



University of Venda

(How) Could a Human Right to a Safe Climate Be Realized under African Union Law?

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Presented at a lunch talk webinar on climate change and human rights, convened by Prof. Dr. Birgit Peters, University of Trier, Germany

12 May 2021

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Compass

- Background
- Sketching gaps under the AHRS
- Addressing the gaps through AHRS mechanisms

Background

The recognition of a right to a safe climate is implicit in some of the promotional and protective works of UN charter and treaty monitoring bodies

Background

- Human Rights Committee → General comment No. 36 (2018) on the right to life, para 62
- Committee on Economic and Social Cultural Rights (→ General Comment No 12 of 1999 on the right to food, paras 4 and 7; General Comment No 15 of 2002 on the right to water, para 28; General Comment No 4 on the right to adequate housing in 1991, para 18; General Comment No 25 of 2020 on science and economic and socio cultural rights, para 81)
- Committee on the Elimination of Discrimination Against Women (→ General Recommendation No. 27 on Older Women and Protection of their Human → Rights, para 25; Reports on Djibouti, Seychelles, Vanuatu report), and
- The Committee on the Rights of the Child (→ Tuvalu in 2013, United kingdom 2016).

Background

Emerging features in the communications lodged before complaint mechanisms

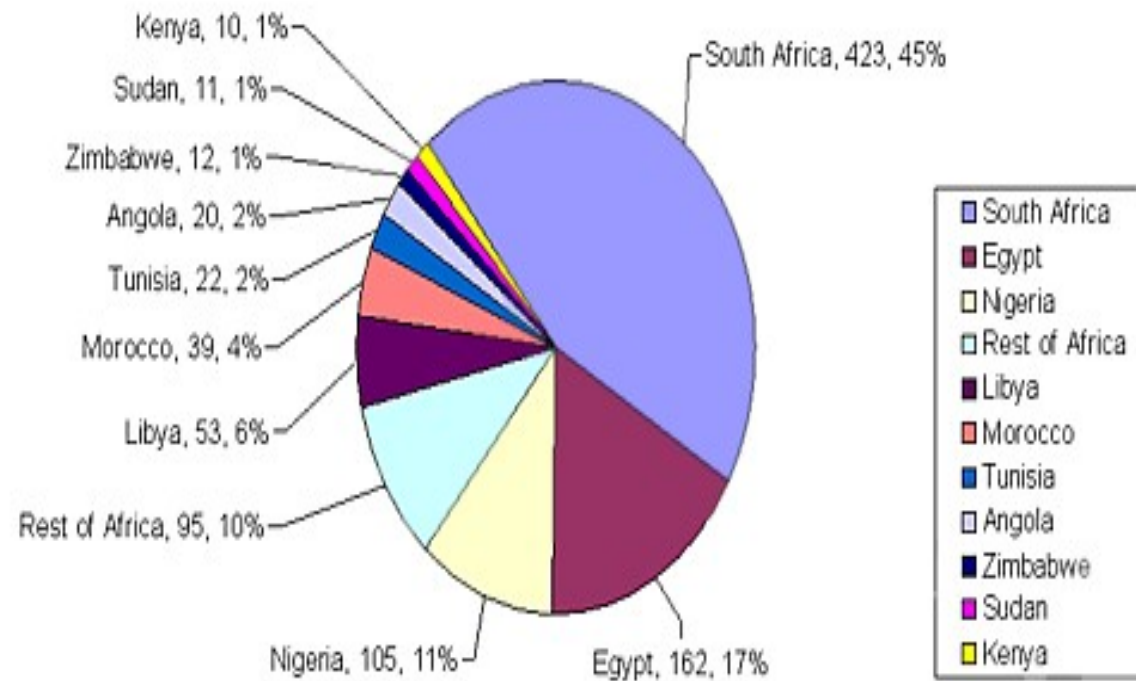
- HRC → Communication to the Human Rights Committee *Loane Teitiota v New Zealand* 15 September 2015 (initial submission) and views adopted 24 October 2019
- CRC → Communication to the Committee on the Rights of the Child in the case of *Chiara Sacchi (Argentina) and others v Argentina, Brazil, France, Germany & Turkey*

Background

- UN Charter system → Resolution 7/23 of 2008, Resolutions 10/4 of 2009, Resolution 18/22 of 2011, Resolution 26/33 of 2014 and Resolution 32/34 of 2016.
- Resolution 10/4 was adopted following the report of the Office of the High Commissioner on Human Rights (OHCHR).
- Mali claims that the activities of the populations in developed countries are to blame for a changing climate and a human rights concept can be used as a tool to address the adverse consequences resulting from such activities
- **Mali takes the view in its submission to the OHCHR that ‘laws and institutions for the defence of human rights must evolve to adapt to the new reality of climate change’**

Background Disproportionate contribution to present climate state

► Africa



► Source: Environmental Benefits

The AU –Human Rights System (AHRS)

- The AHRS is constituted by a set of human rights instruments that are admitted by states as binding and the quasi-judicial and judicial treaty monitoring bodies.
- African Charter on Human and Peoples' Rights (1982), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention (2009), the African Convention on the Conservation of Nature and Natural Resources (Conservation Convention (2003), and the African Charter on the Rights and Welfare of the Child (ACRWC (1999)
- The treaty monitoring bodies of the AHRS are: African Commission on Human and Peoples' Rights (the Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

Gaps in relation to climate change under the AHRS

- Climate change as a specific issue hardly features in the state reporting process
- There is only a passing reference made in the reports of Mali, Rwanda, Côte d'Ivoire while the reports of Mauritania and Uganda make no reference to climate change at all
- There is no reference to climate change in the concluding observations in reports of the above states
- Minimal Link of Climate Change to Specific Human Rights/ Resolution 153 (2009); Resolution 271 of 2014; Resolution 342 of 2016 (externalized causation)
- Scant Collaborative Promotion Initiatives at the regional level aimed at climate change human rights implications
- Climate change has equally not featured in the protective mandate of the African Commission, neither through individual nor inter-state communications

Addressing the gaps

More effective Use of Mechanisms of the AHRS



The promotional functions



The protective functions

Interpretive functions

Promotional mandate

- Article 45(1)(a), (b), and (c) of the African Charter; articles 42 (a) (i) and 43(1) speak to the promotional mandate of the ACERWC.
- The African Court has promotional activities not functions and these include its publication and media related activities aimed at boosting its public image
- These promotional functions entail a range of activities performed through state reporting, special mechanisms, visits, resolutions, seminars and conferences, publications and dissemination of information

Promotional mandate

State reporting

- State reporting process before the Commission and the ACERWC aims to review at the regional level the extent to which states have complied in their territory with their obligations under relevant human rights instruments.
- In the context of climate change and human rights, these bodies can amend their **reporting guidelines** to accommodate reporting not only on the current state of effects on climate change on human rights but also its future projections.
- Other stakeholders in the process such as **NGOs and National Human Rights Commissions** can submit **shadow or alternative reports** before the quasi-judicial bodies on the general implication of climate change on human rights
- When considered along with the states reports, the process offers opportunity to shape the concluding remarks of the Commission and the ACERWC

Promotional mandate

Publication and information dissemination activities

- The agendas of the Commission, ACERWC and the Court contain several references to its aspiration of hosting seminars and organizing meetings, delivering speeches, releasing press statements on a variety of issues.
- In collaboration with the Commission, ACERWC and the African Court, NGOs can assist with organizing workshops and seminars focusing on climate change and human rights.
- ‘Publication and Information Dissemination’ (PID) as a promotional activity has the aim of educating and ensuring greater visibility of issues. Information advanced through these tools can be placed on functional websites and distributed through other electronic means among networks and actors working on climate change and human rights of vulnerable groups.

Promotional mandate

Special mechanisms

- The Commission creates Special Rapporteurs to address substantive provisions of human rights under the African Charter Thus far, **neither the Commission nor the ACERWC has established a mandate holder for environmental protection, let alone climate change.**
- Yet, the establishment of a new mandate for climate change aligns with article 24 of the African Charter on the right to healthy environment.
- Importantly, it is justifiable under article 5(4) of the Kampala Convention which enjoins state parties to take ‘measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change’

Promotional mandate

- If established, the mandate holder can work with NGOs to, among other tasks, address current practices and development around climate change that have implications for human rights.
- It can do so by assisting with the clarification of obligations of states in Africa on the protection of human rights affected by climate change.
- Even without the existence of such specific mandate holder, stakeholders can still engage existing special rapporteurs established under the African Commission and the ACERWC in so far as their mandates relate to climate change.

Promotional mandate

Working groups

- The Commission has established working groups that can advance and forge partnership on the realization of the right to a safe climate.
- These include the Working Group on Economic, Social and Cultural Rights in Africa established in 2004 and the Working Group on Extractive Industries, Environment and Human Rights Violations in 2009.
- Climate change has featured in the activities of the Working Group on the Rights of Indigenous or Ethnic Communities in Africa as is evident from its visits to states including the DRC, Rwanda, and Kenya).
- Also, during its 35th Ordinary Session 2020, the ACERWC established three Working Groups: (1) Working Group on Children's Rights and Business; (2) **Working Group on Children's Rights and Climate Change**; and (3) Working Group on Implementation of Decisions and Recommendations.

Promotional mandate

- The establishment of the Working Group on Children's Rights and Climate Change is particularly notable as it is crucial for exploring the specific impact of climate change on the rights of children in Africa.
- When its operation fully commences, it is hoped that the Working Group on Children's Rights and Climate Change will involve NGOs from the South on the subject.
- African NGOs should also engage the existing Working Groups, such as the Working Group on Economic, Social and Cultural Rights to submit on implications of climate change on the realisation of the social economic and cultural rights.
- Similarly, they can engage with the mandate of the Working Group on Extractive Industries, Environment and Human Rights Violations (Working Group on extractive industries) 'to undertake research on the violations of human and peoples' rights by non-state actors in Africa'.

Protective Mandate

- The protective mandate of the Commission, in terms of article 60 of the African Charter, is exercisable through the consideration of inter-state and individual communications.
- The legal basis for the latter is article 55 of the Charter which allows communications other than those of state parties. Article 55(3) allows for NGOs with observer status to bring matters before the Court, if they relate to a state party that has accepted the competence of the court to receive such complaints in accordance with article 34(6) of the Protocol.
- Also, article 44(1) of the ACRWC allows the Committee to receive communication, from NGOs recognized by the 'Organization of African Unity, by a Member State, **or the United Nations**'

Protective Mandate

- Based on the foregoing, complaints can be brought before the AHRS by NGOs with focus on climate change and human rights.
- As mentioned earlier, climate change related complaints have featured in the work of human rights treaty monitoring bodies under the UN system.
- A development that suggests that violations of human resulting from adverse climate change can be made before the quasi-judicial and judicial bodies of the AHRS

Interpretive role

- The Commission, the ACERWC and the African Court have interpretive functions as quasi-judicial and judicial treaty monitoring bodies. Interpretation of every provision of the Charter may be fulfilled during the consideration of communications.
- Article 45(3) of the African Charter deals with the interpretive functions of the Commission which can be aided by submission of a Third Party in terms of articles 46 and 52 of the Charter which authorize the Commission to receive information from different sources including states and any person it deems necessary to resolve a pending matter.
- In specific terms, Rule 104(2) of the 2020 Rules of Procedure of the Commission allows **an amicus brief**. A similar inference can be made from article 4 (1) and (2) of the Protocol establishing the Court, that allows entities including recognised African organizations to offer ‘**an opinion** on any legal matter relating to the Charter or any other relevant human rights instruments’. Rule 72 (1) of the ACERWC 2018 Rules of Procedure equally permits NGOs, if invited, to provide it with **expert advice** in areas falling within the scope of their activities.

Interpretive role

- The foregoing rules offer different stakeholders including NGOs the space to contribute significantly to the protective mandate of the quasi and judicial bodies of the AHRS.
- They can give expert opinions on topical issues of climate change regarding **questions of attribution, of proof, or questions concerning the rights of future generations** within the meaning of the instruments earlier discussed.
- They can also provide further clarity on normative content of other rights within the African Charter that can be applied in the context of climate change.

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