of Arid Environments* 12
- Badawi, E 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: Introductory note' (1997) 9 *African Journal of International and Comparative Law* 953
- Besson, S 'The principle of non-discrimination in the Convention on the Rights of the Child' (2005) 13 *International Journal of Children's Rights* 433
- Betts, RA et al 'A successful prediction of the record CO₂ rise associated with the 2015/2016 El Nino' (2018) 373 *Philosophical Transactions of the Royal Society B: Biological Sciences* 20170301
- Blackmore, A 'The application of and the prospects for the public trust doctrine in South Africa: A brief overview' (2018) 18 *South African Law Journal* 631
- Blumm, MC & Guthrie RD 'Internationalising the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision' (2011-2012) 45 *UC Davis Law Review* 741
- Bodansky, D 'The Paris climate change agreement: A new hope?' (2016) 110 *American Journal of International Law* 288
- Bodansky, D 'Introduction: Climate change and human rights: Unpacking the issues' (2010) 38 *Georgia Journal of International and Comparative Law* 511
- Bodansky, D 'Climate change and human rights: Unpacking the issues' (2010) 38 *Georgia Journal of International and Comparative Law* 511
- Bongaarts, J & O'Neill, B 'Global warming policy: Is population left out in the cold?' (2018) 361 *Science* 650
- Bradbrook, AJ et al 'A human dimension to the energy debate: Access to modern energy services' (2008) 26 *Journal of Energy and Natural Resources Law* 526
- Brandsen, T, Trommel, WA & Verschuere, B 'The state and the reconstruction of civil society' (2017) 83 *International Review of the Administrative Sciences* 676
- Cabre, M 'Issue linkages to climate change measured through NGO participation in UNFCCC' (2011) 11 *Global Environmental Politics* 10
- Cameron, E 'Human rights and climate change: Moving from an intrinsic to an instrumental approach' (2010) 38 *Georgia Journal of International and*

Comparative Law 673

- Carbone, M 'Theory and practice of participation: Civil society and EU development policy' (2008) 9 *Perspectives on European Politics and Society* 241
- Chhatre, A & Agrawal, A 'Trade-offs and synergies between carbon storage and livelihood benefits from forest commons' (2009) 106 *PNAS* 17667
- Cléménçon, R 'The two sides of the Paris Climate Agreement: Dismal failure or historic breakthrough?' (2016) 25 *Journal of Environment and Development* 3
- Colenbrander, S et al 'The economic case for low-carbon development in rapidly growing developing world cities: A case study of Palembang, Indonesia' (2015) 25 *Energy Policy* 25
- Collier, P, Conway, G & Venables, T 'Climate change and Africa' (2008) 24 *Oxford Review of Economic Policy* 337
- Cornwall, A & Nyamu-Musembi, C 'Putting the "rights-based approach" to development into perspective' (2004) 25 *Third World Quarterly* 1415
- Costello, A et al 'Managing the health effects of climate change' (2009) 373 *The Lancet* 1693
- Davidson, O et al 'The development and climate nexus: The case of sub-Saharan Africa' (2003) 3 *Climate Policy* 97
- Dehm, J 'Indigenous peoples and REDD+ safeguards: Rights as resistance or as disciplinary inclusion in the green economy?' (2016) 7 *Journal of Human Rights and the Environment* 180
- Dodson, J et al 'Population growth and climate change: Addressing the overlooked threat multiplier' (2020) 748 *Science of the Total Environment* 141346
- Durojaye, E & Oluduro, O 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Feminist Legal Studies* 315
- Duyck, S et al 'Human rights and the Paris Agreement's implementation guidelines: Opportunities to develop a rights-based approach' (2018) 12 *Carbon and Climate Law Review* 191
- Ebeku, K 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 149
- Etuvoata, AE 'Towards improved compliance with human rights decisions in the African human rights system: Enhancing the role of civil society' (2020) 21 *Human Rights Review* 415
- Fabreau, GE et al 'Skeletal fluorosis in a resettled refugee from Kakuma refugee camp' (2019) 393 *Lancet* 223
- Fobissie, K, Alemagi, D & Minang, PA 'REDD+ policy approaches in the Congo Basin: A comparative analysis of Cameroon and the Democratic Republic of Congo' (2014) 5 *Forests* 2403
- Ganguly, G, Setzer, J & Heyvaert, V 'If at first you don't succeed: Suing corporations for climate change' (2018) 38 *Oxford Journal of Legal Studies* 841
- Ganivet, E 'Growth in human population and consumption both need to be addressed to reach an ecologically sustainable future' (2019) *Environment, Development and Sustainability* 10
- Gibbons, ED, Huebler, F & Loaiza, E 'Child labour, education and the principle of non-discrimination' (2005) 10 *Capitulo* 214
- Gormley, W 'The right of individuals to be guaranteed a pure, clean and decent environment: Future programmes of the Council of Europe' (1975) 23 *Legal*

Issues in European Integration 52

- Grace, K 'Considering climate in studies of fertility and reproductive health in poor countries' (2017) 7 *Nature Climate Change* 479
- Greaves, H 'Climate change and optimum population' (2019) 102 *The Monist* 42
- Grugel, J & Piper, N 'Do rights promote development?' (2009) 9 *Global Social Policy* 79
- Gumedze, S 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118
- Gupta, J 'Legal steps outside the climate convention: Litigation as a tool to address climate change' (2007) 16 *Review of European Community and International Environmental Law (RECIEL)* 76
- Hamm, BI 'A human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005
- Harrison, S et al 'One health: A theory-focused review in response to calls for convergence' (2019) 132 *Environment International* 105058
- Hart, D 'Is climate change a human rights issue?' (2012) 24 *Environmental Law and Management* 76
- Hayes, A & Adamo, S 'Introduction: Understanding the links between population dynamics and climate change' (2014) 35 *Population and Environment* 225
- Holifield, R 'Defining environmental justice and environmental racism' (2001) 22 *Urban geography* 78
- Ikpeze, O 'Non-justiciability of chapter II of the Nigerian Constitution as an impediment to economic rights and development' (2015) 5 *Developing Country Studies* 48
- Jegede, AO 'A realist Africa in the polemics of climate change and "carbon free" economy' 2018 *African Renaissance* 99
- Jegede, AO 'Arguing the right to a safe climate under the UN human rights system' (2020) 9 *International Human Rights Law Review* 184
- Jegede, AO 'Climate change in the work of the African Commission on Human and Peoples' Rights' (2017) 31 *Speculum Juris* 135
- Jegede, AO 'Rights away from home: Climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention' (2016) 16 *African Human Rights Law Journal* 58
- Jegede, AO 'The impact of climate change on indigenous peoples' land tenure and use: The case for a regional policy in Africa' (2014) 21 *International Journal on Minority and Group Rights* 256
- Jesse, R & Larson, A 'Reducing REDD risks: Affirmative policy on an uneven playing field' (2012) *International Journal of the Commons* 6
- Killander, M 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41
- Knox, JH 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 483
- Kotzé, LJ & Du Plessis, A 'Putting Africa on the stand: A bird's eye view of climate change litigation on the continent' (2020) 50 *Environmental Law* 615
- Lavrysen, L 'Presentation of Aarhus-related cases of the Belgian Constitutional Court' (2007) 2 *Environmental Law Network International Review* 5
- Le Masson, V et al 'How violence against women and girls undermines resilience

- to climate risks in Chad' (2019) 43 *Disasters* S245
- Limón, M 'Human rights and climate change: Constructing a case for political action' (2009) 33 *Harvard Environmental Law Review* 439
- Markell, D & Ruhl, JB 'An empirical assessment of climate change in the courts: A new jurisprudence or business as usual?' (2012) 64 *Florida Law Review* 15
- Marks, S 'Emerging human rights: A new generation for the 1980's' (1981) 33 *Rutgers Law Review* 442
- Mayer, B 'Human rights in the Paris Agreement' (2016) *Climate Law* 109.
- McInerney-Lankford, S 'Climate change and human rights: An introduction to legal issues' (2009) 33 *Harvard Environmental Law Review* 431
- McMichael, AJ 'Climate change and children: Health risks of abatement inaction, health gains from action' (2014) 1 *Children* 99
- Mezmur, BD 'The African Children's Charter@ 30: A distinction without a difference?' (2020) 28 *International Journal of Children's Rights* 693
- Montoute, A, Mohammed, D & Francis, J 'Prospects and challenges for civil society and climate change engagement in the Caribbean: The case of Trinidad and Tobago' (2019) 47 *Caribbean Studies* 81
- Morgera, E & Tsioumani, E 'The evolution of benefit-sharing: Linking biodiversity and community livelihoods' (2010) 20 *RECIEL* 150
- Müller, C et al 'Hotspots of climate change impacts in sub-Saharan Africa and implications for adaptation and development' (2014) 20 *Global Change Biology* 2505
- Nanda, V & Ris, W 'The public trust doctrine: A viable approach to international environmental protection' (1976) 5 *Ecology Law Quarterly* 291
- Neller, AH & Neller, RJ 'Environment well-being and human well-being' (2009) 2 *Institutional Issues Involving Ethics and Justice* 137
- Nelson, A & Chomitz, KM 'Effectiveness of strict vs multiple use protected areas in reducing tropical forest fires: A global analysis using matching methods' (2011) 6 *PLoS ONE* 1
- Ngcamu, BS & Chari, F 'Drought Influences on food insecurity in Africa: A systematic literature review' (2020) 17 *International Journal of Environmental Research and Public Health* 5897
- Nsikan-Abasi, O 'Burden of proof: Real burden in environmental litigation for the Niger-Delta of Nigeria' (2020) 35 *Journal of Environmental Law and Litigation* 193
- Okereke, C 'Climate justice and the international regime' (2010) 1 *Wiley Interdisciplinary Reviews: Climate Change* 462
- Olawuyi, D 'Advancing climate justice in international law: An evaluation of the United Nations human rights-based approach' (2015) 11 *Florida A&M University Law Review* 103
- Oraham, I 'The effects of population growth in Nigeria' (2006) 6 *Journal of Applied Sciences* 1332
- Owoeye, O 'Access to energy in sub-Saharan Africa: A human rights approach to the climate change benefits of energy access' (2016) 18 *Environmental Law Review* 284
- Pearsall, H & Pierce, J 'Urban sustainability and environmental justice: Evaluating the linkages in public planning/policy discourse' (2010) 15 *Local Environment* 569

- Peel, J 'Issues in climate change litigation' (2011) 1 *Carbon and Climate Law Review* 15
- Peel, J & Lin, J 'Transnational climate litigation: The contribution of the Global South' (2019) 113 *American Journal of International Law* 679
- Pickering, J & Barry, C 'On the concept of climate debt: Its moral and political value' (2012) 15 *Critical Review of International Social and Political Philosophy* 667
- Porter-Bolland, L *et al* 'Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics' (2011) *Forest Ecology and Management* 6
- Posner, EA 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925
- Posner, EA & Sunstein CR 'Climate change justice' (2008) 96 *Georgetown Law Journal* 1565
- Prieur, M 'De L'urgente Necessité de Reconnaître le Principe de Non Regression en Droit de l'environnement' (2011) 1 *IUCN Academy of Environmental Law E-Journal* 26
- Roberts, J *et al* 'Who ratifies environmental treaties and why? Institutionalism, structuralism and participation by 192 nations in 22 treaties' (2004) 4 *Global Environmental Politics* 22
- Röser, F, Widerberg, O, Höhne, N & Day, T 'Ambition in the making: Analysing the preparation and implementation of process of the nationally determined contributions under the Paris Agreement' (2020) 20 *Climate Policy* 415
- Sachs, W 'Climate change and human rights' (2008) 51 *Development* 332
- Sagarin, R & Turnipseed, M 'The public trust doctrine: Where ecology meets rational resources management' (2012) 37 *Annual Review of Environment and Resources* 473
- Sands, P 'Climate change and the rule of law: Adjudicating the future in international law' 2016 *Journal of Environmental Law* 19
- Sanson, AV, Van Hoorn, J & Burke, SE 'Responding to the impacts of the climate crisis on children and youth' (2019) 13 *Child Development Perspectives* 201
- Schlosberg, D & Collins, LB 'From environmental to climate justice: Climate change and the discourse of environmental justice' (2014) 5 *Wiley Interdisciplinary Reviews: Climate Change* 359
- Scholtz, W 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1
- Sen, A 'Human rights and capabilities' (2005) 6 *Journal of Human Development* 151
- Sengupta, A 'Right to development as a human right' (2001) 36 *Economic and Political Weekly* 2527
- Serdeczny, O *et al* 'Climate change impacts in sub-Saharan Africa: From physical changes to their social repercussions' (2017) 17 *Regional Environmental Change* 1585
- Setzer, J & Benjamin, L 'Climate litigation in the Global South: Constraints and innovations' (2020) 9 *Transnational Environmental Law* 77
- Setzer, J & Benjamin, L 'Climate change litigation in the Global South: Filling in gaps' (2020) *American Journal of International Law* 66

- Singh, S & Rajamani, S 'Issue of environmental compliance in developing countries' (2003) 47 *Water Science and Technology* 301
- Sohn, L 'The new international law: Protection of the rights of individuals rather than states' (1982) 32 *American University Law Review* 62
- Starrs, A et al 'Accelerate progress – Sexual and reproductive health and rights for all: Report of the Guttmacher-Lancet Commission' (2018) 391 *Lancet* 2642
- Stephenson, J et al 'Population dynamics and climate change: What are the links?' (2010) 32 *Journal of Public Health* 150
- Summers, JK et al 'A review of the elements of human well-being with an emphasis on the contribution of ecosystem services' (2012) 414 *Ambio* 327
- Sussman, E et al 'Climate change adaptation: Fostering progress through law and regulation' (2010) 18 *New York University Environmental Law Journal* 55
- Swesi, R, El-Anis, I & Islam, MM 'Food insecurity coping strategies in conflict-affected Libya' (2020) 30 *Development in Practice* 394
- Thabane, T 'Weak extraterritorial remedies: The Achilles heel of Ruggie's "protect, respect and remedy" framework and guiding principles' (2014) 14 *African Human Rights Law Journal* 43
- Thomas, B 'The normative and institutional evolution of the international human rights' (1997) 19 *Human Rights Quarterly* 703
- Thorme, M 'Establishing environment as a human right' (2020) 19 *Denver Journal of International Law and Policy* 301
- Toft, KH 'Climate change as a business and human rights issue: A proposal for a moral typology' (2020) 5 *Business and Human Rights Journal* 1
- Toussaint, P & Blanco, A 'A human rights-based approach to loss and damage under the climate change regime' (2019) 20 *Climate Policy* 1
- Ujunwa, A, Okoyeuzu, C & Kalu, EU 'Armed conflict and food security in West Africa: Socio-economic perspective' (2019) 46 *International Journal of Social Economics* 182
- Unmüßig, B & Cramer, S 'Climate change in Africa' (2008) 2 *GIGA Focus Afrika*
- Van Asselt, H & Moncel, R 'All hands on deck! Mobilising climate change action beyond the UNFCCC' (2012) 21 *Review of European, Comparative and International Environmental Law* 163
- Veerman, PE 'An African and international perspective on children's rights: Interview with Dr Benyam Dawit Mezmur, Chairperson of the African Children's Rights Committee (ACERWC) and for two years (2015–2017) the Chair of the UN CR Committee' (2017) 25 *International Journal of Children's Rights* 672
- Viljoen, F & Abebe, AK '*Amicus curiae* participation before regional human rights bodies in Africa' (2014) 58 *Journal of African Law* 22
- Viljoen, F 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2003) 27 *Human Rights Quarterly* 125
- Waris, A 'Taxes, tax injustice and the fight against inequality: An African perspective' (2020) *Os Impostos e o combate as desigualdades* 43
- Waris, A 'Developing fiscal legitimacy by building state-societal trust in African countries' (2018) 4 *Journal of Tax Administration* 103
- Waris, A & Latif, LA 'Financing the progressive realisation of socio-economic

- rights in Kenya' (2015) 8 *University of Nairobi Law Journal* 1
- Wewerinke-Singh M & Doebbler C 'The Paris Agreement: Some critical reflections on process and substance' (2016) 39 *University of New South Wales Law Journal* 1486
- Wieland, P 'Building carbon rights infrastructure with REDD+ incentives: A multi-scale analysis in the Peruvian Amazon' (2013) 43 *Environmental Law Reporter* 10275
- Wilensky, M 'Climate change in the courts: An assessment of non-US climate litigation' (2015) 26 *Duke Environmental Law and Policy Forum* 131
- Yuan, H, Zhou, P & Zhou, D 'What is low-carbon development? A conceptual analysis' (2011) *Energy Procedia* 1707

Conference, working, occasional, discussion papers and lectures

- Anderson, P 'Free, prior, and informed consent: Principles and approaches for policy and project development' (2011) Centre for People and Forests (RECOFTC), Bangkok & Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)
- Barletti, J & Larson, A 'Rights abuse allegations in the context of REDD+ readiness and implementation: A preliminary review and proposal for moving forward' (2017) CIFOR Infobrief
- Battery, J & Vircoulon, T 'Les pouvoirs coutumiers en RDC: Institutionnalisation, politisation et resilience' (2020) Notes de l'Ifri 12
- Business and Human Rights Research Centre 'Climate litigation against companies: An overview of legal arguments' (2019) Business and Human Rights Research Centre
- Chapman, S & Wilder, MAM 'Defining the legal elements of benefit sharing in the context of REDD+' (2014) REDD+ Law Project, Working Paper
- Chudhury, M, Summerlin, T & Ginoya, N 'Mainstreaming climate change adaptation in Kenya: Lessons from Makueni and Wajir Counties' (2020) World Resources Institute Working Paper
- CIHR 'Rights-based approaches to REDD+: Report of a conservation initiative on human rights workshop' (2012) CIHR
- Clapp, C et al 'Low emissions development strategies: Technical, institutional and policy lessons' (2010) OECD, IEA, COM/ENV/EPOC/IEA/SLT
- Colchester, M 'Free, prior and informed consent: Making FPIC work for forests and peoples' (2010) The Forest Dialogues Research Paper 11
- Dagnet, Y et al 'Building capacity for the Paris Agreement's enhanced transparency framework: What can we learn from countries' experiences and UNFCCC processes?' (March 2019) World Resources Institute Working Paper
- De Wit, P 'Land use planning: Impact on community rights, baseline study on tenure in the Democratic Republic of Congo' (2019) RRI 107
- De Wit, P 'Planification de l'utilisation des terres: Impact sur les droits communautaires' (2019) RRI Étude de référence sur la tenure en République Démocratique du Congo
- Debroux, L et al 'Forests in post-conflict Democratic Republic of Congo: Analysis of a priority agenda' (2007) CIFOR
- FAO 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities

- in relation to land acquisition' (2014) Governance of Tenure Technical Guide 3
- FPP 'Comments on the Forest Carbon Partnership Facility (FCPF) Emission Reductions Programme Document (ER-PD) on the Mai-Ndombe Emission Reduction Programme in the Democratic Republic of Congo' (2017) FPP
- Gayoom, MA 'Speech by His Excellency Mr Maumoon Abdul Gayoom, President of the Republic of Maldives, on "Is there a right to a safe environment" at the Royal Commonwealth Society' (17 July 2007)
- Gilmour, D 'Forty years of community-based forestry' (2016) FAO Forestry Paper 176
- Graham Research Institute on Climate Change and the Environment 'Governance of climate change policy: A case study of South Africa' (June 2019) Policy Brief
- Griffiths, T 'Seeing 'RED'? "Avoided Deforestation", and the rights of indigenous and local communities' (2007) Forest Peoples' Programme
- Herbert, R & Grudz, S 'The African Peer Review Mechanism: Lessons from the pioneers' (2008) South African Institute of International Affairs
- Ickowitz, A, Slayback, AD, Asanzi, P & Nasi, R 'Agriculture and deforestation in the Democratic Republic of the Congo: A synthesis of the current state of knowledge' (2015) CIFOR Occasional Paper 119
- IFAD 'How to do: Seeking free, prior and informed consent in IFAD investment projects' (2015) IFAD
- IFAD 'Land tenure security and poverty reduction'(2008) IFAD
- International Bar Association 'Achieving justice and human rights in an era of climate disruption' (2014) International Bar Association
- Khan, F 'NDC score card: Measuring the nationally determined contributions (NDCs) under the Paris Agreement' (2019) M-RCBG Associate Working Paper Series .123.
- Kipalu, P *et al* 'Securing forest peoples' rights and tackling deforestation in the Democratic Republic of Congo: Deforestation drivers, local impacts and rights-based solutions' (2016) Forest Peoples' Programme.
- Koné, L'Garantir les droits fonciers coutumiers en République démocratique du Congo : Guide Pratique à l'intention des acteurs impliqués dans le processus de la réforme foncière' (2017) Forest Peoples' Programme.
- MacKay, F 'Indigenous peoples' rights and conservation: Recent trends in human rights jurisprudence' (2017) Forest Peoples' Programme
- Milazzo, A & Van de Walle, D 'Women left behind? Poverty and headship in Africa' (2015) World Bank Group Policy Research Working Paper Series 7331
- Mpoyi, A 'Amélioration de la gouvernance du secteur foncier en République démocratique du Congo: La mise en œuvre du cadre d'évaluation de la gouvernance foncière' (2013) CAGF
- Mpoyi, A, Sakata, G, Longbango, A & Kabue, G 'REDD+ en RDC: Cadre juridique et institutionnel de mise en œuvre de la REDD+ en RD' (2013) GLOBE International
- Mpoyi, A, Nyamwoga, B, Kabamba, M & Mvondo SA 'Le contexte de la REDD+ en République Démocratique du Congo: Causes, agents et institutions' (2013) CIFOR Document occasionnel
- Newell, P *et al* 'The political economy of low carbon energy in Kenya' (2014)

- Institute of Development Studies Working Paper 445
- Oduwole, O 'International law and the right to development: A pragmatic approach for Africa' (20 May 2014) Inaugural lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015 at the International Institute of Social Studies, The Hague, The Netherlands
- Quan, J & Dyer, N 'Climate change and land tenure: The implications of climate change for land tenure and land policy' (2008) Land Tenure Working Paper Vol 2
- Republic of Kenya 'Sessional Paper No 5 of 2016. National Climate Change Policy Framework Policy' (Ministry of Environment and Natural Resources 2016)
- RRI 'Mai Ndombe: Will the REDD+ laboratory benefit indigenous peoples and local communities? Analysis of the cumulative impacts and risks of REDD+ initiatives' (2018) Rights and Resources Initiatives
- RRI 'A global baseline of carbon storage in collective lands: Indigenous and local community contributions to climate change mitigation' (2018) Rights and Resources Initiatives
- The Rainforest Foundation UK (RFUK) 'REDD-minus: The rhetoric and reality of the Mai Ndombe REDD+ programme' (2020)
- Thuy, PT et al 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries' (2013) CIFOR Working Paper 108
- Tirpak, D 'How to strengthen the institutional architecture for capacity building to support the post-2020 climate regime' (December 2015) World Resources Institute Working Paper
- Van Weezel, S 'Food security and armed conflict: A cross-country analysis' FAO Agricultural Development Economics Working Paper 18-03 (2018)
- VeneKlasen, L, Miller, V, Clark, C & Reilly, M 'Rights-based approaches and beyond: Challenges of linking rights and participation' (2004) IDS Working Paper 235

Treaties, declarations, resolutions, statutes and decisions

- ACHPR General Comment 2 on articles 14(1)(a), (b), (c) and (f) and articles 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- ACHPR 'Guidelines for National Periodic Reports under the African Charter' (1989)
- ACHPR 'Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa'
- ACHPR Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change Res 417 (LXIV) 2019
- ACHPR Resolution on Climate Change and Human Rights in Africa' (adopted at its 58th ordinary session, Banjul, The Gambia, 6-20 April 2016
- ACHPR Resolution on Climate Change in Africa, adopted at its 55th ordinary session, Luanda, Angola, 28 April-12 May 2014
- ACHPR 361 Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organisations Working on Human and Peoples' Rights in Africa ACHPR/Res.361(LIX)2016
- ACHPR Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, 25 November 2009, ACHPR/Res153(XLVI)09

- ACHPR Resolution on Climate Change and Human Rights and the Need to Study its Impacts in Africa, ACHPR/Res. 153(XLVI)09, adopted at its 46th session in 2009
- ACHPR Resolution on Climate Change and Human Rights in Africa ACHPR/Res.342(LVIII)2016), adopted at its 58th ordinary session, held in Banjul, The Gambia, from 6 to 20 April 2016
- ACHPR Resolution on the Human Rights Impacts of Extreme Weather in Eastern and Southern Africa due to Climate Change' ACHPR/Res. 417 (LXIV) 2019, adopted at its 64th ordinary session, held in Sharm el Sheikh, Arab Republic of Egypt, from 24 April to 14 May 2019
- ACHPR Resolution on Climate Change in Africa, ACHPR/Res.271(LV)2014, adopted at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014
- ACHPR Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, adopted at its 46th ordinary session, 11-25 November 2009, Banjul, The Gambia
- ACHPR Resolution on Climate Change and Human Rights in Africa, ACHPR/Res.342(LVIII) (2016) adopted at its 58th ordinary session, held in Banjul, The Gambia, from 6 to 20 April 2016
- ACHPR State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (Tunis Reporting Guidelines)
- ACHPR State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter on Human and Peoples' Rights related to the extractive industries (2018)
- African Convention on the Conservation of Nature and Natural Resources 2003
- African Charter on Human and Peoples' Rights (African Charter) 21 ILM 58, adopted by the Organisation of African Unity on 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, entered into force 21 October 1986
- African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990)
- African Peer Review Mechanism 'Guidelines for countries to prepare for and to participate in the African Peer Review Mechanism' (2003)
- African Union Climate Change Declaration, AU Doc Assembly/AU/Decl.4 (VIII) adopted by the Assembly of the African Union Heads of State and Government (2007)
- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) adopted by a Special Summit of the African Union on 22 October 2009, AU Doc Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1, entered into force 6 December 2012
- Algiers Declaration on Climate Change, adopted by AMCEN on 19 November 2008
- Assembly of OAU Heads of State and Government 'The New Partnership for Africa's Development: The African Peer Review Mechanism' (APRM Base Document) adopted at its 38th ordinary session, Durban, South Africa, 8 July 2002, Doc AHG/235 (XXXVIII) Annex II
- Assembly of the OAU Heads of State and Government 'New Partnership for Africa's Development: Declaration on Democracy, Political, Economic and Corporate Governance', Doc AHG/235 (XXXVIII) Annex II, adopted at

- its 38th ordinary session, Durban, South Africa, 8 July 2002
- Assembly of AU Heads of State and Government 'Decision on the Integration of the APRM into the African Union', AU Doc Assembly AU Dec.527(XXIII), adopted at its 23rd ordinary session, 26-27 June 2014, Malabo, Equatorial Guinea
- Assembly of AU Heads of State and Government 'Decision on the Report of the African Peer Review Mechanism', AU Doc Assembly/AU/Dec.686(XXX), adopted at its 30th ordinary session, 28-29 January 2018, Addis Ababa, Ethiopia
- Assembly of AU Heads of State and Government 'Decision on the Revitalisation of the African Peer Review Mechanism', AU Doc Assembly/AU/Dec.631(XXVIII), adopted at its 28th ordinary session, 30-31 January 2017, Addis Ababa, Ethiopia
- Committee on ESCR General Comment 14 'The right to the highest attainable standard of health (art 4)', E/C.12/2000/4
- Concluding Observations on the eighth periodic report of the Democratic Republic of the Congo adopted by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) at its 73rd session (1-19 July 2019)
- Convention on Biological Diversity of 5 June 1992 1760 UNTS 69
- Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, A/RES/34/180
- Convention on the Rights of the Child CRC, 1577 UNTS 3, 28 ILM 1456, 20 November 1989, entered into force 2 September 1990
- Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019), adopted by the 65th ordinary session of the African Commission on Human and Peoples' Rights (African Commission) 21 October-10 November 2019
- General Assembly resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development.
- Human Rights Council 'Human rights and climate change' Res 7/23, UN Doc A/HRC/7/78 (Resolution 7/23)
- Human Rights Council 'Human rights and climate change' A/HRC/RES/32/33, Resolution, adopted by the Human Rights Council on 1 July 2016
- International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 17, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976
- International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, 3
- International Climate Justice Network, Bali Principles of Climate Justice Bali Principles of Climate Justice (2002)
- Kigali Declaration, adopted at the 1st African Union (AU) Ministerial Conference on Human Rights in Africa, on 8 May 2003 in Kigali, Rwanda
- Kyoto Protocol to the United Nations Framework Convention on Climate Change 37 ILM 22, UN Doc FCCC/CP/1997/7/Add.2, adopted by the 3rd session of the UNFCCC Conference of Parties on 10 December 1997, entered into force 16 February 2005
- Memorandum of Understanding on the African Peer Review Mechanism (2003)

- Doc NEPAD/HSGIC/03-2003/APRM/MOU
- Nairobi Declaration on the African Process to Combat Climate Change (2009), adopted by the special session of the African Ministerial Conference on the Environment (AMCEN) on 29 May 2009
- Paris Agreement under the United Nations Framework Convention on Climate Change, FCCC/CP/2015/L.9/Rev.1, adopted 30 November to 11 December 2015 at the 21st session, Conference of the Parties
- Protocol on the Establishment of an African Court on Human and Peoples' Rights, adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered force on 25 January 2004
- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc AU/LEG/EXP/AFCHPR/ PROT (III), art 1, 9 June 1998
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), adopted by the 2nd ordinary session of the Assembly of the African Union on 11 July 2003, entered into force 25 November 2005
- Resolution on Human Rights and Climate Change (Resolution 10/4), adopted 25 March 2009 at the 41st meeting of the Human Rights Council
- Resolution on Human Rights and Climate Change (Resolution 18/22), A/HRC/Res/18/22, adopted 30 September 2011 at the 37th meeting of the Human Rights Council
- Resolution on Human Rights and Climate Change (Resolution 26L/33), A/HRC/26/L.33, 1, adopted 23 June 2014 at the 26th meeting of the Human Rights Council
- Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child
- Rules of Court of the African Court on Human and Peoples' Rights 1 September 2020
- Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, adopted by the African Commission on Human and Peoples' Rights during its 27th extraordinary session held in Banjul, The Gambia, from 19 February to 4 March 2020
- Statute of the African Peer Review Mechanism (APRM Statute) (2016), adopted at the 25th African Peer Review (APR) Forum, Nairobi, Kenya
- The Grand Bay (Mauritius) Declaration and Plan of Action, adopted at the 1st Organisation of African Unity (OAU) Ministerial Conference on Human Rights, meeting from 12 to 16 April, 1999 in Grand Bay, Mauritius
- UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295) (2007)
- UN Resolution 'Transforming our world: The 2030 Agenda for Sustainable Development' A/RES/70/1, 2015, adopted by the General Assembly on 25 September 2015
- UNCHR (Sub-Commission) 'Indigenous peoples and their relationship to land, Final Working Paper prepared by the Special Rapporteur E-I A. Daes' (2001) UN Doc E/CN.4/Sub.2/2001/21
- UNFCCC 'The Cancun Agreements: Outcome of the work of the *Ad Hoc* Working Group on Long-term Cooperative Action under the Convention' (Decision 1/CP.16) FCCC/CP/2010/7/Add.1
- UNFCCC COP, Decision 4/CMA.1 'Further Guidance in relation to the

- Mitigation Section of Decision 1/CP.21' (NDC Guidance) UN Doc. FCCC/PA/CMA/2018/3/Add.1, 15 December 2018
- UNFCCC COP, Decision 18/CMA.1 'Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement', UN Doc FCCC/PA/CMA/2018/3/Add.2, 15 December 2018
- UNFCCC Decision 1/CP.16, The Cancun Agreement, Report of the Conference of the Parties on its 16th session, held in Cancun from 29 November to 10 December 2010
- United Nations 'Guiding Principles on Business and Human Rights' (2011)
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations General Assembly in 2007
- United Nations Framework Convention on Climate Change, 9 May, ILM 849 (1992)
- United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles), endorsed by the Human Rights Council in its Resolution 17/4 of 16 June 2011
- Universal Declaration of Human Rights (1948) adopted by UN General Assembly Resolution 217A (III) of 10 December 1948
- UN-REDD Programme UN-REDD Programme guidelines on free, prior and informed consent (2013)

Action plan and strategies

- Africa Regional Strategy for Disaster Risk Reduction (July 2004)
- African Union Commission 'Programme of Action for the Implementation of the Sendai Framework for Disaster Risk Reduction 2015-2030 in Africa in line with the Africa Regional Strategy for Disaster Risk Reduction' (November 2016)
- African Union Development Agency – New Partnership for Africa's Development (AUDA-NEPAD) 'Africa Climate Smart Agriculture Vision 25x25: Africa's Strategic Approach for Food Security and Nutrition in the face of Climate Change' (June 2014)
- African Union Agenda 2063: 'The Africa we want'
- APRM Strategic Plan 2016-2020
- Concluding Observations and Recommendations – Burundi: 1st Periodic Report, 1991-2000, adopted at 27th ordinary session 27 April to 11 May 2000, Algérie
- Conclusion Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the initial report of the Republic of Benin on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child, September 2019
- Draft Africa Climate Change Strategy 2020-2030
- DRC National REDD+ Strategic Environmental and Social Assessment Report (2014)
- East African Community (EAC) Secretariat 'EAC Climate Change Strategy 2011-2016'
- Government of Kenya Kenya Climate Smart Agriculture Implementation Framework 2017-2026 (Ministry of Agriculture, Livestock and Fisheries)

2018)

- Government of Kenya National Climate Change Action Plan (NCCAP) 2018-2022: Vol I (Ministry of Environment and Forestry 2018)
- Ministry of Environment and Sustainable Development, 'Maurice Ile Durable: Policy, strategy and action plan'
- Nigeria's Economic Sustainability Plan 2020
- PreventionWeb Kenya: National policy for disaster management (2009)
- REGLAP Secretariat 'Key statistics on the drylands of Kenya, Uganda and Ethiopia' (October 2012)
- Republic of Kenya Kenya National Adaptation Plan 2015-2030 (Ministry of Environment and Natural Resources, 2016)
- Republic of Kenya National Climate Change Action Plan (NCCAP) 2013-2017
- Republic of Kenya National Climate Change Action Plan (NCCAP) 2018-2022: Volume I' (2018)
- Republic of Kenya National Disaster Risk Financing 2018-2022 (National Treasury 2019)
- Republic of Kenya National Forest Programme 2016-2030 (Ministry of Environment and Natural Resources 2016)
- Republic of Kenya National Policy on Climate Finance (December 2016)
- Southern African Development Community (SADC) Secretariat, SADC Climate Strategy and Action Plan (2015)
- The 2016 Renewable Energy for All Action Agenda (SEE4ALL-AA) adopted by the Inter-Ministerial Committee on Renewable Energy and Energy Efficiency (ICREEE)
- Turkana County Government 'Turkana County: County Integrated Development Plan (CIDP)' (2018-2022)
- UN General Assembly, Transforming our world: The 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1
- United Nations Secretary General's Advisory Group on Energy and Climate Change, Energy for a Sustainable Future: Report and Recommendations, 28 April 2010

Reports and commentaries

- ACERWC Continental study on the impact of conflict and crises on children in Africa (ACERWC 2016)
- ACERWC 'Study mapping children on the move within Africa' (ACERWC 2018)
- ACHPR & IWGIA 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Research and Information Visit to the Democratic Republic of Congo', adopted by the African Commission on Human and Peoples' Rights at its 49th ordinary session, 2011
- ACHPR 'Report of the African Commission's Working Group on Indigenous Populations/Communities' (2003) Doc DOC/OS (XXXIV)/345
- African Development Bank 'Gap Analysis Report: African Nationally Determined Contributions' (2018)
- African Union Commission (AUC) 'Programme of Action for the Implementation of the Sendai Framework for Disaster Risk Reduction

- 2015-2030 in Africa in line with the Africa Regional Strategy for Disaster Risk Reduction' November 2016
- African Union 'Maputo Plan of Action (MPoA) for the operationalisation of the Sexual and Reproductive Health and Rights (SRHR) Continental Policy Framework 2016-2030'
- Allen, MR et al 'Technical summary' in Global warming of 1,5°C: An IPCC Special Report on the impacts of global warming of 1,5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, Intergovernmental Panel on Climate Change, 2018
- APRM 'Country Review Report 7: Republic of Uganda' (January 2009)
- APRM 'Second Country Review Report: Republic of Uganda' (January 2018)
- Bundnis, H *World Risk Report 2020*
- Burkina Faso 'Rapport National Volontaire de Mise en Œuvre des Objectifs de Développement Durable (2016-2018)' Juin 2019
- Carbon Disclosure Project 'CDP Carbon Majors Report 2017' (2017) The Carbon Majors Database
- Comoros 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 8 November 2013, A/HRC/WG.6/18/COM/1
- Food and Agriculture Organisation of the United Nations 'Climate change and food security: A framework document' (FAO 2008)
- Government of Mauritius 'Third international conference on Small Island Developing State – National report of the Republic of Mauritius' (2014)
- Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' A/HRC/10/61 15 January 2009
- Human Rights Watch 'There is no time left. Climate change, environmental threats, and human rights in Turkana County, Kenya' (2015)
- IIED 'Vulnerable communities: Climate adaptation that works for the poor' Briefing November 2015
- Initial Report of the Republic of Guinea to the ACERWC (2011)
- International Organisation for Migration 'Environmental changes and migration in Mauritius' (2011)
- IPCC 'Fifth assessment report: Impacts, adaptation, and vulnerability' (2014)
- Lesotho 'National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 4 November 2019, A/HRC/WG.6/35/LSO/1
- Maldives 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 14 February 2020, A/HRC/WG.6/36/MDV/1
- Mauritius Meteorological Services 'Technical Report CS 28 Cyclone Season of the South West Indian Ocean 2006-2007'
- Ministry of Water Services, Environment and Mineral Resources: Turkana County Government 'Turkana County Climate Change Policy 2020 Draft I' 10 June 2020
- Minura, L 'Small islands' in Climate change 2007: Impacts, adaptation and

- vulnerability' Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 2017
- Morocco 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/2' submitted 20 February 2017, A/HRC/WG.6/27/MAR/1
- Nellemann, C, Verma, R & Hislop, L 'Women at the frontline of climate change: Gender risks and hopes' A Rapid Response Assessment, United Nations Environment Programme, GRID-Arendal (2011)
- Office of the United Nations High Commissioner for Human Rights 'Understanding climate change' submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (2015)
- OHCHR 'Climate change and the full and effective enjoyment of the rights of the child' A/HRC/35/13
- OHCHR 'Kenya CSO Report to the UPR' (2020)
- OXFAM 'Uprooted by climate change: Responding to the growing risk of displacement' (2017)
- Pachauri, RK et al 'Climate change 2014: Synthesis report, contribution of Working Groups I, II and III to the fifth assessment report of the Intergovernmental Panel on Climate Change, IPCC, 2014
- Prize, R 'The linkages between population change and climate change in Africa' (2020)
- Report by Women Review 'The link between climate change and sexual and reproductive health and rights: An evidence review' (2021)
- Report of the Country visit of the Working Group on Indigenous Populations/Communities to the Republic of Congo' 15-24 March 2010
- Report of the Independent Panel of Experts of the Independent Review of allegations raised in the media regarding human rights violations in the context of WWF's conservation work 'Embedding human rights in nature conservation: From intent to action' (2020) November 2020
- Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights on 15 January 2009, A/HRC/10/61
- Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, A/71/229, 29 July 2016
- Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/34/49, 19 January 2017
- Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Rwanda', 1-5 December 2008, adopted by the Commission at its 47th ordinary session, 12-26 May 2010
- Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya' 1-19 March 2010, adopted by the Commission at its 50th ordinary session, 24 October-5 November 2010
- Republic of Cameroon '4th, 5th & 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (2015-2019)' submitted 3 January 2020
- Republic of Kenya 'Background report on national climate change priorities and

- relevant capacity development goals and initiatives in Kenya' (Government Printers 2020)
- Republic of Malawi 'Combined Second and Third Periodic Report under the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Women in Africa (2015-2019)' submitted 7 February 2020
- Republic of Mauritius '9th & 10th Combined Periodic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (2016-2019)' submitted 6 February 2020
- Republic of Niger '15th Periodic Report on the implementation of the African Charter on Human and Peoples' Rights (2017-2019)' submitted 25 November 2019
- Republic of South Africa 'Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2003-2014)' submitted 10 February 2015)
- Republic of Zimbabwe '11th-15th Combined Report under the African Charter on Human and Peoples' Rights and 1st-4th Combined Report under the Maputo Protocol (2007-2019) submitted 1 August 2019
- République de la Côte d'Ivoire 'Rapport Volontaire d'Examen National de la mise en œuvre des objectifs de développement durable en Côte d'Ivoire' Juin 2019
- République du Bénin 'Contribution Nationale Volontaire à la Mise en Œuvre des ODD au Forum Politique de Haut Niveau' New York, Juillet 2020
- République du Burundi 'Rapport de l'examen national volontaire sur la mise en œuvre des objectifs de développement durable au Burundi' Avril 2020
- Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment' A/74/161
- São Tomé and Príncipe 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 11 November 2015, A/HRC/WG.6/23/STP/1
- Sobhee, S & Blocher, F 'Using migration to develop resilience against climate change in Mauritius' (2015) 11 *Migration, Environment and Climate Change: Policy Brief Series 2*
- The African Strategy on Climate Change 2020
- The Maputo Plan of Action Review Report 2015
- The Sexual and Reproductive Health and Rights Continental Policy Framework (2008)
- UN Report of the UN Conference on the Human Environment Stockholm, UN Doc A/CONF.48/14/Rev. 1 (1974) 4
- UN Special Rapporteur on Human Rights and the Environment 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/74/161, distributed 15 July 2019
- UNDP 'The Next Frontier: Human Development and the Anthropocene', Human Development Report 2020
- UNEP 'The adaptation finance gap report' (2016)
- UNEP 'UNEP DTU Partnership, Emissions Gas Report' (2020)

- UNFCCC 'Climate change 2014: Impacts, adaptation, and vulnerability' (2014)
- UNFCCC Secretariat 'Nationally determined contributions under the Paris Agreement: Synthesis Report' (Initial version) UN Doc. FCCC/PA/CMA/2021/2, distributed 6 February 2021
- United Nations (UN) Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Human rights and the environment' E/CN.4/Sub.2/1994/9/Corr.1
- United Nations Development Programme and UN Climate Change 'The heat is on: Taking stock of global climate ambition' (2019)
- United Nations Environment Programme 'Climate change and human rights' (2015)
- United Nations Environment Programme, Sabin Centre for Climate Change Law 'The status of climate change litigation: A global review' (2017)
- United Nations Human Rights Council Resolution A/HRC/26/L.22/Rev.1 'Elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights' adopted on 25 June 2014
- United Nations Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' 15 January 2009, A/HRC/10/61
- United Nations, Department of Economic and Social Affairs, Population Division, 'World Population Prospects 2019: Highlights ST/ESA/SER.A/423' (2019)
- United Nations, Department of Economic and Social Affairs, Population Division, 'World Population Prospects 2019: Ten Key Findings' (2019)
- Wood, M 'The Second report on identification of customary international law' (International Law Commission 2014)
- World Meteorological Organisation 'Multi-agency report highlights increasing signs and impacts of climate change in atmosphere, land and oceans' (WMO 2020)
- Zimbabwe 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21' submitted 22 August 2016, A/HRC/WG.6/26/ZW E/1

Constitution, national legislation, policy and strategy

- African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9, Vol 1, LFN 2004
- Arrêté Ministériel N 004/CAB/MIN/ECN-T/012 du 12 février 2012 fixant la procédure d'homologation des projets REDD+
- Arrêté ministériel no 013/CAB MIN/ECN-EF/2006 du 03 avril 2006 portant création d'une réserve naturelle dénommée réserve des primates de Kisimba-Ikobo en abrégé RPKI
- Children Act, Kenya 2006
- Climate Change Act, Kenya 2016
- Democratic Republic of the Congo's (DRC) Minister of Environment, Nature Conservation and Tourism (MECNT) REDD Readiness Plan 2008-2012 (2010) R-PP Version Finale
- DRC Loi No 14/003 du 11 février 2014 relative à la conservation de la nature

- DRC Arrêté Ministériel N. 026/CAB/MIN/EDD/AAN/KTT/04/2017 du 8 novembre 2017 fixant le cadre des directives nationales sur le CLIP dans le cadre de la mise en œuvre de la REDD+ en RDC
- DRC Décret no 14/018 du 02 août 2014 fixant les modalités d'attribution des concessions forestières aux communautés locales
- DRC Forest Code, Loi n° 11/2002 du 29 août 2002
- DRC Land Law, Loi n° 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés telle que modifiée et complétée par la loi n° 80-008 du 18 juillet 1980 (1973)
- DRC Stratégie nationale de conservation de la biodiversité dans les aires protégées de la République Démocratique du Congo (2012)
- DRC Stratégie-cadre nationale REDD de la République Démocratique du Congo (2012)
- Electric Power Sector Reform Act CAP E7 LFN 2004
- Energy Act, Kenya 2019
- Ghana National Climate Change Policy (2013)
- Kenya Climate Change Act 11 of 2016)
- Kenya Climate Change Framework Policy (2016)
- Mauritius Energy Efficiency Act 2011
- Mauritius Environment Protection (Banning of Plastic Bags) Regulations 2020
- Mauritius Renewable Energy Agency Act 2015
- Public Finance Management, Kenya Act 18 of 2012
- Republic of Kenya National Policy on Climate Finance 2016 (National Treasury 2016)
- Revised Nigeria National Climate Change Policy 2021-2030)
- South Africa National Climate Change Response Policy (2011)
- Tanzania National Climate Change Strategy (2012)
- The 1999 Constitution of the Federal Republic of Nigeria (as amended 2018) CAP C23 LFN 2004
- The Constitution of France 1958
- The Constitution of Kenya 2010
- The Constitution of the Democratic Republic of the Congo (2006)
- Uganda National Climate Change Policy (2015)
- Zimbabwe National Climate Change Response Strategy (2015)

Cases

- Australian Land and Environment Court, Gloucester Resources Limited v Minister for Planning* [2019] New South Wales (Australia) 8 February 2019
- Centre for Minority Rights Development & Others v Kenya* (2000) AHRLR 75 (ACHPR 2009)
- Chiara Sacchi (Argentina); Catarina Lorenzo (Brazil); Iris Duquesne (France); Raina Ivanova (Germany); Ridhima Pandey (India); David Ackley, III, Ranton Anjain, and Litokne Kabua (Marshall Islands); Deborah Adegbile (Nigeria); Carlos Manuel (Palau); Ayakha Melithafa (South Africa); Greta Thunberg (Sweden); Raslen Jbeili (Tunisia); & Carl Smith and Alexandria Villasenor (USA) v Argentina, Brazil, France, Germany & Turkey*

- Constitutional Rights Project & Others v Nigeria* (2000) AHRLJ 227 (ACHPR 1999)
- Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004)
- Dutch Supreme Court, *Urgenda v The Netherlands* (2019)
- European Court of Justice, Case T-330/18 *Armando Carvalho & Others v Parliament and Council* (2019)
- French Tribunal Judiciaire De Nanterre, Association Notre Affaire à tous et al c SA TOTAL*, 1ère Chambre, 11 Février 2021
- Gbemre v Shell Petroleum Development Company Nigeria Limited & Others* (2005) AHRLR 151 (NgHC 2005)
- German Higher Regional Court of Essen, Saul Luciano Lliuya v RWE* (2017) 20171130 Case No-2-O-28515
- Institute for Human Rights and Development in Africa and Finders Groups Initiative on behalf of TFA v Cameroon* Communication 006/Com/002/2015
- Jacobs v Flemish Region* (1999) Council of State No 80.018, 29 April 1999. *Venter* (1999) Council of State No. 82.130, 20 August 1999
- Kenyan National Environmental Tribunal Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another* [2019] eKLR
- Loane Teitiota v New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC) 7 January 2020
- Luciano Lliuya v RWE AG Reporter Info: Case No 2 O 285/15 Essen Regional Court* 2015
- Mineral Commodities Limited & Another v Clarke; Mineral Commodities Limited & Another v Dlamini & Another* (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22 (9 February 2021)
- MRGI & Another v Mauritania* Communication 007/Com/003/2015
- Pavel Ocepek, Breg pri Komendi* (1999) Up-344/96, 04/01/1999 (Constitutional Court)
- Salvatori Abuki v the Attorney General Uganda* (2001) 1 LRC 63
- Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001)
- South Africa Gauteng High Court Pretoria, Thabametsi*, Unreported Case 65662/16 (8 March 2017)
- South Africa Western Cape High Court, Mineral Sands Resources (Pty) Ltd & Another v Reddell & Others*, [2021] ZAWCHC 22.
- Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009)
- The Hague District Court, Vereniging Milieudéfensie & Others v Royal Dutch Shell* C/09/571932 2019/379
- United Kingdom Supreme Court Okpabi & Others v Royal Dutch Shell Plc & Another* (2021)
- United Kingdom Supreme Court Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe & Others (Respondents)* (2019)
- United States District Court for the Northern District of California, Kivalina v ExxonMobil Corp No 4:08-cv-01138* (2008)
- United States First Circuit Court, Rhode Island v Shell Oil Products Co 19-1818* (2018)

Media and other sources

- Bega, S 'High court gives Australian mining company a big SLAP(P)' *Mail & Guardian* 10 February 2021
- BuzzFeed News* 'WWF's secret war: WWF funds guards who have tortured and killed people' (2020)
- Daily Nation 'Power, politics and economy of the coal-fired plant in Lamu' *Daily Nation* 2019, <https://www.nation.co.ke/news/Power-politics-economy-of-coal-fired-plant-in-Lamu-/1056-4379590-112cm0xz/index.html> (accessed 15 March 2021)
- Desk Nature 'La société civile exige des enquêtes sur la mort de 3 autochtones pygmées et 1 soldat autour du Parc national de Kahuzi-Biega' (2020)
- Food and Agricultural Organisation 'Climate change and food security: Is the link strong enough?' Relief Web 18 October 2018
- Lmawi, O 'Kenyans paying heavy price due to climate change' *Business Daily* 11 March 2021
- Muggah, R 'The Sahel is engulfed by violence, climate change, food insecurity and extremists are largely to blame' World Economic Forum 2019
- Mayans, J 'The Sahel in the midst of climate change' 2020, <https://reliefweb.int/report/chad/sahel-midst-climate-change> (accessed 16 November 2021)
- Reliefweb 'Mozambique humanitarian response plan revised following Cyclones Idai and Kenneth' May 2019 (November 2018-June 2019)
- Standard Media 'Kenya eyes 100 per cent green energy in two years' *The Standard* 2018
- The Standard 'Experts oppose tax proposal on solar and cook stoves product' *The Standard* 2020
- WRM 'Les riverains autochtones Batwa et le retour sur leurs terres ancestrales dans le Parc National de Kahuzi Biega, Est de la RD Congo' (2020), <https://wrm.org.uy/fr/les-articles-du-bulletin-wrm/section1/les-riverains-autochtones-batwa-et-le-retour-sur-leurs-terres-ancestrales-dans-le-parc-national-de-kahuzi-biega-est-de-la-rd-congo/>

Internet sources

- 'Adding it up: Investing in contraception and maternal and newborn health in Nigeria, 2017', <https://www.guttmacher.org/fact-sheet/adding-it-up-contraception-mnh-2017> (accessed 16 November 2021)
- 'Analytical study on the impacts of climate change on the rights of the child', <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/RightsChild.aspx#H> (accessed 21 March 2021)
- 'Climate change, forest conservation and indigenous peoples rights' submission by Global Forest People (GFP submission), http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Global_Forest (accessed 16 November 2021)
- 'Climate change, human rights and indigenous peoples' submission to the United Nations High Commissioner on Human Rights by the International Indian Treaty Council (IITC Submission)
- 'Establishment of a special procedures mandate on human rights and climate change', <https://un.op.org/en/node/3430> (accessed 20 March 2021)
- 'Forest Peoples Programme', <http://www.achpr.org/network/ngo/347/>

(accessed 20 March 2021)

- 'In developing regions, 23 million adolescents at risk of unintended pregnancy, not using modern contraceptives', <https://www.guttmacher.org/news-release/2016/developing-regions-23-million-adolescents-risk-unintended-pregnancy-not-using> (accessed 16 November 2021)
- 'Institute of Wildlife, Forestry and Human Development Studies', <http://www.achpr.org/network/ngo/371/> (accessed 20 March 2021)
- 'Special Rapporteurs', <https://www.acerwc.africa/special-rapporteurs/> (accessed 21 March 2021)
- 'Submission to the OHCHR regarding human rights and climate change by Friends of the Earth Australia, the Australian Climate Justice Programme and Climate Action Network Australia' (Friends of the Earth Submission), http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Friends_of_the_Earth_Australia_CANA_ACJP.pdf (accessed 15 March 2021)
- 'The integration of human rights in the Nationally Determined Contributions in Asia-Pacific to the Paris Agreement on climate change', <https://environmentalmigration.iom.int/sites/default/files/Human%20rights%20and%20NDC%20report.pdf> (accessed 20 March 2021)
- 'Unmet need for family planning', https://www.un.org/en/development/desa/population/publications/dataset/contraception/wcu2014/Metadata/WCU2014_UNMET_NEED_metadata.pdf (accessed 16 November 2021)
- Al Jazeera 'Can the Coronavirus help save the planet?' 5 July 2020, <https://www.aljazeera.com/programmes/start-here/2020/07/coronavirus-save-planet-start-200705074443076.html> (accessed 5 July 2020)
- Amnesty International 'Philippines: Landmark decision by Human Rights Commission paves way for climate litigation' 9 December 2019, <https://www.amnesty.org/en/latest/news/2019/12/landmark-decision-by-philippines-human-rights-commission-paves-way-for-climate-litigation/> (accessed 16 November 2021)
- Amnesty International 'Climate Change' (undated), <https://www.amnesty.org/en/what-we-do/climate-change/> (accessed 16 November 2021)
- Arid Lands Institute, <http://www.achpr.org/network/ngo/399/> (accessed 20 March 2021)
- Birch-Jeffrey, S 'Women pastoralists feel the heat of climate change' 7 August 2019, <https://www.un.org/africarenewal/magazine/august-november-2019/women-pastoralists-feel-heat-climate-change> (accessed 10 November 2020)
- Burrow, S 'UN treaty on business and human rights vital for economic and social justice' 28 October 2019 Social Europe, <https://socialeurope.eu/un-treaty-on-business-and-human-rights-vital-for-economic-and-social-justice> (accessed 16 November 2021)
- Business and Human Rights Resource Centre 'Gloucester Resources lawsuit (re mine's impact on climate change, Australia)' 23 April 2018, <https://www.business-humanrights.org/en/latest-news/gloucester-resources-lawsuit-re-mines-impact-on-climate-change-australia/> (accessed 16 November 2020)
- Cameroon Environmental Protection Association, <http://www.achpr.org/network/ngo/362/> (accessed 26 June 2013)
- Centre for International Environmental Law 'Analysis of human rights language in the Cancun Agreements' (UNFCCC 16th Session of the Conference of

- the Parties), https://www.ciel.org/wp-content/uploads/2014/11/HR_Language_COP16_Mar11.pdf (accessed 19 March 2021)
- Citizens for a Better Environment, <http://www.achpr.org/network/ngo/365/> (accessed 20 March 2021)
- De Rechtspraak 'Uitspraken: ECLI:NL:RBDHA:2021:5339' 26-05-2021, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> (accessed 30 June 2021)
- De Wit, E, Hoare, R & Shannon, N 'Climate change litigation update' Norton Rose Fulbright (February 2020), <https://www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update#autofootnote13> (accessed 16 November 2021)
- Deutsche Welle 'Climate change threatens Kenya's Turkana communities', <https://www.dw.com/en/climate-change-threatens-kenyas-communities/a-18816731> (accessed 1 September 2020)
- Duyck, S 'Delivering on the Paris promises: Combating climate change while protecting rights recommendations for the negotiations of the Paris Rule Book', <https://unfccc.int/sites/default/files/903.pdf> (accessed 22 July 2021)
- Dzebo, A, Shawoo, Z & Kwamboka, E 'Coordinating climate finance in Kenya: Technical measures or political change?' (Stockholm Environment Institute, 2020), <https://www.sei.org/wp-content/uploads/2020/06/coordinating-climatefinance-in-kenya.pdf> (accessed 9 March 2021)
- Environmental Investigation Agency (EIA) 'Preliminary comments by the Environmental Investigation Agency on the Democratic Republic of the Congo's Emission Reduction Programme Document for the World Bank Forest Carbon Partnership Facility' (2016), <https://www.forestcarbonpartnership.org/system/files/documents/EIA%20Comments%20DRC%20ER-PD.pdf> (accessed 19 September 2021)
- Franciscans International, Amnesty International, the Centre for International Environmental Law and Earthjustice 'Joint statement' delivered at 43rd session of the Human Rights Council, 15 June 2020, <https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5eea02ce15fa7b5d4c4daf75/1592394447898/FI+statement+-+GD+Item+6+-+Joint1.pdf> (accessed 20 March 2021)
- French, D 'International law and the policy of sustainable development' Juris publishing (2005) 13GCF project portfolio, [https://www.greenclimate.fund/projects?f\[\]=field_region:318](https://www.greenclimate.fund/projects?f[]=field_region:318) (accessed 16 November 2021)
- Government of Kenya & Turkana County Government 'Turkana County Smart Nutrition Surveys' (2019), <http://www.nutritionhealth.or.ke/wp-content/uploads/SMART%20Survey%20Reports/Turkana%20County%20SMART%20Survey%20Report%20-%20June%202019.pdf> (accessed 21 March 2021)
- Heinrich-Böll-Stiftung Washington DC 'What is climate finance?' 7 August 2019, https://www.youtube.com/watch?v=_Y9vM4e9XaM (accessed 10 November 2020)
- Human Rights Watch 'Kenya: Climate change threatens rights' 15 October 2015, <https://www.hrw.org/news/2015/10/15/kenya-climate-change-threatens-rights> (accessed 15 November 2020)
- Igoe, M 'DevExplains: The climate finance challenge' (Devex 2020), <https://www.google.com/amp/s/www.devex.com/news/devexplains-the-climate->

- finance-challenge-98235/amp (accessed 11 March 2021)
- IHRDA 'Case law analyser', <http://caselaw.ihrda.org/> (accessed 16 November 2021)
- IIED 'REDD: Protecting climate, forests and livelihoods' (2009), <https://www.iied.org/redd-protecting-climate-forests-livelihoods> (accessed 19 September 2021)
- IIED 'REDD+ and rights: Extending carbon rights in the DRC to climate-regulating services' (2013) Briefing, https://www.researchgate.net/publication/300132610_REDD_and_rights_extending_carbon_rights_in_the_DRC_to_climate-regulating_services (accessed 18 December 2020)
- Indigenous Peoples in the African region '12th session of the UN Permanent Forum on indigenous Issues', <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2/unpfii-twelfth-session.html> (accessed 16 November 2021)
- International Labour Office Geneva 'Indigenous peoples and climate change' 2017, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_551189.pdf (accessed 21 March 2021)
- International Planned Parenthood Federation 'Sexual and reproductive health and rights the key to gender equality and women's empowerment' (2015), <https://www.ippfen.org/sites/ippfen/files/2016-12/Vision%202020%20Gender%20Report.pdf> (accessed 16 November 2021)
- Kameri-Mbote P & Nyukuri E 'Climate change, law, and indigenous peoples in Kenya: Ogiek and Maasai narratives (International Environmental Law Research Centre 2017), <http://www.ielrc.org/content/a1308.pdf> (accessed 1 May 2021)
- Kenya Climate Change Knowledge portal, <https://www.kcckp.go/ke> (accessed 15 March 2015)
- Kirk, K 'Fossil fuel political giving outdistances renewables 13 to one' 6 January 2020 *Yale Climate Connections*, <https://yaleclimateconnections.org/2020/01/fossil-fuel-political-giving-outdistances-renewables-13-to-one/> (accessed 16 November 2021)
- Kyrkan, AS 'International climate finance from a human rights perspective policy brief' (February 2020), https://www.svenskakyrkan.se/filer/8385_SK20032-MR-och-klimatfinansiering-eng_utskrift.pdf?id=1997150 (accessed 21 March 2021)
- Larson, E 'Making big oil pay for climate change may be impossible' *Insurance Journal* 24 January 2020, <https://www.insurancejournal.com/news/national/2020/01/24/556341.htm>. (accessed 16 November 2021)
- Mogelgaard, K & Patterson, KP 'Building resilience through family planning and adaptation finance' (2018) Policy Brief. Population Reference Bureau, <https://www.prb.org/building-resilience-through-family-planning-and-adaptation-finance/> (accessed 16 November 2021)
- Moodley, P 'Litigation to challenge large extractive projects is gaining traction in Africa' 28 June 2020 *Open Global Rights*, <https://www.openglobalrights.org/litigation-to-challenge-extractive-projects-gaining-traction-in-africa/> (accessed 16 November 2021)
- Mutua, M 'The African human rights system: A critical evaluation', <http://hdr.undp.org/sites/default/files/mutua.pdf> (accessed 20 March 2021)
- Nazir, A 'Carbon, climate and COVID-19: An opportunity to create a green economy' 17 August 2020, <https://fiscallawafrika.wordpress.com>

- com/2020/08/17/carbon-climate-and-covid-19-an-opportunity-to-create-a-green-economy/ (accessed 19 November 2020)
- OECD & Climate Policy Initiative 'Climate finance in 2013-14 and the USD 100 billion goal' (2015), <https://doi.org/10.1787/9789264249424-en> (accessed 21 March 2021)
- Office of the United Nations High Commissioner for Human Rights 'Climate change and the UNGPs', <https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change-and-the-UNGPs.aspx> (accessed 16 November 2021)
- OHCHR & Heinrich Böll Stiftung North America 'Promoting rights-based climate finance for people and planet', https://us.boell.org/sites/default/files/promoting_rights-based_climate_finance_for_people_and_planet.pdf (accessed 21 March 2021)
- Otto, F, James, R & Allen M 'The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts' Environmental Change Institute, https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf (accessed 16 November 2021)
- Patterson, K 'Making the connection: Population dynamics and climate compatible development recommendations from an expert working group', <https://www.prb.org/wp-content/uploads/2018/03/PHP-population-climate-full-paper.pdf> (accessed 16 November 2021)
- Population Action International 'Why population matters to climate change', https://pai.org/wp-content/uploads/2012/02/PAI-1293-Climate-Change_compressed.pdf (accessed 16 November 2021)
- Pragya 'Conflict assessment: Northern Kenya', https://www.pragya.org/doc/Conflict_Assessment_Report.pdf (accessed 21 March 2021)
- Presidential Press 'Covid-19 has aggravated Africa's vulnerability to climate change, President Kenyatta, Government of Kenya' (Presidential Press, 6 April 2021), <https://www.president.go.ke/2021/04/06/covid-19-has-aggravated-africas-vulnerability-to-climate-change-president-kenyatta-says/> (accessed 1 May 2021)
- Rights and Resources Initiative (RRI) 'Étude de référence sur la tenure en République Démocratique du Congo' (2019), https://rightsandresources.org/wp-content/uploads/2019/05/Etude-de-Reference-RDC_RRI_2019.pdf (accessed 13 December 2020)
- Rodríguez-Garavito, C 'Climate litigation and human rights: Averting the next global crisis' 26 June 2020 *Open Global Rights*, <https://www.openglobalrights.org/climate-litigation-and-human-rights-averting-the-next-global-crisis/> (accessed 16 November 2021)
- RRI & Ateneo School of Government 'Status of forest carbon rights and implications for communities, the carbon trade, and REDD+ investments' (2014) Washington DC, http://www.rightsandresources.org/wp-content/uploads/ForestCarbon_Brief-for-web-16Mar14.pdf (accessed 17 December 2020)
- RRI 'Looking for leadership: New inspiration and momentum amidst crisis' (2015), RRI4087_AR2014r11B3.pdf (rightsandresources.org) (accessed 18 December 2020)
- Sanderson, BM & O'Neill, BC 'Assessing the costs of historical inaction on climate change' (2020) 10 *Scientific Reports*, <https://www.nature.com/articles/s41598-020-66275-4> (accessed 16 November 2021)

- Setzer, J 'Climate litigation against "carbon majors": Economic impacts' *Open Global Rights* 16 July 2020, <https://www.openglobalrights.org/climate-litigation-against-carbon-majors-economic-impacts/> (accessed 16 November 2021)
- The ACERWC 'Table of communications', <https://www.acerwc.africa/table-of-communications> (accessed 16 November 2021)
- The Presidency '*The big four agenda*' The Presidency, 2019, <http://www.president.go.ke/> (accessed 15 March 2021)
- Think Africa 'Largest companies in Africa: Top 20', <https://thinkafrica.net/largest-companies-in-africa-top-20/> (accessed 16 November 2021)
- Trocaire 'Kenya climate change case', <https://www.trocaire.org/sites/default/files/resources/policy/kenya-climate-change-case-study.pdf> (accessed 11 March 2021)
- UN Human Rights Office of the High Commissioner 'Open-Letter from the United Nations High Commissioner for Human Rights on Integrating Human Rights in Climate Action', <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf> (accessed 16 November 2021)
- UNDP 'Goal 13: Climate action', <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-13-climate-action.html> (accessed 16 November 2020)
- UNFCCC 'Introduction to climate finance', <https://unfccc.int/topics/climate-finance/the-big-picture/introduction-to-climate-finance> (accessed 10 November 2020)
- UNICEF 'Thirsting for a future: Water and children in a changing climate' (2017), https://www.unicef.org/media/49621/file/UNICEF_Thirsting_for_a_Future_ENG.pdf (accessed 16 November 2021)
- UNICEF 'Unless we act now: The impact of climate change on children', https://www.unicef.org/publications/index_86337.html (accessed 16 November 2021)
- United Nations Environmental Programme (UNEP) 'Climate change and human rights' (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf (accessed 16 November 2021)
- United Nations Human Rights Council 'Basic facts about the UPR', <https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> (accessed 18 March 2021)
- United Nations Human Rights Council 'Human Rights Council Complaint Procedure', <https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> (accessed 20 March 2021)
- United Nations Office for Coordination of Humanitarian Affairs 'Southern Africa: 12 million people are food insecure' (2019), <https://www.unocha.org/story/southern-africa-12-million-people-are-food-insecure> (accessed 16 November 2021)
- Van de Walle, D 'Poverty is falling faster for female-headed households in Africa' (2015), <https://blogs.worldbank.org/africacan/poverty-is-falling-faster-for-female-headed-households-in-africa> (accessed 16 November 2021)
- Vlassoff, M & Tsoka, M 'Benefits of meeting the contraceptive needs of Malawian women', <https://www.guttmacher.org/report/benefits-meeting->

- contraceptive-needs-malawian-women (accessed 16 November 2021)
- Wlokas, HL 'The impacts of climate change on food security and health in Southern Africa', www.scielo.org.za/pdf/jesa/v19n4/04.pdf (accessed 16 November 2021)
- Women Deliver and Population Council 'Having a child before becoming an adult: Exploring the economic impact in a multi-country analysis' (2019), <https://womendeliver.org/publications/having-a-child-before-becoming-an-adult-exploring-the-economic-impact-in-a-multi-country-analysis/> (accessed 16 November 2021)
- World Meteorological Organisation 'State of the climate in Africa 2019' (2020), https://library.wmo.int/doc_num.php?explnum_id=10421 (accessed 16 November 2021)
- WWF 'NDC checklist: Kenya analysis' (WWF 2021), https://wwfint.awsassets.panda.org/downloads/ndcs_we_want_checklist__kenya.pdf (accessed 22 July 2021)
- Zorob, M 'The lengthy journey towards a treaty on business and human rights' *Open Global Rights* 11 October 2019, <https://www.openglobalrights.org/the-lengthy-journey-towards-treaty-on-business-and-human-rights/> (accessed 16 November 2021)