



## Climate Change in the Work of the African Commission on Human and Peoples' Rights

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### Abstract

*The evidence of climate change and its implications for the global realisation of human rights has been clarified at the United Nations (UN) level, in particular through the activities of the treaty monitoring bodies. The development at this level is remarkable for four salient features: the increasing attention of resolutions, general comments, general recommendations and concluding remarks regarding the link between climate change and human rights, the explicit connection of climate change with human rights obligations, the strategic involvement of human rights special mechanisms, and the promotion of regional interventions. While there is the possibility that these features may shape interventions by regional treaty monitoring bodies, such as the African Commission on Human and Peoples' Rights (African Commission), which is a monitoring body of the African Charter on Human and Peoples' Rights (African Charter), these features have not been clearly articulated, let alone engaged with, in assessing the role of the African Commission in the context of climate change and human rights. Against the backdrop of features distilled from the development at the UN-level, this article argues that the effort of the African Commission in linking climate change to the realisation of human rights is thus far ineffective. The article also explores the potentials of the structures and programmes that already have a climate change focus within the African Union (AU) that the African Commission can engage with along with its own role in developing both the link and application of human rights to climate change in its regional work.*

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## 1 INTRODUCTION

Climate change is a major global challenge. Efforts to address the concern have thus been a prominent feature of the normative development at the United Nations (UN) level.<sup>1</sup> Notably, under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC),<sup>2</sup> the reports of the Intergovernmental Panel on Climate Change (IPCC) establish the scientific basis of climate change, tracing its causation to human activities.<sup>3</sup> In its 2014 report in particular the IPCC affirms that human activities connected with fossil-based economic development choices are substantially worsening the concentration of greenhouse gases in the atmosphere, thus increasing the greenhouse effect, which in turn, has led to increased warming of the earth surface resulting in climate change.<sup>4</sup> The regional effects of climate change are also well documented in the work of the IPCC.<sup>5</sup> In Africa, areas such as northern and southern Africa will become drier, while others such as East Africa may become wetter, with different outcomes for food production and health conditions.<sup>6</sup> Africa will bear the brunt of climate change's negative consequences,<sup>7</sup> despite the minimal contribution of the continent to its cause.<sup>8</sup> Established vulnerable areas are water resources, food security, natural resource management and biodiversity, human health, settlements and infrastructure, and desertification.<sup>9</sup> Subsequent to the adoption of the UNFCCC, the link between the adverse effects of climate change and the enjoyment of human rights has also been underscored in the 2015 Paris Agreement,<sup>10</sup> by key UN treaty monitoring bodies,<sup>11</sup> and the United Nations Human Rights Council (UNHRC).<sup>12</sup>

As shall be demonstrated later, there are key features in the development on the link of human rights to climate change at the UN-level that can guide interventions by regional treaty monitoring bodies such as the African Commission on Human and Peoples' Rights (African Commission), which is the treaty monitoring body of the African Charter on Human and Peoples' Rights (African Charter).<sup>13</sup> However, the key features have not been clearly articulated,

- 1 UNGA "Protection of Global Climate for Present and Future Generations of Mankind" UNGA Res. 43/53, 70th plenary meeting 6 December 1988 (UNGA Resolution 43/53).
- 2 United Nations Framework Convention on Climate Change (1992) ILM 851.
- 3 The World Meteorological Organisation and the United Nations Environment Programme in 1988 established the IPCC to review and assess the most recent scientific, technical and socio-economical information relating to climate change, UNGA Resolution 43/53 para 10; IPCC "Summary for Policymakers" in Stocker, Quin et al (eds) *The Physical Science Basis. Contribution of Working Group I to the 5th Assessment Report of the Intergovernmental Panel on Climate Change* (2013) 5 9.
- 4 IPCC "Summary for Policymakers" 2010 15-16; World Bank *World Development Report 2010: Development and Climate Change* (2010) 1.
- 5 Hewitson, Janetos et al "Regional Aspects" in Barros, Field et al (eds) *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 1133-1197; Boko, Niang et al "Africa" in Parry, Canziani et al (eds) *Climate Change, Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 433.
- 6 Niang, Ruppel et al "Africa" in Barros, Field et al (eds) *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 1202-1204; Collier, Conway and Venables "Climate Change and Africa" 2008 *Oxford Review of Economic Policy* 337.
- 7 Collier et al 2008 *Oxford Review of Economic Policy* 338.
- 8 *Ibid.*
- 9 Boko, Field et al "Africa" 433-467.
- 10 UNFCCC "Paris Agreement under the United Nations Framework Convention on Climate Change", adopted by Conference of the Parties, 21st Session Paris, 30 November to 11 December 2015. FCCC/CP/2015/L.9/Rev.1 [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) (accessed 28-05-2018).
- 11 These are committees of independent experts that monitor implementation of international human rights treaties. Office of the High Commissioner for Human Rights (OHCHR) "Monitoring the Core International Human Rights Treaties" <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (accessed 10-06-2017).
- 12 The UNHRC was established by the United Nations General Assembly on 15 March 2006, United Nations General Assembly Resolution 60/251 'Human Rights Council' A/RES/60/251 adopted by the General Assembly on 15 March 2006. On the development of the link between climate change and human rights at the UNHRC, see, McInerney-Lankford, Darrow et al *Human Rights and Climate Change: A Review of the International Legal Dimensions* (2011) 55-63; Knox "Linking Human Rights and Climate Change at the United Nations" 2009 *Harvard Environmental Law Review* 477 478; Limon "Human Rights and Climate Change: Constructing a Case for Political Action" 2009 *Harvard Environmental Law Review* 439.
- 13 African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 (African Charter 1982) Art 30; Viljoen *International Human Rights Law in Africa* 2 ed (2012) 289.

let alone utilised, in assessing the role of the African Commission. Thus far, the African Commission is only noted for Resolutions 153 (2009),<sup>14</sup> 271 (2014)<sup>15</sup> and 342 (2016),<sup>16</sup> which underscore the need to undertake an in-depth study of the impact of climate change on human rights in Africa. The adequacy of these resolutions and, more importantly, the potentials of structures and programmes that already have a climate change focus within the African Union (AU) which the African Commission can engage with in addition to its own work in developing both the link and application of human rights to climate change have attracted scant consideration. Notably, these structures and programmes are the AU Commission, the African Ministerial Conference on the Environment (AMCEN), the Pan African Parliament (PAP), the Climate for Development in Africa (ClimDev-Africa) Programme, and the New Partnership for African Development (NEPAD).<sup>17</sup> This article articulates key features in the development of the link of climate change to human rights at the UN-level, and against this backdrop argues that the role of the African Commission in relation to the link between human rights and climate change is inadequate. In making the argument, it is acknowledged that the UN has greater financial resources and manpower,<sup>18</sup> which can impact the effective performance of the African Commission in the context of climate change and human rights. However, as shall be shown later in the article, resourcefulness within the existing structures and programmes at the African regional level is required of the African Commission to develop both the link and application of human rights to climate change in its work.

## 2 CLIMATE CHANGE AND HUMAN RIGHTS AT THE UN

The development of human rights in relation to climate change at the UN-level has produced salient features, as the analysis in this section will reveal, but certain preliminary comments are necessary. The legal weight of applicable instruments, both *hard* instruments mostly in the form of treaties, and *soft* instruments mostly in the form of decisions, resolutions and recommendations, is generally disputed. Bodansky argues that the UNFCCC, like other environmental instruments, seeks consensus building rather than the bindingness of law.<sup>19</sup> The Paris Agreement, argues Sands, does not contain “legally binding provisions that require countries to take domestic legal action.”<sup>20</sup> In particular, pointing to the fact that its provision on human rights obligations is embodied in the preamble, other authors express the probability that the Paris Agreement is not intended to impose a legally binding human rights obligation on parties.<sup>21</sup>

However, these viewpoints should not be accepted uncritically. Even if per Bodansky, environmental instruments are driven by consensus, the UNFCCC and the Paris Agreement are treaties in terms of the definition of a treaty under Article 2(1)(a) of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>22</sup>

14 African Commission, “153: Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa” adopted at its 46th Ordinary Session held from 11 to 25 November 2009 in Banjul, The Gambia (ACHPR Resolution 153).

15 African Commission, “271: Resolution on Climate Change in Africa” adopted at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014 (ACHPR Resolution 271).

16 African Commission, “342: Resolution on Climate Change and Human Rights in Africa” adopted at its 58th Ordinary Session, held in Banjul, The Gambia, from 6 to 20 April 2016 ACHPR/Res. 342(LVIII) (ACHPR Resolution 342).

17 For a more detailed discussion of the legal basis for the existence and role of these structures and programmes, see section 4.2 of this article. On the role of these structures in the context of indigenous peoples’ land rights and climate change, see Jegede *The Climate Change Regulatory Framework and Indigenous Peoples’ Lands in Africa: Human Rights Implications* (2016) 238-239.

18 Balogun and Durojaye “The African Commission on Human and Peoples’ Rights and the Promotion and Protection of Sexual and Reproductive Rights” 2011 *African Human Rights Law Journal* 368 383; Viljoen *International Human Rights Law in Africa* 348.

19 Bodansky “Introduction: Climate Change and Human Rights: Unpacking the Issues” 2010 *Georgia Journal of International & Comparative Law* 511 516.

20 Sands “Climate Change and the Rule of Law: Adjudicating the Future in International Law” 2016 *Journal of Environmental Law* 19 22.

21 Mayer “Human Rights in the Paris Agreement” 2016 *Climate Law* 109 114; Cléménçon “The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough?” 2016 *Journal of Environment & Development* 3 8.

22 Vienna Convention on the Law of Treaties (with annex). Concluded at Vienna on 23 May 1969

Hence, they are legally binding in terms of the doctrine of *pacta sunt servanda* under Article 26 of the Vienna Convention which states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>23</sup> Besides, the continuing reference to human rights in environmental law instruments, as evidenced in the Paris Agreement, questions the long-held notion that environmental law instruments merely aim to facilitate compliance not to impose binding obligations on states.<sup>24</sup> In fact, to maintain such a notion is to endorse that human rights provisions in environmental instruments can be neglected, a position that is unacceptable as it defeats the essence of including human rights language in such instruments. Concerning the legal consequences of preambles, Hulme argues that they do not go as far as creating an obligation under a treaty.<sup>25</sup> Nevertheless, the legal effect of preambles as a significant tool of interpreting a treaty is clearly recognised in customary international law.<sup>26</sup> This then signifies that, at the very least, the human rights obligations mentioned in the preamble of the Paris Agreement should govern its understanding and application.

Decisions, concluding remarks, recommendations and resolutions are generally not legally binding on states.<sup>27</sup> In the case of resolutions, however, there can be exceptions in terms of their legal effect which depend on a number of factors, including the source of the resolutions or their subsequent use by domestic courts.<sup>28</sup> For instance, although the United Nations General Assembly (UNGA) resolutions are recommendatory as a rule, especially regarding external relations with member states,<sup>29</sup> the legal weight of resolutions of the United Nations Security Council (UNSC) on international peace and security,<sup>30</sup> or on the enforcement under Chapter VII of the UN Charter carry more political weight and are binding due to the premium placed on global peace and security,<sup>31</sup> and its acceptable status as obligation *erga omnes*.<sup>32</sup> A parallel argument can be made that since climate change is accepted as a global challenge to mankind,<sup>33</sup> resolutions, and indeed concluding remarks, recommendations and decisions dealing with the theme qualify as equal in legal status with instruments dealing with international peace.<sup>34</sup> Hence, the obligations under these instruments should constitute obligations *erga omnes* which all states and arguably regional institutions should have an interest in addressing. Against the foregoing backdrop, it is necessary to distil key features on the interface of climate change and human rights at the UN-level which can guide regional interventions in this area.

## 2.1 Increasing Consideration by Treaty Bodies

Several years before the first resolution linking human rights to climate change was passed by the UNHRC in 2009,<sup>35</sup> and the reference to human rights under the auspices of UNFCCC was included in the Cancun Agreements Decision in 2010,<sup>36</sup> the interface of climate change and human rights had found expression in the work of treaty monitoring bodies, namely the

<sup>23</sup> *Ibid.*

<sup>24</sup> Ulfstein and Werksman “The Kyoto Compliance System: Towards Hard Enforcement” in Stooke, Hovi and Ulfstein (eds) *Implementing the climate regime: International Compliance* (2005) 39.

<sup>25</sup> Hulme “Preambles in Treaty Interpretation” 2016 *University of Pennsylvania Law Review* 1281 1320.

<sup>26</sup> Vienna Convention on the Law of Treaties Art 31(2); Mayer 2016 *Climate Law* 113.

<sup>27</sup> *South West Africa (Ethiopia v S Africa; Liberia v S Africa) (Second Phase)* [1966] ICJ Rep 6 para 98; Öberg “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ” 2006 *The European Journal of International Law* 879.

<sup>28</sup> Viljoen *International Human Rights Law in Africa* 31.

<sup>29</sup> *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174 178; Öberg 2006 *The European Journal of International Law* 879

<sup>30</sup> Öberg 2006 *The European Journal of International Law* 885.

<sup>31</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* [1962] ICJ Rep 151 163; confirmed by *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ para 26.

<sup>32</sup> Bassiouni “International Crimes: Jus Cogens and Obligation Erga Omnes” 1996 *Law and Contemporary Problems* 63 69.

<sup>33</sup> UNGA Resolution 43/53.

<sup>34</sup> Jegede “Climate Change and Socio-economic Rights Duties in Nigeria” 2017 *Dignitas-The Slovene Journal of Human Rights* 13 25.

<sup>35</sup> UNHRC “Resolution 10/4, Human Rights and Climate Change” adopted at 41 Meeting (25 March 2009) (UNHRC Resolution 10/4).

<sup>36</sup> UNFCCC “The Cancun Agreements: Outcome of the Work of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention” (Decision 1/CP.16 ) FCCC/CP/2010/7/Add.1. (UNFCCC Cancun Agreements 2010).

Committee on Economic and Social Cultural Rights (CESCR),<sup>37</sup> the Committee on the Elimination of Discrimination Against Women (CEDAW),<sup>38</sup> and the Committee on the Rights of the Child (CRC).<sup>39</sup> While examining the normative content of the right to food, the CESCR General Comment No 12 of 1999,<sup>40</sup> urges states parties to note that the normative elements of the right to food, that is the availability, accessibility, acceptability and safety, can be adversely affected by climatic and ecological factors. It therefore urges states parties to adopt appropriate measures to ensure that climate change does not adversely affect the right to food.<sup>41</sup> Also in delineating states' obligations in CESCR General Comment No 15 of 2002 on the right to water,<sup>42</sup> states parties are urged to adopt strategies and programmes that address developments such as climate change which may hamper the realisation of the right to water.<sup>43</sup> While setting out the obligations of states under General Comment No 4 on the right to adequate housing in 1991, the CESCR indicates that security of tenure, availability, accessibility, location, affordability, habitability and cultural adequacy of housing may be adversely affected by climatic and ecological considerations.<sup>44</sup>

Subsequent to 2009, there is a consideration of human rights in a climate change context in the activities of other treaty monitoring bodies. The CEDAW, for instance, has worked on the gender dimension of the effect of climate change with the aim of formulating a General Recommendation on the subject.<sup>45</sup> Its General Recommendation No. 27 on Older Women and Protection of their Human Rights urges states to note and recognise in their decision-making that older women suffer more from climate change, due to their "physiological differences, physical ability, age and gender, as well as social norms and roles and an inequitable distribution of aid and resources relating to social hierarchies."<sup>46</sup> Climate change also features in the state reporting process before the CEDAW. In its report on Djibouti in 2011, the CEDAW notes that "rural women are particularly affected by poverty, food insecurity, the lack of safe drinking water and adverse climatic conditions such as drought."<sup>47</sup> In its concluding remarks to its fifth periodic report of the Seychelles in 2016, the CEDAW expresses concern that the policy interventions by the state on climate change lacks a gender perspective which would recognise the disproportionate effect of climate change on women.<sup>48</sup> In its Vanuatu report, the CEDAW recommends that the active participation of women should be paramount in "planning, decision-making and implementation processes concerning disaster risk reduction, post-disaster management and climate change policies."<sup>49</sup>

37 The CESCR was established under the Economic and Social Council Resolution 1985/17 of 28 May 1985.

38 UN General Assembly "Convention on the Elimination of All Forms of Discrimination Against Women", 18 December 1979, United Nations, Treaty Series, vol. 1249, 13, Art 17.

39 UN General Assembly "Convention on the Rights of the Child", 20 November 1989, United Nations, Treaty Series, vol. 1577, 3, Art 43.

40 UN Committee on Economic, Social and Cultural Rights "General Comment No. 12: The Right to Adequate Food (Art. 11), E/C.12/1999/5" adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999.

41 *Ibid.* paras 4 and 7.

42 UN Committee on Economic, Social and Cultural Rights "General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11" adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003.

43 *Ibid.* para 28; also see Orellana, Kothari et al *Climate Change in the Work of the Committee on Economic, Social and Cultural Rights* (2010) 21.

44 UN Committee on Economic, Social and Cultural Rights "General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)", 13 December 1991, E/1992/23 adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 para 18.

45 UN Committee on the Elimination of Discrimination Against Women "Gender-related Dimensions of Disaster Risk Reduction and Climate Change" 29 February 2016 <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ClimateChange.aspx> (accessed 23-06 -2017).

46 UN Committee on the Elimination of Discrimination against Women "General Recommendation No. 27 on Older Women and Protection of their Human Rights" 16 December 2010 CEDAW/C/GC/27 para 25.

47 UN Committee on the Elimination of Discrimination against Women "Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Djibouti", adopted at its forty-ninth session, 2 August 2011 CEDAW/C/DJI/CO/1-3 para 32.

48 UN Committee on the Elimination of Discrimination against Women "Concluding Observations on the Combined Initial to Fifth Periodic Reports of Seychelles" 29 October 2013, CEDAW/C/SYC/CO/1-5 para 36.

49 UN Committee on the Elimination of Discrimination against Women "Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Vanuatu" 9 March 2016, CEDAW/C/VUT/CO/4-5 para 37.

In its consideration of the report of Tuvalu in 2013, the CRC recognises the increasing threat posed by climate change to children and indeed the survival of the country.<sup>50</sup> In relation to the United Kingdom report in 2016, the CRC recommends that the state should regard the vulnerabilities, peculiar needs and views of children while formulating policies or programmes to address climate change and disaster risk management.<sup>51</sup> The adverse effects of climate change on human rights are, however, yet to be tested through the complaint mechanisms of any of the treaty monitoring bodies referred to above. What is certain is that there is no legal impediment to institute individual complaints provided applicable admissibility criteria under the instruments are met by applicants.<sup>52</sup>

While the foregoing development does not generate a legal conclusion that every treaty monitoring body should engage with, and develop the connection between climate change and human rights in its work, at the very least, it evidences a symbolic international recognition that offers the inspiration that treaty monitoring bodies, including those at the regional level, can use general comments, recommendations, concluding remarks or their equivalence in developing the implications of climate change for the realisation of human rights.

## 2.2 Explicit Connection with Human Rights and Obligations

The content of the instruments under the auspices of the UNHRC is explicit in terms of the implications of climate change for the enjoyment of rights. Thus far, five key resolutions have been passed by the UNHRC in connection with the theme: 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.<sup>53</sup> Resolution 7/23 requires a detailed analytical study on the relationship between climate change and human rights.<sup>54</sup> The Office of the United Nations High Commissioner for Human Rights (OHCHR) Report, which responded to this request, describes the effect of climate change on a range of rights, including right to life,<sup>55</sup> the right to adequate food,<sup>56</sup> the right to adequate water,<sup>57</sup> the right to health,<sup>58</sup> the right to adequate housing,<sup>59</sup> and the right to self-determination.<sup>60</sup> This position is reinforced in UNHRC Resolution 10/4 which in addition affirms that human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change.<sup>61</sup> It is also reiterated in UNHRC Resolution 18/22, emphasised in UNHRC Resolution 26/33,<sup>62</sup> and buttressed by UNHRC Resolution 32/34, which notes additionally that climate change is an “existential threat” that has impacted negatively on the fulfilment of the Universal Declaration of Human Rights.<sup>63</sup>

50 UN Committee on the Rights of the Child “Concluding Observations on the Initial Report of Tuvalu”, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013) CRC/C/TUV/CO/14, para 7.

51 UN Committee on the Rights of the Child “Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland” 3 June 2016 CRC/C/GBR/CO/5 paras 56(a), 68(b).

52 Office of the High Commissioner for Human Rights (OHCHR) “Human Rights Bodies - Complaints Procedures” <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (accessed 23-06-2017).

53 UNHRC “Human Rights and Climate Change” Res. 7/23, U.N. Doc. A/HRC/7/78 (UNHRC Resolution 7/23); UNHRC Resolution 10/4 (n 30); UNHRC “Human Rights and Climate Change” A/HRC/RES/18/22 (2011) (UNHRC Resolution 18/22); UNHRC “Human Rights and Climate Change” A/HRC/26/L.33 (23 June 2014) (UNHRC Resolution 26/33); UNHRC “Climate Change and Human Rights” A/HRC/32/L.34 (2016) (UNHRC Resolution 32/34).

54 UNHRC Resolution 7/23.

55 UNHRC “Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights” A/HRC/10/61 15 January 2009 (OHCHR Report) paras 21-24.

56 *Ibid.* paras 25-27.

57 *Ibid.* paras 28-30.

58 *Ibid.* paras 31-34.

59 *Ibid.* paras 35-38.

60 *Ibid.* paras 39-41.

61 UNHRC Resolution 10/4 preamble.

62 UNHRC Resolution 18/22 preamble; UNHRC Resolution 26/33 para 1.

63 UNHRC Resolution 32/34 preamble.

Under the aegis of the UNFCCC, the provision of the Cancun Agreements Decision reached at COP 16 is instructive.<sup>64</sup> Recital 8 of that decision reads:

Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognises that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability.

The Paris Agreement adopted by States in December 2015 leaves no doubt that human rights obligations are important in climate change activities. It provides that:

Parties should, when taking action to address climate change, 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, as well as gender equality, empowerment of women and intergenerational equity.<sup>65</sup>

The above signifies that the obligations, namely, to *respect*, to *protect*, and to *fulfil* human rights under international human rights law,<sup>66</sup> should be considered while implementing climate actions.<sup>67</sup>

### 2.3 Strategic Involvement of Special Mechanisms

At the UN-level, there is evidence on the use of special mechanisms, both in the study and analysis of climate change and human rights. UNHRC Resolution 10/4 indicates that a panel discussion on the relationship between climate change and human rights should be held to inform the activities of the Conference of Party of the UNFCCC.<sup>68</sup> With Resolution 18/22, the UNHRC requested the OHCHR to convene a seminar on addressing the adverse impacts of climate change on the full enjoyment of human rights with a view of forging stronger interface and cooperation between the human rights and climate change communities.<sup>69</sup>

Engagement with a range of stakeholders as an approach in developing the study and link of climate change to human rights is also evident. Paragraph 3 of UNHRC Resolution 10/4 indicates that it is the mandate of Special Rapporteurs to develop the link. Paragraph 3 furthermore welcomes the decision of the Special Rapporteur on adequate housing to prepare and present a thematic report on the potential impact of climate change on the right to adequate housing and encourages other special procedure mandate-holders to do so in their respective mandates.<sup>70</sup> Similar evidence is seen in UNHRC Resolution 32/34 of 2016 which notes the report by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment focusing on climate change and human rights.<sup>71</sup> Paragraph 9 of UNHRC Resolution 26/33 of 2014 equally encourages special procedures mandate-holders to give consideration to the issue of climate change and human rights.<sup>72</sup> It is thus no surprise that the report of the Special Rapporteur on the right to housing has a component on the impact of climate change on this right.<sup>73</sup> The OHCHR also submitted a detailed report in 2017 on the relationship between climate change

<sup>64</sup> UNFCCC Cancun Agreements 2010.

<sup>65</sup> Paris Agreement 2015.

<sup>66</sup> United Nations General Comment 31 [80] "Nature of the General Legal Obligation Imposed on state parties to the Covenant" (26 May 2004) CCPR/C/21/Rev.1/Add.13 HRC) paras 5-6; Koch "Dichotomies, Trichotomies or Waves of duties?" 2005 *Human Rights Law Review* 81.

<sup>67</sup> On the explanation of these obligations in the context of indigenous peoples' land rights, see Jegede *The Climate Change Regulatory Framework* (2016) 66-67.

<sup>68</sup> UNHRC Resolution 10/4 paras 1 and 2.

<sup>69</sup> UNHRC Resolution 18/22 para 2(a).

<sup>70</sup> UNHRC Resolution 10/4 para 3.

<sup>71</sup> UNHRC Resolution 32/34.

<sup>72</sup> *Ibid.* paras 8 and 9.

<sup>73</sup> UNGA "The Right to Adequate Housing" 6 August 2009 A/64/255.

and the full and effective enjoyment of the rights of the child, a report that was made pursuant to UNHRC Resolution 32/34 of 2016.<sup>74</sup>

Aside from the involvement of mandate holders and special mechanisms, there is a strong indication that other stakeholders are involved in developing the theme of climate change and human rights. UNHRC Resolutions 18/22 and 26/33 invite states and other relevant stakeholders, including academic experts, civil society organisations and representatives of vulnerable populations, to participate actively in seminar and panel discussions related to the theme.<sup>75</sup> In particular, paragraph 2(c) of the UNHRC Resolution 18/22 indicates the involvement of the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP) in organising seminars on the theme.<sup>76</sup>

## 2.4 Promotion of Regional Interventions

The urgency of regional interventions is both expressly and impliedly discernible from the instruments developed under the UNFCCC and the UNHRC. Article 4(1)(1)(b) of the UNFCCC requires parties to formulate and implement regional programmes on climate mitigation and adaptation measures.<sup>77</sup> Article 6 of the UNFCCC urges parties to promote education, training and public awareness, participation, and access to information in carrying out activities in Article 4(1).<sup>78</sup> Articles 4(1)(1)(b) and 6 of the UNFCCC are reinforced by the Paris Agreement's Article 11(4) which states that a regional approach is useful in building the capacity of developing states to implement the instrument.<sup>79</sup> The Paris Agreement further affirms the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels.<sup>80</sup> Hence, if, as argued earlier, the reference to human rights in the preamble of the treaty is useful in interpreting its content, it means that initiatives raised under Article 11(4) of the Paris Agreement are not mere climate change interventions, but should be construed as interventions of regional human rights relevance and attention.

Although, no specific reference is made to regional interventions in the safeguards contained in Paragraph 2 of Appendix 1 of the Cancun Agreements Decision, regional relevance can be inferred. This is because the preamble to the safeguards does refer to all "parties",<sup>81</sup> an indication that it is applicable also to states parties in Africa.<sup>82</sup> The UNHRC Resolution 32/34 affirms that human rights obligations, standards and principles have the potential to inform and strengthen regional policymaking in the area of climate change.<sup>83</sup> In the light of the foregoing features, the next section examines the effectiveness of the role of the African Commission in relation to climate change and human rights.

## 3 EXAMINING THE ROLE OF THE AFRICAN COMMISSION

Article 45 of the African Charter states the functions of the African Commission. These functions can be broadly categorised as promotional and protective listed under subsections 1, 2, 3 and 4 of Article 45.<sup>84</sup> Article 45(1)(a)-(c) of the African Charter reflects the promotional functions as a range of activities performed through state reporting, special mechanisms, promotional visits, resolutions, seminars and conferences, publications and dissemination of information, and the relationship with non-governmental organisations (NGOs) and national human rights institutions.<sup>85</sup> The protective mandate is exercisable through the consideration of inter-state and individual communications. Generally, such communications are based on allegations about violations of rights under the African Charter, but may not necessarily be limited to it as

74 UNHRC "Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child" 27 February 2017, A/HRC/34/CRP.2.

75 UNHRC Resolution 18/22 para 2(b); UNHRC Resolution 26/33 para 8.

76 UNHRC Resolution 18/22 para 2(c).

77 United Nations Framework Convention on Climate Change 1992 Art 4(1)(1)(b).

78 *Ibid.* Arts 4 and 6.

79 Paris Agreement 2015 Art 11(4).

80 *Ibid.* preamble.

81 UNFCCC Cancun Agreements 2010 preamble.

82 *Ibid.*

83 UNHRC Resolution 32/34 preamble.

84 Viljoen *International Human Rights Law in Africa* 300-390.

85 *Ibid.* 349.



the African Charter allows the African Commission to draw inspiration from international law and the provisions of other human rights instruments.<sup>86</sup>

When examined in the light of the features of the development on the link of climate change to human rights at the UN-level, much improvement is required to develop the link and application of human rights to climate change through the work of the African Commission.

### 3.1 Limited Direct Engagement in Monitoring Role

Thus far, other than resolutions calling for the investigation of human rights implications of climate change in Africa, climate change as a specific issue hardly features in the state reporting process which usually offers the opportunity to the African Commission to implement the African Charter and examine the challenges inhibiting the realisation of its objectives.<sup>87</sup> For instance, there is only a passing reference to climate change in the reports of Mali,<sup>88</sup> Rwanda,<sup>89</sup> and Côte d'Ivoire,<sup>90</sup> while the reports of Mauritania<sup>91</sup> and Uganda<sup>92</sup> make no reference to climate change at all. Along with the inconsistent references to climate change in reporting, there is no information on the implications of the adverse effects of climate change on the human rights of populations in these reports, except for the report on South Africa, which emphasises the vulnerability of women to the impact of climate change.<sup>93</sup> This is not surprising as the 1989 Guidelines for National Periodic Reports under the African Charter makes no reference to climate change,<sup>94</sup> and the 2010 Tunis Guidelines, which offers guidance on the implementation of obligations related to socio-economic rights under the instrument, only makes a casual reference to global warming, in the context of reporting on the right to health.<sup>95</sup> States hardly use this provision to detail issues around climate change and its implications for human rights.

If states' report guidelines contain no detailed information on the implications of climate change on human rights, it is not surprising that the African Commission neither offers recommendations on how the African Charter relates to climate change, nor gives a position on how the challenge can be addressed. This can be illustrated using some of the concluding observations available on the African Commission's website.<sup>96</sup> There is no reference to

86 African Charter 1982 Art 60.

87 African Charter 1982 Art 62.

88 African Commission of Human and Peoples' Rights (ACHPR) "Mali Periodic Report to the African Commission on Human and Peoples' Rights relating to the Implementation of the African Charter on Human and Peoples' Rights 2001-2011" [http://www.achpr.org/files/sessions/58th/state-reports/2nd-2001-2011/mali\\_\\_periodic\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/58th/state-reports/2nd-2001-2011/mali__periodic_report_eng.pdf) (accessed 23-06-2017) paras 352, 354.

89 ACHPR "The 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights & The Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (Maputo Protocol)" [http://www.minijust.gov.rw/fileadmin/Documents/International\\_Reports/ACHPR\\_Maputo\\_Final\\_report2016.pdf](http://www.minijust.gov.rw/fileadmin/Documents/International_Reports/ACHPR_Maputo_Final_report2016.pdf) (accessed 24-06-17) para 173.

90 ACHPR "Initial and Combined Report of the Republic of Cote D'ivoire to the African Commission on Human and Peoples' Rights" 52nd Ordinary Session 9-22 October 2012 Yamoussoukro, Côte d'Ivoire [http://www.achpr.org/files/sessions/52nd/state-reports/1-1994\\_2012/initial\\_combined\\_periodic\\_report\\_194\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/state-reports/1-1994_2012/initial_combined_periodic_report_194_2012_eng.pdf) (accessed 23-06-2017) s 10.7.

91 ACHPR "Mauritania: 10th, 11th, 12th, 13th & 14th Periodic Report, 2006 – 2014" [http://www.achpr.org/files/sessions/60th/state-reports/10th-14th-2006-2014/mauritania\\_10th\\_14th\\_periodic\\_report.pdf](http://www.achpr.org/files/sessions/60th/state-reports/10th-14th-2006-2014/mauritania_10th_14th_periodic_report.pdf) (accessed 24-06-2017).

92 ACHPR "5th Periodic Report by the Government of the Republic of Uganda to the African Commission on Human and Peoples' Rights" presented at the 54th Ordinary Session held in Banjul, the GAMBIA 22nd Oct – 5th November 2013 [http://www.achpr.org/files/sessions/56th/state-reports/5-2010-2012/uganda\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/5-2010-2012/uganda_state_report_eng.pdf) (accessed 23-06-2017).

93 ACHPR "Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa" [http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2\\_southafrica\\_2003\\_2014\\_eng.pdf](http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2_southafrica_2003_2014_eng.pdf) (accessed 23-06-2017) para 505.

94 ACHPR "1989 Guidelines for National Periodic Reports under the African Charter" [http://www.achpr.org/files/instruments/guidelines\\_national\\_periodic\\_reports/achpr\\_guide\\_periodic\\_reporting\\_1989\\_eng.pdf](http://www.achpr.org/files/instruments/guidelines_national_periodic_reports/achpr_guide_periodic_reporting_1989_eng.pdf) (accessed 24-06-2017).

95 ACHPR "State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights" (Tunis guidelines) [http://www.achpr.org/files/instruments/economic-social-cultural-guidelines/achpr\\_instr\\_tunis\\_reporting\\_guidelines\\_esc\\_rights\\_2012\\_eng.pdf](http://www.achpr.org/files/instruments/economic-social-cultural-guidelines/achpr_instr_tunis_reporting_guidelines_esc_rights_2012_eng.pdf) (accessed 24-06-2017). section c(v).

96 ACHPR "State Reports and Concluding Observations" <http://www.achpr.org/states/reports-and-concluding-observations/> (accessed 23-06-2017).

climate change in the concluding observations in reports on Mauritania,<sup>97</sup> Uganda,<sup>98</sup> and Côte d'Ivoire,<sup>99</sup> which is in contrast to the reports of the CESCR, CEDAW and CRC which refer to climate change.

Climate change has equally not featured in the protective mandate of the African Commission, neither through individual nor inter-state communications. This is in contrast to the situation elsewhere: for example, in the Inter-American human rights system there has been at least two communications in respect of climate change lodged with the Inter-American Commission on Human Rights: the *Inuit* petition in 2005<sup>100</sup> and the *Athabaskan Council* petition of 2013.<sup>101</sup> In the *Inuit* petition, it was alleged that the United States' climate change policy is destroying the Arctic environment, thereby, violating a number of their rights, including the right to health, life and property,<sup>102</sup> while the *Athabaskan Council* petition alleges that the lack of effective legislation on black carbon emissions in Canada is accelerating Arctic warming, threatening the rights of the Arctic Athabaskan people to culture,<sup>103</sup> property,<sup>104</sup> and health enshrined in the American Declaration.<sup>105</sup> The *Inuit* petition was not entertained on the ground that the information supplied in the communication was not enough to "characterise a violation of the rights protected by the American Declaration",<sup>106</sup> while no decision has yet been given on the *Athabaskan* petition. At the very least, however, lodging the complaints demonstrates that the Inter-American Commission is perceived by populations in that region as a platform to ensure accountability with regards to the adverse effects of climate change. It cannot be said that the African Commission guarantees the same measure of accountability.

### 3.2 Minimal Link of Climate Change to Specific Human Rights

Resolutions have been passed by the African Commission on climate change and human rights, but the quality of their content is not impressive. The African Commission Resolution 153 of 2009 only focuses on the negotiations under the UNFCCC and mentions the concern that human rights standards are lacking in "various draft texts of the conventions under negotiation."<sup>107</sup> It further urges the Assembly of Heads of State and Government of the AU to ensure the incorporation of the need to comply with human rights in UN instruments being negotiated on climate change.<sup>108</sup> Resolution 271 of 2014 of the African Commission is no different in that it merely mandates the investigation of the impact of climate change on human rights in Africa.<sup>109</sup>

97 ACHPR "Concluding Observations and Recommendations on the Initial Report of the Islamic Republic of Mauritania" adopted at 31st Ordinary Session, 2-16 May 2002, Pretoria, South Africa. [http://www.achpr.org/files/sessions/31st/conc-obs/1st-1986-2001/achpr31\\_conc\\_staterep1\\_mauritania\\_2002\\_eng.pdf](http://www.achpr.org/files/sessions/31st/conc-obs/1st-1986-2001/achpr31_conc_staterep1_mauritania_2002_eng.pdf) (accessed 24-06-2017).

98 ACHPR "Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010 – 2012)" 57th Ordinary Session 04 – 18 November 2015, Banjul, The Gambia [http://www.achpr.org/files/sessions/57th/conc-obs/5-2010-2012/concluding\\_observations\\_5th\\_state\\_report\\_uganda.pdf](http://www.achpr.org/files/sessions/57th/conc-obs/5-2010-2012/concluding_observations_5th_state_report_uganda.pdf) (accessed 23-06-2017).

99 ACHPR "Observations Finales sur le Rapport Periodique, Initial et Cumule de la Republique de Cote D'Ivoire" adopted at 52nd Ordinary Session, 9 - 22 October 2012, Yamoussoukro, Côte d'Ivoire. [http://www.achpr.org/files/sessions/52nd/conc-obs/1-1994-2012/observations\\_conclusives\\_cote\\_divoire.pdf](http://www.achpr.org/files/sessions/52nd/conc-obs/1-1994-2012/observations_conclusives_cote_divoire.pdf) (accessed 24-06-2017).

100 Centre for International Environmental Law (CIEL) "Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming Caused by Acts and Omissions of the United States on Behalf of all INUIT of the Arctic Regions of the United States and Canada" (*Inuit* Petition) [http://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf) (accessed 24-06-2017).

101 Earthjustice "Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada" (*Athabaskan* Petition) [http://earthjustice.org/sites/default/files/AAC\\_PETITION\\_13-04-23a.pdf](http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf) (accessed 24-06-2017).

102 *Inuit* Petition.

103 *Athabaskan* Petition 61, 76.

104 *Ibid.* 71.

105 *Ibid.* 76.

106 "Letter from Ariel E Dulitzky, Assistant Executive Secretary, Organisation of American States, to Paul Crowley, Legal Rep. (Nov. 16, 2006)" <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> (accessed 24-06-2017).

107 ACHPR Resolution 153 preamble.

108 *Ibid.*

109 ACHPR Resolution 271.

Resolution 342 of 2016 makes reference to the UNFCCC and the Kyoto Protocol as consistent with “African standard[s] on the protection of the environment”, and highlights key obligations under the Paris Agreement.<sup>110</sup> It urges Member States to improve regional cooperation for climate action that respects human rights and tasks the Working Group on Economic and Social Rights and the Working Group on Extractive Industries, Environment and Human Rights Violations, to undertake a “study on the impact of climate change on human rights in Africa.”<sup>111</sup>

There is little doubt that the adoption of resolutions is a starting point, but it is not acceptable that since the adoption of the African Commission’s first resolution in 2009, a detailed analysis of the impact of climate change is not yet available. It compares poorly with the process and content of resolutions by the UN. At the UN-level, a detailed analysis of the impact of climate change on human rights was conducted and reported in 2009 – one year after the adoption of Resolution 7/23 of the UNHRC in 2008, which requested the OHCHR to carry out “a detailed analytical study of the relationship between climate change and human rights.”<sup>112</sup> Further still, the resolutions of the African Commission compare poorly with Resolution 7/23, which is clear on the context of human rights instruments in which the analytical study is to be conducted.<sup>113</sup> Of course, there may be the challenge of manpower and resources at the African regional level, but that cannot be an excuse for the failure to use existing resources within the African Commission and the AU structure. This failure is made worse by the fact that African states, such as Mali,<sup>114</sup> Mauritius,<sup>115</sup> and Zimbabwe,<sup>116</sup> participated in the process which led to the adoption of resolutions at the UN-level, which list a range of rights which can be adversely affected by climate change. Resources thus do exist, but have not been fully utilised.

### 3.3 Scant Collaborative Promotion Initiatives

There has been no climate change specific programmes, discussions, debates or dialogues initiated or commissioned by the African Commission, despite the fact that doing so falls within the promotional mandate of the Commission.<sup>117</sup> There has been no known efforts at promoting awareness, participation and access to information in addressing climate change, its effects and adequate responses. Yet, this is a dominant strategy at the UN-level. Dialogue and panel discussions are anchored by the OHCHR, the secretariat of the UNFCCC, the UNEP and the UNDP to facilitate the exchange of information.<sup>118</sup> Monitoring bodies furthermore participate in sponsoring events on the impact of climate change on the provisions of specific international human rights instruments, such as the Convention on the Elimination of Discrimination Against Women.<sup>119</sup> This is not yet the case in the functioning of the African Commission on climate change and human rights. For instance, no specific programme or event has been organised to advance the development of the theme by the African Committee of Experts on the Rights and Welfare of the Child, established to protect and promote the rights of the child under the African Charter on the Rights and Welfare of the Child.<sup>120</sup> Despite the implications of climate change for women referred to in Article 2(1)(c) of the Protocol to the African Charter on Human

110 *Ibid.*

111 ACHPR Resolution 342.

112 UNHRC Resolution 7/23 para 1.

113 *Ibid.*

114 OHCHR “Submission of Mali to OHCHR Study ‘Human Rights and Climate Change’ (Mali Submission) <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Mali.pdf> (accessed 24-06-2017).

115 OHCHR “Human Rights Council Resolution 7/23 (Human rights and climate change)” (Mauritius Submission) <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Mauritius.pdf> (accessed 24-06-2017).

116 OHCHR “Expected impacts of climate change vulnerability and adaptation assessments in Zimbabwe” (Zimbabwe Submission) <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Zimbabwe.pdf> (accessed 24-06-2017).

117 Viljoen *International Human Rights Law in Africa* 369

118 UNHRC Resolution 10/4 para 4; UNHRC Resolution 18/22 para 2 (c); UNHRC Resolution 7/23 para 2.

119 UN Committee on the Elimination of Discrimination Against Women “Gender-related Dimensions of Disaster Risk Reduction and Climate Change” 29 February 2016 <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ClimateChange.aspx> (accessed 24-06-2017).

120 African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) Art 32.

and Peoples' Rights on the Rights of Women in Africa, which calls for the integration of a gender perspective into policy decisions and development, programmes and activities,<sup>121</sup> the gender dimension to climate change has not been a feature of discussions before the African Commission.

While the UNHRC resolutions encourage relevant stakeholders and spell out their specificities as including academic experts, civil society organisations and representatives of vulnerable populations to participate in seminar and panel discussions related to the theme of climate change and human rights,<sup>122</sup> Resolution 271 of 2014 of the African Commission only broadly refers to "civil society and other stakeholders" to support the work of the Working Group on Extractive Industries, and other resolutions of the Commission make no reference to stakeholders or civil society.<sup>123</sup> The lack of specificity creates a barrier for broader participation in activities related to climate change's impact on human rights in Africa.

### 3.4 Inadequate Use of Special Mechanisms

Special mechanisms exist to complement the promotional objectives of the African Commission for the realisation of human rights in Africa<sup>124</sup>, including working groups and the special rapporteurs. Although not mentioned specifically in the African Charter, in practice, these mechanisms allow for the operationalisation of the Commission's mandate.<sup>125</sup> Working groups are involved in its work on climate change. Resolution 342 of 2016 by the African Commission affirms that it is the responsibility of the Working Group on Economic and Social Rights and the Working Group on Extractive Industries, Environment and Human Rights Violations to study the impact of climate change on human rights. The adverse impact of climate change on the way of life of indigenous peoples has featured in the report by the Working Group on Indigenous Populations/ Communities on its activities in Kenya,<sup>126</sup> Rwanda,<sup>127</sup> and Niger.<sup>128</sup> The intersection report by the Commissioner/Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa in 2016 refers to discussions on climate change and its impact on human rights in Algeria as well as the impact of climate change as a cause of internal displacement in many countries in Africa.<sup>129</sup>

Despite the above-mentioned reports, there is no concrete evidence that the African Commission has used the findings of the working groups and special rapporteurs to inform an official direction on the link between climate change and human rights. Yet, such findings can be useful in sensitising and generating advocacy interest in human rights principles on which states could base their legislation and policies on climate change and human rights in Africa. It is also not impressive that the issue has not formed a component of the activities of the Working Group on the Rights of Older Persons and People with Disabilities in Africa, and the Special Rapporteur on Women, a development that is in contrast to the development at the UN-level where climate change has featured in the work of CEDAW in relation to older women and women living in rural settings.<sup>130</sup>

121 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003.

122 ACHPR Resolution 271.

123 *Ibid.*

124 Viljoen *International Human Rights Law in Africa* 369.

125 Viljoen *International Human Rights Law in Africa* 371; Harrington "Special Rapporteurs of the African Commission on Human and Peoples' Rights" 2001 *African Human Rights Law Journal* 247.

126 ACHPR "Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya" 37, 1-19 March 2010 adopted by the African Commission on Human and Peoples' Rights at its 50th ordinary session, 24 October - 5 November 2011, 76.

127 ACHPR "Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Rwanda", 1-5 December 2008 adopted by the African Commission on Human and Peoples' Rights at its 47th ordinary session, 12-26 May 2010, 30.

128 ACHPR "Report of the African Commission's Working Group on Indigenous Populations/ Communities Mission to the Republic of Niger" adopted at its 40th Ordinary Session, 15 - 29 November 2006 para 91.

129 ACHPR "Intersession Report" adopted at the 58th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, 6 to 20 April 2016 paras 6 and 45.

130 UN Committee on the Elimination of Discrimination against Women "General recommendation No. 27 on Older Women and Protection of their Human Rights" 16 December 2010 CEDAW/C/GC/27 para 25.

When compared to the actions that have been taken at the UN-level, it can be argued that the contribution of the African Commission on the interaction between climate change and human rights is insufficient in the sense of its lack of engagement with its monitoring role, its minimal linkage of climate change to specific human rights, scant collaborative promotion initiatives and inadequate use of special mechanisms.

#### 4 POTENTIALS FOR DEVELOPING HUMAN RIGHTS AND CLIMATE CHANGE NEXUS

In addition to the opportunities within its own functions, as discussed below, there are potentials within the AU structure that the African Commission can engage with to develop the link and application of human rights in a climate change context.

##### 4.1 Effective Use of Mechanisms of the African Commission

The promotional functions of the African Commission – state reporting, resolutions, promotional visits, seminars and conferences, publications and dissemination of information, national human rights institutions, special mechanisms and the protective mandate in the form of individual and interstate communications<sup>131</sup> – can arguably be utilised to develop and apply the climate change human rights nexus in Africa.

State reporting is an important process in the hands of the African Commission that can be used to review and strengthen the work of the state in relation to climate change. The African Commission can amend its reporting guidelines to accommodate the adverse effects of climate change and implications for human rights. Doing this will guide states in documenting the realities of the adverse effects of climate change and will give the African Commission the opportunity to offer concluding observations which can guide states in their interventions and civil society in their advocacy in that area. Since at the African regional level, resolutions can play a similar function to “General Comments” adopted by UN human rights treaty bodies,<sup>132</sup> there can be further resolutions to clarify and amplify the obligations of states relating to human rights in the context of climate change. Such resolutions can address specific states where allegations of violations of human rights linked to climate change are rampant.

Through promotional visits, commissioners can sensitise high-ranking officials and organs of government on the implications of climate change for human rights and the need to ratify and comply with applicable regional and international treaties. Since the agendas of the African Commission and activity reports contain several references to its aspiration to host seminars on a variety of topics,<sup>133</sup> conferences relating to climate change and human rights can be conducted in collaboration with other institutions, such as the Committee on the Welfare of the Child. The aim of publication and information dissemination (PID) as a promotional activity of the African Commission is to educate and ensure greater visibility for its activities.<sup>134</sup> Hence, through PID, the Commission can provide information on climate change and human rights on its website and ensure the distribution of information on climate change and human rights through electronic means to NGOs enjoying observer status with the Commission.

Giving their affiliate status with the African Commission, the national human rights institutions (NHRIs) can be invited to make presentations in the Commission sessions on the promotion and protection of human rights at national level.<sup>135</sup> Accordingly, the NHRIs can include reports on the vulnerability of populations to the adverse impacts of climate change in their presentations. More than it is presently utilised, there is potential in the role of special rapporteurs to aid the development of the climate change human rights nexus.

131 Viljoen *International Human Rights Law in Africa* 300.

132 *Ibid.* 379.

133 *Ibid.* 382.

134 *Ibid.* 383.

135 ACHPR “Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions on Africa” adopted at the Commission’s 24th session, Banjul, the Gambia, 22-31 October 1998 para 4(a).

The mandate of the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa,<sup>136</sup> for instance, can do more for climate change and human rights, especially as Article 5(4) of the Kampala Convention enjoins states parties to take “measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.”<sup>137</sup> The Special Rapporteur on the Rights of Women in Africa, the Special Rapporteur on Human Rights Defender in Africa, and the Special Rapporteur on Freedom of Expression in Africa,<sup>138</sup> can be used to advance the theme in the various ways it affects women, the situation of human rights defenders and freedom of expression in Africa.

Both individual and inter-state communications can be used to advance the link of climate change to human rights in Africa. As shown earlier, communications on climate change grounded in allegations of human rights violations feature in the work of the Inter-American Commission. National courts have also examined the implication of climate change for environmental rights. For instance, in *Urgenda Foundation v The State of the Netherlands*, the Hague District Court established a causal link between emissions by the Netherlands, global climate change, and the effects on states’ duty for environmental rights.<sup>139</sup> The foregoing jurisprudence is relevant to the functioning of the African Commission by virtue of Article 61 of the African Charter which allows it to draw inspiration from other jurisdictions. Even in the absence of communications directly linked to climate change, it does not mean that the Commission cannot in its analysis link allegations on violations of environmental rights to climate change. Where no complaint is made, by virtue of Article 45(3) of the African Charter the Commission can, at the very least, through an advisory opinion, reference climate change and human rights.

## 4.2 Collaboration with other Operational Structures and Programmes within the AU

In developing the link and application of human rights in the climate change context, the African Commission can collaborate with structures and programmes within the AU which already have climate change as part of their focus. These are the AU Commission, AMCEN, PAP, the ClimDev-Africa Programme and NEPAD.<sup>140</sup> They could be useful to the Commission in developing both the link and application of human rights to climate change.

The AU Commission was established under Article 5 of the AU Constitutive Act as the AU secretariat.<sup>141</sup> In relation to climate change it has been involved in implementing roles of the AU under Article 3(d) of the Constitutive Act which include the promotion and defence of common positions for Member States.<sup>142</sup> With specific reference to Article 3(d), the AU Commission prepared the African Climate Change Strategy which, among other functions, seeks to promote research, education, awareness raising and advocacy about climate change.<sup>143</sup> The strategy can facilitate collaboration between the African Commission and the AU Commission in the promotional activities of the former, focusing on climate change awareness building and advocacy. AMCEN consists of the Ministers responsible for environmental affairs of AU Member States and has played a critical role in climate change negotiation.<sup>144</sup> Its mandate extends to the provision of advocacy for environmental protection in Africa and the observance of the implementation of environmental conventions.<sup>145</sup>

136 Viljoen *International Human Rights Law in Africa* 376.

137 African Union Convention for the Protection and Assistance of Internally-Displaced Persons in Africa, adopted by the Special Summit of the AU held in Kampala, Uganda, 23 October 2009 (Kampala Convention).

138 For the establishment and mandate of these rapporteurs, see ACHPR “Special Mechanisms” <http://www.achpr.org/mechanisms/> (accessed 24-06-2017).

139 *Urgenda Foundation v The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015); for a review of the case, see De Graaf and Jans “The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change” 2015 *Journal of Environmental Law* 517.

140 Jegede *The Climate Change Regulatory Framework* 238-239.

141 Constitutive Act of the African Union adopted in Lome Togo on 11 July 2000 and entered into force on 26 May 2001 (Constitutive Act)

142 *Ibid.* Art 3

143 AMCEN “Decision 15/5: African Strategy on Climate Change” adopted at the fifteenth session of the African Ministerial Conference on the Environment, Cairo from 4 to 6 March 2015; Draft African Union Strategy on Climate Change 2014, AMCEN-15-REF-11, 3.

144 Acquah, Torheim et al *History of the African Ministerial Conference on the Environment 1985 – 2005* (2006) 12-13.

145 UNEP “AMCEN” <http://web.unep.org/africa/amcen> (accessed 23-06-2017).

Climate change is a core aspect of the programme of the AMCEN. For instance, at its special session in 2016, it expressed a commitment to addressing the environmental dimension of the Paris Agreement on Climate Change.<sup>146</sup> Previously it has organised dialogues and raised awareness in public meetings on climate-related issues in different sub-regions of Africa.<sup>147</sup> The African Commission can collaborate with AMCEN in increasing awareness regarding the human rights provision of the Paris Agreement. For that purpose, its commissioners, special rapporteurs and working groups can feature in dialogues and public meetings organised at sub-regional levels by AMCEN.

The AU Constitutive Act provides for the establishment of PAP as one of the organs of the AU.<sup>148</sup> One of the reasons for the existence of the organ is to ensure “full participation of African peoples in the development and economic integration of the continent.”<sup>149</sup> PAP is expected to “play a vital role in development of policy and legislative frameworks on climate change.”<sup>150</sup> In its meetings, it has noted that national legislation can play a critical role in ensuring that climate change is addressed.<sup>151</sup> It reiterates the need for the legislative domestication of the 2015 Paris Agreement.<sup>152</sup> In addition to collaborating with PAP on its general activities, the African Commission can address PAP in its subsequent resolutions to work towards ensuring the integration of human rights in climate change-related legislation and policies at a national level.

The ClimDev-Africa Programme is an initiative of the AU Commission (AUC), the African Development Bank (AfDB) and the United Nations Economic Commission for Africa. It was created to offer a concrete response to climate change in Africa.<sup>153</sup> Responding to this call, the Conference of African Ministers of Finance, Planning and Economic Development worked with organisations, including the AUC and AfDB, to develop and implement a ClimDev-Africa Programme.<sup>154</sup> The focus of the programme includes the development of science, working partnerships with stakeholders, including vulnerable communities, and action integration for climate change.<sup>155</sup> Its key stakeholders include the poor, women and vulnerable communities and populations.<sup>156</sup> The agenda of ClimDev-Africa is compatible with aspects such as the promotional visits, organising seminars and conferences, publications and dissemination of information, which fall within the promotional mandate of the African Commission. Hence, ClimDev-Africa is an avenue through which the Commission can generate both the realities in terms of the adverse effects of climate change and disseminate its efforts and findings in relation to climate change and human rights.

The NEPAD framework was adopted in July 2001 by the Organisation of African Unity (OAU) Assembly of Heads of State and Government.<sup>157</sup>

146 UNEP “AMCEN Sixth Special Session” Cairo Declaration, 18 to 19 April 2016 [http://drustage.unep.org/sites/default/files/amcen6/amcen\\_sixth\\_special\\_session\\_cairo\\_declaration\\_final.pdf](http://drustage.unep.org/sites/default/files/amcen6/amcen_sixth_special_session_cairo_declaration_final.pdf) (accessed 23-06-2017).

147 For instance, see AMCEN “Report of the Eastern African Sub-regional Meeting on Climate Change, jointly convened by the East African Community and the African Ministerial Conference on the Environment” (3 September 2009) AMCEN/EAC/CC/1 1-31 para 70.

148 Constitutive Act 2001 Art 5(c).

149 Constitutive Act 2001 Art 17(1).

150 Chagutah “PAP is fully behind the Common African Position on Climate Change” <http://www.za.boell.org/web/cop17-785.html> (accessed 23-06-2017).

151 Wordpress “PAP Debates Reports on Land Grabbing, Climate Change, and the Situation in Libya and Tunisia” <https://appablog.wordpress.com/2011/10/14/pap-debates-reports-on-land-grabbing-climate-change-and-the-situation-in-libya-and-tunisia> (accessed 24-06-2017).

152 PAP “PAP calls for Legislative Domestication of the 2015 Paris Agreement” <http://www.panafricanparliament.org/news/246-pap-calls-for-legislative-domestication-of-paris-agreement-on-climate-change> (accessed 23-06-2017).

153 AU “Decision on Climate Change and Development in Africa” Doc. Assembly/AU/12(VIII).

154 Economic Commission for Africa: Conference of African Ministers of Finance, Planning and Economic Development Fortieth session of the Commission, Addis Ababa, Ethiopia 2-3 April 2007 “Ministerial Statement” E/ECA/COE/26/L6 para 24.

155 AfDB “Framework Document for the Establishment of the Climdev-Africa Special Fund” (AfDB 2009) para 2.

156 *Ibid.* 7, 14.

157 Centre for Human Rights (CHR) “The New Partnership for Africa’s Development” <http://www.chr.up.ac.za/undp/regional/docs/nepad4.pdf> (accessed 24-06-2017) (NEPAD Framework Document). On the evolution of NEPAD, see Taylor *NEPAD: Toward Africa’s Development or Another False Start?* (2005) 1-18; Killander “The African Peer Review Mechanism and Human Rights: The first Reviews and the Way Forward” 2008 *Human Rights Quarterly* 41.

Since 2003, it has identified climate change as a regional challenge and suggested the need for a task force as an urgent measure of action.<sup>158</sup> Subsequently, NEPAD formulated an action plan in which it asserts that climate change is a major threat to the atmosphere and that its impacts will be “varied, irreversible and long-term.”<sup>159</sup> As a response, through its Climate Change Fund, NEPAD seeks to strengthen the resilience of African countries to adapt to climate change and mainstream gender into climate change agricultural support.<sup>160</sup> In implementing this programme, the African Commission can manage and share knowledge and encourage mutual participation to aid the integration of human rights.

## 5 CONCLUSION

This article set out to argue that the work of the African Commission, the treaty monitoring body of the African Charter in relation to climate change, is ineffective and to suggest a way forward. The article articulated the normative features in the development on climate change and human rights at the UN-level through the UNFCCC, the UNHRC and treaty monitoring bodies. As shown, the OHCHR report, UNHRC Resolutions, the UNFCCC Cancun Decision and the Paris Agreement have clarified the link of climate change to the enjoyment of human rights. Programmes and engagements with a range of stakeholders have been used by special mechanisms to advance the link of climate change to human rights. Effective regional interventions through public awareness and participation also characterise developments at the UN-level.

In the light of the above, the article revealed that the effort of the African Commission is limited. There is scant reference to climate change in the reports of states, while climate change has not featured in the concluding observation on states’ reports and in the exercise of protective mandate. The Commission’s resolutions on climate change and human rights offer little clarity on the particularity and effective processes to adopt in establishing the link and application. The promotion of awareness, participation and access to information in addressing climate change and its effects is also not adequate. Relevant special mechanisms such as the Working Group on the Rights of Older Persons and People with Disabilities in Africa, and the Special Rapporteur on Women are yet to feature climate change in their activities.

However, as has been shown in this article, the potential exist to strengthen the link between climate change and human rights within the functions of the African Commission as well as in collaboration with other existing structures and programmes of the AU. The human rights connection to climate change can be developed through state reporting and the amendment of reporting guidelines, promotional visits, information dissemination, a closer relationship with NHRIs, and the inclusion in the mandate of existing special mechanisms of the Commission. Collaboration with structures and programmes within the AU that already have climate change as a focus is an important step to take in developing both the link and application of human rights to climate change. There is a need for improvement to advance climate change in the work of the African Commission.

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158 Open Society Foundation *The New Partnership for Africa’s Development (NEPAD) in Plain Language: A Resource for Organisations* (2002) 39-40.

159 African Union “New Partnership for Africa’s Development (NEPAD) Action Plan of the Environment Initiative” (African Union October 2003) paras 32 and 33.

160 NEPAD “Our Work” <http://www.nepad.org/programmes> (accessed 23-06-2017).