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Climate Change and the Future Generation under the African Human Rights System: Fostering Pathways and Partnerships



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Ademola Oluborode Jegede

EXECUTIVE SUMMARY

The objective of this policy brief is to argue the conceptual and legal bases for the protection of the rights of future generations in the context of adverse effects of climate change and articulate the potential pathways and partnerships necessary for its achievement under the African human rights system (AHRS). In Africa, climate change is not only a reality, it has current and future consequences on the enjoyment of several rights including the rights to life, health, food, water and housing. Yet, it is not clear whether the protection of future generations against the adverse consequences of climate change is possible, and if so, how it may be achieved and advanced under the AHRS. The policy brief shows that there is no conceptual challenge in constructing a claim for the protection of the rights of future generations in the context of climate change. It then explores not only the potentials in key instruments under the AHRS but also shows how the promotional, protective and interpretive mandates of quasi-judicial and judicial bodies of the AHRS may advance the protection of future generations in the light of adverse effects of climate change in Africa. To advance this approach, the policy brief recommends that awareness campaigns, capacity building and empowerment through workshops and trainings at state and regional levels are necessary to equip actors, especially African non-governmental organisations (NGOs), lawyers, human rights institutions, states representatives and mandate holders, on the pathways across the mandates of bodies within the AHRS.

INTRODUCTION

Climate change is a global challenge. The need to address the situation has led to the negotiation of instruments under the aegis of the United Nations (UN), particularly, the UN Framework Convention on Climate Change (1992), the Kyoto Protocol to the UN Framework Convention on Climate Change (1998) and the Paris Agreement (2015). Climate change is also a prominent feature of the UN Sustainable Development Goals (UNSDGs) (2015) (Goal No. 13). In Africa, established vulnerable areas due to climate change are water resources, food security, natural resource management and biodiversity, human health, settlements and infrastructure, and desertification (Boko, Niang, Nyong et al. 2007: 433-467). Climate change is not only a current reality, though. Its impact projection for the future is just as real. According to the report of the Intergovernmental Panel on Climate Change (2018) on global warming of 1.5°C, failure to achieve net zero carbon dioxide (CO₂) emissions and stabilise global temperatures below 2°C by 2100 will be devastating for the future global climate system and human populations.

The protection of the climate system for the benefit of future generations is reflected in the preamble of five key resolutions of the UN Human Rights Council (UNHRC) linking climate change to enjoyment of human rights: Resolution 7/23 (2008), Resolution 10/4 (2009), Resolution 18/22 (2011), Resolution 26/33 (2014) and Resolution 32/34 (2016). According to the Office of the UN High Commissioner for Human Rights (OHCHR) annual report (2009) which informed the resolutions, climate change has an effect on a range of rights, including the right to life (paras 21-24), the right to adequate food (paras 25-27), the right to adequate water (paras 28-30), the right to health (paras 31-34) and the right to adequate housing (paras 35-38). The potential in a regional policy approach to link climate change to human rights obligations toward present and future generations is also mentioned in UNHRC Resolution 26/33 (2014) and buttressed by UNHRC Resolution 32/34 (2016). With a focus on the AHRS, a regional system, this policy brief clarifies the conceptual and legal bases for the protection of the rights

of future generations in the context of adverse effects of climate change and articulates the potential pathways and partnerships necessary for its achievement.

RATIONALE FOR ACTION

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 (Viljoen 2012: 169; Mutua 2000). Of these instruments, the African Charter on Human and Peoples' Rights (African Charter) (1982), the 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) are important to this discussion. The treaty monitoring bodies of the AHRS are the African Commission on Human and Peoples' Rights (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).

The protection of future generations in the face of adverse effects of climate change raises conceptual uncertainties which need clarification. One uncertainty is that both climate change and future generations deal with future projections. Another is that it is not clear whether human rights can be used as a means of addressing a projected or future harm. As Tung-Chieh (2002: 13-14) argues, it is difficult to accept that rights can be attributed to a group that does not yet exist. This sentiment equally reflects the position of the UN Human Rights Committee in *Aalbersberg v The Netherlands* that for a person to claim to be a victim of a violation of a right, 'he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such a right, or that such an effect is imminent ...' (para 6.3).

Also, there is rarity of interpretation and application of existing instruments and the use of mechanisms in the AHRS for the advancement of the protection of the rights of future generations against the adverse effects of climate change.

For instance, while there have been resolutions on human rights and climate change, such as African Commission Resolution 153 (2009), Resolution 271 (2014), Resolution 342 (2016) and Resolution 417 (2019), no specific provision of the pillar instruments such as the African Charter, Kampala Convention, Conservation Convention and ACRWC refers to the protection of future generations. So far, there is also no complaint lodged before the quasi-judicial and judicial institutions of the AHRS on the subject. Hence, it is important to explore the conceptual and legal bases for the protection of the rights of future generations in the context of adverse effects of climate change and articulate the potential pathways and partnerships necessary for its achievement within the AHRS.

PROPOSED POLICY OPTIONS

Arguably, the conceptual uncertainties and lack of application of existing norms to address adverse effects of climate change on future generations are not beyond appropriate action responses that are discussed in this section.

ADDRESSING CONCEPTUAL UNCERTAINTIES

Conceptual uncertainties should not bar the protection of the rights of future generations against the future adverse effects of climate change in the AHRS. First, the protection of future generations resonates with the thinking that the current generation is the custodian of the present climate system and has the capability to take measures for its improvement.

Second, it is difficult to accept the future reality of adverse effects of climate change and yet challenge the protection of future generations. The future generation is a core feature of the earth system that will be negatively impacted by future climate change. As Norton (1982: 322) argues, rights of future generations may be 'hypothetical rights' but cannot be ignored since there is strong evidence that future generations will exist.

Third, the argument against the protection of future generations is untenable in that it ignores the emerging development in international

human rights instruments that regards future generations as holders of rights. Articles 60 and 61 of the African Charter empower the Commission to draw inspiration from international law and international human right law. In relation to future generations, article 25 of the UN Declaration on the Rights of Indigenous Peoples (2007) affirms the responsibilities of indigenous populations towards their future generations. While there is no such specific provision in other human rights instruments, the protection of future generations is grounded in the preamble of the Universal Declaration on Human Rights (1948), the UN Charter (1945) and the International Convention on Civil and Political Rights (1976). These instruments, according to Weiss (1985: 73), 'express a fundamental belief in the dignity of all members of the human family and an equality of rights, which extends in time as well as space'. Besides, UN human rights treaty bodies have alluded to the idea that future generations can enjoy rights and that climate change may have impacts on those rights. For instance, in the context of right to food, the Committee on Economic and Social Cultural Rights (CESCR) General Comment No. 12 (1999) affirms that the right to food should be accessible for both present and future generations. It observes that normative elements of the right can be negatively affected by climatic and ecological factors (para 7). Also, in its General Comment No. 15 on the right to water, the CESCR urges 'states parties to ensure that there is sufficient and safe water for present and future generations' and notes that climate change may impact the right to water (paras 28-29).

Besides, the interests of future generations in the context of climate change have been at the heart of complaints within the UN treaty system, such as in *Sacchi et al. v Argentina et al.*, a 2019 communication awaiting hearing before the UN Committee on the Rights of the Child. In that communication, the applicants alleged that the respondent's climate policies are hindering the sustainable and safe livelihood of future generations (para 12). Thus, the foregoing demonstrates that human rights can be used for protecting the future generations against the adverse effects of climate change.

DEPLOYING EXISTING INSTRUMENTS IN THE AFRICAN HUMAN RIGHTS SYSTEM AS LEGAL BASES

Arguably, the protection of future generations in the context of adverse effects of climate is legally possible under the AHRS through the African Charter, Kampala Convention, the Conservation Convention and the ACRWC.

African Charter on Human and Peoples' Rights

The African Charter has provisions, namely, the right to a satisfactory environment (article 24), the right to existence and self-determination (article 20), free disposal of wealth and natural resources (article 21), and economic, social and cultural development (article 22), that are relevant to future generations and climate change. There is also a range of relevant individual rights, notably, freedom from discrimination, respect for life and integrity of person, human dignity, property, physical and mental health, and education (articles 2-17). Also, in terms of article 1, obligations of states include the adoption of 'appropriate legislative or other measures to give effect' to the rights guaranteed under the African Charter.

The rights to healthy environment, free disposal of wealth and natural resources, and economic, social and cultural development are crucial in climate change discussions. Carbon emission is often associated with the exploitation of environmental and natural resources by states, a development that contributes to current and future global warming. Scenarios such as overheating, heavy rainfall and flooding linked to global warming have long term effects on the rights to life, health, food, water and housing of vulnerable populations (Jegade 2020; OHCHR 2009). The fact that failure to address the underlying activities responsible for these scenarios may worsen the future state of the climate justifies the need to protect the interest of the future generations. Hence, these provisions along with articles 60 and 61 of the African Charter on the relevance of international instruments may be triggered where states fail to put in place laws,

policies and programmes on climate change that will safeguard the interests of the future generations.

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa

The Kampala Convention specifically aims at protecting and assisting persons displaced internally in Africa. In addition to article 1(k) linking displacement to 'natural or human-made disasters', article 5(4) requires states to take measures to protect and assist persons who have been internally displaced due to climate change. The effects of climate displacement can last a lifetime and beyond, hindering the prospects of future generations to enjoy a range of socio-economic rights relating to culture, food, water and housing. This is mostly due to its damaging effects on infrastructures that are necessary for the realisation of rights in the immediate and long terms. For instance, in addition to displacement, sea level increase and associated flooding may have damaged educational and health infrastructures, a reality that may worsen the situation of future generations to access health and education.

African Convention on the Conservation of Nature and Natural Resources

The Conservation Convention complements the African Charter in that it has a range of interesting provisions that have direct and indirect potential on the rights of future generations in the climate change context. Its preamble considers the environmental and natural resources of Africa as 'irreplaceable'. This is significant for the future generation when bearing in mind the potential threat and long term consequences that the reckless exploitation and depletion of these resources may have on the climate system. Article 6 calls for states to take measures in key areas which are vital in addressing the impacts of climate change including the prevention of land and soil degradation, protection and conservation of vegetation cover which include forest covers.

In more specific terms, the Conservation Convention makes copious references to future generations, a development that signifies that the protection of their interest is within the scope of its application. For instance, article 4 calls upon states to take preventative conservation measures in the interest of present and future generations while annex 1 to the Convention advances the need for protected areas to ensure that future generations can experience the wilderness qualities of the area.

The African Charter on the Rights and Welfare of the Child

While the ACRWC is a specific instrument that sets out rights and defines universal principles and norms for the status of children in Africa, aside from the African Charter, it is the other instrument with a treaty monitoring body within the AHRS. The ACRWC covers the whole spectrum of civil, political, economic, social and cultural rights which can be adversely affected by climate change. Article 14 of the ACRWC guarantees a cluster of socio-economic rights to every child. Article 14(1) provides that ‘every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health’, while article 14(2)(c) urges states to ensure the provision of adequate nutrition and safe drinking water provides for children. Although there is no provision specifically referring to ‘future generations’, article 4(1) is relevant in that it urges that ‘in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration’. Arguably, it is in the best interests of the child, whether of the present or future generations, to require states to put in place appropriate legislation and embark on measures that address climate change.

In all, the conclusion can be made that the African Charter, the Kampala Convention, the Conservation Convention and the ACWRC contain provisions and obligations that have bearing on the adverse effects of climate change on the rights of future generations in Africa.

Advancing Future Generations Rights Through Pathways and Partnerships

Interventions at regional level are important in protecting the rights of future generation in the context of adverse effects of climate change. As Hettne (2005: 549) notes, regional intervention is useful in solving transboundary environmental problems. Consequently, for a challenge such as climate change, the pathways and partnerships to advance the protection of future generations in the light of adverse effects of climate change lie in the mandates of the regional quasi-judicial and judicial bodies of the AHRS: the Commission, the African Court and the ACERWC. As demonstrated in this section, the promotional, protective and interpretive mandates of these bodies offer pathways and partnership possibilities for African NGOs, lawyers, human rights institutions, states representatives and mandate holders to advance the protection of future generations in the light of adverse effects of climate change.

Promotional Mandate

Articles 45(1)(a), (b) and (c) of the African Charter reflects the promotional functions of the Commission while articles 42(a)(i) and 43(1) speak to the promotional mandate of the ACERWC. These promotional functions entail a range of activities performed through state reporting, special mechanisms, visits, resolutions, seminars and conferences, publications and dissemination of information (Viljoen 2012: 349-390). The African Court has promotional activities not functions and these include its publications and media related activities aimed at boosting its public image (African Court website).

State Reporting and Special Mechanisms

State reporting processes 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 future generations, 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 and specifically on the rights of future generations. When considered along with the states reports, the process offers opportunity to shape the concluding remarks of the Commission and the ACERWC.

The Commission creates special rapporteurs to address substantive provisions of human rights under the African Charter (Viljoen 2012: 371). 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 by NGOs is not incompatible with the provisions of key instruments of AHRs. It aligns with article 24 of the African Charter on the right to a 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'. If established, the mandate holder can work with NGOs to, among other tasks, address current practices and developments that can have future consequences on the climate as they evolve. 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 holders, 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.

Publication and information Dissemination Activities

The agendas of the Commission, ACERWC and the African Court contain several references to its aspiration of hosting seminars and organising meetings, delivering speeches and releasing press statements on a variety of issues

(Viljoen 2012: 382). In collaboration with the Commission, ACERWC and the African Court, NGOs can assist with organising workshops and seminars focusing on climate change and human rights with specific reference to increasing awareness on the rights of future generations. Publication and information dissemination 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.

Working Groups

The Commission has established working groups that can advance and forge partnerships on the rights of future generations in the context of climate change. 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 Democratic Republic of Congo, Rwanda and Kenya with no reference in the reports to its implications for future generations in 2010 (Jegade 2016). Also, during its 35th Ordinary Session in 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 (ACERWC 2020).

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. An analytical study was commissioned by the UN in relation to child rights under the UN Convention on the Rights of the Child, which was submitted to the 35th session of the HRC (2017). In conducting the study, NGOs, mainly from the north, participated in the study (OHCHR nd). 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 social, economic and cultural rights. Similarly, they can engage with the mandate of the Working Group on Extractive Industries, Environment and Human Rights Violations 'to undertake research on the violations of human and peoples' rights by non-state actors in Africa'. Studies show that activities of non-state actors in the extractive industry, particularly oil and gas, are linked to environmental degradation (Ako and Oluduro 2013). Hence, the working groups offer stakeholders an opportunity to partner on the rights of future generations with a focus on climate change.

Protective Mandate of Quasi-Judicial and Judicial Bodies

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 African Charter which allows communications other than those of state parties (Gumedze 2003). Article 5(3) allows for NGOs with observer status to bring matters before the African 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 to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (1998). Also, article 44(1) of the ACRWC allows the Committee to receive communications from NGOs recognised by the 'Organization of African Unity, by a Member State, or the United Nations'.

Based on the foregoing, complaints can be brought before the AHRS by NGOs with a focus on climate change and the human rights of future generations. 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 rights of future generations resulting from climate change can

be made before the quasi-judicial and judicial bodies of the AHRS.

INTERPRETIVE ROLE

The Commission, the African Court and the ACERWC have interpretive functions as quasi-judicial and judicial treaty monitoring bodies. Interpretation of every provision of the African 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 African Charter which authorise 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 articles 4(1) and (2) of the Protocol establishing the Court which allow entities including recognised African organisations 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.

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 be invited to give expert opinions on topical issues of climate change regarding questions of attribution, proof or questions concerning the rights of future generations within the meaning of the instruments earlier discussed. They can also provide further clarity on the normative content of other rights within the African Charter that can be applied in the context of climate change.

CONCLUSION AND POLICY RECOMMENDATIONS

The evidence of climate change and its adverse effects are not in doubt. In Africa, actual and projected effects of climate change will undermine rights. The focus of this brief is whether

the protection of future generations against the effects of climate change is possible, and if so, how it may be achieved and advanced under the AHRS. As has been shown, constructing a claim regarding the violation of rights of future generations can be achieved through the provisions of pillar instruments of the AHRS: the African Charter, the Kampala Convention, the Conservation Convention and the ACRWC. Pathways and partnerships to advance the approach can be found in the promotional, protective and interpretive mandates of quasi-judicial and judicial bodies within the AHRS. Hence, integrating climate change impact on the rights of future generations in the state reporting process and engaging the mandates of quasi-judicial and judicial bodies within the AHRS on this issue are necessary. No less significant is the need to make climate change and future generation visible in the Special Procedures work.

As these possibilities are not yet convincingly triggered in the AHRS, it is pertinent for actors, especially African NGOs, lawyers, human rights institutions, states representatives and mandate holders, to include this approach in their activities within the AHRS. These actors that already exist within the AHRS should be identified as they are strategically placed to advocate and implement the issue. Preparation of general promotional materials including leaflets and presentations is also necessary to ground awareness campaigns, capacity building and empowerment through workshops and trainings at state and regional levels which are necessary to equip actors across the mandates of quasi-judicial and judicial bodies within the AHRS.

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