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INTRODUCING CLIMATE CHANGE JUSTICE AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE

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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.