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

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### 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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).<sup>4</sup> Under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC),<sup>5</sup> 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.<sup>6</sup>

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,<sup>7</sup> the Kyoto Protocol,<sup>8</sup> the Paris Agreement,<sup>9</sup> and the United Nations Sustainable Development Goals (SDGs).<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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,<sup>14</sup> 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).<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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’.<sup>18</sup> 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 good<sup>19</sup> They form part of the space of ‘associational life’ consisting of various forms of voluntary associations.<sup>20</sup> Generally, other authors refer to the civil society as a ‘heterogeneous collection of organisations and initiatives with different roles and functions.’<sup>21</sup> 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.<sup>22</sup> Elster views NGOs as a deliberative tool of exerting pressure and changes on law making and social life.<sup>23</sup> 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](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 Verschueren ‘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.<sup>24</sup> Arguably, this covers climate change legislation process,<sup>25</sup> 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.<sup>26</sup> They participate as both internal and external players in global climate change discussions.<sup>27</sup> 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.<sup>28</sup> 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'.<sup>29</sup> 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'.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> Within the UNFCCC process, as a result of the sustained NGO pressure, the Cancun Agreements also include the language of human rights.<sup>40</sup> 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.<sup>41</sup> This language is significant in that it represents the first recognition of the human rights impacts of climate change in any international climate agreement.<sup>42</sup> 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.<sup>43</sup> 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](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.<sup>44</sup>

## 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.<sup>45</sup> 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.<sup>46</sup> Resolution 10/4 was adopted following the report of the Office of the High Commissioner on Human Rights (OHCHR).<sup>47</sup> The report followed the adoption of Resolution 7/23 of the HRC in 2008,<sup>48</sup> which requested the office of the OHCHR to carry out ‘a detailed analytical study of the relationship between climate change and human rights’.<sup>49</sup> 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.<sup>50</sup> 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’.<sup>51</sup> 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,<sup>52</sup> the International Indian Treaty Council,<sup>53</sup> and Friends of the Earth.<sup>54</sup> 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.<sup>55</sup> The International Indian Treaty Council discusses different scenarios of the impacts of climate change on indigenous peoples,<sup>56</sup> a viewpoint equally affirmed by Friends of the Earth in their conclusion on the need to integrate human rights into the climate policy debate.<sup>57</sup>

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,<sup>58</sup> 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.<sup>59</sup> 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](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](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.<sup>60</sup>

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.<sup>61</sup> 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.<sup>62</sup> 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),<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> In *Sacchi & Others v Argentina & Others* the applicants requested the Committee to find that climate change was a children's rights crisis.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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'.<sup>70</sup> 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.<sup>71</sup> 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'.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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'.<sup>77</sup> 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.<sup>78</sup>

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'<sup>79</sup> or related words such as 'land'<sup>80</sup> and 'forestry'<sup>81</sup> 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'.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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).<sup>85</sup> 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.<sup>86</sup>

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,<sup>87</sup> a reason signifying that NGOs may only add another layer of complexity to environmental governance.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> The African Children’s Committee of the African Children’s Charter<sup>92</sup> has a general mandate to promote and protect the rights and welfare of the child.<sup>93</sup> 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.<sup>94</sup> The African Court has promotional activities and these include its publication and media-related activities aimed at boosting its public image.<sup>95</sup> 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.<sup>96</sup> 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'.<sup>97</sup> 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'.<sup>98</sup> 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.<sup>99</sup> 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](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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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),<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> Also, visits can form part of the activities of the African Children's Committee to collect and document information.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup> 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 Africa<sup>111</sup> 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.<sup>112</sup> 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),<sup>113</sup> Rwanda<sup>114</sup> and Kenya.<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup>

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.<sup>118</sup> 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.<sup>119</sup> 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',<sup>120</sup> in the sense that activities in relation to the extractive industry, particularly oil and gas, are linked to climate change.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> 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'.<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup> 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.