

LIMITATIONS AND OPPORTUNITIES OF CHILD PARTICIPATION IN CLIMATE CHANGE LITIGATION IN AFRICA

<https://doi.org/10.29053/pslr.v18i1.4652>

by Gift Gawanani Mauluka



Abstract

Climate change legal frameworks call upon countries to mitigate and adapt to the adverse effects of climate change. These frameworks have influenced the creation of policies and laws addressing climate change across the globe. Activists, individuals, and civil society organisations have utilised campaigns, demonstrations, and climate change litigation to compel countries to adhere to their climate change obligations provided in these frameworks. However, climate change litigation is still in its infancy and progressing slowly in African countries. Additionally, children's involvement in such litigation is limited despite international and domestic legal frameworks permitting their participation. This article argues that children's participation in climate change litigation in African countries is currently tokenistic and does not afford them meaningful involvement in the decision-making processes in climate change matters. Having presented the importance of child participation, it examines the opportunities and limitations of children's participation in climate change litigation.

Key words: climate change; litigation; child participation, child rights

1 Introduction

Africa is disproportionately affected by climate change.¹ This is due to the continent's social, economic, and political constraints and low levels of development, which limit its ability to cope with the effects of climate change and render it more dependent on natural resources.² Despite this state of affairs, few cases directly related to climate change have been litigated in African tribunals.³ Scholars and activists have attributed this to a need for more technical and financial growth and a failure to treat climate change as an immediate challenge.⁴

Children's engagement as litigants or as essential stakeholders in global issues is equally limited, as they are considered too immature to make meaningful contributions to the decision-making process.⁵ This is so despite the existence of policy and legal frameworks that allow children to participate in international, regional, and domestic protection frameworks.⁶

From the dearth of climate change-related cases, more pronounced elsewhere but limited in Africa, this paper explores the limits and possibilities of child participation in such litigation.⁷ It argues that while international and domestic laws in African countries give children the right to participate, their provisions are merely tokenistic and do not facilitate meaningful child participation in an array of matters that affect them – including climate change litigation.

To situate the discussion, the current status of climate change has been provided, which is followed by an exploration of the impact of climate change, particularly on children. This discussion will be followed by a brief exploration of the obligations that States have in order to address climate change. To ensure that these obligations are met, citizens have resorted to engaging courts through climate change litigation, which has also been discussed. The subsequent section details how the principle of child participation is presented in

1 L Kotzé & A du Plessis 'Putting Africa on the stand' (2020) 50 *Environmental Law* at 615.

2 M Berhanu & W Alemayehu 'Review on climate change impacts and its adaptation strategies on food security in Sub-Saharan Africa' (2019) 19 *Agricultural Socio-Economics Journal* at 146.

3 S Adelman 'Climate change litigation in the African system' in I Alogna, C Bakker & J Gauci (eds) *Climate Change Litigation: Global Perspective* (2021) at 2.

4 J Setzer & L Benjamin 'Climate litigation in the Global South: Constraints and innovations' (2020) 9 *Transnational Environmental Law* at 82.

5 J Josefsson & J Wall 'Empowered inclusion: Theorizing global justice for children and youth' (2020) 17 *Globalizations* at 1049.

6 J Aldridge 'Introduction to the issue: Promoting children's participation in research, policy and practice' (2017) 5 *Social Inclusion* at 89.

7 Sabin Center for Climate Change Law 'Climate change litigation databases' <https://climatecasechart.com> (accessed 9 March 2024).

the United Nations Convention on the Rights of the Child ('UNCRC') and how it manifests within some African countries. Thereafter, it provides an overview of how participation is viewed from a theoretical perspective and its manifestation. The final section focuses on the opportunities and limitations of child participation in climate change litigation.

2 Current climate change status

Despite the presence of legal frameworks on climate change, actions taken by State parties in ratifying these frameworks, and the commitment of States to use the maximum available resources to curb emissions in line with the Paris Agreement, climate change seems to be getting worse.⁸ The 2021 Nationally Determined Contributions ('NDC') synthesis report indicates that the current greenhouse gas ('GHG') emissions would correspond to a temperature rise of about 2,7°C by the end of the century.⁹ The report contends that unless there are immediate, rapid, and large-scale reductions in GHG emissions, limiting global warming to below 1,5°C will no longer be possible.¹⁰ These findings have further been echoed by the High-Level Climate Champions,¹¹ who opined that actions by individual actors will not lead to the reduction of GHG emissions, and will not meaningfully keep the 1,5°C temperature limits for a resilient future.¹²

The Intergovernmental Panel on Climate Change ('IPCC') has reported that human-induced climate change is already disrupting the natural world and the lives of billions across the planet.¹³ For instance, at least 2,8 million people have been affected, at least 603 lives lost, and more than 2,500 injured by the floods in 2022 in Nigeria alone.¹⁴ Similarly, devastating events were caused by tropical storms Gombe and Ana in Malawi, Mozambique, and Madagascar in the same

8 Article 9 of the Paris Agreement provides for financing adaptation and mitigation. Whether this is working effectively or not is outside the scope of the current discussion.

9 United Nations Climate Change 'Marrakech Partnership 2021' <https://unfccc.int/climate-action/marrakech-partnership/reporting-and-tracking> (accessed 9 March 2023).

10 As above.

11 United Nations Climate Change, 'Meet the champions, climate action', <https://unfccc.int/climate-action/marrakech-partnership/actors/meet-the-champions> (accessed 7 March 2023).

12 United Nations Climate Change 'Marrakech', <https://unfccc.int/climate-action/marrakech-partnership-for-global-climate-action> (accessed 08 March 2023).

13 UNFCCC 'Yearbook of global climate action 2022 Marrakech Partnership for global climate action' https://unfccc.int/sites/default/files/resource/Yearbook_GCA_2022.pdf (accessed 17 March 2023).

14 International Federation of Red Cross and Red Crescent Societies (IFRC) 'Emergency Appeal, Nigeria, Africa Floods' <https://www.ifrc.org/emergency/nigeria-floods> (accessed 17 March 2023).

year.¹⁵ The catastrophic effects of the storm rendered families destitute and were reported to have claimed the lives of 46 people; 18 went missing, and 206 were injured in Malawi.¹⁶ Furthermore, Cyclone Freddy reportedly killed over 300 people in Malawi, with thousands displaced.¹⁷

Globally, the IPCC reports that some of the impacts related to climate change include extreme hot weather on land and oceans, heavy rainfall, droughts and fires.¹⁸ Additionally, the IPCC reports that rising sea levels and widespread deterioration of ecosystems are attributed to human-induced climate change. Subsequently, these have affected food production and access to food compounded by decreased diet diversity, which has increased malnutrition, especially for indigenous peoples, small-scale food producers and low-income households with children, elderly people and pregnant women particularly impacted.¹⁹

Despite this, it has been contended that the financing mechanism for climate change adaptation and mitigation has various challenges. These include an unwillingness to commit to financing developing countries, a lack of transparency – particularly for domestic and private sector finance – and the fact that the pledges made towards this financing are hardly met.²⁰ It is further reported that although climate finance has been on an upward trajectory from \$52.4 billion in 2013 to \$83.3 billion in 2020, reaching the promised \$100 billion remained doubtful, prompting a further extension to 2025, for which a new goal will be set.²¹ Therefore, more robust and ambitious steps towards climate financing must be set and acted upon if meaningful climate change mitigation and adaptation is to be achieved.

Nonetheless, there is hope that there will be increased recognition of the catastrophes that climate change has on humankind as different stakeholders act to find tangible solutions. Among other

15 Department of Disaster Management Affairs (DODMA) 'Malawi: Tropical Storm Ana, Situation Report-2' <https://reliefweb.int/report/malawi/malawi-tropical-storm-ana-department-disaster-management-affairs-situation-report-2-15> (accessed 15 January 2023).

16 As above.

17 Al Jazeera Staff 'Malawi's president appeals for immediate aid after Cyclone Freddy' 16 March 2023 <https://www.aljazeera.com/news/2023/3/16/malawis-chakwera-appeals-for-immediate-aid-after-cyclone-freddy> (accessed 17 March 2023).

18 Intergovernmental Panel on Climate Change (IPCC), 'Climate change 2022: Impacts, adaptation and vulnerability, summary for policymakers' https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf (accessed 7 March 2023).

19 IPCC (n 18) 9.

20 Organisation for Economic Co-operation and Development (OECD) 'Aggregate trends of climate finance provided and mobilised by developed countries in 2013-2020' <https://www.oecd.org/climate-change/finance-usd-100-billion-goal> (accessed 17 March 2023).

21 As above

efforts, activists have been holding protests and demonstrations, campaigning against the use of fossil fuels, changing their diets, and even seeking remedies through legislation and litigation on climate change.²² As Luhandjula argues, States can no longer overlook their obligations to address climate change to safeguard human rights effectively.²³ She further claims that States will have to be pushed through climate litigation to enhance and adopt laws to increase climate action on mitigation and adaptation through a broad spectrum of stakeholders.²⁴ This is exactly what has been done by different players, as discussed in a later section. But before that, the following section discusses the impact that climate change has, with a special focus on children.

3 The impact of climate change on children

Despite efforts to ameliorate the effects of climate change, the IPCC reports that human-induced climate change is causing dangerous and widespread destruction in the natural world and negatively affecting the lives of billions of people worldwide.²⁵ This report is particularly pertinent, as floods, droughts, and unpredictable weather patterns affecting people across the globe with increased frequency and intensity are indisputably caused by climate change.²⁶

Besides, it has been contended that in as much as climate change has devastating effects on everyone in the world, it disproportionately affects the welfare and development of children.²⁷ This assertion has also been echoed in an analytical study on the relationship between climate change and the effective enjoyment of children's rights by the United Nations ('UN'). This UN report contends that altering the social and physical settings can have far-reaching and disproportionate effects on children and the enjoyment of a broad array of their rights, including the right to life, survival and development, the highest attainable standards of health, adequate standard of living, education, freedom from any form of violence or exploitation, recreation and play, among others.²⁸

22 International Bar Association (IBA) 'Model Statute' (2020) <https://www.ibanet.org/Climate-Change-Model-Statute> (accessed 2 February 2023).

23 Y Luhandjula 'Assessing the prospects for climate action in the form of climate litigation as a tool to safeguard human rights' unpublished LLM Mini Dissertation, University of Pretoria, 2020.

24 As above.

25 IPCC (n 18).

26 V Satgar 'Worsening climate crises and the challenge of red-green alliances for labour: introducing the climate justice charter alternative in South Africa' (2009) *ICDD Working Papers*, University of Kassel, Fachbereich Gesellschaftswissenschaften (Social Sciences) at 8.

27 A Sanson & S Burke 'Climate change and children: An issue of intergenerational justice' in DC Marion (ed) *Children and Peace* (2020) at 368.

28 Report of the Office of the United Nations High Commissioner for Human Rights (4 May 2017) UN Doc A/HRC/35/13 (2017).

It has also been reported that the effects of climate change are associated with socioeconomic disruptions, such as increased poverty,²⁹ amplified displacement and migration.³⁰ Thus, when disasters associated with climate change impact communities, children are more likely to experience long-lasting health, educational, psychological, and developmental harm than adults.³¹ In the same vein, Nicholas and Anthony have asserted that when extreme weather conditions associated with climate change disrupt social amenities, children are disproportionately affected and are often taken advantage of either by being given work beyond their capacity or through sexual exploitation and a plethora of exploitative forms of labour.³²

Furthermore, climate change contributes to the depletion of potable water sources, resulting in women travelling greater distances in search of water that is fit for consumption.³³ In the African setting, where such an issue is exacerbated by the existing water challenges, this causes a transfer of the mothers' productive role to children, who must now assume or actively participate in taking care of siblings and doing other household chores.³⁴ Thus, traditional roles that are mostly done by women either increase in intensity and take a longer time to finish or are shifted to children as a coping mechanism. Even though it is tradition for children to help with light work within a majority of African households, their compromised situation pushes the nebulous line between light work and child labour so thin, so much so that the work that they are involved in can potentially be termed as child labour. This is because the work is either light but done over a long time or done in conditions that affect the well-being of the children.

Therefore, it is undoubted that even though climate change affects everyone on Earth, children are more adversely affected by the global issue than adults.³⁵ The dire socioeconomic conditions children face are compounded by the fact that they are physiologically more susceptible to the harmful effects of climate change than adults, as their developing physical and biological makeup is not well equipped to cope with the changing

29 J Magrath & E Sukali 'The winds of change: Climate change, poverty and the environment in Malawi (2009) 9 *Oxfam Policy and Practice: Agriculture, Food and Land* at 43.

30 R Black et al 'The effect of environmental change on human migration' (2011) 21 *Global environmental change*.

31 Sanson & Burke (n 27) 368.

32 R Nicholas & D Anthony 'Unless we act now: The impact of climate change on children' *United Nations International Children's Fund* (UNICEF, 2015).

33 R Nicholas & D Anthony (n 32) 54.

34 SK Yadav & G Sengupta, 'Environmental and occupational health problems of child labour: Some issues and challenges for future' (2009) 28 *Journal of Human Ecology* at 144.

35 UN Doc A/HRC/35/13 (n 28) 3.

environment.³⁶ Additionally, children's diets differ from those of adults, and their explorative behaviour makes them even more vulnerable to harm and infections.³⁷ Furthermore, their reliance on adults compromises their ability to survive during disasters.

Premised on the discussion and findings above, it is likely undisputable that climate change affects children's socioeconomic conditions and development more disproportionately than it affects adults. This is amidst reports that the current climate situation is a dire warning about the consequences of inaction and calls for cooperation in risk reduction, equity, and justice in decision-making and investment.³⁸ To tackle these pressing problems, States use international legal frameworks on climate change to protect people from its effects. The following section will discuss these frameworks while briefly highlighting how they include the protection of children.

4 States' obligations in climate change

The 1992 United Nations Framework Convention on Climate Change ('UNFCCC') is the first key climate change document, and it acknowledges that climate change has adverse effects on natural ecosystems and humankind.³⁹ Global engagement through the UNFCCC is one method of addressing the effects of climate change.⁴⁰ This Convention has informed the development of key legal instruments on climate change by State parties.⁴¹

Among other things, UNFCCC emphasises the principle of intergenerational equity in Article 3.⁴² Here, State parties are called upon to protect the climate system for the benefit of present and future generations of humankind, based on the principles of equity, their common but differentiated responsibilities, and respective capabilities.⁴³ It is most likely that the intergenerational equity principle is rooted in the reality that the children of the present generation will inherit an environment strikingly different from the previous generations, where an estimated 125 million children will face the socioeconomic challenges discussed above by 2030.⁴⁴ This is

36 SK Yadav & G Sengupta (n 34) 146.

37 P Sheffield & P Landrigan 'Global climate change and children's health: Threats and strategies for prevention' (2011) 119 *Environmental Health Perspectives* at 293.

38 As above.

39 United Nations Framework Convention on Climate Change ('UNFCCC').

40 Satgar (n 26) 6.

41 A Solntsev 'Climate Change: international legal dimension' (2018) 1 *Moscow Journal of International Law* at 62.

42 UNFCCC (n 39) art 3.

43 UNFCCC (n 39) art 3(1).

44 R Fambasayi & M Addaney 'Cascading impacts of climate change and the rights of children in Africa: A reflection on the principle of intergenerational equity' (2021) *African Human Rights Law Journal* at 31.

even more reason to act to ensure that the present children are protected and the future children are assured protection from the harms imposed by climate change by living up to the standards of this principle. By acting so, the States will ensure that the unfortunate situation of children disproportionately affected by climate change is avoided. In doing so, the States will realise the aspiration of Article 3 and live up to its moral principle that no generation has priority over another.⁴⁵

The second key document is the Kyoto Protocol. It was adopted by parties to the UNFCCC in 1997 to operationalise UNFCCC, as the Convention only asked countries to adopt policies and measures on mitigation and periodic reporting requirements.⁴⁶ The Kyoto Protocol went a step further by instructing industrialised countries to reduce GHG emissions through the creation of binding targets.⁴⁷ The 1990 targets set out in Kyoto Protocol aimed to reduce GHG emission levels by at least 5% from 2008 to 2012.⁴⁸ In 2012, the parties to the Kyoto Protocol adopted an amendment to the Protocol, which resulted in a second commitment to reduce GHG emissions from 2013 to 2020.⁴⁹ The amendments included ambitious plans for committing parties to reduce GHG emissions by 18% below the 1990 levels between 2013 and 2020.⁵⁰

Although the Protocol does not directly mention the protection of children and their rights, it is meant to operationalise UNFCCC's aspirations. Thus, an expansive reading of it would likely entail that the principle of intergenerational equity provided for in UNFCCC will be achieved through the different mechanisms set in this Protocol. For instance, reducing GHGs to curb climate change, as is provided for in the Protocol, is more than just benefiting future generations; it's about securing a sustainable world for everyone, the current world population and the children to come.⁵¹

A third key document is the Paris Agreement, which was adopted in 2015 to replace the Kyoto Protocol.⁵² Bodansky argues that replacing the Kyoto Protocol was necessary to find a middle ground for

45 D Shelton 'Intergenerational equity' in R Wolfrum & C Kojima (ed) *Solidarity: A structural principle of international law* (2010) at 125.

46 United Nations Climate Change 'What is the Kyoto Protocol?' https://unfccc.int/kyoto_protocol (accessed 9 March 2024).

47 A Nukusheva et al 'Global warming problem faced by the international community: International legal aspect' (2021) 21 *International Environmental Agreements: Politics, Law and Economics* 223.

48 Kyoto Protocol art 3.

49 United Nations Climate Change (n 46).

50 Doha Amendment to the Kyoto Protocol art 1(c).

51 R Patil 'Kyoto Protocol: Control of CO₂ emissions' (2020) 1 *Jus Corpus Law Journal* at 105.

52 United Nations Climate Change 'The Paris Agreement' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed 2 June 2023).

addressing its prescriptive nature by allowing non-binding nationally determined contributions ('NDC') and establishing common transparent frameworks for financing, which are arrangements provided for through the Paris Agreement but were not available or unclear in the previous document.⁵³

The Paris Agreement established a global objective to keep the rise in global temperatures well below the pre-industrial 2°C threshold and to strive to limit the temperature increase to 1,5°C compared to pre-industrial levels.⁵⁴ It further enhances the efforts to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty.⁵⁵ The Paris Agreement also calls upon State parties to undertake domestic mitigation measures to set up continuous NDCs to reduce GHG emissions.⁵⁶

In addition to the above, the Paris Agreement provides that developing countries must continue enhancing their mitigation efforts and are encouraged to move towards economy-wide emission reduction or limitation targets.⁵⁷ As per the principle of common but differentiated responsibility, the Paris Agreement also highlights that developing countries will receive financial support, technology transfer, and capacity building to help them implement programmes that contribute to the Convention's aspirations.⁵⁸

Unlike its predecessor, the Paris Agreement is linked, through its preamble, to human rights principles, which can serve as a basis for climate change litigation and children's participation.⁵⁹ Furthermore, it is contended that the reference to human rights in the Paris Agreement's preamble provides a basis for understanding and applying its provisions from a human rights perspective.⁶⁰ This potential to litigate climate matters using a human rights-based approach is guaranteed through the human rights provisions of different countries' domestic legislation and a provision in African Charter on Human and People's Rights ('ACHPR') that recognises the right to a satisfactory environment.⁶¹

In tandem with the observation above, in their communication to the UNCRC through *Sacchi v Argentina, Brazil, France, Germany and*

53 D Bodansky 'Paris Agreement' (2021) *United Nations Audiovisual Library of International Law* https://legal.un.org/avl/pdf/ha/pa/pa_e.pdf (accessed 9 March 2024).

54 United Nations Paris Agreement art 1(a).

55 United Nations Paris Agreement (n 54) art 2(1).

56 United Nations Paris Agreement (n 54) art 4(3).

57 United Nations Paris Agreement (n 54) art 4(4).

58 United Nations Paris Agreement (n 54) art 4(5).

59 UNFCCC (n 39) Preamble.

60 AO Jegede 'Climate change in the work of the African Commission on Human and Peoples' Rights,' (2017) 31 *Speculum Juris* at 138.

61 African Charter on Human and People's Rights ('ACHPR') art 42.

Turkey,⁶² the children claim that the State party has violated their rights by failing to prevent and mitigate the consequences of climate change. These rights include the right to life, enjoyment of the highest attainable standard of health, the right of the child to enjoy his or her own culture, and the best interests of the child.⁶³ In its observation, the Committee referred to the preambular section of the Paris Agreement, which provides for human rights consideration, noting that the State party had the capacity to live up to the Paris Agreement's expectations, and that the children have experienced significant harm.⁶⁴

UNFCCC and its associated Protocols identify climate change mitigation and adaptation as options for addressing climate change.⁶⁵ Mitigation comprises all human activities to reduce emissions or enhance the sinks of GHGs such as carbon dioxide, methane, and nitrous oxide.⁶⁶ Adaptation refers to any adjustment that takes place in natural or human systems aimed at moderating harm or using beneficial opportunities in response to actual or expected impacts of climate change.⁶⁷ Subsequently, through articles 4 and 11, the UNFCCC provides for the transfer of technology and financial support to developing countries to address climate change.⁶⁸ These aspirations are put into practice through the Kyoto Protocol and the Paris Agreement.

Therefore, one can confidently assent with a certain level of confidence that the UNFCCC and its associated Protocols have provisions for addressing climate change with a consideration of children. Thus, in all the efforts that State parties take to address the impacts of climate change, whether it be mitigation or adaptation, specific attention has to be made to ensuring that there are special mechanisms targeted at children. This will not only protect the children's array of rights but will also guarantee that the principle of intergenerational equity, as provided for in these instruments, is fulfilled. Such attention has to be paid as a matter of urgency in light of the toll that climate change has on the world, and direly so on children. Where this is not fully met, or when States are complacent in meeting their obligations, citizens are prompted to resort to courts through climate change litigation, as discussed below.

62 CRC/C/88/D/104/2019 ('*Sachhi Case*') para 1.1.

63 *Sachhi Case* (n 62) paras 3.3-3.6.

64 *Sachhi Case* (n 62) para 10.11.

65 UNFCCC (n 39) art 4(8); Kyoto Protocol (n 46), arts 2(3) & 3(14); United Nations Paris Agreement (n 54) art 9 (4) & 11 (1).

66 KJT Richard et al 'Integrating mitigation and adaptation into climate and development policy: three research questions' (2005) 8(6) *Environmental Science & Policy* at 580.

67 As above.

68 UNFCCC (n 39) Art 4 & 11.

5 Climate change litigation trends

Climate change litigation refers to the legal actions usually taken by the applicants, in which they seek the Court's intervention to enforce or clarify the integration of existing laws to climate change issues.⁶⁹ Affirmed most recently in the Paris Agreement, it is regarded as an invaluable strategy when governments have failed to live up to their promises to prevent dangerous interference with the climate system.⁷⁰ Setzer & Vanhala have also supported this assertion, arguing that the growing interest in climate change litigation is also a consequence of frustration with the inadequacy of government action.⁷¹

According to the Global Trends on Climate Change Litigation Report of 2021, climate change litigation continues to grow in importance as a means of either advancing or delaying effective action on climate change.⁷² Additionally, litigation influences policy outcomes and the behaviour of society and corporate entities.⁷³ While recognising that the need for courts' intervention varies from case to case, particularly for Global North and Global South countries, climate change litigation is being sought as a mechanism to pressure governments and industries into responding to climate change problems.⁷⁴

Furthermore, climate change activists are using litigation to claim that a failure to act on climate change or protect related natural resources results in a failure to protect human rights.⁷⁵ Climate litigation cases have mainly been filed using the provisions in the UNFCCC and associated agreements, as well as regional human rights instruments such as the ACHPR.⁷⁶ For instance, Article 24 of ACHPR recognises a collective right to a satisfactory environment for development. While the definition of this right in the ACHPR is unclear, it is opined that a general satisfactory environment encompasses the whole ecosystem and the enjoyment of all the rights

69 T Okonkwo 'Protecting the environment and people from climate change through climate change litigation' (2017) 10 *Journal of Politics and Law* at 67.

70 T Khan, 'How climate change battles are increasingly being fought, and won, in court' 8 March 2017 <https://www.theguardian.com/environment/2017/mar/08/how-climate-change-battles-are-increasingly-being-fought-and-won-in-court> (accessed 8 March 2023).

71 J Setzer & L Vanhala 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* at 7.

72 J Setzer & C Higham 'Global trends in climate change litigation: 2021 snapshot' (2021) *London School of Economics and Political Science* at 5.

73 O Rumble & A Gilder 'Climate change litigation on the African continent' https://www.kas.de/documents/282730/0/Climate_Litigation_Africa.pdf/1450e939-d100-a70e-8a9d-315161f96024 (accessed 14 March 2023).

74 Okonkwo (n 69) 74.

75 J Setzer & C Higham (n 72) 5.

76 O Rumble & A Gilder (n 73) 5.

provided for in the ACHPR, including non-discrimination, pursuing an education, and all situations where people are free to exercise their right to economic, social, and cultural progress.⁷⁷ This provides an argumentative basis for more ethical economic growth that minimises damage to the environment for current and future generations.⁷⁸ It would be more plausible, therefore, that when this is not done through self-realisation and deliberate effort, some form of pressure from the courts would be sought to ensure that the rights as provided for in different legislation are met and that obligations are fulfilled.

This view is further reflected by the African Commission in its deliberation of cases before it.⁷⁹ The right to a satisfactory environment for development is one of the violated rights claimed in *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.⁸⁰ In the case, the Commission concluded that the Nigerian government violated the right to a clean environment as provided for in the ACHPR, which affected the Ogoni people's right to life (article 4) and right to health (article 16).

Despite varying reasons for seeking redress, it has been argued that the common idea of these lawsuits is to bring policy changes that conform to international and national actions for climate change mitigation.⁸¹ However, it is reported that out of the 1,841 ongoing or concluded cases of climate change litigation worldwide, over 75% were filed in the United States alone, while the remaining few were in other regions by May 2021.⁸² Surprisingly, the numbers are low in Africa and other developing countries, where climate change impacts will reportedly have more devastating effects.⁸³ In other words, despite being the most vulnerable to the impacts of climate change, Africa has the least climate litigation cases. This is true for domestic courts and cases within the African region (regional courts and tribunals).

The low number of climate change litigation in African countries has mainly been attributed to weak legislative and regulatory frameworks, poor governance and enforcement mechanisms, limited access to finances, and the absence of robust human rights protections.⁸⁴ Specifically, the International Bar Association ('IBA')

77 MO Ikeke 'The African Charter's right to a general satisfactory environment and socio-economic development: An eco-philosophical discourse' (2020) 3 (2) *Journal of African Studies and Sustainable Development* at 56.

78 Ikeke (n 77) 60.

79 ACHPR (n 61) art 24.

80 African Commission on Human and Peoples' Rights *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*, Communication 155/96.

81 Okonkwo (n 69) 2.

82 Setzer & Benjamin (n 4) 5.

83 Sabin Center for Climate Change Law (n 7).

84 Adelman (n 3) 5.

asserts that African climate change litigation could only be described as nascent.⁸⁵ It is contended that increased financial resources and specific expertise, standing, causation, and enforceability are required to increase climate change-centred cases in Africa.⁸⁶

Despite these challenges, activists, organisations, and groupings have instituted actions related to climate change against their governments and big corporations. For instance, in *Earthlife Africa, Johannesburg v Minister of Environmental Affairs*,⁸⁷ activists stopped a coal-fired power generation project in South Africa. In the case, the Court recognised that considering climate change impacts are relevant, and their absence in deciding authorisation for the construction of a coal-fired power station and the consequential appeal made the authorisation unlawful.⁸⁸ The Court remitted the authorisation for reconsideration with climate change and paleontological impact assessment reports, including comments from interested and affected parties, and set aside the Minister's appeal decision.⁸⁹

In *Tsama William v Uganda's Attorney General*,⁹⁰ the applicants filed a suit against the government and other related authorities, alleging that they failed to put adequate machinery in place to prevent landslides in the Bududa district and that the respondents' acts and/or omissions violated the applicant's fundamental rights.⁹¹ In the case, the applicants asked the Court to determine whether the government of Uganda failed to fulfil its positive obligations under climate change and disaster management laws to manage the risk of landslides in the Bududa district.⁹²

Another climate litigation-related action by citizens is seen in the *Save Lamu* case in Kenya. In this case, the claimants alleged that the respondents did not involve the communities in carrying out an Environmental Impact Assessment ('EIA'), even though it was licensed to construct the first coal-fired power plant in Kenya. Here, the company was ordered to conduct a new EIA that addressed the

85 IBA (n 22).

86 As above.

87 2017 3 All SA 187 (WCC).

88 *Earthlife* (n 87) 126.

89 InforMEA '*EarthLife Africa Johannesburg v The Minister of Environmental Affairs and Others*' <https://www.informea.org/en/court-decision/earthlife-africa-johannesburg-vs-minister-environmental-affairs-and-others> (accessed 20 March 2023).

90 2020 24 UHC.

91 Climate Change laws of the World '*Tsama William and Others v Uganda's Attorney General and Others*' https://climate-laws.org/geographies/uganda/litigation_cases/tsama-william-and-others-v-uganda-s-attorney-general-and-others (accessed 20 March 2023).

92 *Tsama William* (n 90) 4.

adverse effects on human health and biodiversity caused by climate change.⁹³

In Malawi, the *Salima-Lilongwe Water Pipeline*⁹⁴ case demonstrates the importance of civil society and other interested stakeholders in addressing environmental concerns and ensuring the accountability of relevant authorities.⁹⁵ In this case, it is alleged that a proper EIA was not conducted and that the project subsequently failed to address the community's environmental needs. The project is expected to pump water over a 130-kilometre distance between Lake Malawi and Lilongwe.

Typically, an EIA is conducted on major projects such as hydro dams, mining and road construction, which are likely to harm the environment but do not incorporate climate change impacts.⁹⁶ However, Amankwah proposes using EIAs to integrate climate change resilience through regulating every major project that has the potential to release carbon dioxide and other GHGs, eventually contributing to the reduction of GHG emissions.⁹⁷ Thus, much as no argument related to climate change was explicitly made in the *Salima-Lilongwe Water Pipeline* case, this is a major construction that will most likely involve machinery that will produce a lot of carbon dioxide and warrant an EIA that considers potential climate change ramifications. This resonates with the opinion that climate change matters are ingrained in other matters, and litigation is more likely to address localised environmental issues that may have climate-related elements, rather than climate change *per se*.⁹⁸

A Ugandan case involves Client Earth, Survie, and four Ugandan civil society organisations that demanded companies to act on environmental damages and climate change.⁹⁹ The plaintiffs opposed the construction of the East African Crude Oil Pipeline ('EACOP'). The civil society organisations claimed that the company was not vigilant in protecting communities and addressing environmental risks associated with the construction.¹⁰⁰ Despite the commitments made by TotalEnergies, one of the companies sued, investigations

93 *Save Lamu et al v National Environmental Management Authority and Amu Power Co. Ltd* ('*Save Lamu*') 2016 196 KNET 155.

94 2017 MWHC 135.

95 G Makanje 'The Environmental Management Act (2017) and natural resource regulation in Malawi: Opportunities for and limitations to effective enforcement' (2017) *Environment| Africa* at 404.

96 E Amankwah 'Environmental Impact Assessment (EIA); A useful tool to address climate change in Ghana' (2013) 1 (4) *International Journal of Environmental Protection and Policy* at 96.

97 As above.

98 Adelman (n 3) 5.

99 L Caramel, 'Total Energies back in court over its mega-project in Uganda' 8 December 2022 lemonde.fr/en/environment/article/2022/12/08/totalenergies-back-in-court-over-its-mega-project-in-uganda_6006954_114.html# (accessed 20 March 2023).

100 As above.

conducted by Friends of the Earth France and Survie, and information provided by numerous local partners, NGOs, and institutions concluded that the EACOP projects entail serious guaranteed and potential violations of human rights and fundamental freedoms, the health and safety of persons and the environment.¹⁰¹

It is reported that the oil exported by the EACOP is anticipated to produce roughly 34 million metric tons of additional carbon emissions per year, which is not aligned with the ambitions of reducing GHGs to curb climate change.¹⁰² The case highlights the challenges in litigation when organisations are fighting multi-billion dollar projects run by governments and transnational cooperation partners. Moreover, the case was heard in France rather than Uganda or Tanzania, which reinforces the issue of limited financial capacity for African climate change litigation.

In the cases above, though at different stages, there are no specific instances where the involvement of children is prominent or explicit. The applicants are usually representatives of communities or organisations working on their own accord but not specifically for or on behalf of children, as was the case in *Mbabazi v The Attorney General and National Environmental Management Authority*¹⁰³ in Uganda, where relief was sought on behalf of four minors seeking government action in climate change mitigation.¹⁰⁴ The absence of children in climate litigation is unsurprising, as climate litigation is in its infancy in most African countries.¹⁰⁵ Despite the low levels of participation, international, regional, and domestic legal frameworks provide for children's participation in matters that affect them, including climate change.

6 Legal frameworks and children's participation

The UNCRC recognises that the child, because of their physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before and after birth.¹⁰⁶ Specifically, article 12 of UNCRC provides that children should be allowed to express their views on matters that impact them in judicial and administrative proceedings.¹⁰⁷ According to the UN Committee on the Rights of the Child ('Committee on CRC'), article 12 has been

101 Survie 'Serious Breaches of the Duty of Vigilance Law: The Case of Total in Uganda' https://survie.org/IMG/pdf/report-totaluganda-foefrance-survie-2019_.pdf (accessed 20 March 2023).

102 I Mugabi 'The Potential Impacts of the East African Crude Oil Pipeline ('EACOP') on Human Rights in Uganda' 2023 *Social Sciences Research Network* at 3.

103 2012 KHC 283.

104 As above.

105 Setzer & Higham (n 72) 5.

106 United Nations Convention on the Rights of the Child ('UNCRC') Preamble para 9.

107 UNCRC (n 106) art 12.

identified as one of the general principles of UNCRC.¹⁰⁸ Thus, as climate change disproportionately affects the welfare and development of children, they should be allowed to express their views and opinions through any appropriate means, including climate change litigation.

Equally important is Article 2 of UNCRC, which provides that States are obliged to ensure that children enjoy their rights without discrimination of any kind.¹⁰⁹ Furthermore, Article 4 of UNCRC also calls upon State parties to undertake all appropriate legislative, administrative, and other measures to implement the rights recognised in the UNCRC, including the right to participation.¹¹⁰ It can, therefore, be argued that apart from providing children the right to participate in matters that affect them, the UNCRC also protects children from any acts that potentially stop them from taking part in matters like climate change litigation.

Additionally, the UNCRC explicitly links the right to life to the obligation of States to ensure the survival and development of the child to the maximum extent possible.¹¹¹ According to the Office of the United Nations High Commissioner for Human Rights ('OHCHR'), climate change and human rights are linked, and the adverse effects of climate change threaten the right to life as it affects the right to food and clean water.¹¹² Similarly, the IPCC contends that the devastating effects of climate change have had a disproportionate impact on children, as they are vulnerable members of society whose status and rights are affected when the adverse effects of climate change are dire.¹¹³ Furthermore, mental health issues such as stress and anxiety among children are also reported to increase due to climate change.¹¹⁴

Article 4 of African Charter on the Rights and Welfare of the Child ('ACRWC') also provides for children's participation in all matters that concern them at the regional level.¹¹⁵ ACRWC provides that children shall voice their opinions and be considered during legal and administrative proceedings. This is particularly important in an African setting where children are only sometimes accorded an opportunity to participate in the decision-making process.¹¹⁶ Furthermore, article 7 provides for the right to all children's

108 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (15 January 2009) UN Doc A/HRC/10/61 (2009)

109 UNCRC (n 106) art 2.

110 UNCRC (n 106) art 4.

111 UNCRC (n 106) art 6 (2).

112 UN Doc A/HRC/35/13 (n 28) 14.

113 IPCC (n 8) 15.

114 As above.

115 The African Charter on the Rights and Welfare of the Child ('ACRWC') art 4.

116 As above.

expression, and that the State must ensure children are accorded this right and that their views are given the necessary attention.¹¹⁷

Through African Children's Committee General Comment 5, it is recommended that the right to participation for children should be enshrined in all national legislation and that States should ensure that the participation is done through processes that are transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training for adults, safe and sensitive to risk, and accountable.¹¹⁸

Significantly, children's right to participate has been provided for in several African constitutions, including Malawi, South Africa and Kenya. According to the African Children's Committee, widespread practice has emerged at regional and national levels and has been conceptualised as participation.¹¹⁹ For instance, participation is widely used to describe information sharing, dialogue, and processes where children can voice their views.¹²⁰ In this vein, child participation, conceived as freedom of expression, has been provided for through section 28 of the Constitution of the Republic of South Africa, section 35 of the Constitution of the Republic of Malawi, and section 33 of the Constitution of the Republic of Kenya.¹²¹

Relatedly, African States have established legal frameworks to remedy human rights violations effectively. Section 22(1) of the Constitution of the Republic of Kenya, 2010 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.¹²² It provides that children can also bring an action as individuals or as a group through representation.¹²³ Similar provisions are provided for in the Constitution of the Republic of Malawi under section 46,¹²⁴ as well as section 50 of the Constitution of the Republic of Uganda,¹²⁵ and section 38 of the Constitution of the Republic of South Africa.¹²⁶

117 ACRWC (n 115) art 7.

118 African Children's Committee General Comment 5 at 14.

119 UN Doc A/HRC/35/13 (n 28).

120 UNCRC General Comment 12 2009 para 5.

121 These have been stated differently from the regional frameworks but they are in the spirit of participation. See Article 28 of the South African Constitution, Article 35 of the Constitution of the Republic of Malawi, and Article 33 of the Constitution of the Republic of Kenya.

122 Constitution of the Republic of Kenya, 2010 art 22 (1).

123 Constitution of the Republic of Kenya (n 122) art 22 (2).

124 Constitution of the Republic of Malawi, 1994 (rev 2017) art 46.

125 Constitution of the Republic of Uganda, 1995 art 50.

126 Constitution of the Republic of South Africa, 1996 sec 38.

Concerning climate change, participation entails establishing measures ensuring that this right is upheld, especially when the State is formulating climate change adaptation programmes at all levels.¹²⁷ In this regard, particular importance needs to be attached to the involvement of children in the implementation stages of adaptation programmes about climate change and rebuilding communities affected by its effects.¹²⁸ Such involvement will ensure that the intentions of participation, as provided for in these instruments, are materialised. Thus, through participation at this stage, children can give their opinions and views on protecting their safe spaces. Furthermore, if provided with relevant and inclusive information, they can hold the government accountable for failure to implement some climate change adaptation or mitigation programmes. Let alone, they can provide their views on how they would like to participate in climate change litigation at different stages.

Some organisations have invoked the above provisions for a legal remedy to climate change. For example, in the *ClientEarth* case,¹²⁹ people affected by landslides in the Bududa district of Uganda took the country's government to court for failing to protect local villagers from climate risks.¹³⁰ Similarly, in *Earthlife*, youth climate activists and coal-affected community activists called upon the South African government to abandon plans to build a new coal-fired power generation, as doing so would be a threat to their right to a healthy environment, the best interests of the child, and the rights to life.¹³¹ Besides, another example of climate change litigation was taken by Malawian citizens, and pertains to the banning of thin plastic and several campaigns surrounding this action.¹³²

Through the provisions above and specific domestic legislation, State parties to the UNCRC acknowledge and affirm their commitment to fulfilling the rights of children or their representatives and must be held accountable by them. A typical and more recent example would be the communication to the Committee on the Rights of the Child, which included allegations from children, including three from Nigeria, South Africa, and Tunisia, that Argentina, Brazil, France, Germany, and Turkey have violated children's rights by failing to

127 T Kaime 'Children's rights and the environment' in U Kil Kelly & T Lief aard (ed) *International children's rights law* (2018) at 13

128 As above

129 EACJ, Ref. 9/2012, 11.

130 Q Schiermeier 'Climate science is supporting lawsuits that could help save the world' 8 September 2021 <https://www.nature.com/articles/d41586-021-02424-7> (accessed 7 March 2023).

131 *Earthlife* case (n 87) para 1 (22).

132 C Pensulo 'Malawi wins battle against business to reinstate ban on plastic bags' 2 August 2019 <https://www.theguardian.com/global-development/2019/aug/02/malawi-reinstates-ban-thin-plastic-bags-campaigners-hail-fantastic-victory> (accessed 25 March 2023).

prevent and mitigate the consequences of climate change.¹³³ Other than this, instances of climate change litigation, which is gradually expanding in its regional reach through cases in the Global South gaining visibility,¹³⁴ those directly involving children seem to be limited. This limited children's participation reflects the limited climate change litigation in most African countries at national and regional levels.¹³⁵

7 Participation: A theoretical explanation

The international, regional, and domestic legal frameworks discussed above provide children with the right to participate. This section discusses how participation has been theorised from other perspectives and argues that it manifests differently.¹³⁶ These manifestations, as discussed below, provide a basis for the claim that children's current involvement in climate change litigation might not be meaningful and is misaligned with the UNCRC, as it is mainly in the less impactful strands of participation and, therefore, tokenistic.

In her ladder of participation theory, White argues that as participation is a process of power; it should consider who is involved, what is on the agenda and how many people are allowed to participate in the process.¹³⁷ She identifies and distinguishes between four significant forms of participation, namely: nominal, instrumental, representative, and transformative.¹³⁸ Regarding the importance of these approaches, Nylund argues that knowledge of participation procedures will determine when and how children will participate.¹³⁹ This, however, does not mean that children need to know which of these forms of participation is being employed. Rather, practitioners and those advocating for children's rights can use them to ensure that children's participation is more meaningful and that all measures guaranteeing children's representation are met.¹⁴⁰

133 *Sachhi Case* (n 62) para 1.1.

134 United Nations Environment Programme (2023). *Global Climate Litigation Report: 2023 Status Review*. (UNEP Nairobi, 2023) 12.

135 E Boshoff & SG Damtew 'The potential of litigating children's rights in the climate crisis before the African Committee of Experts on the Rights and Welfare of the Child' (2022) 22 *African Human Rights Law Journal* at 329.

136 S White 'Depoliticising development: the uses and abuses of participation' (1996) 6 *Development in practice* at 15.

137 As above.

138 White (n 136) 7.

139 A Nylund 'Children's right to participate in decision-making in Norway: Paternalism and autonomy' in T Haugli and others (eds) *Children's constitutional rights in the Nordic countries* (2019) 214.

140 UNICEF, 2007 *Implementation Handbook for the Convention on the Rights of the Child* at 172.

In nominal participation, White asserts that less powerful people become involved just for the sake of inclusion.¹⁴¹ Regarding child participation, Nylund claims that children legitimise adults' decision-making process in this approach. Often, this type of participation concentrates on the number of people involved to give the impression that many people participated. It is considered tokenistic participation, with no meaningful contribution to change.¹⁴² For instance, this type of participation might be common when institutions and informal organisations seek the endorsement of a candidate, an opinion, or a petition. Through such endorsement, people, including children, might state their opinion without really thinking about what they are appending their names to. This might still be considered as participation, even though it is the lowest level of participation.

Instrumental participation is a means to an end. Those in power use it to their advantage to achieve a particular outcome.¹⁴³ In this form of participation, people working with children gain information from them to enable adults to make informed decisions that are considered to be in the child's best interest.¹⁴⁴ However, Nigel refers to this type of participation as manipulation, decoration, and tokenism, as it does not involve the child as a subject of change.¹⁴⁵ In this approach, children are treated as beneficiaries or welfare cases. This participation is contrary to the idea of participation provided for in UNCRC, as it maintains the notion of a child as a charity beneficiary, rather than a subject of rights with the ability to enjoy the benefits of specific rights and freedoms.¹⁴⁶

Representative participation is where people have a voice in executing a decision or a project; consequently, the decisions are potentially sustainable.¹⁴⁷ This form of participation allows children to be consulted in dialogue where their opinions are taken seriously.¹⁴⁸ In climate change litigation, this type of participation might possibly see children giving evidence on cases that involve them or even directly moving the courts for particular declarations and orders.

White asserts that transformative participation allows people to weigh out the available options and take collective action to fight

141 White (n 136) 8.

142 Nylund (n 139) 203.

143 White (n 136) 8.

144 T Nigel 'Towards a theory of children's participation' (2007) 15 *International Journal of Children's Rights* at 199.

145 Nigel (n 144) 203.

146 T Kaime 'The foundations of rights in the African Charter on the Rights and Welfare of the Child: A historical and philosophical account' (2009) *African Journal of Legal Studies* at 123.

147 White (n 136) 8.

148 Nylund (n 139) 203.

injustice. Furthermore, this form of participation empowers people, as it involves reflection regarding the root causes of a particular problem.¹⁴⁹ This is in tandem with J Josefsson & J Wall's argument on inclusive participation, where they opine that inclusive empowerment appears where participation is not only rhetorically based on a current issue but also an open platform for empowering marginalised people to change policy, legislation, and even culture.¹⁵⁰ Thus, this form of participation will most likely involve children seeking remedies in the courts, calling on the government to enact climate change-related legislation. They will seek climate change litigation for future generations and not solely for their immediate and short-lived benefit.

According to Save the Children, facilitating children's participation means involving them in identifying an issue, setting the agenda, defining priorities, assessing gaps in services and commitments, dialogues with duty bearers, and monitoring actions to address the problems identified.¹⁵¹ While not all children can participate at all times, meaningful participation should ensure that the process is transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable.¹⁵²

Therefore, in climate change litigation, child participation will surely entail involving children in identifying gaps and neglected actions and spotlighting areas where the government needs to fulfil its obligations to address climate change. These gaps might be those that are often ignored or considered irrelevant from adults' perspectives, especially in climate change adaptation programmes where recovery plans are being implemented within communities affected by climate change damages.¹⁵³ Furthermore, participation will imply providing children with child-friendly information on climate change to facilitate their participation in the whole litigation process. It is contended that where the litigation is presumed to be risky and uncondusive for child participation, necessary measures must be implemented to ensure that children are protected from any perceived harm through, for example, children's representation by adults.¹⁵⁴

149 White (n 136) 8.

150 Josefsson & Wall (n 5) 1052.

151 F Sheahan et al 'How to do Child-Centred Social Accountability' (Save the Children, 2022) at 4.

152 Save the Children 'The basic nine requirements for meaningful and ethical Children's participation' <https://resourcecentre.savethechildren.net/pdf/basic-requirements-english-final.pdf> (accessed 23 March 2023).

153 Kaime (n 127) 15.

154 H Tolonen 'Children's right to participate and their developing role in Finnish proceedings' (2019) *Children's Constitutional Rights in the Nordic Countries* at 225.

However, it has been contended that understanding children's participation in rungs or categories, as discussed by White above, should not bar flexibility in the participation process, especially in an African environment where unregulated participation occurs.¹⁵⁵ It is further submitted that the model of child participation has evolved. Such an evolution has produced lessons that should encourage children's participation, allowing more meaningful consideration of their views and ideas compared to earlier years when participation meant doing things for them and around them.¹⁵⁶

Consistently, it is submitted that formalising the participation process for children should not just create a conducive environment where the children's participation is controlled by the adults or institutions working with children.¹⁵⁷ If this is done, a strongly controlled environment for participation is created that is purposive and only suits the objectives of adults.¹⁵⁸ In other words, formalising participation in climate change litigation might probably entail a strict dictation of what children will say if given a chance to speak. This will be under the guarded conditions and terms of adults. If such is the case, this will not be empowering, as the children will only parrot what adults have instructed them to say, and it will fit into instrumental participation, which achieves adults' needs and not necessarily those of the children.¹⁵⁹

Contrary to the understanding of child participation as proposed by the theories above and as set out in the legal frameworks, Imoh proposes that children's participation should allow them to act independently, or alongside adults, and be self-represented, thus transcending legal frameworks or theories of participation.¹⁶⁰ She further assents that by going beyond theories and provisions in the legal frameworks, a more transformative and meaningful change is assured.¹⁶¹ Furthermore, meaningful participation should at least be broad enough to include children from all areas, have intergenerational relations, understand that participation might require children to be independent and sometimes work jointly with adults, be open to new methods of participation, and account for the demands on children and young people.¹⁶²

155 L Ehlers & F Cheryl 'Child participation in Africa' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2016) at 115.

156 As above.

157 ATD Imoh 'Adults in Charge: The Limits of Formal Child Participatory Processes for Societal Transformation' in *The Politics of Children's Rights and Representation* (Cham: Springer International Publishing, 2023) at 60.

158 Imoh (n 157) 60.

159 White (n 136) 8.

160 Imoh (n 157) 76.

161 As above.

162 Nigel (n 144) 216.

Since children make up 50% of all people affected by disasters and are likely to experience the worst effects of climate change, their participation in climate change litigation cannot be overemphasised.¹⁶³ Therefore, children's participation in climate change litigation can be more meaningful if it is through representative and transformative participation models, which are classified as genuine forms of participation.¹⁶⁴

8 Participation: Opportunities and limitations in practice

8.1 Opportunities

The IPCC summary report for policymakers of 2022 indicates that climate change has caused substantial damages and increasingly irreversible losses.¹⁶⁵ It further suggests that unless drastic and innovative approaches are taken, global warming levels will be higher than anticipated, and the effects will be devastating.¹⁶⁶ Unfortunately, these effects will mostly be felt by vulnerable members of society, like children, who are susceptible to harm arising from environmental pollution, which is undoubtedly causing irreversible damage to their vital organs.¹⁶⁷ Regrettably, the youth and children will inherit the society modelled by the adults of today, who exclude them from decisions on some of the critical challenges facing the globe, such as migration, child labour, and climate change.¹⁶⁸

However, according to the United Nations Population Fund ('UNFPA'), the high numbers of youth in the world present an opportunity for their energies, ideas, and innovations to transform the future.¹⁶⁹ In this context – even using nominal participation in White's theory, where numbers matter – an opportunity arises for children to bring class actions against their States through climate change litigation. This can be seen as participation, although it will not be sustainable or empower children.

Another opportunity rests in the existing legal frameworks that recognise the child's rights at different levels. Article 12 of UNCRC

163 K Zhanda et al 'Children climate change activism and protests in Africa: Reflections and lessons from Greta Thunberg' (2021) 41 *Bulletin of Science, Technology & Society* at 93.

164 White (n 136) 8.

165 IPCC (n 18).

166 As above

167 UNCRC General Comment 26 (2023) at 24.

168 J Josefsson & J Wall (n 5) 1047.

169 United Nations (UN) 'Envoy of youth' (2015) <https://www.un.org/youthenvoy/2015/04/10-things-didnt-know-worlds-population/> (accessed 13 February 2023).

provides for the right of participation of the child in matters that affect them,¹⁷⁰ while Article 13(1) provides the child with the right to freedom of expression.¹⁷¹ The same is provided for in article 4(2) of ACRWC, section 46 (2) of the Malawian Constitution, section 38 of the Constitution of the Republic of South African, and section 50 of the Constitution of the Republic of Uganda. Thus, through the use of these human rights provisions, children have a starting point to bring a class action against their States or companies where they have taken inadequate or no steps to protect them from the harms of climate change or have limited their participation in decisions and actions that affect them. This also recognises that, in most cases, their standing is limited by age, which has been liberalised by statutory rules, at least in the case of South Africa.¹⁷² Moreover, despite age limitations, children's participation can be guaranteed either through adults or older children who can approach the courts acting in the interest of children.¹⁷³

Furthermore, apart from the substantive provisions in these human rights instruments, the African Children's Committee and its responsibilities provide other opportunities for children to participate in climate change litigation through its mandate of promoting and protecting children's rights enshrined in ACRWC.¹⁷⁴ Among its other duties, the African Children's Committee is mandated to receive State reports and adopt Concluding Observations (article 43), monitor the implementation and ensure the protection of children's rights enshrined in the Charter (article 42), receive communication concerning matters covered in the Charter, and investigate children's rights violations within the State parties (article 44). These are potential avenues that can meaningfully allow children to participate in matters that affect them, including climate change litigation. For instance, in its Concluding Observation of Malawi's State report for 2018-2021, the African Children's Committee, in its general implementation measures, recommended that Malawi should strengthen structures for the participation of children in judicial and administrative procedures concerning them, especially at the community level.¹⁷⁵ Through this observation, one of the measures that the Malawian government could have taken could include measures that allow children to learn more about climate change and the work of the African Children's Committee through community-

170 UNCRC (n 106) art 12.

171 UNCRC (n 106) art 13 (1).

172 A Moyo 'Child participation under South African Law: Beyond the Convention on the Rights of the Child? (2015) 31 (1) *South African Journal on Human Rights* at 179.

173 As above

174 ACRWC (n 115) art 32.

175 African Union 'Concluding Observations and Recommendations for Malawi' <https://www.acerwc.africa/sites/default/files/2022-09/Malawi%20CO%20-2-17.pdf> (accessed 16 March 2023).

based structures. This access to knowledge and information about climate change, as well as the children's enhanced knowledge about the mandate of the African Children's Committee, could provide an opportunity for children to seek redress on matters that affect them, including human rights violations related to climate change, either by communicating with the African Children's Committee or local courts.¹⁷⁶

Relatedly, the presence of regional justice institutions such as the East African Court of Justice, which has a human rights jurisdiction, accords children an opportunity to seek remedies over climate change matters where domestic redress has failed.¹⁷⁷ The regional court provides an avenue for child participation since it does not require the exhaustion of domestic remedy, as in *Venant Masenge v Attorney General of the Republic of Burundi*.¹⁷⁸ The regional court affords children an opportunity to seek representation through organisations in their respective countries when local remedies seem to be challenging.

Additionally, institutions such as African Committee of Experts on the Rights and Welfare of the Child ('ACERWC') at the regional level also provide an opportunity for children's participation. Drawing its mandate from articles 32-46, one of the functions of ACERWC is to monitor the implementation and ensure the protection of the rights enshrined in the African Charter, which includes the right of the child to be heard.¹⁷⁹ Apart from the substantive provisions, Boshoff & Damtew opine that ACERWC has the potential to facilitate successful climate change litigation based on its procedural safeguard measures and the potential remedies it provides for child rights violations.¹⁸⁰

At the domestic level, constitutional bodies such as Human Rights Commissions guarantee a right to participate in protecting and promoting children's rights.¹⁸¹ Using such a mandate and the constitutional powers of such institutions, children can hold their States accountable for matters involving their participation and violations of their rights.¹⁸² If this fails or proves challenging at the domestic level, they could communicate with regional and international bodies such as ACERWC and the Committee on the Rights of the Child.¹⁸³

176 UNICEF (n 140) 172.

177 Adelman (n 3) 7.

178 EACJ (n 129) 11.

179 ACRWC (n 115) arts 32-46.

180 Boshoff & Damtew (n 135) 331.

181 Constitution of Malawi (n 124) sec 130.

182 Constitution of Malawi (n 124) sec 129.

183 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), Article 5. This provides for individual communication submissions to the Committee.

Additionally, there is an opportunity for children to participate in climate change litigation through civil societies with *locus standi* and observer status provided for under Article 5(3) of Protocol to the ACHPR.¹⁸⁴ This opportunity can help in addressing both financial and *locus standi* challenges for children from the 34 African countries that have ratified the Protocol of the African Court on Human and People's Rights and the eight States – namely, Burkina Faso, Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger, and Tunisia – that have accepted the competence of the Court and subsequently allowed for individuals or non-governmental organisations to access the court.¹⁸⁵

8.2 Limitations

Children will face limitations in climate change litigation because of their status, amongst other reasons. Firstly, in a majority of African countries, children are viewed as a vulnerable population whose views are almost non-existent.¹⁸⁶ Abdullah and Cudjoe further present that in an African setting, the widely held belief is that a child should listen and not be listened to.¹⁸⁷ For instance, in Ghana, children are socialised not to talk during meetings between adults.¹⁸⁸ In Malawi, children express their views indirectly to adults through intermediaries, recitals, songs, and role play, as addressing adults directly might be interpreted as being disrespectful.¹⁸⁹

Even though the above might be considered a form of participation, it is limited in the spirit of UNCRC, which states that children have a right to be heard.¹⁹⁰ That is likely why the Committee on CRC argues that Article 12 of UNCRC should be read with other Articles in the Convention, for instance, Article 2 on discrimination.¹⁹¹ The Committee on CRC notes that while it is provided that children have the right to be heard, some cultural and traditional practices, values, and beliefs are discriminatory and place severe limitations on the enjoyment of this right. Thus, more is needed to have children present so that their views can be heard and considered.¹⁹² While this is true, its practical implementation is

184 ACHPR (n 61) art 5 (3).

185 African Court 'Basic information' <https://www.african-court.org/wpafc/basic-information/> (accessed 29 March 2023).

186 H Mugadza et al 'The concept of a child within sub-Saharan African migrant homes: Reconciling culture and child rights' (2019) 24 *Child & Family Social Work* at 523.

187 A Abdullah et al 'Barriers to children's participation in child protection practice: The views and experiences of practitioners in Ghana' (2018) 34 *Children Australia* at 273

188 As above

189 T Kaime, *The Convention on the Rights of the Child: A cultural legitimacy critique* (2011) at 123.

190 UNCRC (n 106) art 12.

191 UNCRC General Comment 12 (2009), para.76.

192 As above

limited, especially in most African countries where the notion of child participation, at least in the aspiration of UNCRC and the African Children's Charter, is yet to be fully realised. Again, this is also particularly difficult when climate change litigation for children is associated with challenges such as a lack of resources and constrained ability to effectively engage with legal processes, coupled with prohibiting procedures and unreasonably time-consuming cases.¹⁹³

Lack of access to courts and limited awareness of climate change litigation model statutes have also been seen as one of the limitations for accessing justice.¹⁹⁴ This is one of the reasons that motivated the IBA to launch its Model Statute for proceedings challenging the government's failure to act on climate change.¹⁹⁵ Article 4(5) of this Model Statute provides that any person may bring government-related climate change proceedings on behalf of minors or future generations.¹⁹⁶ Nevertheless, awareness and adoption of models like these are still limited in African countries, coupled with challenges in implementing policies and enforcing legislation.¹⁹⁷

While there are possibilities for children's participation in climate change litigation in Africa, these possibilities are not closer to the successes registered in the *Urgenda* case,¹⁹⁸ and *Juliana v United States* case,¹⁹⁹ in the Global North where children were vital in the whole litigation process, and their presence was not only in the document filed on their behalf but also physical. Nevertheless, hope rests in the understanding that human rights are universal, and the principles used in these cases can potentially be adapted by litigants in African countries, even though this might be challenging given other compounding challenges facing the continent.

Additionally, children's participation in litigation in general and in climate change litigation, in particular, is characterised by threats of intimidation, financial challenges, and lack of know-how, which remain a challenge, especially to vulnerable groups, including Indigenous Peoples, women and those from a lower socioeconomic status.²⁰⁰ The arrest of nine students who participated in a peaceful demonstration supporting the EU resolution stopping the East African

193 A Nolan 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*' <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/> (accessed 11 March 2024).

194 IBA (n 22) 2.

195 As above.

196 BA (n 22) art 4 (5).

197 World Bank 2017. *World Development Report 2017: Governance and the Law* (Washington, DC: World Bank) 4. See also <https://www.bloomberg.com/news/articles/2021-08-18/climate-litigation-victories-face-enforcement-problems>

198 HDC, Case C-09/456689, (2015) 13-1396 (*Urgenda*) at 11.

199 *Juliana v United States* 947 F.3d 1159 (2020).

200 UNEP (n 134) 28.

Crude Oil Pipeline ('EACOP') implementation in Uganda is an example of this.²⁰¹ Such actions not only violate the students' right to assembly but also infringe on their right to participate. Even though these are legally not children, it potentially instils fear in children who would have otherwise participated in such or similar actions, as arrests are a strategy to silence critical and dissenting views.

9 Conclusion

It is undeniable that climate change is affecting the fabric of society in many ways. It is also undisputed that children are most affected by the adverse effects of climate change. These conditions have led to the rise of activism, which includes climate change litigation. Most cases brought to courts have relied on international law to call upon governments to act based on their obligations in the UNFCCC, the Paris Agreement, and other human rights treaties.

However, climate change litigation has been scant in Africa compared to developed countries. The low numbers have also been mirrored in children's participation in climate change litigation. These trends have been attributed to limited resources in light of other immediate challenges and poor or lack of enforcement of existing climate change legislation. Likewise, children's participation in climate litigation is a challenge, as cultural beliefs continue undermining them as incapable of making sound decisions. In limited cases, children are present through representatives such as parents, guardians, and civil society organisations, which is tokenistic. Such representation is arguably not transformative, and it is not the aspirations of participation presented in different international, regional, and domestic legislations on children's rights.

Nevertheless, the existence of normative and procedural frameworks that provide children with a right to participate, coupled with the availability of institutions, civil society organisations and children's majority in African countries, presents an opportunity for them to contribute and participate meaningfully in climate change litigation.

201 Juliet Kigongo 'Business and Human rights Resource Centre, 24 October 2022' <https://www.business-humanrights.org/en/latest-news/uganda-9-students-arrested-for-supporting-eu-resolution-on-halting-controversial-eacop-project-over-human-rights-environmental-concerns/> (accessed 28 March 2023). See T Weber 'Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders' (2023) 32 (1) *Review of European, Comparative & International Environmental Law* 67-76 for more on environmental defenders, the challenges they face, and the strategies that they use to bring about action from governments. The problems they face are similar to climate change litigants, including children.