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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ) is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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CLIMATE CHANGE, HUMAN RIGHTS AND THE RESPONSE OF THE AFRICAN HUMAN RIGHTS SYSTEM: FOCUS ON THE AFRICAN COMMISSION AND THE COURT ON HUMAN AND PEOPLES' RIGHTS

KELESE GEORGE NSHOM* & GIDEON FOSOH NGWOME**

Abstract

The article argues that the response of the African Human Rights System (AHRS) to climate change is inadequate due to some identified shortcomings and that the Commission and the Courts can enhance the climate activism by adopting some innovative measures. Drawing on relevant primary and secondary data, the article underscores the suitability of a human right-based approach to fighting climate change with focus on the measures that the Commission and the Courts can adopt in order to enhance the response of the AHRS to climate change. A key recommendation is that the limitations that weaken the response of the AHRS to climate change should be dealt with through some innovative measures that can be adopted by the Commission and the Court.

Key words: human rights, climate change, Commission, Court, system.

Introduction

The contours of the relationship between climate change and human rights (CCHRs) are increasingly becoming clearer. One of the linkages between CCHRs is that a healthy climate is a pre-condition for the full enjoyment of a wide range of internationally protected human rights¹. The human rights risks of climate change are particularly acute and in most cases, irreversible. From another perspective, the respect and enforcement of human rights can leverage and enhance the fight against climate change. On yet another front, measures to fight against climate change provide additional momentum for the protection of human rights. In fact,

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¹ Example of such human rights include the right to life, right to health, right to a healthy environment, rights to water and food, the right to shelter and property, the collective rights of indigenous peoples (IPs) and local communities to their ancestral lands and resources, rights of people in vulnerable situations, right to development, etc., enshrined in various international instruments on human rights.

international climate change policy guidelines² urge states to ensure that measures taken to tackle climate change are human rights-friendly. That is, climate mitigation and adaptation (CMA) actions must not result in the violation of human rights or hinder their enjoyment. For example, in taking CMA actions, states and other stakeholders are encouraged to ensure access to information, public participation in decision-making and access to justice, referred to by Takacs³ as 'environmental democracy' rights. These fundamental procedural human rights recognised by relevant international legal provisions⁴ are critical for fighting climate change. The relationship between CCHRs is articulated upon by some human rights officials and bodies notably the United Nations (UN) Special Rapporteur on Human Rights and the Environment,⁵ the Human Rights Council;⁶ the Inter-American Court of Human Rights;⁷ national courts;⁸ and CCHRs related legal and policy instruments.⁹ These articulations are supported by a growing body of scholarly literature.¹⁰

² Para. 2(c) & (d) of UNFCCC 'Decision 1/CP.16, The Cancún Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) hereinafter referred to as 'Cancún Agreements'. This paragraph directs that REDD+ intervening activities should be implemented in a way that enhance human rights; that REDD+ implementation respect the knowledge and rights of indigenous peoples (IPs) and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the UN General Assembly has adopted the UNDRIP; ensure the full and effective participation of relevant stakeholders, in particular, IPs and local communities. Available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>, accessed 20 April 2020.

³ Takacs, D. 2014. 'Environmental democracy and forest carbon (REDD+)'. 44 Environmental Law, No. 71, p. 80.

⁴ Principle 10 of Rio Declaration on Environment and Development, Rio de Janeiro (Brazil), 3 to 14 June 1992. Available at: <https://www.cbd.int/doc/ref/rio-declaration.shtml>; Articles 1-5 of Convention concerning Access to Information, Public Participation in Decision-making & Access to Justice in Environmental Matters, Aarhus, (Denmark), 25 June 1998, in force 30 Oct. 2001. Available at: https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf; Articles 17 & 18 of the Convention on Biodiversity Diversity, Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993. Available at: https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf; Articles 2, 5, 6, 7, 15, 22, 23 & 29 of ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples Convention, in Independent Countries, Geneva (Switzerland), 1989, in force 05 Sept. 1991. Available at: <https://www.ilo.org>.

⁵ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2019) report A/74/161, available at <https://undocs.org/en/A/74/161>.

⁶ The United Nations Human Rights Council adopted Resolution 10/4 on 'human rights and climate change' in which it recognized that 'climate change-related impacts have a range of implications for the effective enjoyment of human rights', available at <http://www2.ohchr.org/english/issues/climatechange/index.htm>, accessed 24 May 2020.

⁷ Inter-American Court of Human Rights, 'The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)', Advisory Opinion OC-23/17 of Nov. 15, 2017, Requested by the Republic of Colombia "available at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf" accessed 01 June 2020. The Court stated that the right to a healthy environment is a fundamental human right; that environmental degradation, including negative impacts of climate change, hinder the enjoyment of this fundamental human right and others; and, that states have an obligation to ensure that their actions (including the actions of those under their control) do not affect the enjoyment of these fundamental rights. See also the petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States, December 7, 2005.

⁸ *The State of the Netherlands vs. Urgenda Foundation (the Urgenda case)* "available at <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>"; *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*, Suit No. FHC/B/CS/53/05 (Unreported), (2005).

⁹ Para. 11 of the Preamble of the Paris Agreement on Climate Change, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; UN Human Rights Council's Resolution 10/4 on 'human rights and climate change'; Male' Declaration on the Human Dimension of Global Climate Change, 14 November 2007.

The human rights-based approach to fighting climate change has received wide support worldwide probably due to the inextricable nexus between climate change and human rights. Other reasons for pursuing a human rights-based approach to climate change include the limitations of the compliance mechanisms under existing climate change law and the absence of a specifically focused climate change court¹¹ or litigation system. It is unfortunate that the African Charter¹² and its Protocols¹³ do not expressly address climate change despite the severe human rights threats it poses. That notwithstanding, the African human rights system (AHRs) holds some potential to contribute to the fight against climate change. Thus, in the absence of an express reference to climate change by the African Charter and its Protocols, the response of AHRs to climate change can be inferred from the activities of the African Commission on Human and Peoples' Rights (the Commission) and the African Court on Human and Peoples' Rights (the Court). The Commission was

¹⁰ Doelle, M. 2004. 'Climate Change and Human Rights: The Role of International Human Rights in Motivating States to Take Climate Change Seriously'. 1 Macquarie Journal of International and Comparative Environmental Law, No. 2, p. 1; Kravchenko, S. 2008. 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change'. 9 Vermont Journal of Environmental Law, p. 513; Friedrich-Ebert-Stiftung & Center for International Environmental Law, 2009. Human Rights and Climate Change: Practical Steps for Implementation. Washington, DC & Geneva, p. 6; Knox, J. H. 2009. 'Linking Human Rights and Climate Change at the United Nations'. 33 Harvard Environmental Law Review, p. 479; Limon, M. 2010. 'Human Rights Obligations and Accountability in the Face of Climate Change'. 38 Georgia Journal of International and Comparative Law, p. 543; Bodansky, D. 2010. 'International Human Rights and Climate Change'. 38 Georgia Journal of International and Comparative Law, No. 3, p. 518; Chapman, M. 2010. 'Climate Change And The Regional Human Rights Systems'. 10 Sustainable Development Law & Policy, No. 2, p. 37; McNerney-Lankford, S. Darrow, M. & Rajamani, L. 2011. Human Rights and Climate Change: A Review of the International Legal Dimensions. Washington, DC: The World Bank, pp. 12-18; Orellana, M. A. (2012) *A Human Rights-Based Approach to Climate Change* in Parra J. [Eds.] The human rights-based approach: a field of action for human rights education. Cifedhop, pp. 53-58; Donald, K. 2013. 'Human Rights Practice: A Means to Environmental Ends?'. 3 Oñati SocioLegal Series, issue 5, pp. 908, 912 & 914; Pathak, P. 2014. 'Human Rights Approach to Environmental Protection'. 7 OIDA International Journal of Sustainable Development, No. 1, pp. 17 and 21; UNEP, 2015. Climate Change and Human Rights. UNEP, p. 2; Jegede, A. O. 2016. The Climate Change Regulatory Framework and Indigenous Peoples' Lands in Africa: Human Rights Implications. Ph.D Thesis, University of Venda, Pretoria University Law Press, pp. 102-103; Addaney, M. Boshoff, E. & Olutola, B. 2017. 'The Climate Change and Human Rights Nexus in Africa'. 9 Amsterdam Law Forum, No. 3, p. 1; Albers, J. 2017. Human Rights and Climate Change – Protecting the Right to Life of Individuals of Present and Future Generations'. Master Dissertation, Utrecht University, p. 9, available at <https://www.knvir.org/wp-content/uploads/2018/11/Albers.pdf>, accessed 20 April 2020.

¹¹ Kravchenko, S. 2010. 'Procedural Rights as a Crucial Tool to Combat Climate Change'. 38 Georgia Journal of International and Comparative Law, p. 616.

¹² African Charter on Human and Peoples' Rights, Banjul (Gambia), 01 June 1981, in force 21 Oct. 1986. Available at: https://www.achpr.org/public/Document/file/English/banjul_charter.pdf

¹³ The Protocols include: Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Ouagadougou (Burkina Faso), 10 June 1998, in force 25 Jan. 2004. Available at: https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_h uman_and_peoples_rights_e.pdf; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Maputo (Mozambique), 01 July 2003, in force 25 Nov. 2005. Available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>; Protocol on the Statute of the African Court of Justice and Human Rights, Sham El-Sheikh (Egypt), 01 July 2008, updated 11 May 2020. Available at: <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Malabo (Equatorial Guinea), 27 June 2014, updated 02 April 2019. Available at: <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

established by the African Charter¹⁴ which charged it with three principal functions to wit: the protection of human and peoples' rights; the promotion of human and peoples' rights; and the interpretation of the African Charter.¹⁵ The Court on the other hand was created¹⁶ in order to complement¹⁷ the mandate of the Commission by providing legally binding judgments. The Commission and the Court act through a variety of measures that are embedded in their mandates. The works of these two institutions in promoting and protecting human rights in Africa to a limited extent, have contributed to the response of the AHRS to climate change. However, there is much to be done by the Commission and the Court in order to enhance the response of the AHRS to climate change.

Evidence¹⁸ abound to support the undisputed fact that climate change is already threatening the enjoyment of a wide range of internationally protected human rights in Africa. Whilst the enforcement of human rights law can contribute to moving forward the climate change course, the potentials of AHRS in tackling climate change appear to be largely untapped. Consequently, the response of the AHRS to climate change is weak despite the acute and irreversible threats climate change poses to the enjoyment of a wide range of protected human rights in Africa. For instance, the African Charter and its Protocols disappointingly, make no reference to climate change. This may probably be because at the time the Charter was adopted little was known about climate change, especially in Africa. The same cannot, however, be said of the protocols which were all adopted when the international policy and legal response to climate change were already gaining momentum. The Commission has, however, adopted some Resolutions¹⁹ that address the human rights implications of climate change much in the same way as human rights bodies around the world²⁰. Sadly, the Commission's resolutions are

¹⁴ Articles 30-68 of the African Charter.

¹⁵ See generally Article 45 of the African Charter which sets out the mandate of the Commission.

¹⁶ The Court was created by Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (African Court Protocol), adopted in Ouagadougou in June 1998, in force 25 Jan. 2004.

¹⁷ Article 2 of the African Court Protocol.

¹⁸ Mwebaza, R. (2009) *Climate Change and the International Human Rights Framework in Africa* in Mwebaza R. & L.J. Kotzé [Eds.] *Environmental governance and climate change in Africa: legal perspectives*. Institute for Security Studies, p. 229; Tamasang, C. F. (2009) *The Clean Development Mechanism and Forestry Projects in Africa: The Case of Forestry Projects in Cameroon* in Mwebaza R. & Kotzé L. J. [Eds.] *Environmental governance and climate change in Africa: legal perspectives*. Institute for Security Studies, p. 187.

¹⁹ See in this respect, Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI)09 adopted at its 46th Ordinary Session held from 11-25 November 2009 in Banjul; Resolution 271 on Climate Change in Africa - ACHPR/Res.271(LV)2014 adopted at its 55th Ordinary Session held in Luanda, from 28 April to 12 May 2014; and Resolution 342 on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII)2016 adopted at its 58th Ordinary Session, held in Banjul, from 6-20 April 2016.

²⁰ See for instance, the UN Human Rights Commission (UNHRC) Resolution 7/23 on Human Rights and Climate Change, adopted at the 41st Meeting of the Human Rights Council on 28 March 2008; the UN Human Rights Council Resolution 10/4 on 'human rights and climate change', available at <http://www2.ohchr.org/english/issues/climatechange/index.htm>, accessed 24 May 2020.

hardly implemented probably due to inadequate political will by member States and limited financial resources, but also due to the Commission's inability to enforce its own measures. How the Commission can secure this political will in the process of protecting human rights, especially those affected by extreme climatic events constitute a major challenge.

Another problem is that the Commission's resolutions appear to have no legally binding force as the African Charter contains no provision for their enforcement. Moreover, it is unfortunate that the Court has not yet made any pronouncement on the CCHRs nexus in an era marked by a ripple of human rights-based climate change petitions and corresponding judgments across the world. In fact, courts across the world including regional human rights courts are building a body of human right-based climate change case-law²¹ that lends support to combating climate change. In consequence of the above limitations, the response of the AHRS to climate change remains inadequate with the effect that it lends limited support to the fight against climate change, thus raising the problem of its effectiveness.

The ever-increasing frequency of the policy guidelines and human rights-based climate petitions to the courts requesting for climate actions in order to curb the impacts of climate change on human rights and the corresponding judgments worldwide are telling and speak volumes of the need for the AHRS to replicate them. A key challenge is, therefore, for the Commission and the Court to strongly embrace the above practices within the framework of their mandates of promoting, protecting, interpreting, adjudicating and advising on human rights issues. This of course will require ground-breaking human rights-based climate change measures that enhance the response of the AHRS to climate change.

The objective of this article is, therefore, to evaluate the response of the AHRS to climate change with a focus on the innovative human right-based climate measures that the Commission and the Court can adopt in order to best enhance the response of the AHRS to climate change. To achieve this, the research analyses the African human rights legal instruments and other human rights related treaties ratified by member states, relevant climate change legal instruments, and case-law. The analyses are aided by an extensive review of existing literature on the subject matter under consideration. The research brings to limelight the emerging interconnection of climate change and human rights and the inadequate response of the AHRS to climate change.

²¹ See for example, the *Urgenda case* (n 8); *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*, Suit No. FHC/B/CS/53/05 (Unreported), (2005); Inter-American Court of Human Rights, n. 7 above.

The Emerging Interconnection between Climate Change and Human Rights Law

The climate change wind is gusting across the globe demanding for a paradigm shift in combating it. Human rights law is one of the legal disciplines that offers an opportunity to tackle climate change. In fact, over the years, climate change law (CCL) activists and scholars²² continue to consider human rights law as a suitable tool for combating climate change and by extension, lever for the progressive development of CCL. Because these two areas of the law began at different times and have been developing separately for the most part, their connection has not been conspicuous until recently. In the last two decades, it has become clearly visible that CCHRs are closely linked. The nexus between them has instigated much scholarly debate geared towards demonstrating the interplay between the two bodies of law governing them and exploiting implementation synergies between such laws. As noted by Ngwome,²³ the international human rights legal framework provides an effective regime within which to design climate change mitigation strategies. Mwebaza²⁴ had earlier noted that the international human rights regime provides an effective and practical framework from within which Africa can respond to the various impacts of climate change. The emerging interconnection of CCHRs is captured by some relevant international human rights 'soft law',²⁵ instruments which are gradually receiving judicial blessings.²⁶

A Global Recognition of the Human Rights Dimension of Climate Change

The global recognition of the relationship between human rights and climate change is still embryonic as only soft law instruments exist in this perspective. The Male's Declaration on the Human Rights Dimension of Global Climate Change of 14 November 2007 is an example. The Declaration is an intergovernmental statement that explicitly recognizes that:

climate change has clear and immediate implications for the full enjoyment of human rights including inter alia the right to life, the

²² Tamasang, C. F. (2009), *op. cit.*, p. 187; Mwebaza, R. *op. cit.*, p. 228; Ngwome, G. F. 2018. The Contribution of Forest to Climate Change Mitigation under the REDD+ Initiative in Cameroon: The Search for an Appropriate Legal Framework. Ph.D thesis. University of Yaounde II, p. 106.

²³ Ngwome, G. F. *op. cit.*, p. 106.

²⁴ Mwebaza, R. *op. cit.*, p. 228.

²⁵ Soft law instruments or 'Voluntary' standards such as: Declarations, Resolutions, Recommendations, Directives, Statements, Guidelines, Stipulations, Targets, Plans, Memorandum of Understanding, etc. are legally non-binding instruments, having only persuasive authority that may harden into binding requirements in the future. See Tamasang C. F. 2014. 'Constructing synergies for the conservation and wise use of wetlands in the Central African sub-region: legal and institutional pathways'. III Revue Africaine de Droit Public, No. 5, p. 29.

²⁶ *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*, Suit No. FHC/B/CS/53/05 (Unreported), (2005); Petition to the Inter-American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States; *The State of the Netherlands vs. Urgenda Foundation* (the *Urgenda case*) "available at <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>" accessed 24 June 2020; etc.

right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.

The UN Human Rights Commission (UNHRC) Resolution 7/23 on Human Rights and Climate Change²⁷ is another soft law instrument that expresses concern over the fact that climate change poses serious threats to people around the world, and has implications for the full enjoyment of human rights. In addition, the UN Human Rights Council adopted Resolution 10/4 on ‘human rights and climate change’ in which it recognised that ‘climate change-related impacts have a range of implications for the effective enjoyment of human rights’.²⁸ In fact, while commenting on the Resolution, Mwebaza²⁹ reiterated that human rights commitments and obligations have the potential to inform and enhance international and national climate change policy-making. Measures to promote and protect human rights therefore, appear to offer opportunities for the implementation of climate change actions. In consequence, states’ human rights and climate change obligations are aligned.

Furthermore, a human rights-based approach to fighting climate change is imbedded in Paragraph 11 of the Preamble of the 2015 Paris Agreement on Climate Change (Paris Agreement)³⁰ which requests parties when taking action to address climate change, to respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, etc. This reference to human rights constitutes a milestone towards greater integration of human rights in international climate governance. The importance of such reference, however, depends on the extent to which the Paris Agreement is implemented. There is thus an increasing tendency for implementation synergy between CCHR laws and for human rights bodies to work closely with climate change bodies for enhanced results in terms of fighting climate change that is critical for promoting and protecting human rights.

²⁷ Adopted at the 41st Meeting of the Human Rights Council on 28 March 2008.

²⁸ See Office of the UN High Commissioner for Human Rights, Human Rights and Climate Change, available at <http://www2.ohchr.org/english/issues/climatechange/index.htm>, accessed 24 May 2020.

²⁹ Mwebaza, R. *op. cit.*, p. 232.

³⁰ Paris Agreement, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf

A Gradual Judicial Recognition of the Interconnection of Human Rights and Climate Change

There is a near absence of case law on human rights approach to the fight against climate change. The available data show that the judiciary is yet to make headway in this direction. Nevertheless, courts in some countries have begun to consider human rights law as the basis to fight climate change, even though the move is still timid because few cases exist in this perspective. *The State of the Netherlands vs. Urgenda Foundation* (the *Urgenda case*)³¹ – the most authoritative example of the human rights-based climate change case has reaffirmed human rights law as the basis of the obligation of the Dutch government to take preventive actions to reduce its GHG emissions. On 20 December 2019, the Dutch Supreme Court upheld the decision of the Court of Appeal establishing the legal responsibility of the Dutch government to urgently and significantly reduce her GHG emissions in line with its human rights obligations. Another exemplary human rights-based climate change case in point which of course, is the only one instituted in Nigeria is the *Gbemre v. Shell*³² in which the Federal High Court of Nigeria (FHC) while ruling against the defendants, held that Shell's flaring of methane, a GHG from its gas production activities in the Niger Delta violated human rights to a clean and healthy environment protected under the Nigerian constitution and the African Charter.³³ In this case, Jonah Gbemre on behalf of himself and some members of his community living near gas flaring sites in the Niger Delta, citing climatic changes among other impacts of gas flaring on their community, instituted an action against Shell Petroleum Development Company of Nigeria Limited, the Nigerian National Petroleum Corporation, and the Attorney General of the Federation in the FHC of Nigeria, claiming that gas flaring was a violation of their fundamental rights to life and dignity guaranteed under the Nigerian Constitution.³⁴ In a ruling on 14 November 2005, the FHC of Nigeria ruled against the defendants holding that the flaring of gas in the community amounted to a gross violation of the Applicants' fundamental rights to life including their rights to a healthy environment and dignity of human person and then ordered the defendants to take immediate steps to stop the further flaring of gas in the plaintiffs' community.³⁵

³¹ "available at <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>" accessed 24 June 2020.

³² *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*, Suit No. FHC/B/CS/53/05 (Unreported), (2005).

³³ See United Nations Environment Programme, (2017), 'The Status of Climate Change Litigation – A Global Review', ISBN No: 978-92-807-3656-4, pp. 31 and 32.

³⁴ See Duruïke, p. 2018. Climate Change Litigation and Corporate Accountability in Nigeria: The Pathway to Climate Justice?. Masters Dissertation, the University of British Columbia, p. 6.

³⁵ *Ibid.*

These cases are an indicator of the near universal acknowledgment that climate change is a challenge to the enjoyment of human rights and thus, the suitability of human rights law as a tool for addressing climate change. In fact, these legal prescriptions and case-law appear to make human rights protection systems the bedrocks for general environmental protection³⁶ and specifically for combating climate change. This is to buttress the near universal consensus that climate change cannot continue to be addressed in isolation of the internationally established human rights legal prescriptions.

There are many advantages of a human rights-based approach to addressing climate change. Given that states have obligations under international law to protect individuals against threats posed by climate change, human rights law offers a momentum that is essential for addressing climate change.³⁷ Stakeholders involved in climate change negotiations may pay little attention to the concerns and interests of poor, marginalized and vulnerable people who are disproportionately affected by climate change. Using human rights law to address climate change thus enables these groups to have their concerns taken on-board when taking actions to promote and protect human rights. Since the impacts of climate change interfere with and threaten the enjoyment of their human rights, the enforcement of their human rights which seems to attract more political concern, provides a window of opportunity to properly fight against climate change.

A human rights-based approach to addressing climate change is, however, not without some challenges in Africa. Mwebaza expresses concern that it seems superficial to consider the international human rights regime as a framework for responding to the challenges of climate change in Africa because the continent is not known to be a 'bastion' for the protection and promotion of human rights.³⁸ This assertion does not only reveal the inherent limitation of the AHRS in protecting and promoting human rights in Africa, but also in addressing climate change on the continent. One would expect the assertion to tickle the Commission and the Court to take measures to overcome the challenge of Africa's response to global problems too late and too little. This, the Commission and the Court must do by opening their doors to welcome and pronounce on climate change petitions that have a bearing on human rights protection. Such an approach would usher well for the AHRS being an appropriate tool for addressing climate change in Africa.

³⁶ Hunter, D. Salzman, J. & Zaelke, D. 1998. International Environmental Law and Policy. Foundation Press, p. 1305.

³⁷ Mwebaza, R. *op. cit.*, p. 233.

³⁸ Mwebaza, R. *op. cit.*, p. 230.

Be that as it may, a cross section of the African population is already being affected by climate change as it hinders the enjoyment of their human rights. Some major climate change bodies³⁹ and researchers⁴⁰ have concluded that Africa is one of the most vulnerable continents to climate variability and change, despite contributing less than 4% of global GHG emissions. Having that in mind and given that climate change is a common concern of humankind and fighting it is a shared responsibility, it is apt for one to expect the Commission and the Court to take robust human rights-based measures to address the challenges posed by climate change. Furthermore, the United Nations Framework Convention on Climate Change (UNFCCC), 1992 which almost all African states have ratified, obliges states parties thereto, to '... protect the climate system ..., on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.⁴¹ The deep human rights implications of this international policy guideline translates into a clarion call on the Commission and the Court to gather momentum and use human rights law as a springboard to enforce the human rights related provisions of the UNFCCC and any other relevant climate change legal instrument ratified by African states.

The Inadequate Response of the African Human Rights System to Climate Change

Tamasang⁴² opines that the promotion and enforcement of human rights constitute a governance mechanism for addressing climate change. As highlighted above, the failure of the African Charter and all its Protocols⁴³ to expressly address climate change has resulted to timid response by the Commission. The Commission has addressed the question of climate change to an extent while the Court is yet to do so. The AHRS through the works of the two institutions can lend greater support to the effective implementation of climate change actions. As it has been observed, the response of the AHRs to climate change is inadequate and mixed; the Commission has been active in adopting some resolutions but the Court is yet to make pronouncements on the issue.

³⁹ M. Parry et al. [Eds.] 2007. IPCC Climate change 2007: impacts, adaptation and vulnerability, contribution of Working Group II to the Fourth Assessment Report of the IPCC. Cambridge University Press, p. 435; UNFCCC Secretariat. 2007. Climate change: impacts, vulnerabilities and adaptation in developing countries. The Information Services of the UNFCCC Secretariat Bonn, pp. 18 & 52.

⁴⁰ Mwebaza, R. (2009) *The Impact of Climate Change in Eastern Africa* in Mwebaza R. & Kotzé L. J. [Eds.] Environmental governance and climate change in Africa: legal perspectives. Institute for Security Studies, p. 3; Zerisenay, H. (2009) *Adaptation Policies in Africa: Challenges and Opportunities in the Application of Tools and Methods on Climate Change* in Mwebaza R. & Kotzé L. J. [Eds.] Environmental governance and climate change in Africa: legal perspectives. Institute for Security Studies, p. 72.

⁴¹ Article 3(1) of the UNFCCC.

⁴² Tamasang, C. F. (2009), *op. cit.*, p. 187.

⁴³ *op. cit.*, note 13.

The Active Role of the Commission in Response to Climate Change

Within the framework of exercising its mandate which involves promotional and protective missions,⁴⁴ the Commission acts through its special mechanisms such as rapporteurs, committees and working groups. In accordance with Article 45(1)(b)⁴⁵ of the African Charter, the Commission could pass thematic,⁴⁶ administrative⁴⁷ and country specific⁴⁸ resolutions to address climate change. Thus, in line with its mandate to promote human and peoples' rights and ensure their protection in Africa,⁴⁹ the Commission has adopted some resolutions that explore the relationship between climate change and human rights in Africa. The Commission adopted Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa⁵⁰ in 2009 in which it raised certain important CCHRs-related concerns. One such concerns was that before the Copenhagen Conference of Parties (COP) of the UNFCCC in December 2009.

The international climate change negotiations made no clear reference to human rights principles such as the rights to traditional knowledge and intellectual property of local and indigenous communities, as well as the principle of free, prior and informed consent (FPIC) by communities, as enshrined in the Maputo Convention and other relevant African human rights instruments. Another important concern was the lack of human rights safeguards in various draft texts of the climate change conventions that were under negotiation, which the Commission feared could put at risk the life, physical integrity and livelihood of the most vulnerable members of the society notably isolated indigenous and local communities, women, and other vulnerable social groups. After raising the above concerns, the Commission ordered a study to be carried out on the impacts of climate change on human rights in Africa; and urged the Assembly of Heads of State and Government of the AU to:

⁴⁴ Article 45(1)&(2) of the African Charter.

⁴⁵ The Article empowers the Commission to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.'

⁴⁶ A thematic resolution develops in details specific human right themes covered in the African Charter and describes the standard set by the African Charter and defines the states' obligations in respect of such right. See Center for Human Rights University of Pretoria. 2016. A guide to the African human rights system. Pretoria University Law Press, p. 36.

⁴⁷ Administrative resolutions among other things deal with cooperation between the Commission and other organs of the AU, intergovernmental organisations, national human rights institutions and NGOs. See *ibid*.

⁴⁸ Country specific resolutions address important human rights concerns in member states especially widespread violations in a member state where no individual has submitted any communications to the Commission in respect of those violations. The Commission for instance, has passed specific resolutions to address the human rights situation in Sudan, Somalia, Uganda, Côte d'Ivoire, and many other countries. See *ibid*.

⁴⁹ Article 45 of the African Charter.

⁵⁰ Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI)09 adopted at its 46th Ordinary Session held from 11-25 November 2009 in Banjul, Gambia.

- ensure that human rights standards and safeguards, such as the principle of FPIC, be included in any adopted legal text on climate change as preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations;
- ensure that special measures of protection for vulnerable groups such as children, women, the elderly, indigenous communities and victims of natural disasters and conflicts are included in any international agreement or instruments on climate change; and
- take all necessary measures to ensure that the Commission participates in the AU's negotiating team on climate change.

Mindful of Articles 45(1)(b) and 24⁵¹ of the African Charter, the Commission also adopted Resolution 271 on climate change in Africa⁵² in 2014 in which it noted that the conduct of an in-depth study on the impact of climate change in Africa will contribute to the development of effective human rights-based measures and solutions. In furtherance of this, the Commission requested the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (hereinafter referred to as the Working Group on Extractive Industries), to undertake an in-depth study on the impact of climate change on human rights in Africa and called on civil society and other stakeholders to support the work of the Working Group in that respect.

To advance the climate activism of the AHRS, the Commission further adopted Resolution 342 on Climate Change and Human Rights in Africa⁵³ in 2016 in which it pointed Articles 22 and 24 of the African Charter as the suitable basis for addressing climate change. Article 22 deals with the right of all peoples to economic, social and cultural development and imposes on states the duty, individually or collectively, to ensure the exercise of the right to development. Article 24 deals with the right of all peoples to a satisfactory environment favourable to their development. In the same light, the Commission in the said Resolution further expressed the wish that the implementation of the UNFCCC and the Paris Agreement should adequately reflect the African perspective on human and peoples' rights, especially the right to a generally satisfactory environment favourable to their development, the right to development and the right to health. These rights are vulnerable to climate change which probably justifies why the

⁵¹ Article 24 guarantees the right of all peoples to a satisfactory environment favourable to their development.

⁵² Resolution 271 on Climate Change in Africa - ACHPR/Res.271(LV)2014 adopted at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

⁵³ Resolution 342 on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII)2016 adopted at its 58th Ordinary Session, held in Banjul, Gambia, from 6 to 20 April 2016.

Commission specifically mentioned that the implementation of the UNFCCC and the Paris Agreement should adequately reflect them. The Resolution also raised an avalanche of other concerns including:

- that African regional standards for the protection of the environment, management of natural resources and human and peoples' rights should be consistent with provisions of the UNFCCC and the Kyoto Protocol, to which all African states are parties;
- welcoming the agreement reached at COP21 meetings in December 2015 held in Paris, outlining obligations relating to, among other things, the limitation of GHG emissions, mitigation of and adaptation to climate change;
- the detrimental impact of the increased levels of GHGs which could lead to temperature rises with serious consequences on the lives of African populations;
- failure of developed countries parties to the UNFCCC to comply with their obligation to take the lead in mitigation while creating enabling conditions for African countries to realize their right to sustainable development and adapt to climate change; and
- the absence of full, effective and sustained implementation of the UNFCCC through long-term cooperative action, including a lack of technology transfer and financial assistance for mitigation and adaptation, seriously undermines the capacity of African governments to safeguard human rights in Africa.

More importantly, the Commission in order to strengthen the climate activism of the AHRS adopted Resolution 342 in which it encourages member states of the AU to:

- strengthen regional and international co-operation in order to achieve a strong, committed and comprehensive climate action that will ensure that the human rights of Africans are safeguarded to the greatest extent possible both today and for future generations;
- urgently requests member states to adopt and implement the special measures of protection for vulnerable groups such as children, women, older persons and persons with disabilities, indigenous communities and other minorities as well as victims of natural disasters and conflicts.

The Commission then tasked its Working Group on Economic and Social Rights, in collaboration with the Working Group on Extractive Industries, to undertake a 'study on the impact of climate change on human rights in Africa'. Such a study is

critical for preparing the ground works for subsequent adoption and implementation of human rights-based climate actions.

Through the above resolutions of the Commission, the AHRS has established important policy guidelines addressing the human rights implications of climate change much in the same way as human rights bodies around the world⁵⁴. The above resolutions of the Commission, therefore, constitute progressive policy guidelines for combating climate change in terms of mitigation and adaptation in Africa. Although the resolutions lend help to the fight against climate change, the African Charter contains no provision for the enforcement of the Commission's resolutions, findings and recommendations with the effect that when they are overlooked by AU member States, no legal action may lie. On another sad note, the Commission's resolutions are hardly implemented probably due to inadequate political will by member States of the AU and limited financial resources, and also due to the Commission's inability to enforce its own measures.

The question of the binding nature of the Commission's resolutions is raised. Are they legally binding or merely aspirational? As a regional body similar to other Commissions within the context of community and integration law, the resolutions of the Commission ought to be hard law and therefore, binding on AU member States. Simply put, the Commission's resolutions are international law with regional character which ought to be binding. However, the Commission is usually unable to enforce its measures probably because it lacks the appropriate tool to do so and consequently, the legal strength of its resolutions is weakened. In this regard, the Commission's resolutions remain aspirational or persuasive in character. Persuasive instruments in international law have always been a subject of debate that renders their enforcement and effectiveness frail and problematic. Instruments of moral persuasion only appeal to conscience but most governments unfortunately are conscienceless and do not understand the language of morality.⁵⁵ In the absence of political commitments by AU member States to implement the Commission's resolutions, they can only offer minimal support to addressing climate change. Just how effective the implementation of the Commission's resolutions is, therefore, depends largely on greater involvement of public-spirited civil society and activists involved in the CCHRs course, stronger regional and national political commitments and financial strength to implement climate actions, but also the

⁵⁴ See for instance, the UN Human Rights Commission (UNHRC) Resolution 7/23 on Human Rights and Climate Change, adopted at the 41st Meeting of the Human Rights Council on 28 March 2008; the UN Human Rights Council Resolution 10/4 on 'human rights and climate change', available at <http://www2.ohchr.org/english/issues/climatechange/index.htm>, accessed 24 May 2020.

⁵⁵ Ngwome, G. F. 2013. The Protection of Foreign Direct Investments under Bilateral Investment Treaties and the Erosion of State Sovereignty - The Case of Cameroon. Masters Dissertations, University of Dschang, p. 152.

commitments of the Commission to take bold steps to diplomatically coerce defaulting States to implement climate actions.

Notwithstanding the achievements of the Commission in advancing the climate change activism of the AHRS through resolutions, much still needs to be done by the Commission to enhance the response of the system to climate change. Within the framework of exercising its mandate which involves promotional, protective and interpretative missions,⁵⁶ the Commission can order climate actions through its special mechanisms such as rapporteurs, committees and working groups. With respect to its protective mission, upon receiving a human right-climate change related communication against a State, the Commission could embark on a protective mission and order an on-site or fact-finding mission to the State in question for the purpose of investigating specific facts relating to the communication. The report of the special rapporteurs, committees and working groups as the case may be, can form the basis of the Commission's measures or recommendations requesting the State in question to take climate actions. On its own motion, the Commission without any prior communication submitted to it may also undertake fact-finding missions concerning widespread allegations against a state party for not taking climate actions that constitute human rights violations.

Regarding its promotional mission, the Commission may cooperate with other African and international institutions concerned with the promotion and protection of human rights to tackle climate change; and carry out country sensitisation missions on CCHRs-related issues. Furthermore, the Commission may of its own motion submit communications to the Court in respect of gross violations of human rights that result from failure or unwillingness of States to comply with its decisions or provisional measures requesting such states to take climate actions to protect human rights.

Again, the Commission could on the basis of Article 45(3)⁵⁷ of the African Charter adopt an extensive interpretation of some of the legal provisions guaranteeing human rights whose enjoyment are threatened by climate change, to impose obligations on States to implement climate actions. Relevant legal provisions in this regard include, but not limited to Article 24 of the African Charter guaranteeing the right to a general satisfactory environment favourable to peoples' development;

⁵⁶ Article 45(1), (2) & (3) respectively.

⁵⁷ The article empowers the Commission to interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organization recognized by the OAU.

Article 16(2) guaranteeing the right to health⁵⁸; Article 4 guaranteeing the right to life; etc. The Commission could for example, interpret the right to a healthy environment as guaranteed by Article 24 of the African Charter to implicitly include an obligation on States to carry out climate actions. The Commission had earlier made such an interpretation of Article 16 of the African Charter by holding that a State must not carry out or allow any practice that would be harmful to peoples' physical and mental health.⁵⁹ This was one of the issues the Commission had to deal with in *Social and Economic Rights Action Center v. Nigeria* (2002) Communication No. 155/96.⁶⁰ The Commission noted that the government of Nigeria's right to exploit oil must be exercised in a manner that does not infringe people's rights to health and to live in a safe and clean environment. The Commission found Nigeria guilty of violating several human rights, including the right to health and the right to clean environment as guaranteed under Articles 16 and 24 of the African Charter, by failing to fulfil the minimum duties (by failing to take adequate measures to protect the Ogoni population from the negative impacts of oil exploitation in the Niger Delta) required by these rights. The Commission then ordered the government of Nigeria to clean up damaged areas and develop good planning and monitoring systems to prevent future contamination from oil activities.⁶¹ In the light of this decision, the Commission could, in its recommendations order governments not to allow activities that contribute to climate change or to carry out climate actions to prevent harms to the rights to health, life, water, food, shelter, property, etc.

Although the above constitutes human rights based opportunities to address climate change, the legal status of the Commission's recommendations is debatable,⁶² making their implementation challenging. However, with the exception of Botswana,⁶³ many States have never challenged the legal status of the Commission's recommendations and it considers them to be legally binding.⁶⁴

⁵⁸ See also Article 12 of the Covenant on Economic, Social and Cultural Rights, New York (United States), 16 December 1966, in force 3 Jan. 1976. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁵⁹ Amnesty International. 2006. A guide to the African Charter on Human and Peoples' Rights. Amnesty International Publications, p. 24.

⁶⁰ Ref: ACHPR/COMM/A044/1 27th May 2002.

⁶¹ Amnesty International, *op. cit.*, p. 24.

⁶² Ssenyonjo, M. 2018. 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)'. 7 International Human Rights Law Review, p. 10.

⁶³ *Kenneth Good v Republic of Botswana*, Communication 313/05, 28th Activity Report. In its Combined 32nd and 33rd Activity Report, ex.cl/782(xxii) Rev.2 (2013), the African Commission noted in para. 24 that: 'Through Diplomatic Note Ref: 10/12 bea5/21 c viii (4) AMB of 23 March 2012, the Republic of Botswana unequivocally stated the following: 'the Government has made its position clear; that it is not bound by the decision of the Commission'. Cited by Ssenyonjo, M. *op. cit.*, p. 11.

⁶⁴ See for instance, *Sir Dawda K. Jawara v The Gambia*, Communication 147/95 and 149/96, 13th Activity Report, (2000) AHRLR 107, para. 31; *Legal Resources Foundation v Zambia*, Communication 211/98, 14th Annual

Moreover, the Commission can refer complaints to the Court that delivers binding judgments⁶⁵ on compliance with the African Charter and any other relevant human rights instruments ratified by the States concerned.⁶⁶ Rule 118 of the Commission's Rules of Procedure empowers it to seize the Court in some instances to wit: if it considers that a State has not complied with, or is unwilling to comply with recommendations or provisional measures in its communications; or where a situation that constitutes serious or massive violations of human rights comes to the attention of the Commission. The aim of submitting or referring a case to the Court is to transform the Commission's 'requests' for provisional measures into legally binding Court 'orders'.⁶⁷ Of course such a referral will be made only if it is 'necessary' to do so. This means that there must be pressing need for a binding court judgment in response to a situation of extreme gravity and urgency.⁶⁸ The impacts of climate change on the enjoyment of human rights are examples of cases of extreme gravity and urgency. Consequently, they can necessitate a referral by the Commission to the Court where a State defaults to take climate action prescribed by the Commission in its recommendation or provisional measure to protect human rights. However, Viljoen and Louw⁶⁹ succinctly note that 'the mere fact that the Court will provide legally binding and specific remedies and better formulated judgments will not in itself guarantee improved State compliance'. The big challenge, therefore, is that the effective implementation of the measures of the Commission and the Court depends highly on the cooperation and support they receive from member States. Such cooperation and support includes States' authorisation for the Commission's missions and concrete steps by member States to implement the Commission's decisions and recommendations⁷⁰ on CCHRs nexus.

The Awaited Response of the Court to Climate Change

The Court on its part exercises contentious jurisdiction in interpretation and application of the African Charter, the African Court Protocols⁷¹ and other relevant

Activity Report, (2001) AHRLR 84, paras 61–62; *International Pen, Constitutional Rights Project, Civil Liberties Organisations and Interights (on behalf of Ken Saro-Wira) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97, 12th Annual Activity Report, (2000) AHRLR 212, paras. 113 & 116; *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria*, Communication 87/93, 8th Annual Activity Report, (2000) AHRLR 183, paras. 6–9. Cited by Ssenyonjo, M. *op. cit.*, p. 11.

⁶⁵ Article 30 of the African Court Protocol.

⁶⁶ Article 7 of the African Court Protocol.

⁶⁷ Ssenyonjo, M. *op. cit.*, p. 38 & 39.

⁶⁸ *African Commission on Human and Peoples' Rights (Benghazi) v Libya*, Application 4/2011, Order for Provisional Measures (25 March 2011). Cited by *ibid.*, p. 40.

⁶⁹ F. Viljoen & L. Louw. 2007. 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004'. 101(1) *The American Journal of International Law*, pp. 1–34, at 33 & 1.

⁷⁰ Amnesty International. 2019. *The state of African regional human rights bodies and mechanisms 2018–2019*. Amnesty International Ltd, p. 36.

⁷¹ *op. cit.*, note 13.

human rights instrument ratified by the States concerned, and in determination of its own jurisdiction over matters in the event of disputes as to whether the Court has jurisdiction.⁷² The court also exercises advisory jurisdiction⁷³ that enables it to give advisory opinions. Judgments and orders of the Court in its contentious proceedings are legally binding requiring State parties to comply with them in any case to which they are parties.⁷⁴ Disappointingly, in an era marked by a surge in human rights-based climate change litigations around the world, the Court has not yet made any pronouncement on the CCHR's nexus despite the acute and increasing threats posed by climate change to the enjoyment of human rights in Africa. The inaction of the Court is probably because it has not yet received any petition in this respect and consequently, the response of the AHRS to climate change remains inadequate with the effect that it lends limited support to the fight against climate change. Whenever an opportunity presents, it would be decisive and crucial for the Court to exercise jurisdiction to determine climate change petitions as the enjoyment of human rights are severely threatened by climate change.

For now, the major challenge as to whether human rights-based climate change litigation is tenable within the AHRS is, therefore, yet to be determined by the Court. In this respect, the court has a great opportunity in determining this because it has competence to determine its own jurisdiction over a subject matter in the event of a dispute as per Article 3(2) of the African Court Protocol. This is pertinent because the potential shortcoming as far as the response of the AHRS to climate change is concerned is that a problem of jurisdiction may be raised when the Court is petitioned to decide on a human right-based climate change case. This is so because AU human rights treaties are not clear on the jurisdiction of the Court with respect to climate change. As a solution, within the framework of exercising its contentious jurisdiction, the Court could interpret prescriptions of AU human rights treaties, as well as any other human rights treaty ratified by AU member States, in a way that imposes obligations on States to take climate actions.

Human rights-based climate change litigations that principally seek to coerce governments and non-state GHG emitters to take climate actions are undoubtedly a new paradigm for addressing climate change. Such litigations are flourishing globally and are increasingly based on the grounds that human rights are affected by the negative impacts of climate change.⁷⁵ In fact, climate change and human rights

⁷² Article 3 of the African Court Protocol.

⁷³ The Court may give advisory opinion on any matter within its jurisdiction, requested by the AU, AU organs, member states of the AU and any African organisation recognized by the AU. See Article 4(1) of the African Court Protocol.

⁷⁴ Article 30 of the African Court Protocol.

⁷⁵ Tamasang, C. F. (2009), *op. cit.*, p. 187.

activists in some countries have resorted to human rights law as a tool for taking climate actions against governments and major GHG emitting companies, requesting courts to hold them accountable for human rights violations. A leading case in which the court was not hesitant in deciding against the government ordering it to take climate actions for the purpose of protecting human rights is the *Urgenda case*. In this case, the Dutch Supreme Court confirmed the judgments of a District Court and an Appeal Court requiring the Dutch government to achieve a reduction of GHG emissions of 25% by 2020 compared to 1990, instead of the 20% reduction that the government had envisaged since 2011. The judgments clearly indicates that the Dutch government has a legal responsibility to urgently and significantly reduce her GHG emissions in line with its human rights obligations by taking more ambitious climate actions in order to protect human rights from the adverse effects of climate change.

The legal victory of the Urgenda Foundation against the State of the Netherlands in this case has triggered a wave of human rights-based climate change litigations⁷⁶ across the world aimed at coercing states to take ambitious climate actions. Notwithstanding the proliferation of such litigations, the African Court on Human Rights is yet to embrace such an approach and establish the human rights obligations of States to take climate actions. However, apart from the *Urgenda case*, the existing human rights-based climate change litigations are pending for want of means of proof; procedural challenges and as noted by Kotze and Plessis,⁷⁷ difficulties establishing proximate causation; appropriate plaintiffs and defendants; the fact that climate change harm is realised over very different time and spatial scales, rendering it an intergenerational concern unrestricted by geographical borders; etc.

For now it is clear that the African Court on Human Rights has made no pronouncements on human right-based climate change litigation because it has not been petitioned. The Dutch Supreme Court's decision in the *Urgenda case* considers that the European Convention on Human Rights (ECHR) imposes an obligation on countries to take measures to mitigate climate change on the basis of an expansive interpretation of Article 2 (right to life) and Article 8 (right to private

⁷⁶ Examples of such human rights-based climate change litigations include: *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14 per Perram J.; *Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) v ING* (19 April 2019); *Juliana v United States*; etc. Cited by Wit, E. Seneviratne, S. & Calford, H. 2020. Climate Change Litigation Update. Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update#autofootnote4>, accessed 24 June 2020.

⁷⁷ Kotzé L. J. & Du Plessis, A. 2020. 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent'. 50 Environmental Law, p. 627.

and family life).⁷⁸ This makes a good case for addressing climate change and therefore, worth replicating by the African Court on Human Rights. The Court can adopt such an expansive interpretation of the relevant provisions of human rights treaties to impose obligations on States parties to undertake ambitious climate actions to protect human rights. The landmark decision in the *Urgenda case* is clear evidence that human rights obligations are central to the response to climate change. Human rights systems therefore, provide a window of opportunity to compel governments worldwide to take ambitious and urgent climate actions. The progressive approach taken by the Dutch Supreme Court in the *Urgenda case* should hopefully inspire the African Court on Human Rights to emulate such an approach when opportunities present. For this to happen, public-spirited Non-Governmental Organisations (NGOs) involved in climate change and human rights activism need to replicate the thoughtful example of the Urgenda Foundation and institute human rights based public interest climate change litigations. More importantly, the Court needs to open its doors and welcome such petitions, declare its jurisdiction and pronounce judgments accordingly.

The motivating factor for using human rights law to address climate change is the growing public concerns about the impacts of climate change on human rights, but also emerging spotlight litigations on this issue. The Commission's earlier consideration of the necessity of improving human rights protection through the development of case-law on holding non-state actors accountable for human rights violations in Africa⁷⁹ can further inspire the Court to welcome petitions against non-state entities responsible for GHG emissions. Within the AHRS, states have legally binding obligations to take measures to enhance the enjoyment of human rights. These obligations can be linked to their GHG emissions reduction pledges made under the Paris Agreement. The Court could exploit this connection to enhance the response of the AHRS to climate change. The historic decision of the Dutch Supreme Court in the *Urgenda case* could serve as a template for the African Court on Human Rights is grounded on 'the rights to life and to respect for private and family life' guaranteed in the ECHR. By the same strand of reasoning, the African Court on Human Rights could base its decision on the rights to health, to life, to a healthy or clean environment, to water, to food, etc., guaranteed in the African Charter and other relevant human rights treaties.

⁷⁸ Available at <https://www.lexology.com/library/detail.aspx?g=0dc47cbf-affb-4715-96bd-d872feb59d7a> accessed 24 May 2020.

⁷⁹ Resolution 268 appointing Expert Members for the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa - ACHPR/Res.268(LV)2014 adopted at its 55th Ordinary Session, in Luanda, Angola, 28 April to 12 May 2014.

Much in the same way as in its contentious jurisdiction, the Court may within the framework of exercising its advisory jurisdiction, give advisory opinions on climate change issues that affect the enjoyment of human rights at the request of a member State of the AU, the AU or any of its organs, or any African organisation recognized by the AU, and the Court.⁸⁰

A good number of human rights-based climate change complaints have been brought before national courts,⁸¹ but also before UN human rights bodies and regional human rights institutions for the purpose of strengthening global climate activism. In the course of hearing such complaints, the institutions have acknowledged the CCHRs nexus by connecting the negative impacts of climate change on human rights to obligations undertaken by States under human rights laws. These developments are exemplary for addressing climate change and worth replicating by the African Human Rights Commission and the Court. Through such complaints, the Commission and the Court can adopt measures to encourage or diplomatically coerce defaulting States to take climate actions to prevent further climate change or to deal with actual climate change impacts that threaten the enjoyment of human rights. Through such complaints, the Commission and the Court can also hold States accountable for further climate change resulting from their inactions.

Notwithstanding the opportunities available to the AHRS to address climate change, the Commission's resolutions are hardly implemented probably due to inadequate political will by member States. This could be the same for court judgments; states parties as usual, may be reluctant to enforce the Court's judgments requesting them to comply with its remedial orders by taking climate actions. For instance, it was reported⁸² that from its inception to 30 June 2018, the Court had issued a total of 28 judgments on merits in which it found the state parties concerned at fault and thus issued remedial orders, but only one country⁸³ had fully complied with the Court's judgment at the close of the reporting period; some concerned countries had either partially complied⁸⁴ or not complied at all.⁸⁵ This state of affairs does not appear to be meaningful or effective response of the AHRS to climate change. It is, therefore, important for the Commission and the Court to think of how to diplomatically coerce defaulting States to comply with their resolutions and judgments respectively.

⁸⁰ Article 4(1) of the African Court Protocol.

⁸¹ Such as in the Netherlands, USA, France, Brazil, India, Pakistan, South Africa, etc.

⁸² *ibid.*

⁸³ Burkina Faso.

⁸⁴ Tanzania.

⁸⁵ Cote d'Ivoire, Kenya, Libya and Rwanda.

Conclusion

The above discussions lead one to arrive at some recapitulations. First, the nexus between human rights and climate change is well captured by legal and policy instruments on the two subjects, supported by court decisions and doctrine. Second, the AHRS holds great potentials to respond to climate change but the potentials at present are largely untapped and consequently, the response is inadequate. Third, the works of the Commission and the Court can enhance the response of the AHRS to climate change. In addition to the contributions of the Commission, the two bodies could leverage on their human rights mandates and adopt some innovative measures that offer progressive support to the climate change activism of the AHRS. Fourth, a wave of human rights-based climate change litigations are stockpiling before national courts,⁸⁶ regional human rights courts and UN human rights bodies for the purpose of strengthening the global climate activism. Fifth, despite the above opportunities, the AHRS suffers from some shortcomings that operate to weaken the system's effective response to climate change. Such defects include: no express reference to climate change in the African Charter and all its Protocols; the Commission's inability to enforce its measures; the fact that the Court has not yet made any pronouncement on climate change; and inadequate political will by member States and limited financial resources to implement the recommendations of the Commission.

The identified limitations that weaken the response of the AHRS to climate change could be availed by means of some innovative measures that the Commission and the Court can adopt. Such innovative measures are in terms of a human rights-based climate change litigation that involves an expansive interpretation of relevant human rights legal provisions to factor in the obligation to take climate action in order to protect human rights; a strong collaboration and co-operation spirit by the Court in order to secure the buy-in of politics from member States to implement and enforce its judgments; the Commission's strong collaboration and co-operation spirit to secure the buy-in of politics from member States to implement its recommendations and resolutions that appear to be hardly implemented. The effectiveness of such innovative measures depends largely on greater involvement of public-spirited NGOs and activists involved in climate change and human rights activism; the commitments of the Commission and the Court to take bold steps to diplomatically coerce defaulting States to implement their measures; and stronger regional and national political commitments to implement climate actions based on their international and national CCHRs obligations.

⁸⁶ Human rights-based climate change litigations have been brought before national courts in the Netherlands, USA, France, Brazil, India, Pakistan and South Africa, etc.

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