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The potential of litigating children's rights in the climate crisis before the African Committee of Experts on the Rights and Welfare of the Child

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Summary: *While human rights-based climate litigation has globally increased exponentially in the past few years, no cases related to the climate crisis have been filed before the regional African human rights bodies. The aim of this article is to systematically review the requirements for successful litigation before one of the African human rights bodies, namely, the African Committee of Experts on the Rights and Welfare of the Child. The article considers the potential for successful climate change litigation before the African Children's Committee based on the possible substantive rights arguments, the procedural challenges that may have to be overcome, and the potential remedies that may be granted by the African Children's Committee. It concludes that the*

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Children's Committee is an important potential forum for child rights-based climate litigation, given that it provides strong substantive rights protection, including for the rights of future generations, broad and adaptable provisions on standing, and has a record of granting strong and transformative remedies.

Key words: *child rights; climate change; litigation; African Children's Committee; jurisprudence*

1 Introduction

While human rights-based climate litigation has globally increased exponentially in the past few years,¹ no cases related to the climate crisis have been filed before the regional African human rights bodies, namely, the African Commission on Human and Peoples' Rights (African 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 (African Children's Committee). This is correlated to a trend where scant climate litigation has been brought against African states in general, including at the national level. On the one hand, this is not surprising, given that the vast majority of climate-related cases globally concern climate change mitigation (which concerns the contribution of defendants to causing climate change),² whereas African countries account for only about 3 per cent of global carbon dioxide (CO₂) and other greenhouse gas (GHG) emissions.³ On a cost-benefit analysis, those wanting to hold states accountable for the impacts of climate change would thus be better off pursuing cases against the historic and currently highest polluters, none of which are to be found on the African continent.

On the other hand, there are at least three considerations for why cases may be brought against African states. First, not all African countries contribute equally to GHG emissions, and there thus is a possibility that claims could arise between African countries *inter se*. For example, in 2017 South Africa accounted for approximately

1 J Setzer & C Higham 'Global trends in climate change litigation: 2021 snapshot' (2021) 5.

2 Sabin Centre for Climate Change Law 'Global climate change litigation database', Global Climate Change Litigation - Climate Change Litigation (climatecasechart.com) (accessed 10 October 2022).

3 United Nations 'United Nations Fact Sheet on Climate Change: Africa is particularly vulnerable to the expected impacts of global warming' (2006), United Nations Fact Sheet on Climate Change - Africa is particularly vulnerable to the expected impacts of global warming (unfccc.int) (accessed 5 August 2022).

1,3 per cent of global CO₂ emissions, whereas Kenya accounted for 0,05 per cent and Liberia for only 0,003 per cent.⁴ There is a possibility that this inequality could give rise to interstate litigation before African regional bodies. Second, under climate change obligations, states not only have duties to mitigate climate change, but also to adapt to climate change, something which is particularly pertinent in Africa, given that the consequences of climate change have already started to manifest. Most parts of the continent are experiencing some of the consequences of human-induced climate change, including more erratic weather patterns. For example, the Horn of Africa experienced extreme droughts through most of 2018 and 2019, followed by acute flooding at the end of 2019.⁵ Residents of these countries could turn to human rights bodies to argue that the state failed in their obligations to put in place sufficient safety nets or, for example, to build sea walls to keep salination from affecting agriculture and food sources.⁶ Third, states have obligations not only to respect human rights but also to protect their citizens against third party violations, and to fulfil or realise human rights. Thus, while they may not be the direct cause of the negative consequences of climate change, to the extent that it impacts negatively on the human rights of people in their territories, states have obligations to mitigate such consequences, including, as will be discussed below, through cooperation with developed states for the transfer of aid and technology.⁷

Given the potential for litigating climate change from a human rights-based approach in the Global South and Africa specifically, the aim of this article is to systematically review the requirements for successful litigation before one of the African human rights bodies, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The focus on children is based on three considerations: First, children are more likely to suffer human rights impacts as a result of climate change. Second, they have less say in political processes regarding protection against

4 H Ritchie & M Roser 'CO₂ and greenhouse gas emissions' (2020), Emissions from food alone could use up all of our budget for 1.5°C or 2°C – but we have a range of opportunities to avoid this - Our World in Data (accessed 20 April 2021).

5 World Meteorological Organisation 'State of the Climate in Africa' (2020) 3.

6 See, eg, Communication 3624/2019 *Billy & Others v Australia* United Nations Human Rights Committee (2022).

7 African Union 'Common Africa Position (CAP) on the post-2015 development agenda' (2014) 19-20, 32848-doc-common_african_position.pdf (au.int) (accessed 13 June 2022). The Common Africa Position recognises that Africa stands to suffer the most from climate change, takes the stand that the continent is not responsible for the factors causing climate change, and calls upon developed nations to reduce emissions and provide financial support and technology transfer to developing countries to increase capacity to respond to climate change.

climate change and, therefore, are potentially more likely to turn to the courts for vindication of their rights. Third, there is a close link between the rights of children and that of future generations, which is of particular concern in the context of climate change litigation, given the need for preventative action for future harm. The article considers the potential for successful child rights-based climate change litigation before the African Children's Committee on the basis of its record of substantive rights protection, its procedural safeguards, and potential remedies, and draws some conclusions regarding the types of cases that could succeed before the African Children's Committee.

Following this introduction, the second part of the article provides a brief overview linking children's rights with the climate crisis, whereafter part 3 delves into the potential for substantive rights protection by the African Children's Committee, based on the jurisprudence, soft law instruments and statements of the Children's Committee in which it elaborates its approach to climate change and environmental considerations more broadly. Part 4 is concerned with procedural considerations, including standing and jurisdiction, as well as the admissibility and content requirements for bringing a case before the African Children's Committee, as well as potential remedies related to current and future climate harms before the Children's Committee. While the jurisprudence of the African Children's Committee is limited,⁸ the article draws on the relevant provisions of the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁹ and existing jurisprudence, soft law instruments and other sources from the African Children's Committee to distil existing principles of substance and procedure that may be relevant in climate litigation.

2 Children's rights and the climate crisis

Children are considered one of the groups that is most vulnerable to the negative impacts of climate change.¹⁰ They bear the brunt of the impact of anthropogenic GHG emissions, and pollution of air, water

8 At the time of writing only nine cases before the African Children's Committee had been finalised. See African Children's Committee Table of Communications, <https://www.acerwc.africa/table-of-communications/> (accessed 10 December 2022).

9 At present all but five African states, namely, Morocco, Sahrawi Arab Democratic Republic, Somalia, South Sudan and Tunisia, have ratified the African Children's Charter; African Children's Committee - African Committee of Experts on the Rights and Welfare of the Child (accessed 10 October 2022).

10 A WHO-UNICEF-Lancet Commission 'A future for the world's children?' (2020) 5.

and land linked to industry activities.¹¹ Climate change can have a range of impacts on a child's well-being, including through impacts on their mental and physical health, by inducing forced migration, which disrupts stable environments for growing up, as well as impacts on the right to education, for example where food security is disrupted and children are required to help produce food or work to supply an additional stream of income, which in turn in some cases might result in the economic exploitation of children.¹² Living in an environment with these stressors could also negatively impact on children's rights to leisure and recreation.¹³ As is clear from this exposition, the various child rights concerns resulting from climate change are also highly interlinked with one another. Furthermore, girl children have a 'particular vulnerability to the effects of climate change [resulting] from the intersectionality of their vulnerabilities based on sex, age and in the African context, often also religious and socio-economic circumstances'.¹⁴ Intersectional conditions can also increase the burden on other categories of children, such as children with disabilities, children living in poverty or in single parent or even child-headed households, or for children belonging to indigenous and rural communities that depend directly on the land for their livelihoods. In Africa, the United Nations Children's Fund (UNICEF) has projected that around 125 million children could be subjected to the consequences of climate change by 2030, including through displacement, water scarcity and malnutrition.¹⁵

Because of its impacts in particular on malnutrition and water scarcity, one of the greatest risks of climate change to children's rights involves their rights to health and life. For example, it is estimated that globally 88 per cent of the total burden of climate change-related diseases occurs in children under the age of five years.¹⁶ The impact of climate change on children's health can either be immediate, thus manifesting during childhood, or can take the form of long-term damage that manifests much later in adulthood.¹⁷ The immediate impacts of climate change include physical injuries caused by

11 As above.

12 E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 1 *African Human Rights Yearbook* 23 27-28.

13 K Arts 'Children's rights and climate change' in C Fenton-Glynn (ed) *Children's rights and sustainable development: Interpreting the UNCRC for future generations* (2019) 216-220.

14 Arts (n 13) 27.

15 J Guillemot & J Burgess 'Children's rights at risk' in UNICEF *The challenges of climate change: Children on the front-line* (2014) 47.

16 S Adhoot et al 'Global climate change and children's health' (2015) 136 *Paediatrics* 3.

17 Y Akachi et al 'Global climate change and child health: A review of pathways, impacts and measures to improve the evidence base' (2009) UNICEF Discussion Paper 2.

floods, heat waves, respiratory diseases and trauma. Extremely high temperatures that result in heatwaves could cause heat exhaustion, heat stroke, and even permanent neurological damage and death.¹⁸ The impact of heatwaves on pregnant women and their foetuses is particularly negative, including delayed brain development in unborn children, which affects educational attainment and work outcomes later in life.¹⁹

Climate change further threatens access to potable water and affects crop yields, thereby prejudicing food production.²⁰ These in turn induce malnutrition which has a short and long-term adverse impact on children's health, development and well-being. Malnutrition, in addition to being a challenge on its own, exacerbates diseases that affect children. Furthermore, climate change affects the spread of vector-borne diseases such as malaria, dengue and schistosomiasis. Children are more vulnerable to these diseases and are more likely to experience adverse health outcomes than the rest of the population.²¹

The African Children's Committee has taken note of this range of negative consequences arising from climate change on the rights and welfare of African children. While no child rights climate cases have been brought before its communications procedure, the Committee has recently embarked on a rights-based approach to tackling challenges faced by children in relation to climate change through other avenues at its disposal.

3 Child rights-based approach of the African Children's Committee and its engagement with climate change

3.1 Child rights-based approach

The legal basis for the protection of children's rights on the African continent is the African Children's Charter,²² which establishes not only a range of rights, but also four principles that have to be taken into account in every decision affecting a child. The African Children's Committee is an African Union (AU) organ established by the African

18 JG Zivin & J Shrader 'Temperature extremes, health, and human capital' (2016) 26 *Children and Climate Change* 39.

19 Zivin & Shrader (n 18) 37 39.

20 Akachi et al (n 17) 2.

21 As above.

22 African Charter on the Rights and Welfare of the Child.

Children's Charter, composed of 11 members serving in their individual capacity and with the mandate to promote and protect children's rights as enshrined in the Children's Charter.²³ It became operational in 2002. Its mandate includes receiving communications (complaints) from 'any person, group or non-governmental organisation recognised by the Organisation of African Unity [now AU], by a member state or the United Nations relating to any matter covered by this Charter'.²⁴

In addition, the African Children's Committee receives state reports and adopts Concluding Observations, undertakes follow-up missions and investigations, holds regular sessions, undertakes studies and makes declarations and adopts General Comments.²⁵ Article 46 of the African Children's Charter further empowers the African Children's Committee to draw inspiration from other international instruments in interpreting the provisions of the African Children's Charter.

Unlike the other African human rights instruments, such as the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), the African Children's Charter does not provide for the right to a healthy and clean environment. Nevertheless, there are provisions in the African Children's Charter that would be of particular relevance in the context of climate change. As noted before, many different rights of children can be affected by climate change, and the African Children's Charter makes provision for a right to survival and development (article 5), which also includes a right to life; a right to education (article 11) which includes 'the development of respect for the environment and natural resources'; the right to leisure and recreational activities (article 12); the right to health and health services (article 14); and protection against child labour (article 15). The African Children's Charter also makes specific provision for the protection of children in specific categories of vulnerability, including children with disabilities (article 13) and child refugees (article 23). These rights taken together provide strong protection for African children against a range of rights violations that may result from the impacts of climate change.

Without necessarily mentioning climate change, the African Children's Committee through previous engagements with states has dealt with issues such as drought, malnutrition, access to

23 Arts 32, 33 & 42 African Children's Charter.

24 Art 44 African Children's Charter.

25 <https://www.acerwc.africa/> (accessed 20 March 2021).

United Nations (UN) Convention on the Rights of the Child (CRC) protects the best interests as 'a primary consideration' in all decisions concerning a child, whereas the African Children's Charter requires it to be *the* primary consideration in *all actions* concerning children.³⁰ As *the* primary consideration, no other consideration, such as economic or political interest, can be given greater weight than what would be in the best interests of children. It should further be noted that the best interests of the child applies to decisions that concern children both directly as well as indirectly, and would therefore have to be complied with even in decisions such as those related to development of fossil fuel sources or green energy sources, which do not directly concern children.

A further illustration of the strength of the best interests of the child principle in the climate change context is to be found in the African Children's Committee General Comment 5 (GC5) on state obligations.³¹ Under GC5, an important provision regarding state obligations under the African Children's Charter provides:

The child's best interests include short term, medium term and long term best interests. For this reason, State actions which imperil the enjoyment of the rights of future generations of children (eg allowing environmental degradation to take place, or inappropriate exploitation of natural resources) are regarded as violating the best interests of the child standard.

While climate change is not directly mentioned here, it clearly is included under environmental degradation which 'imperil[s] the enjoyment of the rights of future generations'. The explicit linking by the African Children's Committee of the best interests of the child with environmental considerations would also be an important building block in future litigation on climate change. The GC5 also requires states to monitor and prevent business activities that might 'cause environmental degradation to the prejudice of children's rights'. This places a strong duty on states, which can be enforced by the African Children's Committee, in relation to their obligation to protect children against third party actions.

The GC5 further also demonstrates the relevance of the principle of participation, and requires states to 'consult children in the formulation of plans, policies and laws that have a bearing on their interests, and to ensure that child participation in governance is devolved to regional and district level'.³² This need for the recognition

30 Art 4 African Children's Charter.

31 African Children's Committee General Comment 5 para 4.2.

32 African Children's Committee General Comment 5 para 6.8.

of children's rights to participation would be relevant in relation to responses to erratic weather events and disasters as a result of climate change (adaptation), as well as development policies and longer-term plans around national energy generation, and the necessity to limit GHG emissions during these activities (mitigation).

In relation to the principle on the right to life, survival and development, under the African Children's Charter the state has a duty to ensure the realisation of these rights 'to the maximum extent possible'.³³ The reference to 'maximum extent possible' places a strong obligation on states, which means that in cases of climate litigation there is a high burden of proof on states to show that they have been ensuring (or fulfilling) these rights to the maximum extent through their climate policies and practices.

The African Children's Committee has adopted a child rights-based approach and made the link between the various rights and principles contained in the African Children's Charter, such as the right to health and the principle of the best interests of the child, and other rights with a healthy environment, and now also explicitly with climate change.³⁴

3.2 Engagement of the African Children's Committee on climate change and child rights

The African Children's Committee has arguably been the African human rights body that has been the most proactive in expressing concern about the human rights implications of climate change. While the African Commission has through the years adopted a range of resolutions and statements on climate change, and made mention of the impacts of climate change on various vulnerable groups, its proposed study on climate change, the first real work that it would have undertaken on climate change and its impacts on human rights realisation in Africa, has been pending since 2009.³⁵ The African Children's Committee, on the other hand, took a proactive step

33 Art 5(2) African Children's Charter.

34 Resolution 18/2022 of the African Children's Committee Working Group on Children's Rights and Climate Change to Integrate a Child Rights-Based Approach into Climate Change Action, March 2022.

35 Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa – ACHPR/Res.153(XLVI)09; Resolution 271 on Climate Change in Africa – ACHPR/Res.271(LV)2014; 342 Resolution on Climate Change and Human Rights in Africa – ACHPR/Res.342(LVIII)2016; Resolution 417 on the Human Rights Impacts of Extreme Weather in Eastern and Southern Africa due to Climate Change – ACHPR / Res 417 (LXIV) 2019; Resolution 491 on Climate Change and Forced Displacement in Africa – ACHPR/Res. 491 (LXIX)2021.

through the establishment in September 2020 of a Working Group on Children's Rights and Climate Change, discussed below.³⁶

In 2016 the Children's Committee established a 25-year action plan entitled 'Agenda 2040: Fostering an Africa fit for children', which guides its work on the continent.³⁷ The concept of 'climate change' is referred to only a single time in Agenda 2040, in relation to Aspiration 9, 'Every child is free from the impact of armed conflicts and other disasters or emergency situations'.³⁸ This aspiration, nevertheless, in its action steps requires that states take steps to ensure that '[c]hildren are equipped to be resilient in the face of disasters or other emergency situations'. While the Action Plan is not a binding document, this demonstrates the recognition by the African Children's Committee of the obligations on states to build resilience which, in relation to climate change, would require taking steps to adapt to a changing climate. Aspiration 9 further recognises that '[d]espite their precarious position, children are often overlooked in states' disaster management and response', not only reaffirming the link between disasters and internal displacement and flow of refugees, but also obligating states to take steps to include children's rights concerns in climate responses. Agenda 2040 also engages indirectly with climate change through the engagement of the document with issues such as survival, health, issues of malnutrition, quality education, and providing that the views of the African child matter.

The more explicit and extensive engagement of the African Children's Committee with the issue of climate change commenced with its study on children on the move in Africa. This study, adopted in 2018, found, among others, that climate change is one of the key drivers of children's movement on the continent.³⁹ The study found that extreme weather disasters, floods and droughts are responsible for the displacement of millions of children across the continent. It further found that climate change-induced drought and resource scarcity lead to conflict, exploitation and violence against children and child marriage where girls are exchanged for livestock for the survival of the family.⁴⁰ However, as the main focus of the study is

36 African Children's Committee 'African Children's Committee Establishes Working Groups under its Special Mechanisms' (2020), African Children's Committee - African Committee of Experts on the Rights and Welfare of the Child (accessed 12 February 2021).

37 African Children's Committee *Agenda 2040: Fostering an Africa fit for children* (2016).

38 African Children's Committee (n 37) 45.

39 African Children's Committee 'Mapping children on the move within Africa' (2018) 53.

40 African Children's Committee (n 39) 54.

on children on the move, it only captures some of the impacts of climate change on various rights and welfare of children in Africa.

In 2020 the African Children's Committee embarked on a more direct initiative to tackle the issue of climate change from a child rights perspective, by establishing a Working Group on Children's Rights and Climate Change.⁴¹ The resolution establishing the Working Group cites many reasons for the need to focus on this thematic area, including the alarming and overarching negative impact of climate change on the ecosystem in general, and the disproportionate impact on least-developed and developing countries.⁴² The resolution stresses that climate change has a disproportionate negative impact on Africa due to limited capacity to respond to the phenomenon and the high reliance on water and land resources for survival.⁴³ However, the main justification for the establishment of the Working Group under the African Children's Committee is the special vulnerability of African children to the impacts of climate change.⁴⁴ The resolution notes that due to their growing bodies and developing minds, children are most vulnerable to the risks of climate change and that climate change exacerbates the already-existing vulnerabilities of children.⁴⁵ The resolution draws a direct link between the impact of climate change and various rights enshrined in the African Children's Charter, including its impact on the rights to survival and development, health and welfare, education, protection from harmful practices, non-discrimination and protection from violence.⁴⁶ As the wording used in the resolution indicates, this is not an exhaustive list of rights affected, but merely an illustrative list indicating the rights that are most at stake. The explicit recognition, in an important soft law instrument such as a resolution, of the link between climate change and specific child rights as well as the principles in the Children's Charter is an important development that envelopes a child rights-based approach to climate change, particularly given the relevance of the principles as discussed above in strengthening the application of the rights protected.

The Working Group is expected to undertake several activities to tackle the impact of climate change on the rights and welfare of children in Africa. It can also receive information regarding

41 African Children's Committee 'Working Groups', <https://www.acerwc.africa/working-groups/> (accessed 17 February 2021).

42 African Children's Committee 'Resolution on the Establishment of Working Group on Children's Rights and Climate Change' (2020) 1.

43 As above.

44 As above.

45 African Children's Committee (n 41) 2.

46 As above.

climate change and children's rights violations on the continent. The Working Group, with the wide mandate given to it, has the potential to spearhead the child rights-based approach to climate change in Africa and galvanise various stakeholders towards this approach. Moreover, as the membership of the Group is composed of members of the African Children's Committee as well as external experts, the discussions and inclusion of new external expertise in the Working Group will likely influence and strengthen the wider work of the African Children's Committee on climate change, such as in the consideration of state party reports, the consideration of communications and the undertaking of on-site investigations.⁴⁷

Apart from the important fact that the African Children's Committee has been open to acknowledging the links between environmental degradation, climate change and children's human rights, there are further strategic considerations for why litigants may want to bring cases before it, rather than before other international tribunals or courts. The first is the very important link made between the African Children's Committee between children's rights and the rights of future generations. As we noted earlier, '[s]ome scholars have argued that this concern with future generations means that issues of the environment and sustainability cannot be dealt with within a human rights framework, as they concern generations who are not yet alive, and thus have no entitlement to human rights (yet)'.⁴⁸

Clearly, the recognition by the African Children's Committee that the best interests of the child requires that the rights of future generations (of children) also be taken into account, puts this debate at rest insofar as the African Children's Committee is concerned, and litigants would not have to convince it on this ground. Furthermore, while climate change was previously understood to be limited to future generations, current research, as indicated above, shows that the consequences are already manifesting, which means that arguments about climate change impacts do not have to rely on future impacts only. Nevertheless, future harm remains relevant, since climate change is a form of slow violence that manifests over time, with the cause and effect dispersed over space and time.⁴⁹

47 It is particularly crucial for the issue to be raised during consideration of state party reports on the implementation of the Charter as this mechanism enables the holistic monitoring of all the rights in the Charter and has the potential to prevent violations by proactively monitoring steps taken by state parties.

48 Boshoff & Damte (n 26) 130.

49 R Nixon *Slow violence and the environmentalism of the poor* (2011).

4 Procedural considerations in bringing climate cases before the African Children's Committee

The previous part demonstrates that there are clear protections in the African Children's Charter of children's rights that may be impacted by climate change. It further demonstrates the far-reaching contribution of the principles of the child rights-based approach, as well as the engagement of the African Children's Committee with the issue of climate change to date. Taken together, these considerations allow us to state with high confidence that it is likely that a case brought before the African Children's Committee would have a strong substantive basis in the African Children's Charter, and would have a high likelihood of succeeding on the merits. Nevertheless, there are several procedural matters that should also be in place for a case to succeed which, in the case of international tribunals such as the African Children's Committee, are contained in content and admissibility requirements that must be complied with before a case can be considered on the merits.

While the African Children's Charter and the African Children's Committee's Rules of Procedure do not extensively provide for the procedures around communications, the African Children's Committee adopted Guidelines for the Consideration of Communications, and revised these Guidelines in 2014.⁵⁰ These Guidelines draw on the procedures before the African Commission,⁵¹ and set out six conditions⁵² that must be satisfied for communications to be considered on the merits, along with requirements on the form

50 African Children's Committee 'Revised Guidelines for the Consideration of Communications' (2014), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjz_urt8v6AhUM6CoKHQzICS4QFnoEACkQAQ&url=https%3A%2F%2Facerwc.africa%2Fwp-content%2Fuploads%2F2018%2F07%2FRevised_Communications_Guidelines_Final-1.pdf&usq=AOvVaw0Xka9fmaaAw8z7bFipSwGN (accessed 6 October 2022).

51 J Sloth-Nielsen 'Children's rights litigation in the African region: Lessons from the communications procedure under the ACRWC' in T Liefgaard & JE Doek (eds) *Litigating the rights of the child* (2014) 249.

52 The African Children's Committee Revised Guidelines for Consideration of Communications outline the conditions for admissibility of a communication under secs II and IX. Under sec two the general principle is laid down as follows: 'The Committee shall consider a communication against a State Party alleging violations of the rights and welfare of the child enshrined in the African Children's Charter only if the communication fulfils the requirements set forth in the African Children's Charter and these Guidelines,' after which the requirements of form and content are laid down. Under sec IX(1) the guidelines list six additional conditions for admissibility. Hence, combining these six requirements and merging the requirements of form and content to add the seventh one, it can be considered that there are broadly speaking seven requirements for admissibility. The practice of the Committee further strengthens this understanding; see Communication 006/Com/002/2015 *The Institute for Human Right and Development In Africa and Finders Group Initiative on Behalf of TFA (A Minor) v Government of the Republic of Cameroon* (2018) paras 21 & 22-33.

and content.⁵³ The six main admissibility requirements are that the communication (i) must be compatible with the provisions of the Constitutive Act of the African Union (AU) and the African Children's Charter; (ii) is not exclusively based on information circulated by the media or is manifestly groundless; (iii) does not raise matters pending settlement or previously settled by another international body or procedure in accordance with any legal instruments of the AU and principles of the United Nations Charter; (iv) is submitted after having exhausted available and accessible local remedies, unless it is obvious that this procedure is unduly prolonged or ineffective; (v) is presented within a reasonable period after exhaustion of local remedies at the national level; and (vi) does not contain any disparaging or insulting language. Some of these, such as (ii), (iii) and (vi) above, arguably do not raise any particular issues in the context of climate change that differentiate it from other cases. In terms of content requirements, the Guidelines further require information regarding '(w)here possible, the name of the victim or victims, in case they are not the complainant or complainants, and of any public official or authority who has taken cognisance of the fact or situation alleged', and '(t)he state the complainant considers responsible, by act or omission, for the violation of any of the rights and welfare of the child recognised by the African Children's Charter'.

The first requirement, namely, that the communication must be compatible with the provisions of the Constitutive Act of the AU and the African Children's Charter requires in the first place that there must be a *prima facie* violation of the provisions of one of these two treaties, that is, that the Committee must have material jurisdiction over the case. Given the wide range of children's rights that may be impacted by climate change, a communication could be submitted on *prima facie* proof of violation of any of a number of provisions, such as the right to life, survival and development and health, among others. The first requirement has also been interpreted to contain requirements in relation to other forms of jurisdiction, such as territorial, temporal and personal jurisdiction. In order to simplify the discussion, and focus on the different content and admissibility requirements in the context of climate change cases, this part discusses the requirements that have not yet been disposed of under the following headings below: identifying the victims of climate harms; African states as duty bearers in relation to climate claims;

53 African Children's Committee Revised Guidelines for the Consideration of Communications (2014) sec II(1); African Children's Committee Communication 002/Com/002/2009 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya* (2009) para 15 (*Nubian case*).

the material jurisdiction of the Committee; harm suffered versus (potential) future harm; and exhaustion of local remedies. This part concludes with a discussion of the potential remedies that may be granted by the Children's Committee, as a further consideration on whether a climate case should be brought before the African Children's Committee.

4.1 Identifying the victims

The nature of climate change is such that its impact is generally collective, with a large number of victims who may or, much more likely, may not all be individually identified. Some jurisdictions allow for broad standing, and do not have too many limitations on who may bring cases on behalf of themselves or in the public interest. In other jurisdictions the matter of standing has often been the reason why climate cases have not proceeded, in that the persons instituting the claim must (a) be the victims (directly or indirectly) and (b) may claim only on their own behalf and not in the public interest more generally. This is an argument that was advanced by the government of The Netherlands in the case of *Urgenda v Netherlands*, that the complainants were not direct or indirect victims and hence cannot institute the proceedings. This is because in the case the alleged violations were based on the European Convention on Human Rights (European Convention), and article 34 of the Convention allows only complaints from victims.⁵⁴ However, the ruling of lower courts in The Netherlands, which were later upheld by the Constitutional Court, took the position that Dutch law allows the complainant to institute proceedings on behalf of residents of the country who are victims of the alleged violations of the right to life and the right to family life due to the impact of climate change.⁵⁵ Thus, the limitation on standing was overcome, and it was not necessary to identify every individual that was affected.

Recently, climate litigation on behalf of large groups of children has come before domestic and international judicial and quasi-judicial bodies. One of the latest cases is one that is brought before the UN Committee on the Rights of the Child (CRC Committee) on climate change, by 16 children from various countries, including

54 Supreme Court of The Netherlands *The State of The Netherlands and Stichting Urgenda* (2020) para 2.3.1.

55 *Urgenda* (n 54) para 5.9.3.

African countries (South Africa and Tunisia) against five defendant states.⁵⁶ This case presented no challenges to the requirement of identification of victims, as noted by the CRC Committee in the admissibility decision: 'The authors have *prima facie* established that they have *personally experienced* a real and significant harm in order to justify their victim status'.⁵⁷ Hence, victim identification was not an issue as the complainants elaborated on how they were personally affected by the climate change impact of the acts and omissions of the respondent states.⁵⁸

The question that thus arises is to what extent the African Children's Committee requires that victims bringing cases before it have to be individually identified and to what extent they may bring cases only on their own behalf. The African Children's Charter provides that any person, group or non-governmental organisation recognised by the AU, a member state, or the UN can bring a communication before the African Children's Committee.⁵⁹ The Revised Communication Guidelines further elaborate on this by stating that individuals, groups or legal persons can bring communications before the African Children's Committee on their own behalf or on behalf of third parties, alleging violations of one or more of the provisions of the Charter.⁶⁰ Hence, communications can directly be brought by a child or group of children or a third party on behalf of a child or group of children. The African Children's Committee thus has very wide provisions on standing.

In fact, in most of the communications considered by the African Children's Committee, the case was instituted not by the direct or indirect victims, but by someone else on their behalf. In the *Talibés* case⁶¹ the complainants, an academic institution and a non-governmental organisation (NGO), brought the communication on behalf of approximately 10 000 children in Senegal, known as Talibés, who are forced to work as street beggars.⁶² The alleged victims were not listed individually, but all those belonging to the Talibés group allegedly were direct victims, with the case focusing

56 Table of pending cases before the Committee on the Rights of the Child, <https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf> (accessed 19 February 2021).

57 UNCRC *Chiara Sacchi & Others v Argentina* (2021) 14 (our emphasis).

58 Communication to the UNCRC *Chiara Sacchi & Others v Argentina & Others* (2019) paras 253-274.

59 Art 44(1) African Children's Charter.

60 African Children's Committee 'Revised Guidelines for the Consideration of Communications Section' (2014) (1).

61 *Talibés* case (n 27).

62 *Talibés* case para 2.

on the nature and pattern of violations suffered by a clearly definable but not individually identified group.

In the *Nubian* case the applicants brought the communication on behalf of the children of one ethnic group called Nubians who reside in Kenya. All Nubian children were said to have been denied their right to citizenship in Kenya as a result of discrimination.⁶³ Finally, in *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania*, a case against the government of Tanzania regarding the expulsion of pregnant girls from school, the complainants brought the communication on behalf of Tanzanian 'pregnant and married schoolgirls'.⁶⁴ While the facts in the communication make it clear that only certain adolescent Tanzanian girls were directly victimised by the alleged violations, the communication nevertheless is concerned with all Tanzanian girls who may potentially be impacted should they become pregnant. All these communications and other similar ones were declared admissible by the African Children's Committee. Hence, it is safe to assume that the rules and the practice of the Children's Committee are very flexible when it comes to allowing litigation on behalf of a large group of children, in that not only may a case be brought by someone other than the victims on their behalf, but the individual victims also do not have to be specifically identified, as long as the group to which they belong is well defined (even if very large).

4.2 African states as duty bearers in relation to climate claims

A controversial matter when it comes to responsibility for climate change in Africa may be holding African state parties to the Charter accountable for human rights violations for which they are not directly responsible, given that the contribution of African states to climate change currently is minor. In the AU Common African Position on the post-2015 development agenda, member states unanimously agreed that while Africa stands to suffer most from climate change, it is not responsible for the factors causing climate change.⁶⁵ As noted in the introduction regarding the contribution of Africa to total global GHG emissions, this position is not far from reality. Nevertheless, African countries have willingly entered into various commitments to take measures to tackle climate change, both on the side of mitigating impacts of climate change, and also

63 *Nubian case* (n 53) para 5.

64 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* (2020) para 1.

65 African Union 'Common Africa Position (CAP) on the post-2015 development agenda' (2014) 19-20.

to adapt to the consequences.⁶⁶ One indication of that is the high level of ratification of the Paris Agreement to the United Nations Framework Convention on Climate Change,⁶⁷ which over 90 per cent of African countries have ratified.⁶⁸ Furthermore, 52 African countries have submitted their first nationally-determined contributions (NDCs) to the Paris Agreement.⁶⁹ In their NDCs African countries have committed to take various steps to reduce their greenhouse gas emissions and to build resilience to adapt to the impact of climate change.⁷⁰ NDCs, as targeted and measurable tools, currently are the most important global policy frameworks to tackle climate change, hence it is important to leverage on them in ensuring accountability for child rights violations.

The African Children's Charter in article 46 explicitly mandates the African Children's Committee to 'draw inspiration from international law on human rights and other instruments adopted by the United Nations and by African countries in the field of human rights'. Furthermore, article 1(2) of the Children's Charter provides that '[n]othing in this Charter shall affect any provisions that are more conducive to the realisation of the rights and welfare of the child contained in the law of a state party or in any other international convention or agreement in force in that state'. Therefore, one possibility for determining what the standards are that are required of African states in upholding human rights in the context of climate change, is to look at the commitments that they made in other instruments. Thus, the African Children's Committee could hold African countries responsible for violating the African Children's Charter by connecting the various rights in the Charter with NDC commitments. NDCs can be used as a tool to identify what measures should be taken by states to protect the rights of children under the Charter. Hence, when states fail to meet their self-determined NDC

66 See, eg, the draft African Climate Change Strategy (2020-2030), https://archive.uneca.org/sites/default/files/uploaded-documents/ACPC/2020/africa_climate_change_strategy_-_revised_draft_16.10.2020.pdf (accessed 10 October 2022) as well as strategies on Disaster Risk Reduction, Weather and Climate services, biodiversity and ecosystem-based solutions, in which the member states pledge to undertake a range of measures to mitigate and reduce the impact of climate change.

67 UN General Assembly United Nations Framework Convention on Climate Change: Resolution/adopted by the General Assembly 20 January 1994, A/RES/48/189.

68 United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (accessed 23 February 2021). All African countries, except Eritrea, Libya and South Sudan, have ratified the agreement.

69 United Nations Climate Change 'Climate change is an increasing threat to Africa', <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa> (accessed 21 February 2021).

70 As above.

commitments, it may result in the violation of the rights protected in the Charter.

There are several examples of where the application of standards set in another area has led to findings of human rights violations. One example is the *Urgenda* case, where in the Dutch Supreme Court judgment the Court relied on article 2 of the Paris Agreement, which sets 2°C as the highest level of increased global temperatures that can be allowed. The Court then referred to the best available science under the 2007 report of the Intergovernmental Panel on Climate Change (IPCC), which states that in order to meet the 2°C, industrialised states have to reduce their GHG emissions by 25 to 40 per cent by 2020. The Court's decision thus is based on the argument that in order to protect the human rights under the European Charter of Human Rights (article 2 on the right to life and article 8 on the right to respect for private and family life), the Paris Agreement standard of reduction in GHG emission is the applicable standard that would determine whether there was compliance with human rights obligations. Similarly, in *AS, DI, OI and GD (represented by counsel, Mr Andrea Saccucci) v Italy*,⁷¹ the UN Human Rights Committee found a violation by Italy of the human rights of migrants on a sinking boat in the Mediterranean who were under the 'effective control' of Italy, by reference to the 'relevant legal obligations incurred by Italy under the international law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations'.⁷² The African Children's Committee also already in the *Northern Uganda* case showed that instruments unrelated to human rights, such as those related to international humanitarian law, may be relevant in this regard.⁷³

For these reasons, the commitments of African states in NDCs under the Paris Agreement to the extent that they contain provisions more conducive to the realisation of child rights, could be linked to the rights contained in the African Children's Charter and aid in establishing the standards that should be applied in finding violations of the relevant provisions of the Children's Charter. Even though NDCs vary in level of commitment, most of them contain elements of food

71 UNHRC *AS, DI, OI and GD (represented by counsel, Mr Andrea Saccucci) v Italy* CCPR/C/130/D/3042/2017.

72 *AS, DI, OI and GD* (n 71) para 7.8.

73 *Michelo Hunsungule & Others (on behalf of children in Northern Uganda) v The Government of Uganda* (2005) para 39.

security, non-discrimination, participation and the like that are linked to human rights norms.⁷⁴ The duty to fulfil children's rights obliges states to take all necessary measures to facilitate their realisation.⁷⁵ In the context of climate change, African countries can take measures to mitigate it by protecting natural carbon sinks and increasing the adaptation capacity of children to the impacts of climate change.⁷⁶ In determining adaptation measures, states should, among others, assess how climate change affects specific rights and identify actions that can be taken to lessen the impact on children.⁷⁷ However, the commitments entered into by African countries under their NDCs have high financial implications. The African Development Bank estimates that Africa will need US \$3 trillion to implement its NDCs by 2030.⁷⁸ Accordingly, many of the commitments entered into by African countries are conditional upon receiving technical and financial support.⁷⁹

Hence, when litigating climate change-related child rights violations, it is important to factor in the need to take steps to foster international cooperation to meet mitigation and adaptation targets. The Paris Agreement itself stresses the need for cooperation and specifically calls on developed countries to provide financial resources to developing countries for mitigation and adaptation measures to implement obligations under the agreement.⁸⁰ However, there is a large gap between climate finance needs and the current level of domestic and international climate financing.⁸¹ Hence, African countries should, in fulfilling their human rights obligations in relation to climate change, take a proactive role in seeking financial and technical cooperation from developed countries in meeting their commitments.

Furthermore, based on the positive obligations to protect their citizens against human rights harms perpetrated by third parties, African states have duties towards African children to limit the

74 S Duyck et al 'Human rights and the Paris Agreement's implementation guidelines: Opportunities to develop a rights-based approach' (2018) 12 *Carbon and Climate Law Review* 7.

75 Art 1 African Children's Charter.

76 OHCHR 'Understanding human rights and climate change' (2015) 2.

77 As above.

78 African Development Bank 'Climate change in Africa', <https://www.afdb.org/en/cop25/climate-change-africa> (accessed 23 February 2021).

79 As above.

80 Art 9 United Nations Paris Agreement.

81 'Africa's USD 2,5 trillion of climate finance needed between 2020 and 2030 requires, on average, USD 250 billion each year. Total annual climate finance flows in Africa for 2020, domestic and international, were only USD 30 billion, about 12% of the amount needed.' Climate Policy Initiative, *Climate Finance Needs of African Countries*, *Climate Finance Needs of African Countries – CPI* (climatepolicyinitiative.org) (accessed 7 October 2022).

impact of climate change on their human rights. The third parties from whom African countries have an obligation to protect children include private sector actors and developed states that take the lead in GHG emissions. This is one of the added values of the human rights-based approach to climate change, in that human rights provide a higher threshold of responsibility on states by ensuring that they are responsible not only for their own actions but also for the actions of third parties that result in human rights violations.

In the *Northern Uganda* case cited above, the Ugandan government argued that while they recognise that the actions of private persons may be imputed to the government for purposes of finding a violation, they in fact had 'undertaken various measures in addressing the alleged violations'.⁸² This very likely is a line of arguments that would also be followed by governments in relation to climate change adaptation and mitigation. While the African Children's Committee in the *Northern Uganda* case did not address this under the admissibility requirements where it was raised, in the substantive consideration of the matter, it found substantive gaps in the government systems that allowed violations to continue, and found some of the steps taken by the government to be inadequate.⁸³ The African Children's Committee held that 'protection of rights should lead to the well-being and welfare of children. In other words, the recognition of rights should be able to promote and improve the lived reality of children on the ground', and further held that the rights in the African Children's Charter are not subject to progressive realisation or available resources. These holdings place a considerable burden on states that intend to show that the steps they have taken are sufficient and also impose an obligation of result rather than obligation of conduct. Furthermore, in the *Talibés* case the African Children's Committee made a 'bold condemnation of acts of third parties against children for which states may be held accountable'.⁸⁴ This willingness of the African Children's Committee not to shy away from state responsibility for third party actions will be an important characteristic in relation to climate change litigation as well.

As discussed below, the duty to protect children from climate change-related rights violations also entails that states take proactive steps to prevent foreseeable future harm from occurring.⁸⁵ Such steps include the regulation of business activities and ensuring

82 *Northern Uganda* case (n 73) para 29.

83 *Northern Uganda* case; see eg para 48.

84 MG Nyarko & HM Ekefre 'Recent advances in children's rights in the African human rights system' (2016) 15 *The Law and Practice of International Courts and Tribunals* 385 390.

85 OHCHR (n 76) 2.

accountability and remedies for violations of human rights.⁸⁶ However, African countries may only be able to regulate business activities within their jurisdictions. Even though this remains an important measure to mitigate climate change, it is highly inadequate to combat the phenomenon when one considers the low contribution of Africa to climate change. Hence, there is a need to look into how African countries can ensure accountability of businesses (and possibly even developed states, while being cognisant of the power imbalances in the international system), for GHG emissions that are resulting in human rights violations on the continent. A failure to take measures to do this could be regarded as a failure of African countries to meet their duty to protect their citizens, specifically children, from violations of human rights as a result of climate change.

4.3 Material jurisdiction of the African Children's Committee: Harm suffered versus (potential) future harm

As noted above, one of the challenges that arise in the context of climate change is that while some of the consequences are already being felt today, many of the impacts will only worsen, and climate litigation should thus be able to hold states accountable not only for the human rights violations that have already taken place, but also to prevent and mitigate future harm. However, future harm is a contested issue in human rights law, which generally only makes a finding of human rights violations that had already taken place. In this regard, in bringing a case before the African Children's Committee, a complaint must, among others, contain an 'account of the act or situation that is the subject matter of the complaint, specifying the place and date of the alleged violations'.⁸⁷ In relation to climate change, it may at times be difficult to give such an account of the 'place and date' of the violation, where the cause and effect often cannot be directly correlated, and where the most severe consequences are likely to manifest many years from now in the future.

One way in which future harms may be brought under the remit of the courts is through environmental impact assessments (EIAs), as well as the more recently-developed social impact assessments and climate change impact assessments. EIAs are not only tools used at the national level to determine whether to go ahead with a project

86 S Duyck et al 'Human rights and the Paris Agreement's implementation guidelines' (2018) 12 *Carbon and Climate Law Review* 4.

87 African Children's Committee Revised Guidelines for the Consideration of Communications (2014) sec II art 3(e).

based on the potential environmental impacts that may result from such a project, but it is also a principle of international environmental law as one of the procedural obligations on all states to ensure the protection of the environment.⁸⁸ The conducting of social and climate change impact assessments also is a further requirement in some national jurisdictions, and its use in setting aside or requiring a review of a decision based on the climate impacts could also be transferred to the international level. For example, in the *ANAW* case before the East African Court of Justice (EACJ) the Court concluded that the state would maintain the 'right to undertake such other programmes or initiate policies in the future *which would not have a negative impact on the environment and ecosystem in the Serengeti National Park*',⁸⁹ thereby in effect requiring that future harm should be assessed before any projects are undertaken. While this case is not directly related to climate change, it shows the role of EIAs in putting scientific evidence of future harm before the courts, and in giving 'effect to both the precautionary and preventive principles'.⁹⁰ These are principles that originally arose in the context of environmental law, but are becoming more and more relevant also in a human rights context through their association with the right to a clean and healthy environment, and human rights-based climate litigation. A similar decision was reached in the *SERAC* case⁹¹ before the African Commission, which held that there is a need to conduct EIAs before any future petroleum development projects are undertaken in the Ogoniland region of Nigeria.

In a climate litigation case before the South African High Court, the Court determined that in the decision to build a new coal power station, given the nature of the activity, a climate change impact assessment should have been carried out, and be considered as part of the review process by the minister of the decision to grant an EIA.⁹² While in this case the initial decision to authorise the plant was not overturned, EIAs allow all foreseeable impacts of a project, including its contribution to GHG emissions, to be part of the decision-making process. Similar to these cases, the African Children's Committee should be able to rely on evidence from EIAs and climate change and human rights impact assessments to require governments to

88 N Craik *The international law of environmental impact assessment: Process, substance and integration* (2008) 23.

89 EACJ *ANAW v the Attorney General of the United Republic of Tanzania* para 86.

90 LJ Kotzé & A du Plessis 'Putting Africa on the stand: A bird's eye view of climate change litigation on the continent' (2020) 50 *Environmental Law* 660.

91 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case).

92 *Earthlife Africa Johannesburg v The Minister for Environmental Affairs & Others*, Unreported Case 65662/16 (Gauteng High Court Pretoria, 8 March 2017) (*Thabametsi*), referred to in Kotzé & Du Plessis (n 90) 636.

set aside projects that are likely to cause extensive future harm to the climate and, therefore, to human rights, or to require EIAs to be undertaken in future, before projects with serious climate implications commence.

A further approach to taking into account future harm is an assessment of future risk, and is illustrated by the *Urgenda* case, introduced above. In this case the Court held that states have a duty to take ‘appropriate steps if there is a real and immediate risk to persons and the state ... is aware of that risk’.⁹³ The Court held that this would include ‘risks that may only materialise in the longer term’, such as that resulting from climate change, as long as ‘the risk in question is directly threatening the persons involved’.⁹⁴ The Court also referred to the precautionary principle in this regard. Similarly, in their submissions to the CRC Committee in the *Sacchi* case discussed above, the 16 petitioners referred to a joint statement by the CRC Committee with other UN bodies, in which it confirmed that state human rights obligations ‘include a duty “to prevent foreseeable human rights harm caused by climate change, [and] to regulate activities contributing to such harm”’.⁹⁵ They further refer to the view of the Inter-American Court on Human Rights which, similar to the *ANAW* case above, held that because ‘it is often impossible to restore the *status quo* that existed before the environmental damage has occurred, prevention must be the main policy regarding the protection of the environment’.⁹⁶ Therefore, states have to take proactive steps to prevent foreseeable harm from occurring.⁹⁷ What harm is foreseeable depends on the best available models based on the most up-to-date scientific knowledge on the consequences of climate change, particularly where it pertains to the specific national context. In the *Urgenda* case, for example, the Court relied on the Fifth Assessment Report of the IPCC in making its assessments.

Litigants before African courts and tribunals, including the African Children’s Committee, would have to ensure that the scientific basis

93 J Spier ‘The “strongest” climate ruling” yet: The Dutch Supreme Court’s *Urgenda* Judgment’ (2020) 67 *Netherlands International Law Review* 319.

94 Legal ground 5.2.2.

95 Committee on the Elimination of Discrimination Against Women; Committee on Economic, Social and Cultural Rights; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families; Committee on the Rights of the Child; and Committee on the Rights of Persons with Disabilities ‘Joint Statement on Human Rights and Climate Change’ 16 September 2019, <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and?LangID=E&NewsID=24998> (accessed 10 October 2022).

96 American Convention of Human Rights, Advisory Opinion OC-23/17 Inter-Am Ct HR, Human Rights and the Environment, 130 (15 November 2017).

97 OHCHR (n 76) 2.

of the current as well as future harm is firmly founded and supported by the necessary evidence and models. A lack of such sufficient basis can cause courts to dismiss cases or, as with the *Mbabazi* case in Uganda, the lack of sufficiently-supported arguments arguably is part of the reason why this case has been pending before the national courts since it was filed in 2012 and no action has been taken on it since 2017.⁹⁸ The lack of scientific grounding was criticised by Kotzé and Du Plessis in this case, as follows:⁹⁹

The prayers cited ... are so wide and virtually all-encompassing that it would arguably require considerable effort and evidentiary proof to convince a court that the government has been neglecting its duties in this respect. Moreover, the vague framing of the prayers might signal a lack of information on, or knowledge of, climate change law, policy, and science by the plaintiffs.

4.4 Exhaustion of local remedies

A further admissibility requirement for complaints before the African Children's Committee is that complainants must show '[a]ny steps taken to exhaust domestic remedies, or the impossibility or ineffectiveness of doing so'. The African Children's Committee in this regard has followed the jurisprudence of the African Commission, which states that¹⁰⁰

the requirement of exhaustion of local remedies is only applicable if the remedies are available, effective, accessible and not unduly prolonged. The Committee reiterates the jurisprudence of the Commission in this matter and notes that a remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complaint.

One factor hindering the exhaustion of domestic remedies, and which may trigger the exception where domestic remedies are not available or effective, is provisions around standing. For example, in the *Nubian* case before the African Children's Committee against Kenya, national level litigation was excessively delayed, among others, because a 'justice of the High Court declined to transmit the file to the Chief Justice on the ground that it was necessary to ascertain the identity of the 100 000 applicants'.¹⁰¹ The African

98 High Court in Uganda *Mbabazi & Others v The Attorney General and National Environmental Management Authority* Civil Suit 283 of 2012.

99 Kotzé & du Plessis (n 90) 656.

100 *Project Expedite Justice & Others v the Republic of the Sudan* (2019) Admissibility Decision (*Project Expedite Justice* case) para 44.

101 *Nubian* case (n 53) para 19. See the next part regarding the approach of the African Children's Committee regarding identification of victims.

Children's Committee found that the 'legal limbo for such a long period of time in order to fulfil formalistic legal procedures' was not in the best interests of the child and thus allowed the case. This means that even cases that are filed before national courts, but where the procedure is unduly prolonged, may be brought before the African Children's Committee. In the case of the Tanzanian school girls discussed above, the Committee found that the case had been unduly prolonged because the 'domestic remedy has taken over 7 years in total and the appeal has taken 2 years without the Court fixing a date for a hearing of the case'.¹⁰²

The African Children's Committee, drawing inspiration from the African Commission, further gives a purposive reading to the provision on exhaustion of local remedies, in that the 'lack of awareness of an alleged violation by the state deprives it the opportunity to address such a violation', finding that where cases are pending before national courts for excessive time periods or where reports are available, the state cannot claim that it is not aware.¹⁰³ A further instance where states are assumed to be aware of the situation and to have had the opportunity to remedy it, is instances of 'violations of rights on a large scale that were well documented over a long period of time in the international community'.¹⁰⁴ In such cases of massive or large-scale violations of rights, an exception to the exhaustion of domestic remedies requirement is applied, in that it would '*ipso facto* make local remedies unavailable, ineffective and insufficient',¹⁰⁵ and cases before the African Children's Committee are allowed without recourse to the national courts being required. In its *Talibés* case the African Children's Committee held that 'when a remedy is impractical due to the number of victims and the practically challenging process of exhausting it, then it is considered unavailable'.¹⁰⁶

Thus, while the African Children's Committee has a requirement for the exhaustion of domestic remedies, there are different exceptions where this requirement does not have to be complied with, and which could be applied in climate cases as well. This could consequently mean that if the authors of climate change cases brought before the African Children's Committee can show that the violation resulting from a lack of action by a state on climate change amounts to 'serious or massive violations' or where there are a large

102 *Legal and Human Rights Centre & Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* (2020) paras 19 & 21.

103 *Nubian case* (n 53) para 27.

104 *Northern Uganda case* (n 73) para 27.

105 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 100.

106 *Project Expedite Justice case* (n 100) para 45.

number of victims, as would usually be the case in relation to climate effects, or that domestic procedures are unduly prolonged, then domestic remedies in such cases would not have to be exhausted. In the *Project Expedite Justice* case the African Children's Committee held that the 'large number of victims and the complexities of the violations raise concerns of efficiency; it is wishful thinking to expect local courts to try the cases of millions of children in a reasonable time in keeping with the best interest of the child'.¹⁰⁷ Similarly, climate change with its 'myriad societal impacts' and 'wide range of complex disputes'¹⁰⁸ is likely to fall under the category of cases exempt from the domestic remedies requirement.

4.5 Remedies and provisional measures

This final sub-section is concerned with the remedies and provisional measures that the African Children's Committee has granted in its previous cases as well as, more broadly, the remedies that human rights bodies could grant in climate change cases, to determine the kinds of remedies that may be available to climate litigants before the African Children's Committee. Sloth-Nielsen notes that 'injunctions that require states to amend their laws or policies, to adopt new laws, to include the excluded, and to end practices which violate the Charter' easily fall within the mandate of the African Children's Committee in relation to remedies it can provide.¹⁰⁹ The Children's Committee has not shied away from giving pointed and extensive remedies, including some that 'hinge on resource mobilisation and the progressive implementation of socioeconomic rights' and 'considerable human, technical and financial capacity'.¹¹⁰ Nevertheless, the relatively small contribution of African states to overall global climate change does limit the possibility of comprehensive remedies, especially when it comes to mitigation. In issuing remedies, African courts also have to balance the development needs and prerogatives of states with the climate risk. This is set out clearly by the East African Court of Justice in the *ANAW* case cited above, where the EACJ held that it aims to 'stop future degradation without taking away the respondent's mandate towards economic development of its people'.¹¹¹

The remedies issued by the African Commission in relation to environmental matters may also be instructive. In the *SERAC* case¹¹²

107 *Project Expedite Justice* para 46.

108 Kotzé & Du Plessis (n 90) 621.

109 Sloth-Nielsen (n 51) 264.

110 As above.

111 *ANAW* case (n 89) para 82.

112 *SERAC* case (n 91).

the Commission required the state to 'ensure protection of the environment, health and livelihood of the people of Ogoniland' through, among others, compensation to victims, 'a comprehensive clean-up of lands and rivers', conducting of EIAs before any future project and the establishment of a 'effective and independent oversight bodies for the petroleum industry'.¹¹³ In its more recent *IHRDA v DRC (Kilwa decision)* the African Commission ordered the state 'to take the necessary steps to prosecute and punish state employees and personnel of the Anvil Mining Company involved in the said violations',¹¹⁴ thus 'explicitly calling for the government to hold the company accountable and provide redress for violations suffered as a result of the actions of the state, as well as the company'.¹¹⁵ This is one demonstration of how remedies can be applied to hold African states accountable for the actions of third party actors, also in the context of contribution to climate change, where the activities of such actors take place within the jurisdiction of the state.

Under its Communications Guidelines,¹¹⁶

[w]here the Committee considers that one or more Communications submitted to it or pending before it reveal a situation of urgency, serious or massive violations of the African Children's Charter and the likelihood of irreparable harm to a child or children in violation of the African Children's Charter may, either on its own initiative or at the request of a party to the proceedings, request the State Party concerned to adopt Provisional Measures to prevent grave or irreparable harm to the victim or victims of the violations as urgent as possible.

While this is a procedure regularly used by the African Commission and the African Court, particularly in cases where alleged victims are on death row, the African Children's Committee to date has not yet granted provisional measures. One of the determinants on whether the African Children's Committee would grant provisional measures is the 'imminence' of the harm. While not in the context of provisional measures, the *Urgenda* case dealt with this matter of imminent threat within the European human rights system, and held that climate change does pose 'real and imminent threats' and that 'a dangerous situation is imminent', and consequently that states have to take 'precautionary measures to prevent infringement as far as possible'.¹¹⁷ The African Court has repeatedly held that it will issue provisional measures only where 'irreparable and imminent risk

113 *SERAC case*, Holding.

114 ACHPR Communication 373/10 *IHRDA v DRC*.

115 African Commission Working Group on Extractive Industries, Environment and Human Rights in Africa 'The *Kilwa* case: The importance of Communication 373/10: *IHRDA v DRC*' *WGEI Newsletter* (2018) 10.

116 African Children's Committee Revised Communications Guidelines, sec VII(1)(i).

117 *Urgenda* case (n 54) paras 46 & 71.

will be caused before it renders its final judgement';¹¹⁸ furthermore, that '[t]he risk in question must be real, which excludes the purely hypothetical risk'.¹¹⁹

A second determinant for granting provisional measures is the concept of 'irreparable harm'. In the context of climate change there is a need to define what would constitute irreparable harm. While it is clear that loss of life in a climate disaster, such as flood or heatwave, may constitute a grave violation resulting in irreparable harm, issues such as loss of homes or loss of livelihood due to similar extreme weather events may not give rise to provisional measures unless the Children's Committee expands its interpretation. Additionally, many of the harms caused by climate change are said to have lifelong irreversible impacts on children. For instance, famine-induced undernutrition in the first two years of life can lead to irreversible stunting.¹²⁰

Whether a request for provisional measures will be necessary, of course, will depend on the kind of climate case that is brought before the African Children's Committee, and the most likely cases where it would be relevant would be to prevent the state or a third party from taking actions that will have an irreparable effect in the short term, such as for example building a new coal power station. However, there will be a high burden of proof on the applicants to prove that the specific harm from the actions taken would be irreparable and real and manifest before the final decision would be issued, and thus it is not likely that provisional measures requests in climate cases will succeed. This is evidenced in a communication against Egypt, where the applicants' request for provisional measure was denied, where the Committee applied the requirements strictly and reiterated the need for the request to prove grave violation of a right recognised in the Charter and the likelihood of irreparable harm resulting from the violation.¹²¹ Nevertheless, the urgency of climate cases has resulted in expedited procedures for hearing climate change cases before the European Court of Human Rights,¹²² and a similar reasoning could

118 African Court Application 062/2019 *Sébastien Ajavon v Republic of Benin* Order of 17 April 2020 (provisional measures) para 61.

119 African Court (n 118) para 62.

120 OHCHR 'The global climate crisis: A child rights crisis' (2019) 3, *WorldVisionInputs2.pdf* (ohchr.org) (accessed 10 October 2022).

121 African Children's Committee *Dalia Lotfy and Samar Emad on behalf of Sohaib Emad v the Arab Republic of Egypt* Communication 9/Com/002/2016 para 10.

122 Garden Court Chambers 'European Court of Human Rights is fast-tracking a climate case against 33 European states brought by 6 Portuguese youth', <https://www.gardencourtchambers.co.uk/news/european-court-of-human-rights-is-fast-tracking-a-climate-case-against-33-european-states-brought-by-6-portuguese-youth> (accessed 10 October 2022).

also be applied to expedite the hearing of climate cases before the African Children's Committee.

One of the limitations in litigating at the regional level in Africa is the lack of strong enforcement mechanisms, which affects all judicial and quasi-judicial bodies. While a 'win' before a regional body such as the African Children's Committee may be important in clarifying the state obligations in relation to climate change, it is not a given that this will necessarily result in changes on the ground. Nevertheless, through using its other competencies, such as Concluding Observations on state party reports and follow-up country visits in conjunction with decisions on communications, the African Children's Committee, through regular engagement, 'moral persuasion, diplomacy, or political embarrassment' may be able to engender some change.¹²³ Given that to date only very few cases have been brought before the African Children's Committee, it is able to do extensive monitoring and follow up on its decisions unlike, for example, the African Commission or the African Court. This may contribute to making it a more attractive forum.

Other reasons why the African Children's Committee would be an attractive forum for litigants include the broad standing, which allows anyone to bring a case on behalf of different categories of children affected by climate change. As noted above, despite African states having a lesser role in causing climate change, they have voluntarily, but within the framework of a binding international agreement, the Paris Agreement, agreed to reduce activities that contribute to climate change, and to take steps to adapt to the negative consequences of climate change. These obligations, when read together with state obligations to respect, protect and fulfil human rights, provide standards against which state conduct to protect child rights against climate change impacts can be measured, and against which states can be held accountable. Another strength of the African Children's Committee that may be an incentive for bringing cases before it is the relative flexibility that it has shown in relation to the often stringent requirement of exhaustion of domestic remedies. As noted, the African Children's Committee has been lenient in allowing access where domestic remedies are unnecessarily delayed, where there are too many applicants to realistically be able to exhaust domestic remedies (in cases where domestic jurisdictions do not allow for public interest litigation, for example) or where there are cases against multiple states. One or more of these exceptions

123 E Durojaye 'The potential of the Expert Committee of the African Children's Charter in advancing adolescent sexual health and rights in Africa' (2013) 46 *Comparative and International Law Journal of Southern Africa* 385 408.

are likely to apply in climate change cases, and exhaustion of domestic remedies would thus in most cases not present a barrier to accessing the African Children's Committee. The consideration of future harms is also not excluded by the practice of the Children's Committee so far, despite the requirement that the account of the violations should specify when and where the violation took place. We can consider in this regard the fact that the African Children's Committee takes account of the rights of future generations and, thus, where scientific evidence is clear that there will be future harm, as proven, for example, through EIAs or risk analyses based on best scientific evidence, then the African Children's Committee would be likely to follow the global trend in allowing such a case to proceed. Additionally, with the impact of climate change starting to manifest all over the world, climate litigation would usually be brought not only in relation to future harm, but usually would combine arguments related to future harm with harm that is already manifesting. Given the child rights-based approach developed by the African Children's Committee and, in particular, the best interests of the child principle, it is likely that the long-term implications of climate change would be seriously considered by the African Children's Committee.

5 Conclusion

The growing global trend of human rights (and child rights) litigation in climate change action has opened new horizons to accelerate the urgent action needed in responding to the climate crisis, both preventatively and in relation to already-experienced impacts. In light of the link between children's rights and the climate crisis, the normative and jurisprudential approach of the African Children's Committee, and procedural requirements before the Children's Committee, this article argues that there is a strong basis for bringing climate-based child rights cases before the African Children's Committee, and a high likelihood of complying with the relatively flexible admissibility requirements.

Taking a child rights approach to climate change ensures the prioritisation of the rights to survival and development of children in measures taken to combat climate change. The jurisprudence of the African Children's Committee reveals a very progressive and integrated approach to the rights of children, and it has not shied away from dealing with complex matters involving conflict, socio-economic rights and long-term impacts. Furthermore, it has adopted an expansive approach to the obligations on states in relation to children's rights on the continent, and has extensively used its prerogative to draw inspiration from other sources of international law

in the interpretation of provisions of the African Children's Charter. Through drawing specifically on the jurisprudence of the African Commission, it has contributed to the coherence of the regional human rights system. As alluded to in this article, the Children's Committee has clearly stipulated the obligations of governments in taking into consideration the long-term best interests of children in actions and decisions.¹²⁴ This can be used to easily build a case for climate change-related violations that are yet to occur in addition to those that are already taking place, thus ensuring that litigating before the Children's Committee will address not only the rights of African children, but also future generations. Furthermore, the admissibility requirements before the African Children's Committee are interpreted flexibly in order to ensure the protection of the best interests of the child. It allows for wide access, not only in *locus standi* but in its flexibility to the identification of the victims. Furthermore, in relation to the exhaustion of domestic remedies, the African Children's Committee has been willing, in the best interests of the child, to allow for this requirement to be dispensed with, under certain justified circumstances, which are also likely to apply in climate cases. Furthermore, the Children's Committee gives specific and far-reaching remedies, and takes concrete steps to ensure monitoring and follow-up.

According to best available science, '[s]ignificant climate impacts are already occurring at the current level of global warming and additional magnitudes of warming will only increase the risk of severe, pervasive and irreversible impacts'.¹²⁵ Not only are the effects of climate change already being felt, but Africa as a continent is highly vulnerable to climate change and, in Africa, African children bear the brunt of the impact. Various national, continental and global hard and soft law and policy instruments form the basis of human rights and environmental obligations of African countries. It is argued that the commitments of African states in NDCs under the Paris Agreement have human rights implications that could and should inform the enforcement of human rights treaties, including the African Children's Charter. It is further argued that, based on the positive obligations to protect their citizens against human rights harms perpetrated by third parties, African states also have duties towards African children to limit the impact of climate change on children's rights through comprehensive adaptation measures.

¹²⁴ African Children's Committee General Comment 5 para 4.2.

¹²⁵ UNFCCC 'Report on the Structured Expert Dialogue on the 2013-2015 Review: Note by the co-facilitators of the Structured Expert Dialogue' UN Doc FCCC/SB/2015/INF.1 4 May 2015 15.

The increasing inter-reliance on environmental law principles and human rights law is evident in the recently-adopted resolution by the UN General Assembly recognising the right to a healthy environment. There also is a trend towards relying on environmental science such as IPCC reports, and the (environmental) legal standards set in climate change agreements, to inform findings of human rights violations. The proposal for reliance on NDCs and EIAs as part of making assessments of human rights violations of current and future generations of children, therefore, is just an extension of this trend, and would give the African Children's Committee the necessary standards and indicators in determining whether state action is compliant with children's rights.

Outside of the communications procedure, the African Children's Committee, with its recent focus on climate change and children's rights, including the establishment of a working group on climate, has already signalled the significance that it attaches to this topic. The inclusion of external climate change experts in its working group presents to the Children's Committee an opportunity to further familiarise itself with the challenges and the possible remedies that it may recommend to state parties.

For these reasons, the African Children's Committee arguably is the best-placed organ for bringing the first climate change cases from a rights-based approach to the continental level. However, it should be noted that the communications mechanism of the Children's Committee cannot be initiated by the Committee itself. Hence it is crucial for individuals, civil society organisations and governments to take a proactive role and bring climate change cases before the African Children's Committee.

Finally, in order to protect the rights of all people from the consequences of the climate crisis, it would be necessary to use all available fora to seek remedies and to build a strong human rights and child rights-based climate jurisprudence, not only through the African Children's Committee, but also in the other bodies at the African regional level, at the national level, and in global level fora.