



SCHOOL OF LAW

**CLIMATE CHANGE REGULATORY FRAMEWORK AND THE PROTECTION OF
CULTURAL RIGHTS IN SOUTH AFRICA**

**MINI-DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF
THE LLM DEGREE**

BY

**D.R. MAIWASHE
STUDENT No: 11511026**

SUPERVISOR: Prof A.O Jegede

DECLARATION

I, Dzhivhuluwani Rueben Maiwashe, student number 11511026, hereby declare that this dissertation submitted by me in fulfilment of the requirements of LLM degree at the University of Venda hereby submitted by me, has not been submitted previously for a degree at this or any other university, and that it is my work in design and execution, and all reference material contained herein have been duly acknowledged.

Signature



Date : 05 September 2022

ABSTRACT

Climate change's severe consequences on cultural rights represent a clear threat to South Africa's development and progress. South Africa is affected by climate change, which is currently the world's greatest challenge. The link between culture and the negative effects of climate change has been proven in the literature, but the link between these and cultural rights, as well as the appropriateness of the climate change regulatory framework to handle this, has not been studied. The study looked at the negative effects of climate change on culture and evaluated whether South Africa's current climate change regulatory framework can help or impede the safeguarding of culture in the face of climate change's negative effects. The study also considered whether the climate change regulatory system in South Africa was enough for dealing with the negative effects of climate change on culture. To do so, the study used a desktop research method to assess and analyse current literature, legal framework, policies, and institutional activity on human rights, as well as the negative effects of climate change on the right to culture. It reviewed relevant legislation, national guidance documents and international and national studies about culture and aspects of climate change.

Findings from this study show that South Africa has an elaborate legislative framework for addressing the detrimental effects of climate change but policy inconsistency, lack disjointment in application of policy at local level still affect the effective implementation of the legislative frameworks. The study unravelled the spatial application of law as one of the challenge hindering the protection of cultural rights. Moreover, court cases have demonstrated that the judiciary is an important avenue for solving matters that have to do with cultural rights as stated in the International Conventions on Climate Change. South Africa has a responsibility to integrate multiple knowledge systems, practices, and innovations in the design and implementation of international and national initiatives, programs, and policies in a way that respects and supports local communities and indigenous peoples' culture.

Keywords: climate change, climate change regulatory framework, cultural rights, protection.

Table of Contents

ABSTRACT	ii
CHAPTER ONE	1
INTRODUCTION	1
1.1 Background.....	1
1.2 Problem Statement	3
1.3 Aim and Objectives of the Study	4
1.4 Research Question	4
1.5 Justification of the Study	5
1.6 Methodology	5
1.7 Definition of Concepts	5
1.8 LITERATURE REVIEW.....	6
1.8.1 Climate Change and legal frameworks	6
1.8.2 Climate change regulatory framework and cultural rights	8
1.8.4 Climate Change legal framework in South Africa.....	12
1.9 Delineation of the Study.....	13
1.10 Chapter Outlines	13
ADVERSE EFFECTS OF CLIMATE CHANGE ON CULTURAL RIGHTS IN SOUTH AFRICA.....	14
2.1 Introduction	14
2.2 The link between culture and climate change	14
2.2.1 Culture	16
2.2.2 Climate Change	18
2.3 Climate change interface with culture in South Africa	19
2.4 Implications of adverse effects of climate change on cultural rights	23
2.5 Conclusion	26
CHAPTER THREE.....	28
CLIMATE CHANGE REGULATORY FRAMEWORK AND PROTECTION OF CULTURE IN SOUTH AFRICA.....	28
3.1 Introduction	28
CHAPTER FOUR.....	51
IMPLEMENTING CLIMATE CHANGE REGULATORY FRAMEWORK TO PROTECT CULTURAL RIGHTS IN SOUTH AFRICA.	51

4.1 Introduction	51
CHAPTER FIVE	80
CONCLUSION AND RECOMMENDATIONS	80
5.1 CONCLUSION	80
5.2 Recommendations	82
BIBLIOGRAPHY	84

ACCRONYMS

ACCF	Africa Climate Change Fund
ACCS	Africa Climate Change Strategy
ACPC	Africa Climate Policy Centre
AfDB	African Development Bank
AMCE	African Ministerial Conference on the Environment
AU	African Union
AUC	African Union Commission
AUDA	African Union Development Agency
CAHOSCC	Committee of African Heads of State on Climate Change
CAP	Common African Position
COMESA	Common Market for Eastern and Southern Africa
COP	Conference of Parties
DRM	Disaster Risk Management
DRR	Disaster Risk Reduction
EALA	East African Legislative Assembly
Eco-DRR	Ecosystem-Based Disaster Risk Reduction
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
EIA	Environmental Impact Assessment
ETF	Enhanced Transparency Framework
GHG	Greenhouse Gas
IPCC	International Panel on Climate Change

KP	Kyoto Protocol
LDC	Least Developed Countries
M&E	Monitoring and Evaluation
MRV	Monitoring, Reporting and Verification
NDCs	Nationally Determined Contributions
PA	Paris Agreement
PAP	Pan African Parliament
RCC	Regional Climate Centers
REC	Regional Economic Community
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
UN	United Nations
UNDP	United Nations Development Programme
UNDRR	United Nations Disaster Risk Reduction
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNIDO	United Nations Industrial Development Organization

ACKNOWLEDGEMENTS

Completing a master's degree dissertation is no easy feat especially when dealing with the dynamic area of climate change law and policy. I could not have completed this challenge in record time as I did without the encouragement and support of a number of people. My sincere thanks and appreciation go to:

My principal supervisor, Professor AO Jegede whose unfailing confidence in my abilities provided me with the blank canvas on which to create my work;

My mother, Mashudu Esnath Maiwashe and my father Thinavhuyo Johannes Maiwashe whose encouragement were vital in enabling me to remain motivated;

My beloved wife Masala Mukheli and lovely children and my three sisters Rhoda, Rachel and Regina, I simply couldn't have done this without you, special thanks.

My spiritual father the late Dr. EMM Mureri, may his soul continue to rest in peace, you have been a force to reckon with.

I also want to extend my sincere appreciation to my colleagues from the department of Justice, Mpumalanga Province, Tsepo Mokgope and Nosipho Magwaza and my friends Kenneth Mulaudzi and Raymond Sigwavhulimu.

CHAPTER ONE INTRODUCTION

1.1 Background

In the last decade, efforts have been made by scientists to examine the effects of climate change at both national and international levels as it has been regarded as one of the greatest threats to the planet¹. Scholars have emphasized the effect of climate change on the planet's biophysical systems. Although climate change as a topic has been originally predominantly framed in the class of natural sciences, in recent years social sciences have increasingly contributed to the debate². Recent studies have highlighted the importance of construing climate change from the standpoint of the societies or cultures and of individuals to implement adaptation and mitigation strategies that are appropriate at local scale³. According to Geoghegan and Leysons, for one to understand community and individual replications to climate change, greater attention ought to be given to culture⁴.

Climate change challenges spread universally, making it a global problem. However, this challenge is significantly associated with developing countries, such as South Africa. Schulze posits that all South Africans, especially farmers and ranchers are already suffering from severe floods, terrible heat and drought, as well as heightened challenges from wild fires, diseases and pests⁵. As a result, the South African government is taking steps to reduce carbon pollution, which is at the root of climate change, and to safeguard our people from its consequences. According to a report by the SABC in 2019, some parts of South Africa experience high water stress. Scores of villages, for instance in the Mopani area in the Limpopo province are without clean running water due to the drought

¹ S Fawzy *et al* 'Strategies for mitigation of climate change: a review' (2020) *Environmental Chemistry Letters*.

² H Geoghegan & D Leyson 'on climate change and cultural geography: farming on the Lizard Peninsula, Cornwall, UK' (2012) 113 (1) *Climatic Change*.

³ Article 1 of the United Nations Framework Convention on Climate Change, 1992.

⁴ T Straza *et al* 'Effects of Climate Change on Society, Culture and Gender Relevant to the Pacific Islands' (2018) *Pacific Marine Climate Change Report Card: Science Review* 201.

⁵ Fawzy (n 1 above) 7.

that left three dams empty⁶. In 2016, the City of Cape Town was constrained to set down new categories of water restrictions twice. The total annual water consumption decreased from 1.1 billion litres in 2016 to about 590 million⁷. All these signs point to a change in weather patterns which include inter alia the shortage of rainfall and high temperatures which leads to possible veld fires.

In addition to being a signatory to international climate change instruments such as UN Framework Convention on Climate Control (UNFCCC) 1992⁸, the Kyoto Protocol 1997⁹ and most recently the Paris Agreement 2016¹⁰, South Africa is committed to constantly formulating and executing its national climate policy, and it continues to play a key role in international climate negotiations. Environmental management in South Africa is highly regulated and multiple authorisations from several levels of government (national, provincial and local) are required for legally regulated operations¹¹. The National Environmental Management Act (NEMA)¹² is the primary law that governs actions that have an impact on the environment. Climate change is mentioned in the White Paper on Integrated Pollution and Waste Management Act of 2000¹³, and included in the White Paper on National Water Policy for South Africa of 1997¹⁴. In regards to this, there have been further averments in the National Water Resource Strategy of the government of South Africa.

Current air quality regulation makes no mention of climate change whereas greenhouse gas emissions have been addressed in the National Environmental Management: Air Quality Act¹⁵. Climate change adaptation is included in the Climate Change Bill of 2018¹⁶. The Disaster Management Amendment Act¹⁷ emphasizes climate change adaptation. Section 10 of the Disaster Management Act deals with broad legislative instruments that include implicit climate change adaptation provisions such as the Spatial Planning and

⁶ Fawzy (n 1 above) 7.

⁷ < <https://reliefweb.int/report/south-africa/south-africas-water-crisis-bigger-cape> > (accessed 5 May 2020).

⁸ UN Framework Convention on Climate Control (UNFCCC) 1992. South Africa became a member in 1997.

⁹ Kyoto Protocol 1997. The South African Government acceded to the Kyoto Protocol in July 2002.

¹⁰ Fawzy (n 1 above) 7.

¹¹ Fawzy (n 1 above) 7.

¹² National Environmental Management Act 107 of 1998.

¹³ Integrated Pollution and Waste Management of 2000.

¹⁴ National Water Policy for South Africa, 1997

¹⁵ National Environmental Management: Air Quality Act 39 of 2004

¹⁶ Climate Change Bill of 2018 of South Africa.

¹⁷ Disaster Management Amendment Act 57 of 2002.

Land Use Management Act¹⁸, the National Environmental Management Act¹⁹, the National Water Act²⁰ and the National Housing Code Technical and General Guidelines (Part 3). The National Climate Change Response Policy in 2011²¹, which included climate action, for both greenhouse gas (GHG) mitigation and climate change adaptation for the country was also published²². All these instruments aim at protecting the environment and ensuring that the effects of climate change are not as severe as predictions have shown.

Straza suggested that climate change related losses and damage could include direct material losses as well as losses of mobility, displacement, territory loss, cultural heritage loss and loss of local knowledge and language elements, among others²³. Culture distinguishes completely the dynamics of distinctive intellectual, spiritual, emotional and material features which describes a community or social group²⁴. This includes arts, ways of life, traditions and system values, fundamental rights of human beings, beliefs and heritage initiated since the origin of life and subject to change. The International Covenant on Economic, Social and Cultural Rights, UN Committee on Economic, Social and Cultural Rights, United Nations Human Rights Council adopted Resolution 7/23 are amongst the international instruments meant to promote and protect cultural rights. In addition to these international instruments, section 31 of the South African Constitution guarantees the protection of the right to culture within the Republic. South Africa is a diverse nation and its cultures are recognized to be heterogeneous since collections of different cultures are predominant in the nine provinces of South Africa.

1.2 Problem Statement

South Africa, like the rest of the world, is grappling with the world's most serious problem of climate change. The link between culture and the negative effects of climate change

¹⁸ Spatial Planning and Land Use Management Act 16 of 2013.

¹⁹ National Environmental Management Act 107 of 1998.

²⁰ National Water Act 36 of 1998.

²¹ The National Climate Change Response Policy in 2011.

²² Department of Forestry, fisheries and environment. 2017. National Climate Change Adaptation Strategy Republic of South Africa. Available at:

https://www.environment.gov.za/sites/default/files/legislations/session2_draftnational_adaptationstrategy.pdf. (Accessed on 18 April 2021)

²³ Straza (n 4 above) 7.

²⁴ Department of Arts and Culture. 1996. <http://www.dac.gov.za/white-papers>. (Accessed 20 April 2020).

has been proven in the literature, but the link between these and cultural rights, as well as the appropriateness of the climate change regulatory framework to handle this, has not been studied. As a result, there has been little academic investigation of whether the climate change regulatory system can help or impede cultural rights. As a result, in South Africa, examining the adequacy of the climate change regulatory framework in relation to the protection of the right to culture is crucial.

1.3 Aim and Objectives of the Study

The purpose of this research is to determine if the climate change regulatory framework in South Africa is adequate to address the negative consequences of climate change on the right to culture. To achieve this aim, the following specific objectives will aid us in attaining this goal:

1. Analyze the adverse effects of climate change on culture
2. Examine the relevance of climate change regulatory framework in the context of protection of right to culture;
3. Determine how the existing climate change regulatory framework in South Africa can aid or hinder the protection of culture in the context of adverse effects of climate change

1.4 Research Question

The general research question of this study is: Does the climate change regulatory framework address the adverse effects of climate change on the right to culture in South Africa, if not, how can this gap be tackled?

Arising from above, the following specific research questions have been formulated:

1. What are the documented ways through which climate change may adversely impact cultural rights?
2. To what extent does climate regulatory framework protect culture in South Africa?
3. How can climate change regulatory framework aid the protection of culture against the adverse effects of climate change in South Africa?

1.5 Justification of the Study

Climate change policies at the national, subnational, and corporate levels, according to stakeholders, make little direct reference to human rights norms. The goal of this research is to see if the current climate change regulatory framework in South Africa adequately accommodates and advances people's cultural rights. It also endeavors to suggest various legal means in which the climate change regulatory frameworks can protect the cultural rights of the people of South Africa.

1.6 Methodology

This study investigates the sufficiency of the climate change regulatory framework for addressing the detrimental effects of climate change on culture in South Africa. To achieve that, the study adopts a desktop research method to review and analyze the current literature, legal framework, policies and work of institutions on human rights and adverse impacts of climate change on the right to culture. It reviews relevant legislation, national guidance documents and international and national studies about culture and aspects of climate change. This method enables the researcher to acquire broader knowledge on the problem to be investigated and furthermore, know what has been addressed by other researchers to avoid duplication of effort.

1.7 Definition of Concepts

- Climate change, according to the United Nations Framework Convention on Climate Change (UNFCCC), is defined as a change in climate that is caused by human activity and modifies the composition of the global atmosphere, in addition to natural climate variability observed over comparable time periods²⁵.
- The term "Climate Change Regulatory Framework" refers to the legislative frameworks in place at both the national and international levels to address climate change. These can be compulsory and forceful, or they can be optional.
- Cultural rights can be defined as those that "protect the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their

²⁵ Article 1 United Nations Framework Convention on Climate Change 19 May 1992. Pg16

existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life”²⁶.

- Culture can be defined as the ideas, customs, and social behaviour of a particular people or society. These, amongst others, are passed from generation to generation²⁷.

1.8 LITERATURE REVIEW

While there is a robust research on climate change and legal frameworks which have been enacted nationally and internationally to regulate its consequences, there is scanty work on the adequacy of the framework on how it interfaces with issues including culture and its protection as a right. There have been very little study done that directly focuses on the adequacy of the climate related laws, policies and institutions to enhance the protection of the right to culture in the light of adverse effects of climate change.

1.8.1 Climate Change and legal frameworks

Climate change is framed within the international legal frameworks and are averred in numerous IPCC Assessment reports. The United Nations Framework Convention on Climate Change and Its Kyoto Protocol are the cardinal international instruments for pursuing action against climate change.²⁸ For example, the IPCC forth report warned that warming of the climate system is unequivocal and that the increase in GHG concentrations resulting from human activity is primarily responsible for this warming trend.²⁹ The Paris Agreement further instituted regulatory measures to fast move the adoption of the measures stipulated in the Kyoto Protocol which have been very slow.³⁰ In view of the legislative frameworks, various scholars have written on climate change such as Naing *et.al* that projected a drastic impact of climate change in the Southern African region during the 21st century³¹. Van der Pol indicated that global warming could

²⁶ Office of the United Nations High Commission for Human Rights *Cultural Rights: International Standards (2020)* Available at <https://www.ohchr.org/en/issues/culturalrights/pages/internationalstandards.aspx>. (Accessed on 1 February 2021).

²⁷ Bennet Customary Law 78-79

²⁸ Kyoto Protocol 1997

²⁹ IPCC Assessment Report

³⁰ The Paris Agreement.

³¹ CB Field *Climate change 2014–Impacts, adaptation and vulnerability: Regional aspects (2014)*.

have future impact on basic human needs such as shelter, water, food and health³². These burdens may possibly be twice as much for humanity that live in the poor resourced areas or come from families with low socioeconomic status. South Africa is classified as one of the developing countries where over 45% of households fall within the low wealth quintile³³.

Visscher *et al* investigate the role of climate regulatory frameworks and policies in addressing the current and future effects of climate change³⁴. The study advocates for different governance approaches that will ensure the adequacy of the focus and scope of building regulations in relation to climate change. It further articulates that there should be flexibility in regulation such that these regulations may still be applicable in future problems and needs³⁵. These frameworks should not only focus on protecting the environment but also the dignity of humans occupying the environment.

Stevens *et al* tried to establish a baseline for the establishment of a greenhouse gas (GHG) emissions baseline for the South African agriculture, forestry, and other land use (AFOLU) sector³⁶. Their project's goal was to create a reliable GHG emissions baseline for the AFOLU industry, which would allow South Africa to forecast emissions in the future and demonstrate its contribution to the global goal of lowering emissions.

According to the authors, projects such as the 2010 GHG Inventory, the Mitigation Potential Analysis (MPA), and the National Terrestrial Carbon Sinks Assessment have improved the quantification of AFOLU emissions and the understanding of the dynamic relationship between sinks and sources in South Africa over the last decade (NTCSA)³⁷. However, the climate regulatory framework with a focus on the cultural rights has not been investigated.

³² B Van den Pol The connection between culture and climate change. 2010 *Case Studies in Cultural Diplomacy/Cultural Diplomacy News*.

³³ Statistics South Africa, 2019 Report on social inequalities and the poverty datum line.

³⁴ H Visscher, J Laubscher & E Chan Building governance and climate change: Roles for regulation and related policies (2016) 44(5) *Building Research & Information*.

³⁵ Visscher *et al*. (n 30 above) 13.

³⁶ LB Stevens *et al* Towards the development of a GHG emissions baseline for the Agriculture, Forestry and Other Land Use (AFOLU) sector, South Africa. 2016. 26 (2) *Clean Air Journal*.

³⁷ Stevens (n 32 above) 13

Polonsky *et al.* focus their study on climate change regulation and its implications on business executives³⁸. The study offers a conceptual model which outlines various subjects that are related to climate change regulatory frameworks that provides business executives with information to comprehend the consequences that these frameworks might have on the future of their businesses³⁹. However, this study does not indicate much on the protection of cultural rights by businesses. In a book that discusses climate change adaptation, Oulu explores on climate change governance and emerging legal and institutional frameworks for developing countries⁴⁰. The study is a comparative analysis of legal frameworks of various developing countries which included Kenya, South Africa, Philippines and Mexico in contrast with the United Kingdom. The author argues that there is preference of the implementation of stand-alone climate change legal framework compared to step by step amendments of the available laws⁴¹. But it does not explore on whether these frameworks protect cultural rights or not.

The latest IPCC report comes from Working Group II, which focuses on impacts, vulnerability, and adaptation efforts, and shows the intersectional nature of climate change, the ways in which existing inequalities and injustices compound its effects on the cultural heritage in South Africa⁴². There is gross evidence of observed climate impacts on cultural rights, projected risks, levels and trends in vulnerability, and adaptation limits which demonstrate the view that worldwide climate resilient development action is more urgent than previously assessed in the IPCC reports of 2020. Comprehensive, effective, and innovative responses can harness synergies and reduce trade-offs between adaptation and mitigation to advance sustainable development.

1.8.2 Climate change regulatory framework and cultural rights

³⁸ MJ Polonsky *et al.* Climate change regulation: implications for business executives (2011) 23(4) *European Business Review*.

³⁹ Polonsky (n 34 above) 14.

⁴⁰ M Oulu Climate Change Governance: Emerging Legal and Institutional Frameworks for Developing Countries in *Handbook of climate change adaptation* (2015).

⁴¹ Oulu (n 36 above) 14.

⁴² IPCC, 2022: Summary for Policymakers H.-O. Pörtner *et al* (eds.) In: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.

Scholars have indeed touched on the legislation of climate change around the globe, though there is still a gap regarding cultural rights and climate change. According to a report by Natural Justice, the effects of climate change are evident in communities and indigenous people as it impacts on their struggles of land and cultural conservation⁴³. They gave an example of the farming of rooibos tea in South Africa which was founded by the indigenous Khoikhoi and San people. They state that these farming communities used a community protocol process to articulate free prior informed consent in relation to rooibos farming which launched rooibos not only as a commercial agricultural product, however, as a cultural intimate connection to the indigenous people. The Natural Justice further indicates that South Africa has played its part in legislation by acknowledging these protocols as legal tools for consent in customary law⁴⁴.

South Africa's national heritage resources are managed through the provisions of the National Heritage Resources Act. The Act defines "heritage resources" as any place or object of cultural significance and "conservation" as protecting, maintaining, preserving and sustainable using places or objects so as to safeguard their cultural significance.⁴⁵ The Act aims to "promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations. The National Heritage Resources Act was propelled to enable provinces to establish heritage authorities which must adopt powers to protect and manage some heritage resources. It further provides for the protection of conservation-worthy places and areas by local authorities and to provide for matters connected therewith. The literature review finds that the National Heritage Resources Act, although not addressing climate-related impacts directly, does provide some principles that offer guidance with regard to heritage conservation and management in a changing climate. Of particular importance are the following: the principle of conservation as an act of bequeathment to future generations; the very broad and all-encompassing definition of heritage resources; the principle of places and objects; the principle of cultural

⁴³ Natural Justice. 2020. Submission to the Special Rapporteur for in the Field of Cultural Rights: Cultural Rights and Climate Change. Retrieved from: <https://naturaljustice.org/wp-content/uploads/2020/05/Natural-Justice-Submission-Climate-Change-and-Cultural-Rights-1-May-2020.pdf>. Accessed on 10/02/2021

⁴⁴ Natural Justice (n 39 above) 15.

⁴⁵ National Heritage Resources Act 25 of 1999

significance; the principle of context; the principle of grading by importance; and the principle of integration of heritage resources conservation in urban and rural planning. Furthermore, the White Paper's proposed national heritage system constructs a useful framework which could be useful for heritage resource conservation and management in adaptation planning namely: museums; monuments; heritage sites and resources; geographical place names; heraldry and national symbols; archives and public records; and libraries and information services.

Kim explores the relationship between climate change and cultural heritage, the intangible aspects of cultural heritage, in international legal frameworks, either existing or under development⁴⁶. However, the work is not based on a South African context which has various cultural practices from different walks of life. Pillay also looked into the negative effects of climate change on economic, social, and cultural rights, focusing on the International Covenant on Economic, Social, and Cultural Rights, which provides important safeguards for individuals and groups whose rights are impacted by climate change, particularly vulnerable individuals and groups⁴⁷. The author also discussed the role of the UN Committee on Economic, Social, and Cultural Rights in the field of climate change, as well as states' and other actors' legal obligations, both national and international. Pillay concluded that climate change is influencing the non-fulfillment of economic, social, and cultural rights⁴⁸. The study found that vulnerable individuals or groups, such as women, children, the elderly, people with disabilities, indigenous peoples, internally displaced persons, refugees, and migrant workers, receive effective protection⁴⁹.

Jegade looked at indigenous peoples' relocation due to climate change and the extraterritorial application of the Kampala Convention, saying that indigenous peoples'

⁴⁶HE Kim Changing climate, changing culture: adding the climate change dimension to the protection of intangible cultural heritage (2011) 18 *IJCP*.

⁴⁷ AG Pillay Economic, Social and Cultural Rights and Climate Change. In *Climate Change: International Law and Global Governance* (2013).

⁴⁸ Pillay (n 42 above) 15.

⁴⁹ Pillay (n 42 above) 15.

displacement affects every element of their existence⁵⁰. This, according to Jegede, has huge implications for their right to self-determination, water, food, shelter, the environment, and health. The inefficient implementation of climate response programs is to blame for such relocation and threats to indigenous peoples' rights⁵¹.

Ugochukwu looked on national, subnational, and corporate climate change policies in respect to human rights principles⁵². The author discussed how human rights issues are factored into those policies. Ugochukwu looked at the difficulties of incorporating human rights concepts into climate change measures, especially when the climate change was evaluated in the context of environmental issues with human rights implications⁵³. The challenges of bridging the normative gap in international law and climate change were investigated at length. The study concluded that climate change policies, if they are to respect all human rights, must use human rights language to articulate adaptation or mitigation measures. The researcher notes a concern highlighted in terms of climate change policy and human rights; nonetheless, Ugochukwu's work does not address the protection of cultural rights.

According to Limon, the UN Human Rights Council passed Resolution 7/23, which addressed climate change and human rights⁵⁴. Climate change "has implications for the full enjoyment of human rights," the resolution stated firmly⁵⁵. Limon's paper examines the consequences of this resolution on international response measures to climate change, and asserts that applying human rights principles will be a good response to climate change⁵⁶. Climate change, according to Schapper and Lederer, is likely to violate human rights. This is because it is more likely to affect poor societies and vulnerable groups such as women, indigenous peoples, children, and the elderly due to low adaptation skills⁵⁷. Due to the broadness of climate change, according to Maus, concerns

⁵⁰ AO Jegede, Rights away from home: Climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention (2016) 16(1) *African Human Rights Law Journal*.

⁵¹ Jegede (n 45 above) 16.

⁵² BE Ugochukwu, Climate change and human rights: How? Where? When? (2015) *Osgoode Legal Studies Research Paper No. 45/2016*.

⁵³ Ugochukwu (n 47 above) 16.

⁵⁴ United Nations Human Rights Council adopted Resolution 7/23 which focused on climate change and human rights

⁵⁵ M Limon, Human rights and climate change: Constructing a case for political action (2009) 33 *Harv. Envtl. L. Rev.*

⁵⁶ Limon (n 50 above) 16.

⁵⁷ A Schapper & M Lederer, Introduction: Human rights and climate change: mapping institutional inter-linkages. (2014) 33 (5).

of heritage and culture play a minor role in discussions about climate change and human rights⁵⁸. Maus noted that cultural rights, particularly those under Article 15(1) (a) of the International Covenant on Economic, Social, and Cultural Rights, can provide an operational additional normative basis for the protection of cultural heritage from the adverse effects of climate change, though not in the context of South Africa⁵⁹.

Cultural rights in South Africa are regulated by National Heritage Resources Act⁶⁰. The act defines our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character.

1.8.4 Climate Change legal framework in South Africa

South Africa is a signatory to international climate change treaties such as the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and, most recently, the Paris Agreement. The South African Climate Change Bill of 2018 defines the overarching legislation, with a focus on the Disaster Management Amendment, with explicit reference to climate change adaptation⁶¹. The Spatial Planning and Land Use Management Act; the National Environmental Management Act⁶²; the National Water Act⁶³ and the National Housing Code Technical and General Guidelines are all examples of overarching legislative instruments containing implied provisions for climate change adaptation. These instruments have yet to be evaluated in terms of their applicability to the protection of cultural rights.

In South Africa, there is evolving law on climate change, but not in the context of cultural rights protection. In *Earthlife Africa Johannesburg against Minister of Environmental Affairs and Others*⁶⁴, the Court stated that climate change posed a significant threat to

⁵⁸ S Maus, *Hand in hand against climate change: Cultural human rights and the protection of cultural heritage* (2014) 27(4) *Cambridge Review of International Affairs*.

⁵⁹ Maus (n 53 above) 17.

⁶⁰ National Heritage Resources Act 25 of 1999

⁶¹ Disaster Management Amendment Act 57 of 2002.

⁶² National Environmental Management Act 107 of 1998

⁶³ National Water Act 36 of 1998

⁶⁴ *AO Jegede and AW Makulana, Climate change interventions in South Africa: The significance of Earthlife Africa Johannesburg v Minister of Environmental Affairs (Thabametsi case) 2017 JOL 37526 (GP) 2019 (40(2) Obiter.*

South Africa's sustainable development, an aim enshrined in Section 24 of the Constitution⁶⁵. In some places of South Africa, climate change has resulted in a significant decline in grain productivity and increased water fragility, resulting in more droughts. Even though the South African government has attempted to address the problem of climate change through regulatory frameworks, it is the job and obligation of law makers to defend the people of South Africa's cultural rights.

1.9 Delineation of the Study

For the purpose of this study, the cultural rights under focus are related to the environment and climate change in South Africa.

1.10 Chapter Outlines

Chapter one is the introduction which gives a brief background of climate change regulatory framework in relation to cultural rights in South Africa.

Chapter two focuses on the adverse effects of climate change on culture.

Chapter three examines the relevance of climate change regulatory framework in the context of protection of right to culture;

Chapter four determines whether existing climate change regulatory framework in South Africa can aid or hinder the protection of culture in the context of adverse effects of climate change

Chapter five provides conclusions and recommendations.

⁶⁵ Section 24 of the Constitution of South Africa.

CHAPTER TWO

ADVERSE EFFECTS OF CLIMATE CHANGE ON CULTURAL RIGHTS IN SOUTH AFRICA

2.1 Introduction

The disastrous impacts of climate change on cultural rights, the nexus between climate change and culture, the interaction between cultural rights and climate change and the implications of climate change on cultural rights are all discussed in this chapter. Many indigenous groups in South Africa are actively expressing their fears that the local effects of global climate change may exceed their adaptation ability, endangering their communities and customs, according to this chapter. This chapter considers the negative implications of climate change on human cultures and the exercise of cultural rights, as well as the positive potential of cultures and the exercise of cultural rights to serve as vital tools in reacting to the degrading effects of climate change.

2.2 The link between culture and climate change

Climate change and cultural rights share a clear nexus. The connection highlights how culture and ecology are inextricably linked, particularly for indigenous peoples, rural and traditional groups. This subsection explores the intersection between culture and climate change and how climate change influences our understanding of the culture within an environmental perspective.

The special report of the Special Rapporteur on Climate Change and culture elaborates the threats posed on culture of various groups.⁶⁶ It focuses on the nexus of climate emergency as an existential threat to life, to human rights and to human cultures.⁶⁷ Indeed, the emergency of climate had had documented detrimental effects on human culture.⁶⁸ It is argued that the climate change has altered several cultural activities and

⁶⁶ Report of the Special Rapporteur in the field of cultural rights, Karima Bennoune Augst 2020

⁶⁷ Same as Above (n65)

⁶⁸ Jegede. 2016. The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications. UP.

sites which are symbols of human survival. For example, a quarter of Bangladesh was flooded, devastating the lives of millions of people living in poverty and washing away cultural sites and public spaces.⁶⁹ This clearly indicates that climate change is forcibly separating people from their culture and cultural rights. Cultural rights were established to protect not culture and cultural heritage per se, but rather the conditions allowing all people, without discrimination, to access, participate in and contribute to cultural life through a process of continuous development.⁷⁰ These conditions are greatly jeopardized by the emergency of climate change.

Adapting to hazards is an important part of dealing with climate change. The material dimensions of climate change, such as hazards to lives and livelihoods, the costs of decarbonizing economies, and the costs of impacts on diverse sectors of the economy have dominated research and policy on adaptation and mitigation.⁷¹ These are largely quantitative and thus, are frequently included in policy evaluations. Climate change has significant cultural implications⁷².

Culture has a significant role in comprehending both mitigation and adaptation to climate change, as well as presenting climate change as a societal concern. The Special Rapporteur states that Individual participation in cultural life can be severely limited by physical changes to the local environment including perturbed seasonality and increased competition over resources. Variations in responses to these challenges can fracture cultural groups as individuals make choices about how to seek stability and prosperity in new contexts⁷³.

Culture is deeply ingrained in the prevalent forms of production, consumption, lifestyles and social structures that results in greenhouse gas emissions⁷⁴. Cultural interpretations of science and risk lend significance to the implications of these emissions that cause climate change impacts. Culture plays a critical role in understanding and implementing

⁶⁹ Somini Sengupta and Julfikar Ali Manik "A quarter of Bangladesh is flooded. Millions have lost everything.," New York Times (30 July 2020).

⁷⁰ The United Nations General Assembly (2020).

⁷¹ Same as (n 67)

⁷² Pillay (n 42 above) 15

⁷³ Karima Bennouna : Climate Change, Culture and Cultural Rights

⁷⁴ Kim (n 41 above) 15

adaptation. Culture influences risk identification, response decisions, and implementation methods. Cultures are dynamic and reflexive, and the concept of climate change shapes them. Thus, understanding the causes and meaning of human responses to climate change requires a focus on culture and its analysis⁷⁵.

Straza states that risks from climate change and extreme climate events have direct and indirect impacts on education, food security, and medical care in addition to societal relationships⁷⁶. The loss and damage caused by climate change extends to cultural factors, including direct material losses as well as losses of mobility, displacement, loss of territory, loss of cultural heritage, or loss of local knowledge and language elements, among others. In addition to this, Adger states that culture mediates changes in the environment and changes in societies⁷⁷.

Cultural interpretations of science and risk lend significance to the implications of these emissions that cause climate change impacts.⁷⁸ Culture plays a critical role in understanding and implementing adaptation. Culture influences risk identification, response decisions and implementation methods.⁷⁹ Cultures are dynamic and reflexive, and the concept of climate change shapes them. As a result, understanding the causes and meaning of human responses to climate change requires a focus on culture and its analysis.

2.2.1 Culture

Every aspect of society's response to global climate change is controlled by culture. Climate change threaten the material and lived components of culture, identity, community cohesion, and sense of belonging, all of which are cultural dimensions of lives and livelihoods.⁸⁰ In fact, threats of climate variability influences shifts in the cultural

⁷⁵ Pillay (n 42 above) 15

⁷⁶ Straza (n 4 above) 7

⁷⁷ W. Adger : Cultural Dimensions of Climate Change Impacts and adaptation.

⁷⁸IL Owasuyi The pursuit of sustainable development through cultural law and governance frameworks: a South African perspective 2015

⁷⁹ SA Crate. Gone the Bull of Winter? Grappling with the Cultural Implications of and Anthropology's Role(s) in Global Climate Change. *Current Anthropology* 2008 49 (4): 569-595.

⁸⁰ HE Kim Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage.

beliefs because culture is associated with the environment in which people live. For example, Karima Bennoune reported the fear of climate induced cultural loss if the library of the people of Tulavu Community Library which is under threat of rising sea level.⁸¹ The government should therefore implement programs which ensures that communities cope with the changing environment and preserve culture. This is important because culture influences the ability to cope with the new environment.

Culture is defined as a complex whole that comprises spiritual and physical ties to one's ancestral place, as well as knowledge, belief, art, law, morals, and customs, as well as any other abilities and habits acquired by people as a member of society.⁸² This refers to a social group's spiritual activities and products that set it apart from other comparable groups. It has also defined cultural identity as the religion, language, and other distinguishing qualities of a people's traditional values⁸³. Karima Bennoune mentions that the mandate on cultural rights was established to protect not only culture and cultural heritage but rather the conditions allowing all people without discrimination to access, participate in and contribute to cultural life through a process of continuous development.

How cultures respond to and adapt to climate-related dangers can be understood through clarifying the various cultural components. Changes in the environment and changes in societies are mediated by culture⁸⁴. Culture is crucial for understanding both mitigation and adaptation to climate change, and it also plays a role in framing climate change as a societal problem. In a word, culture is the common good that increases everyone's ability to shape their own future. In light of the foregoing, one could argue that everyone is a vehicle for culture as well as a participant in its growth

South Africa is one of the countries with deeply embedded cultural diversity. Therefore, the effects of climate change are interpreted differently but the underlying changes in cultural distortion are rapidly permeating the whole nation. As a result, the International Council on Monuments and Sites of South Africa remarked in 2019, that cultural and

⁸¹ Karima Bennoune. Special report on Climate change.

⁸² IL Owusuyi. (n 77above)

⁸³ Maus (n 53 above) 17.

⁸⁴ Massey, J.M Climate Change, Culture and Cultural Rights: University of California Davis School of Law (2020).

social values are inextricably linked to natural values and associated bio-cultural practices⁸⁵.

2.2.2 Climate Change

Climate change is an increase in the earth's temperature induced by human actions such as the combustion of fossil fuels and tree felling for agricultural purposes⁸⁶. Article 1 (2) of the United Nations Framework Convention on Climate Change 1992⁸⁷, defines climate change as a change in climate over time, caused directly or indirectly by human activity. Such activities influence certain the characteristics of the atmosphere that gradually alters the environmental climatic variables identified over time.

Natural processes like interactions between the ocean and the atmosphere, variations in the earth's orbit, changes in the energy received from the sun and volcanic eruptions all have an impact on the Earth's climate. Carbon dioxide (CO₂) and methane emissions on the other hand, have the most significant human influence on global climate⁸⁸. This is owing to the continuous use of fossil fuels for energy and electricity in heating, transportation, and industry, all of which generate considerable amounts of CO₂. According to the Intergovernmental Panel on Climate Change (IPCC), human activities increased global greenhouse gas emissions by 70% between 1970 and 2004⁸⁹.

Every year, around 6.5 billion tonnes of CO₂ are released into the atmosphere, mostly due to the burning of coal, oil and gas for electricity⁹⁰. The greenhouse effect, on the other hand, is a natural phenomenon that would make life on Earth impossible if the planet were 30 degrees Celsius cooler. The Earth's temperature is maintained via the greenhouse effect. Large amounts of greenhouse gases, such as carbon dioxide and methane, have been released into the atmosphere as a result of modern life, increasing the greenhouse effect and hence pushing up global temperatures⁹¹. It is rapidly becoming

⁸⁵ International Council on Monuments and Sites of South Africa (ICOMOS Climate Change and Cultural Heritage

⁸⁶ Article 1(2) of the United Nations Framework Convention on Climate Change. 1992.

Available at: <http://unfccc.int/resource/docs/convkp/conveng.pdf> accessed 10 March 2022

⁸⁷ Maus (n 53 above)17.

⁸⁸ Understanding Climate Change.' UK Climate Impacts Programme. Available at

http://www.ukcip.org.uk/index.php?option=com_content&task=view&id=73&Itemid=186 (Accessed 18 November 2021)

⁸⁹ Intergovernmental Panel on Climate Change, 2014: Synthesis Report, p. 69

⁹⁰ Spencer Weart The Discovery of Global Warming.(2009) <http://www.physicists.net/history/climate/> (Accessed 18 November 2021)

⁹¹ Spencer (n 72 above) 22.

clear to the courts that it is humans who are influencing earth's climate change, and the information about climate related cases has become public on an unprecedented scale⁹². The international community, in collaboration with nations, has an obligation to work constructively towards a global agreement to manage climate change, but it also has an obligation to provide an enabling policy framework for adaptation that facilitates and supports the efforts of local institutions and other actors.

They should also make certain that delegated administrative responsibilities are matched with resources and technological capability. Furthermore, African governments must increase their investments in climate and meteorological data, biophysical monitoring, and early warning, preparedness and response mechanisms, as well as integrate such data into their planning.

2.3 Climate change interface with culture in South Africa

Climate change has the potential to jeopardize most of the Universal Declaration of Human Rights' human rights, ranging from the right to life to the ability to participate in cultural life and beyond⁹³. A human rights-based approach to preventing and responding to climate change's effects should be adopted. This section delves into certain cultural components that are being impacted by climate change. In various sections of the Eastern and Western Cape, as well as several parts of Africa's Limpopo Province, climate change has resulted in linguistic diversity and the erosion of indigenous languages.

A case in point is the diversity of Venda and Tsonga languages as a result of the impacts of climate change. One may note the view that Tshivenda being one language, its dialect is different depending on which part of Venda you are domiciled. This is as a result of climate induced displacements which led to migration of people to various communities. For example, there is a risk that the Sotho language and cultural practices will be lost in Eastern Cape due to climate change and resulting migration⁹⁴. Adaptation in the Eastern and Western Cape, knowledge and ways of life, which are consequently now all under

⁹² Limon (n 50 above) 16

⁹³ Maus (n 53 above) 13.

⁹⁴ L Van Wyk *Cultural and heritage sensitive adaptation measures and principles in climate change adaptation plans for South African metropolitan cities*. Smart and Sustainable Cities Conference. Pretoria (2017).

threat, is a case in point that demonstrates the detrimental impacts of climate change on culture on the people⁹⁵.

Climate change has inadvertently affected African culture in several ways. The consensus among scholars such as Ugwu and Ugwueye⁹⁶ is the operational conception of culture which is not limited to beliefs and values but also incorporates rituals in the daily lives of Africans such as what people eat, the language spoken, farming activities and the preservation of traditional medicines. This concept is instructive in informing the link between climate change and African culture in the sense that when climate change occurs, there is a disruption in the African ecosystem and rituals. The conception of African rituals took on various examples such as the rainmaking ceremonies. Scholars such as Terje⁹⁷ in the study of African culture contend that rain is an integral part of the African spiritual, cultural and agricultural system. The conception of rain is understood as life in mean making in Africa, as rain nourishes crops, increases the fertility of soils, plants and provides water to both humans and animals.

The study also noted the adverse impact of climate change on African ecosystems which include the agricultural sector. Although the farming sector is an integral part of African economic systems, the practice is spiritually and culturally linked to African historical identities. In its analysis of land and cultural identities, the study observed examples of the floods that occurred in South Africa in 2015 in which the floods severely destroyed houses, public buildings, roads, bridges, public utilities, crops, cattle, and farms⁹⁸. Further analysis of the infrastructural utilities and agricultural lands destroyed indicates how African cultures are intertwined in these utilities and land. This is consistent with the views postulated by George that land in Africa should not be understood in economic resource terms but rather as a spiritual and historical component of culture⁹⁹.

⁹⁵ Van Wyk (n 76 above)23.

⁹⁶ C O T Ugwu and L E Ugwueye African Traditional religion: A Prolegomenon (2004) Merit International Publications, Africa.

⁹⁷ Terje O Rainmaking and Climate Change in Tanzania: Traditions, Rituals and Globalization (2010)

⁹⁸ N George The Impact of climate change on African Traditional practices: Journal of earth science and climatic change (2014)3(5)

⁹⁹ George (n 80 above) 24.

The Intergovernmental Panel on Climate Change (IPCC) is an international scientific body mandated with evaluating the impact of climate change. It has observed that definite warming of the climate system as shown by intensifications in international average temperature, glacier melting, and sea level rise, is very doubtless owing to anthropogenic greenhouse gas concentration levels. In view of the above sentiment, one may assert the notion that modern climate change regime as proffered by the United Nations Framework Convention on Climate Change (UN-FCCC), places an enormous emphasis on greenhouse gas emissions reduction. Owing to the UNFCCC's utilitarian approach, certain parts of cultural heritage are excluded from the discourse and policy.¹⁰⁰ The impact of climate change on cultural heritage is difficult to ascertain. It is challenging to establish a causative link between climate change and ever-changing cultural heritage.

The contrast between natural climate fluctuation and man-made sources complicates the analysis. Recent evidence that suggest the view that climate change is forcing people to relocate appears to provide a fundamental foundation for linking climatic causes and cultural heritage repercussions¹⁰¹. Experts have warned that one of the most serious repercussions of climate change is human displacement, as mentioned in most studies. In other words, due to factors such as shoreline erosion, coastal flooding, and agricultural disruption, many people are likely to be forced or willing to abandon their homeland. Climate change threatens the lives and security of countries whose populations are on the verge of being displaced, and the cultural identity of the rest of the country is at risk.

The effects of climate change are putting a strain on the culture of Indigenous people, in particular in the African continent. Ugwu and Ugwueye have established that culture permeates every aspect of Indigenous people's lives in Africa. Africans observe and make sense of their world from a cultural thinking. Africans incorporate culture into their daily activities for a better quality of life, which includes farming, traditional medical methods, and whatever they drink or eat that affects their health. These activities are perceived as African's way of living¹⁰². As a result, climate consequences in Africa, such as reduced

¹⁰⁰ Kim (n 41 above) 15

¹⁰¹ As above.

¹⁰² C O T Ugwu and L E Uwueye African Traditional religion: A Prolegomenon (2004) Merit International Publications, Africa.

yields, extinction of animals and particular plants that can be used for healing, dry spells, food scarcity, and other associated difficulties, could be explained using cultural reasons. This is true because in relation to African cultural beliefs, it is impossible for calamities to occur without a reason which can only be interpreted spiritually of life are affected by global warming such as the loss of hunting opportunities as well as loss of traditional territories for the pastoral, forest or coastal communities as observed amongst the Venda and Sotho people¹⁰³. Several cultural sites in Eastern and Western Cape provinces were washed away by the unprecedented floods which is testimony to negative effects of climate change in South Africa. ¹⁰⁴. For example, indigenous rainmaking is one of the culturally embedded features as a way of adapting to climate change.

The effects of climate change can be traced across South Africa and the most affected provinces are Limpopo and Eastern Cape. Climate change has impacted negatively on the right to culture of indigenous peoples since their climate-sensitive ways. A majority of South Africans have distinct cultural connections to natural resources, ecosystem, land and sea, including indigenous communities within a variety of villages in South Africa who are facing disproportionate devastation of their individual and collective cultural lives¹⁰⁵.

This study lays emphasis on cultural rights of indigenous South Africans. The rights of individuals and groups to participate, or not participate, in the cultural life of their choice, and to conduct their own cultural practices in a manner they deem fit and does not harm their cultural identity, the rights to enjoy and have access to the arts knowledge, including scientific knowledge, and to a cultural identity, and to an individual's own cultural heritage, and that of others, as well as the rights to participate in the interpretation, elaboration and development of cultural heritage, as well as the reformulation of cultural identities, are all fundamental human rights, according to the Covenant for Economic, Social, and Cultural Rights.

Climate change exacerbates dangers to civilization, according to a growing body of evidence. The current responses to climate change's cultural implications are insufficient

¹⁰³ Van den Pol (n 28 above) 13.

¹⁰⁴ George (n 80 above) 24.

¹⁰⁵ Van Wyk (n 76 above) 23.

to address the severity of the threat. Adapting to climate change can put some of these fundamental aspects of social life at risk, and these features can either facilitate or hinder adaptation. From urban areas to remote rural communities, the intersection of culture and community is often cemented in place. Climate change impacts in these areas may alter cultures and communities in ways that people dislike and view as losses¹⁰⁶.

2.4 Implications of adverse effects of climate change on cultural rights

The immensity of negative impacts on human rights caused by climate change is daunting. Human rights that are widely affected include self-determination, development, food, health, rights to life, water, sanitation and housing. Culture as defined by Straza distinguishes completely the dynamics of distinctive intellectual, spiritual, emotional, and material features which describe a community or social group which imposes an obligation for the protection and promotion of the rights¹⁰⁷. There are various instruments internationally that promote cultural rights though the extent to which they impact positively to sustainable development of humanity is a nightmare.

Climate change will not stop from causing adverse effects around the globe and this means human rights will continue to be violated. Climate change is believed to cause a rise in the displacement of people, in particular among a population that lack means for planned migration to new environments where they can be extremely vulnerable to harsh weather conditions. The displaced people may face violent conflicts among themselves as a result of poverty¹⁰⁸.

Analysis indicates that there is continued negative impact of climate change on many societies across the world. Findings prove that there is an ongoing consequence of climate change on indigenous peoples, threatening their ability to continue to provide food to their communities. The knowledge on the impact of climate change on indigenous people is limited, and in particular, the capability of indigenous peoples to adapt to

¹⁰⁶ Limon (n 50 above) 16.

¹⁰⁷ Straza (n 4 above) 7.

¹⁰⁸ George (n 80 above) 24.

adverse effects of climate change. Poor regions of the world are grossly affected by climate change¹⁰⁹.

Climate change is a huge security danger to Africa since it is projected to cause a slew of socioeconomic and political issues that could damage states and communities. Climate change will put a pressure on state and society's ability to coordinate activities, communicate, and organize them. This deterioration has far-reaching implications for human security, jeopardizing health, livelihoods, and development¹¹⁰. Water scarcity is becoming increasingly problematic in Africa, and climate change will exacerbate the problem. In conflict zones, conflicts over water resources will have ramifications on both the production of food and its access. Due to the negative effects of climate change, there is a high risk of armed conflict and increased national security problems.

Climate change is best seen as a threat multiplier, amplifying current trends, conflicts, and instability¹¹¹. The main issue is that climate change threatens to overload already fragile and conflict-prone states and areas. It's critical to recognize that the dangers aren't just humanitarian; they also contain political and security problems that directly affect African nations, as well as the rest of the world. Furthermore, many concerns related to the impact of climate change on international security are interconnected, necessitating comprehensive policy solutions, in keeping with the idea of human security. Unless vulnerable communities, notably the poorest in Africa, are aided in developing climate-resilient means of support, climate change will exacerbate poverty. This will necessitate the implementation of adaptation measures, such as catastrophe risk management efforts¹¹².

As a result of the global nature of climate change, all countries must work together as much as possible and participate in an effective and acceptable manner. Climate change poses a threat to 72 percent of natural and cultural heritage sites, according to a 2005

¹⁰⁹ Limon (n 50 above) 16.

¹¹⁰ Pillay (n 42 above) 15

¹¹¹ Limon (n 50 above) 16

¹¹² Straza (n 4 above) 7.

survey by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) World Heritage Centre¹¹³.

The World Heritage Centre reports to the intergovernmental World Heritage Committee on world heritage sites impacted by climate change through its reactive monitoring process, which was established under the 1972 UNESCO World Heritage Convention, in order to provide the best advice possible to State parties and authorities, and to establish the most appropriate mitigation measures¹¹⁴. Heritage, arts and culture are foundations of resourcefulness and inspiration that can aid with shaping the acceptability of policy or system change.

The International Council on Monuments and Sites of South Africa has observed some bio-cultural practices as observed in 2019 which in principle take cultural rights and cultural impacts into consideration in responding to all aspects of climate change and in climate action. An analysis of cultural dimensions on climate change poses a challenge on numerous vital assumptions that have guided research on climate change adaptation. Several efforts to assimilate adaptation into models of climate change assume simple cause and effect relationships between social responses and environmental risks¹¹⁵. Such responses rarely appear in practice. Cultural viewpoints help to explain differences in responses across populations to the same environmental risks. Recent research shows that information about climate change does not connect with all cultures and worldviews in the same way¹¹⁶.

There is need for the effective governance of the cultural dimension as demonstrated in this study. Such an initiative would ultimately contribute to providing prime conditions for achieving economic, environmental and social developmental goals in South Africa. To achieve the pursuit of sustainable development, the cultural law and governance framework in South Africa should be integrated into developmental planning at the

¹¹³ J Hosagrahar, "Culture: at the heart of SDGs", *UNESCO Courier*, Issue April–June, 2017.

¹¹⁴ The Pocantico Call to Action on Climate Impacts and Cultural Heritage, February 2015, www.ucsusa.org/sites/default/files/attach/2016/04/Pocantico-Call-to-Action-on-Climate-Impacts-Cultural-Heritage-4-11-2021.pdf

¹¹⁵ Visscher *et al.* (n 30 above) 13.

¹¹⁶ Limon (n 50 above) 16.

national, provincial and local government levels¹¹⁷. In view of the above sentiments, local government, a sphere of government, ought to be more proactive in the cultural policies envisaged in the promotion of sustainable development. It is prudent for local government by-laws and increased inclusion of local government in national and provincial cultural law and governance. Such policies at local government level will be ideal of sustainable development and can be greatly advanced via the cultural dimension. Stamatopoulou asserts that a major substantive understanding and response of “the well-meaning state” to its majority population would be that the majority culture, in a relatively homogenous society, is in fact well represented in the institutions of the state and that therefore special attention, and visibility, to the minority culture is required so as to reach equitable solutions¹¹⁸.

Climate change impacts pose a threat to meaningful spaces for cultural interactions, including natural spaces and to the continuity of ways of life. The UN Committee on Economic, Social and Cultural Rights (CESCR), General comment no. 21, relates to the right of everyone to take part in cultural life. Such a right is in tandem with article 15 of the Covenant on Economic, Social and Cultural Rights which relates to the significance of cultural rights¹¹⁹. This study has demonstrated immensely that climate change effects undermine the normative content hence one may assert the view that it is a breach of the right to culture in line with the provisions of article 15 of the Covenant on Economic, Social and Cultural Rights. The implications of climate change on culture are daunting. There is need to systematically and urgently address climate change and its impacts on culture and cultural rights.

2.5 Conclusion

This chapter sufficiently proved that climate change is a global phenomenon that has a negative impact on indigenous people's culture. Climate change's negative effects on human cultures and on everyone's right to enjoy their globally guaranteed cultural rights,

¹¹⁷ Visscher et al. (n 30 above) 13.

¹¹⁸ E. Stamatopoulou : Cultural Rights in International Law

¹¹⁹ Article 15 of the Covenant on Economic, Social and Cultural Rights, UN Committee on Economic, Social and Cultural Rights, General Comment Number 21.

as well as the progressive potential of our cultures and the exercise of our cultural rights to serve as essential tools in our response to the climate emergency, should be placed on the international agenda and subjected to global scrutiny because it poses a threat to the entire world.

.

CHAPTER THREE

CLIMATE CHANGE REGULATORY FRAMEWORK AND PROTECTION OF CULTURE IN SOUTH AFRICA

3.1 Introduction

This chapter examines the extent to which South Africa's climate change legislative framework addresses the preservation of cultural rights. The chapter investigates how far the international and national regulatory frameworks on climate change handle the intersection of climate change's negative effects on culture, thereby assisting in the preservation of cultural rights. The UNFCCC, the Kyoto Protocol, and the Paris Agreement are discussed in length in this chapter, as well as the different safeguards linked to measures under these instruments and the extent to which they affect culture.

3.2 An analysis of international climate change framework

Decisions, laws, policies, guidelines, agreements and connected documents in response to climate change at the global level are referred to as the international climate change regulatory framework¹²⁰. The United Nations Framework Convention (UNFCCC), the Kyoto Protocol, the Paris Agreement, and the Nationally Determined Contributions are the current international, legislative, legal and institutional framework that addresses the implications of climate change on a worldwide scale¹²¹.

The first step of the creation of the international framework on climate change was the adoption of the basic governance framework in the UNFCCC in 1992. The Kyoto Protocol, which set down measurable emission reduction objectives for industrialized countries through 2012, was the subject of the second phase of discussions, which culminated in its approval in 1997¹²². The third phase is post-2012 pledges, which established an

¹²⁰ CRS Report R44092, (2018) Greenhouse Gas Pledges by Parties to the United Nations Framework Convention on Climate Change, by Jane A. Leggett.

¹²¹ Paris Agreement under the United Nations Framework Convention on Climate Change 2015, adopted by Conference of the Parties, 21st Session Paris, 30 November 11 December 2015FCCC/CP/2015/L.9/

¹²² UNFCCC, "Mechanisms Under the Kyoto Protocol," <https://unfccc.int/process/the-kyoto-protocol/mechanisms>

enabling environment for emission reduction measures in order to address climate change-related concerns at COPs 15, 16, 17, and subsequent COPs.

While these instruments are important sources of international law, Jegede claims that they are not judicially enforceable because the International Court of Justice's jurisdiction under the UNFCCC and Kyoto Protocol only applies to disputes over the interpretation and application of the instruments' provisions¹²³. The Paris Agreement of 2015 should be viewed as one of the many steps that have been taken since environmental pollution and degradation came to be regarded as a global security threat. Furthermore, the Paris Agreement is consistent with the population, environment and development framework which focused on explaining sustainable development as the balance between human activities and the needs of the environment¹²⁴. As such, to attain sustainable development through reduction on emissions, the Paris Agreement was built on provisions which would hold countries accountable and mobilize investments to aid developing countries to adjust to climate-resilient economies.

The instrument binds and obliges parties to the agreement to pursue domestic mitigation proactiveness. In addition, the agreement is premised on the notions of climate justice, loss and damage which included strategies on how finance, capacity and technologies would be equally distributed as a matter of tackling climate change, loss and damage¹²⁵. In addition, the Paris Agreement requires that parties submit nonbinding pledges, in NDCs, to mitigate their GHG emissions and enhance removals¹²⁶.

The Paris Agreement allows for disagreements over the interpretation and application of the instruments' provisions to be resolved by the International Court of Justice or arbitration, an option that supports the claim that the instruments' provisions are judicially enforceable. These instruments are the result of state negotiations, and insofar as they fall under the category of general and particular conventions (treaties) created by the

¹²³ 2 U.N. Treaty Collection, Chapter XXVII Environment, 7.1, "Kyoto Protocol to the United Nations Framework Convention on Climate Change," December 11, 1997, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=en.

¹²⁴ NRDC. (2017, November). *THE PARIS AGREEMENT ON CLIMATE CHANGE*. Retrieved from NRDC: <https://www.nrdc.org/sites/default/files/paris-agreement-climate-change-2017-ib.pdf>

¹²⁵ Paris Agreement under the United Nations Framework Convention on Climate Change (n 90 above) 27.

¹²⁶ N Katsoulakos *et al*, (2016). Environment and Development. In S. Poulospoulos, & V. Inglezakis, Environment and Development. Basic Principles, Human Activities, and Environmental Implications. (pp. 501-507). Elsevier

consent of states under international law, they have a binding effect on their member states under the principle of *pacta sunt servanda*¹²⁷.

The Nationally Determined Contributions (NDC) articulate goals to adapt to climate change and cooperate toward these ends, including mobilization of financial and other support¹²⁸. Some provisions require reporting and review, while others call for collective commitments. Key aspects of the agreement shall be discussed in detail in this dissertation under the South African Climate regulatory framework since South Africa adopted the NDC's as part of its domestic law.

3.2.1 Instruments under the UN system

Since 1992, the United Nations Framework Convention on Climate Change (UNFCCC) has served as the major multilateral instrument for international collaboration to combat GHG-induced climate change¹²⁹. The UNFCCC is a global instrument that facilitates global collaboration in managing GHG concentrations in the atmosphere. Parties must completely respect human rights in all climate change-related measures, according to the UNFCCC. The term "human rights" encompasses all essential rights, including the right to culture¹³⁰. Despite the UNFCCC's explicit mention of culture, it also specifies that a human rights-based approach should be adopted when dealing with climate change-related concerns¹³¹. Human rights-based approaches address cross-cutting social, cultural, political, and economic issues while empowering individuals, groups, and peoples, particularly those who are vulnerable. The following discussion will focus on the particular references to culture in UN instruments.

Critically scrutinising the role of the UNFCCC, one would assert the notion that its mandate is to reinforce recognition of developing nations' unique status by urging UNFCCC parties to fully consider what commitments are required under the UNFCCC. These functions include activities relating to funding, insurance and technology transfer

¹²⁷ A Savaresi (2015). The Paris Agreement: A New Beginning? *Journal of Energy & Natural Resources Law*, 34(1)

¹²⁸ UNCPFGS. (2017). *Catalysing the Implementation of Nationally Determined Contributions in the Context of the 2030 Agenda through South-South Cooperation*. New York: UN.

¹³⁰ Visscher et al. (n 30 above) 13.

¹³¹ Human Rights Council, Resolutions 16/11, 19/10, 25/21 and 28/11.

to fulfil the specific requirements and concerns of developing nations' parties as a result of climate change's negative effects. The treaty also addresses the challenges that Least Developed Countries confront in responding to climate change by requiring member states to take into account the stated needs and special circumstances of Least Developed Countries in their funding and technology transfer decisions¹³². Similar rules relating to climate change adaptation in underdeveloped nations can be found in the Kyoto Protocol.

The United Nations Framework Convention on Climate Change (UNFCCC) was signed in 1992 as one of the environmental agreements discussed at the United Nations Conference on Environment and Development (UNCED). The United Nations Framework Convention on Climate Change (UNFCCC) is a wide accord for international collaboration to stabilize greenhouse gas concentrations in the atmosphere. The UNFCCC, according to Boyle, is one of those accords that are soft even if it is formally binding¹³³. Because the convention's rules are broad and generic, it does not impose real responsibilities on parties. The UNFCCC, on the other hand, has the potential to be normative because it comprises legal concepts.

The UNFCCC does not require parties to make ambitious substantive commitments; rather, it incorporates principles and objectives to guide global climate policy and sets organizations and processes for further treaty development, including protocol approval¹³⁴. The UNFCCC, on the other hand, does not impose commitments on the parties in accordance with the principle of Common but Differentiated Responsibilities (CBDR). For example, the fundamental sections dealing with policies and methods to reduce GHG emissions are so carefully and cryptically stated, as well as so weak, that it's unclear whether any genuine duties are formed. Examples are Articles 4(1), (2), and 7. Article 4(7) states that developing country pledges are conditional on developed state parties fulfilling their obligations to provide financing and technology transfer. It is almost

¹³² UNFCCC on adaptation Available at: http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf (last accessed 7 September 2021).

¹³³ AE Boyle "Some reflections on the relationship of treaties and soft law" 1999 *The International and Comparative Law Quarterly* No. 4, 901-913. See for example Art 4(1) and (2)

¹³⁴ K Kulovesi "Independent Reporting: The role of the Earth negotiating bulletin in climate change negotiations" 2011 *International Law-Making and Diplomacy Review* 31.

impossible to implement such provisions. As a result, the Kyoto Protocol on the UNFCCC was drafted to remedy these deficiencies¹³⁵.

In a nutshell, the UNFCCC has highlighted climate adaptation as a critical component of a coordinated climate change response. Adaptation is defined by the IPCC as a change in natural or human systems in response to present or anticipated climatic stimuli or their impacts, which mitigates harm or maximizes benefits¹³⁶.

Adaptation occurs in response to a succession of events or previously existing conditions that are aggravated by climate change, rather than in response to a single event or scenario. As a result, determining whether parts of adaptation are driven completely or largely by climate change, as opposed to other reasons unrelated to climate change, can be challenging¹³⁷. As a result, adequately measuring adaptation to climate change is difficult and challenging. Furthermore, there are few comprehensive researches on what climate change adaptation includes, as well as the costs and advantages of adaptation techniques. Adaptation is, nevertheless, a critical and necessary reaction to climate change, and data and procedures to assess adaptation should be established.

A follow-up meeting on the UNFCCC was held in Kyoto, Japan, which resulted in the Kyoto Protocol¹³⁸. The conference produced the "Berlin Mandate," which provided a timeframe for industrialized countries to negotiate the Kyoto Protocol, along with specific defined emission limits and reduction objectives, and pledges them to do so. All parties are required to establish and execute national programs, including climate change mitigation measures, under Article 4 (1) (b)¹³⁹. The Kyoto Agreement makes no explicit

¹³⁵ Pillay (n 42 above) 15

¹³⁶ IPCC, *Climate change (2007): Impacts, adaptation and vulnerability*. Working group II Summary for policymakers. Geneva: IPCC Secretariat. <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf> (accessed July 21, 2021)

¹³⁷ D Bodansky "Whither the Kyoto Protocol? Durban and Beyond" (2011) Harvard Project on Climate Change Agreements 4.

¹³⁸ Kyoto Protocol to the Framework Convention on climate change of 1998 ILM 37, 22. A major difference between the UNFCCC and the Kyoto Protocol is that while the Convention encourages industrialized countries to commit to stabilizing GHG emissions, the Protocol commits them to doing so. The headline commitments of the Kyoto Protocol are the greenhouse emission reduction targets for the countries in Annex B, which are the developed countries, including countries with economies in transition (EITs) in Central and Eastern Europe and some countries from the Soviet Union. These commitments add up to a reduction of just over 5 per cent from their 1990 levels in a five-year period 2008-2012.

¹³⁹ F Conti "Toward a post-2012 international climate agreement" (2010) The Harvard Project on International Climate Agreement Discussion Paper 1-9.

or oblique reference to culture. Because its aim was primarily on promoting technological transfer, the Kyoto Protocol could be interpreted as a tool that hinders the promotion of culture. The Kyoto Protocol is praised for its global emission reduction mechanisms that stabilize greenhouse gas emissions, but it lacks mechanisms to promote culture.

The Kyoto Agreement makes no explicit or oblique reference to culture. Because its aim was primarily on promoting technological transfer, the Kyoto Protocol could be interpreted as a tool that hinders the promotion of culture. The Kyoto Protocol is praised for its worldwide emission reduction procedures that stabilize greenhouse gas emissions, but it lacks tools to promote culture. The Kyoto Protocol's greatest dilemma is that it attempts to solve a long-term problem with impractical short-term solutions¹⁴⁰. The Sustainable Development Principle, the Common but Differentiated Responsibilities and Respective Capabilities Principle (hereafter referred to as CDRRC principle), the Precautionary Principle, Equity, and the special or vulnerability principle are the guiding legal principles on the interpretation of both the convention and the Kyoto protocol that are discussed in this part.

This study offers a review of these guiding legal concepts in order to examine how well they have been interpreted in order to mitigate climate change and its repercussions in Africa. The legal principles linked to climate change, it is believed, should be evaluated in conjunction with international law principles and jurisprudence. Boyle believes that the principles stated in Article 3 of the 1992 UNFCCC are debatably the most important law in the entire treaty since they outline how the parties should build a climate-change regime.

Parties should respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality and women's empowerment, when taking action to address climate change, according to the Preamble of the Paris Agreement¹⁴¹.

¹⁴⁰ Kyoto Protocol (n119 above) 36

¹⁴¹ Boyle (n 114 above) 34.

The Paris Agreement's associated COP 21 decision, which clearly lays out the work program for the coming years, recognizes the need to strengthen local communities' and indigenous peoples' knowledge, technologies, practices and efforts related to addressing and responding to climate change, as well as to establish a framework for the sharing of views and implementation of best practices on mitigation and adaptation in a comprehensive manner¹⁴². This action has a favourable impact on the promotion and preservation of indigenous communities' cultural heritage.

Although cultural rights cut across different regions, each specific social grouping is impacted differently, and this concurs with the above viewpoint. "Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, and knowledge of the properties of plants and animals," according to article 31 of the UN Declaration on the Rights of Indigenous Peoples¹⁴³. Indigenous peoples' knowledge and strategies to sustain their environment should be respected and taken into account in developing national and international approaches to climate change mitigation and adaptation, according to the outcome document adopted at the World Conference on Indigenous Peoples in 2014. When it comes to climate change causes, adaptations, mitigations, and remedies, the International Indigenous Peoples Forum on Climate Change says it's critical to respect indigenous peoples' traditional knowledge¹⁴⁴.

Indigenous peoples are committed to preserving, using and implementing traditional knowledge and traditions in order to implement climate change solutions and adaptation strategies in their communities, so international instruments play an important role in knowledge transfer as well as acting as a regulatory body for climate change policies¹⁴⁵. Such sentiments are expressed in the domestic instruments in various countries affiliated to the AU. Climate change solutions cannot be restricted to Western scientific knowledge;

¹⁴² Human Rights Commission R/36/46, para 57

¹⁴³ Article 31 of the United Nations Declaration on the rights of Indigenous peoples.

¹⁴⁴ African monitoring of the environment for sustainable development' <http://www.eumetsat.int/website/home/AboutUs/InternationalCo-operation/Africa/AfricanMonitoringoftheEnvironmentforSustainableDevelopmentAMESD/index.html> (accessed 13 February 2014).

¹⁴⁵ Human Rights Commission R/36/46, para 59

they must also embrace indigenous peoples' traditional knowledge, ideas, and traditions, which have historically aided in ecosystem and biodiversity protection efforts.

The Katowice Package is one of the international instruments on climate change. During Conference of Parties in Katowice, Poland, in 2018, the Paris Agreement member states agreed to many of the guidelines and processes so that parties may implement the Paris Agreement as anticipated¹⁴⁶. Despite these agreements, parties did not decide on numerous matters of importance. Negotiations on these issues were tabled at the recent COP in Glasgow, Scotland, in 2021. The Katowice Package, as it is known, clarified some ambiguities in the PA that were deemed important to US interests, as well as providing a guiding principle for parties to report their NDCs and the Enhanced Transparency Framework (ETF), which includes guidelines and formats to help a Party's NDC be understood clearly¹⁴⁷. As a result, the Katowice Package contributes to the effectiveness of consultative compliance. The PA's Congressional Research Service mechanism, the UN Framework Convention on Climate Change, the Kyoto Protocol, and the UN Framework Convention on Climate Change.

Article 6 of the Paris Agreement, for example, allows member states to choose voluntary engagement with third parties to implement their NDCs. The goal is to encourage people to be more enthusiastic about their mitigation and adaptation efforts, as well as to promote sustainable development and environmental integrity¹⁴⁸. A major area of work left unanswered in Katowice was the debate over the drive for voluntary collaboration and market mechanisms, as well as the norms that govern their implementation¹⁴⁹. In conclusion, the Katowice accord makes no explicit or oblique references to culture. Its primary focus was on mitigation and adaptation strategies.

In view of the above assertion, one may note that all the instruments do not have an express but an implied reference to cultural rights as observed in the discussion above.

¹⁴⁶ Climate change and national resource management NEPAD thematic areas' <http://www.nepad.org/thematic-area> (accessed 18 October 2021)

¹⁴⁷ Submission of the Climate Action Network International, 15 February 2009 <http://unfccc.int/resource/docs/2009/smsn/ngo/098.pdf> (accessed 18 October 2021)

¹⁴⁸ Article 6.1 of the Paris Agreement.

¹⁴⁹ Katowice Agreement of the UNFCCC

However, from the foregoing discussion, one may observe that all the instruments aid the protection of cultural rights.

3.2.2 The instruments under the AU system

This discussion will be limited to measures that protect culture within the AU system. The Constitutive Act is the first instrument that will be discussed. According to the AU's Constitutive Act, the organization's goals include, among other things, achieving greater unity and solidarity among African countries and peoples. The African Union's instruments aim to foster sustainable development at economic, social, and cultural levels, as well as the integration of African economies, and to coordinate and harmonize policies across existing and prospective RECs in order to gradually achieve the African Union's goals¹⁵⁰. Given the above language, it is reasonable to conclude that the Constitutive Act made explicit reference to the promotion of culture. Sustainable development is one of the AU's primary ideals, according to Article 3 of the Constitutive Act. The Constitutive Act emphasizes the importance of recognizing climate change as an increasing danger to sustainable development and poverty reduction through climate resilient measures, rather than just an environmental problem¹⁵¹. Climate change has not been sufficiently raised as one of the AU's core priority areas, nor has it been adequately sought from the international community through the UNFCCC-Kyoto Protocol discussions¹⁵². In view of the above expression, one may note the view that the Constitutive Act had express reference to promotion of culture and cultural rights¹⁵³.

The Regional Economic Communities are the foundations for continental integration, considering the unique obstacles that both island and landlocked countries face. They make sure that governments and institutions are held accountable for climate change-related impacts and problems. The Regional Economic Communities are linked to the ambitions of the Africa Climate Change Strategy, namely Agenda 2063 aspiration 5,

¹⁵⁰ The Commission' <http://www.au.int/en/commission> (accessed 13 February 2014) The EC-ACP Capacity Building Programme on Multilateral Environmental Agreements-The Africa Hub-African Union Commission Training of African Negotiators file:///C:/Users/User/Downloads/MEAs%20Write%20up%20for%20MEAs%20and%20DREA%20Websites%20%2014-9-11.pdf (accessed 29 August 2021).

¹⁵¹ Article 3 of the AU Constitutive Act of 2000.

¹⁵² A Torheim and Njenga "African Ministerial Conference (2005) AMGEN 1.

¹⁵³ As above.

which addresses concerns of a strong cultural identity, shared heritage, shared values, and ethics in Africa. The African struggle against climate change must be built on the spirit of Pan Africanism, common history, culture, and destiny and this goal is critical. When the African Union issued the Declaration on Climate Change in Africa in January 2007, member states recognised Africa's vulnerability to climate change, driving the AU to act holistically on its mandate¹⁵⁴. Even though practically all AU member states are parties to the UNFCCC and the Kyoto Protocol, climate change is not fully addressed in the AU and RECs environmental frameworks. The declaration mentions culture and the vulnerability of indigenous peoples to climate change.

Despite Africa's obvious vulnerability to the impacts of climate change, the AU and the RECs have done little to address this problem through establishing regional and sub-regional normative frameworks. The AU's efforts to respond to climate change through its normative framework are a relatively recent development¹⁵⁵. The African Union's Climate Change Declaration of 2007 recognized Africa's vulnerability to climate change, while the Nairobi Declaration on the African Process to Combat Climate Change in 2009 aimed to develop AU common positions on climate change and develop climate change programs across the continent¹⁵⁶. As the statement specifically mentions Africa's susceptibility to climate change, this instrument aids in the development of culture.

The African Union's Climate Change Declaration of 2007 recognized Africa's vulnerability to climate change, while the Nairobi Declaration on the African Process to Combat Climate Change in 2009 aimed to develop AU common positions on climate change and develop climate change programs across the continent. As the statement specifically mentions Africa's susceptibility to climate change, this instrument aids in the development of culture.

The Constitutive Act includes new, significantly expanded, and potentially far-reaching values on climate change. These principles indicate a shift in African countries' thinking

¹⁵⁴ The AU Declaration on Climate Change and Development in Africa 2007 'http://www.african union.org (accessed on 10 September 2021). While there is a vibrant international discourse on climate change and the serious threats it poses to both the environment and to humanity, there is less discourse on the role of regional African law in this regard.

¹⁵⁵ Field (n 27 above) 12

¹⁵⁶ Polonsky *et al* (n 34 above) 14.

about how to coordinate common responses to today's political and socioeconomic concerns. They represent an attempt by African states to form an organization that responds to the contemporary needs and wants of ordinary Africans¹⁵⁷. The right of member states to request AU intervention in order to restore peace and security, promotion of self-reliance within the Union's framework, respect for democratic principles, human rights, the rule of law, and good governance, promotion of social justice to ensure balanced economic development, and respect for the sanctity of human life are among these principles.

These rights are based on the concept of climate change. These values are relevant to culture and climate change because they support the right to self-determination, which is expressed in the Constitutive Act, which addresses climate change regulation, mitigation, and adaptation measures. A strong AU collective position on climate change is critical to achieving the declaration's goals. Nonetheless, despite the AU's best efforts to ensure a unified African position on climate change at international climate change negotiations, there have been some tensions due to divergent national interests, African states' relationships with specific developed or emerging nation-players, and varying negotiating skills. The AU conventions gave birth to the Nairobi Declaration. Its goal was to create a comprehensive framework for African climate change programs and outline the continent's unified negotiating positions.

In other words, the Nairobi climate change proclamation establishes a two-pronged approach to combatting climate change, outlining an African common position during international climate change negotiations and developing a comprehensive framework for African climate change programs. The declaration replaced the Algiers declaration, which was used as a reference document for the African AWG-LCA 6 meeting in Bonn from June 1 to 12. Adaptation, mitigation, funding and technology transfer are the four pillars of the Bali Action Plan, which are reflected in the Nairobi declaration. Both the Nairobi Declaration and the Bali Action Plan recognize the importance of cultural heritage and culture preservation.

¹⁵⁷ NEPAD (n 126 above) 38.

The African common position on climate change intends to persuade all State Parties to the climate change regime to boost their support for Africa under the future climate change regime, based on Africa's priorities. The AU member states reached broad agreement on a unified position under the Nairobi climate change statement, based on African countries' needs for adaptation, capacity building, research, financing, technology development and transfer¹⁵⁸.

As a result, several regional climate change programs have been created. These amongst others are; Climate for Development in Africa (ClimDevAfrica) project, which improves the use of climate information for development while also supporting adaptation to climate change and the African Monitoring of the Environment for Sustainable Development (AMESD) project, which uses satellite-based technology to monitor environmental change to aid policy development in the Great Green Wall for the Sahara Initiative, which helps to prevent land degradation in the Sahara¹⁵⁹. ClimDev-Africa is an integrated initiative that connects programmatic activities delivered by the Climate Policy Centre (ACPC), the Climate Change Desertification Unit (CCDU), and investment activities delivered by the ClimDev Special Fund through the Climate Policy Centre (ACPC).

The ACPC's major goal is to recommend appropriate policy alternatives and provide technical assistance to African countries in order to help them achieve more sustainable development and better manage associated climate risks for the benefit of Africans. By assisting AU member states in mainstreaming climate change into their development goals and programs, the ACPC is expected to serve as a centre for the development of a demand-driven knowledge base on climate change in Africa¹⁶⁰. Despite the fact that the African Union has made considerable progress in terms of climate change programs for Africa, more clear and concerted commitments are required, notably in terms of money and capacity building.

¹⁵⁸ Visscher et al. (n 30 above) 13.

¹⁵⁹ CB Field, & VR Barros *Climate change 2014—Impacts, adaptation and vulnerability: Regional aspects* Cambridge University Press: Cambridge (2014).

¹⁶⁰ Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge (2013).

The African Convention on the Conservation of Nature and Natural Resources, signed in 1968, was the continent's first attempt to address environmental concerns. The OAU, which preceded the AU, accepted this convention. Its central premise requires member states to take steps to ensure the conservation, utilization, and development of soil, water, flora, and fauna resources in conformity with scientific principles and in the best interests of people¹⁶¹. The treaty not only rejects the idea of nature conservation just for human benefit (anthropocentrism), but it also underlines the principle that underpins historic African environmental conservation and management techniques, which have cultural features that speak to the cultural legacy. This is evident in the preamble, which states, among other things, that natural resources are a vital capital from an economic, nutritional, scientific, educational, cultural and aesthetic standpoint, and that natural resource utilization must aim to meet man's needs within the environment's carrying capacity. In view of the above assertion, one may postulate the view that the African Convention on the Conservation of nature and natural resources has an obligation for preservation and promotion of culture in Africa as a regional block.

The Kampala Convention is a regional instrument aimed at safeguarding and aiding Africans who have been internally displaced¹⁶². It incorporates ideas and provisions related to human rights. By virtue of article 20(1), which states that the African Charter's provisions protecting human rights, shall be applied when interpreting the convention, the Kampala Convention, in addition to emphasizing that displacement can result from natural or man-made disasters, specifically mentions states' obligations to protect and assist persons displaced by climate change. In particular, article 5(4) requires states to take measures to protect and assist persons who have been internally displaced as a result of natural or man-made disasters, including climate change¹⁶³. Because the Kampala Convention contains no particular provisions relating to the promotion of culture, one could claim that it is ineffective in protecting culture and cultural rights.

¹⁶¹ M, Maretti, A Tontodimamma, A & P, Biermann, "Environmental and climate migrations: an overview of scientific literature using a bibliometric analysis" (2019) 29(2) *International Review of Sociology* 145

¹⁶² Rhodes, E Scott, WA & Jaccard, M "Designing flexible regulations to mitigate climate change: A cross-country comparative policy analysis" (2021) 156 *Energy Policy* 112419

¹⁶³ Article 5(4) Kampala Convention

The draft African climate change strategy, developed in 2014, provided a framework for integrated and coordinated mechanisms to provide tactical direction to Member States and other stakeholders in addressing the challenges and opportunities associated with climate change on the continent, with the goal of improving African people's livelihoods and the environment they live in¹⁶⁴. It outlined Africa's goals for implementing climate change programs to reduce poverty and achieve the SDGs, with a focus on the most vulnerable groups, particularly children and women. The draft strategy's major goal was to help Africa achieve climate-smart socioeconomic growth. Culture is mentioned in the draft African Strategy, and it is aided in its promotion through its broad-based strategy for continental integration and regional socio-economic development.

Many regional sub-bodies that are linked with the AU are included in the AU. The Inter-Governmental Authority on Development is one example (IGAD)¹⁶⁵. IGAD is made up of eight countries in the Horn and Eastern Africa that are among the world's most vulnerable to climate variability and change, particularly drought. Its Climate Change Strategy focuses on long-term resource management, with three main pillars: disaster risk management, low-carbon and climate-resilient development, and food security.

In order to strengthen DRM, IGAD established the IGAD Climate Prediction and Application Centre (ICPAC), which is a type of capacity-building initiative that provides climate information, prediction products and services, early warning, and related applications at the sub-regional and national levels¹⁶⁶. Furthermore, the IGAD Drought Disaster Resilience and Sustainability Initiative (IDDRSI) was created as a support to address the effects of drought and related shocks in a sustainable and holistic manner. Advancing cultural rights through climate change adaptation and mitigation initiatives is one of the major anchors of sustainable development in Africa. The SADC plan attempted to create a shared climate change and development agenda that was backed up by science and technology and indigenous knowledge systems. SADC continues to prioritize adaptation, while encouraging voluntary mitigation techniques and initiatives that promote regional integration and socioeconomic development. SADC aspires to have a cross-

¹⁶⁴ The Draft African Strategy on Climate Change, AU.

¹⁶⁵ Visscher et al. (n 30 above) 13.

¹⁶⁶ Maretti (n 141 above.) 43.

sectoral, single-minded strategy to climate change, centred on SADC's vision and core values, with all sectors engaged and accountable. When evaluating SADC as a regional bloc of the African Union, it's worth noting that it hasn't developed many tools for climate change mitigation and resilience, although assisting in the development of culture and cultural rights.

In contrast to SADC, the East African Community has been active in establishing measures to manage the effects of climate change. Adaptation, mitigation, and research are the three main pillars of climate change policy¹⁶⁷. Technology development and transfer, finance, education, training, public awareness, and information and knowledge management all help to achieve these goals. The Policy gives proper attention to gender considerations. As envisioned in its Climate Change Policy, the East African Community does not foster culture. The policy considers current national sectoral policies and strategies in areas such as environment, water, land, forestry, energy, transportation, agriculture, health, DRM and gender. The East African Legislative Assembly (EALA) passed the Regional Climate Change Bill, which has been incorporated into the legislation of its partner nations, as a supplement to the policy, a first on the continent. This indicates how far the East African Community has progressed inside the African continent.

The Climate Change Bill has made tremendous progress on the promotion of culture and cultural rights¹⁶⁸. The Bill makes specific reference on risks to cultural heritage, remedial measures to protect tangible heritage sites and mitigation and adaptation mechanism in the face of the detrimental impacts of climate change.

3.3 South African climate change regulatory framework

South Africa now has a number of laws, policies, and mechanisms in place to protect and manage the environment. The climate change bill is currently being considered for passage into law¹⁶⁹. The overarching legislation is the National Environmental

¹⁶⁷ Mwebaza (n 133 above) 39.

¹⁶⁸ Climate Change Bill 2018

¹⁶⁹ Climate Change Bill of 2018.

Management Act¹⁷⁰. The White Paper on Integrated Pollution and Waste Management¹⁷¹ expressly mentions climate change, and the White Paper on a National Water Policy for South Africa, published in 1997, makes a reference to it. It's also mentioned in the next National Water Resource Strategy from the government though the impending National Environmental Management: Air Quality Act however, specifically contains provisions for greenhouse gas emissions.

The provisions in (s) 2(a) (iii) of this legislation make it clear that it aims to protect cultural rights that are threatened by climate change, which is wreaking havoc on the ecosystem. The principles outlined in the Constitution, the Bill of Rights, the National Environmental Management Act (NEMA), the MDGs, and the UNFCCC govern South Africa's climate change response goal. Common but diverse obligations, respective capabilities, and equity are among the principles.¹⁷² Within distinct communities, there is a need to address uneven vulnerabilities, responsibilities, capabilities and inequalities. S24 of the Constitution provides for everyone's rights to an environment that is not harmful to their health or wellbeing and to have a protected environment for the benefit of present and future generations through reasonable and other measures that prevent pollution and ecological degradation, promoting conservation and securing ecologically sustainable development and use of natural resources whilst promoting justifiable economic and social development¹⁷³.

As a result, anytime environmental degradation due to climate change threatens a society's cultural rights, the state is obligated to apply the provisions of the relevant legislation. Thus, with such legislation in place in South Africa, it is obvious that cultural rights are safeguarded to some extent from the disastrous effects of climate change¹⁷⁴.

The South African constitution, as the ultimate law of the Republic, recognizes everyone's freedom to speak the language and participate in the cultural life of their choosing, but no

¹⁷⁰ NEMA (n 12 above) 8

¹⁷¹ White Paper on Integrated Pollution and Waste Management.

¹⁷² Pillay (n 137)

¹⁷³ The Constitution of the Republic of South Africa, 1996.

¹⁷⁴ The Pocantico Call to Action on Climate Impacts and Cultural Heritage, February 2015, www.ucsus.org/sites/default/files/attach/2016/04/Pocantico-Call-to-Action-on-Climate-Impacts-Cultural-Heritage-4-11-2021.pdf.

one may exercise these rights in a way that violates any provision of the Bill of Rights¹⁷⁵. The aspect of cultural, religious, and linguistic communities is well articulated in section 31 (1), which expressly states that persons belonging to a cultural, religious, or linguistic community may not be denied the right to enjoy their culture, practice their religion, and use their language with other members of that community; and to form, join, and maintain cultural, religious, and linguistic associations and other civil society organs¹⁷⁶. Critically examining this subsection one may note the view that the constitution of South Africa acknowledges culture as an essential component in any society where human beings live.

The National Environmental Management Act, in its preamble emphasizes the establishment of procedures and institutions that promote and facilitate public participation in environmental governance¹⁷⁷. This is a clear demonstration that in South Africa the law puts the affected population at the forefront of government environmental planning. Thus, whenever a cultural right has been infringed or there is a potential for infringement, the affected population can air out their concerns. Through this legislative provision, the cultural rights of the people of South Africa are promoted and protected against the ravaging effects of climate change by holding the perpetrators of such accountable. The affected communities have the right to redress. Thus, to argue, there is a strong link between the protection of cultural rights and fighting climate change¹⁷⁸.

Furthermore, NEMA plays a crucial role in providing for cooperative environmental governance by establishing principles for decision making on matters affecting the environment. It has established institutions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state¹⁷⁹.

Climate change is mentioned in the White Paper on Integrated Pollution and Waste Management from 2000, and it is included in the White Paper on a National Water Policy for South Africa from 1997. Current air quality regulation makes no mention of climate

¹⁷⁵ Section 30 of the Constitution of South Africa.

¹⁷⁶ Section 31 of the Constitution of South Africa.

¹⁷⁷ The National Environmental Management Act of 1998

¹⁷⁸ S Mason, The Cancun agreements and legal preparedness for climate change in developing countries (2011) Legal Working Paper Series, International Development Law Organisation.

¹⁷⁹ NEMA (n157 above) 48

change. However, greenhouse gas emissions are particularly addressed under the National Environmental Management: Air Quality Act¹⁸⁰. There is no mention of culture in the National Environmental Management Air Quality Act. The Climate Change Bill of 2018 establishes a Legislative Framework that begins by outlining the overarching legislation with explicit reference to climate change adaptation, with a focus on the Disaster Management Amendment Act¹⁸¹.

The Disaster Management Act's Section 10 deals with broad legislative documents, such as the Spatial Planning and Land Use Management Act, the National Environmental Management Act, and the National Water Act that have implied provisions for climate change adaptation¹⁸². Given the foregoing, one may assert that the regulations include no specific reference to culture, despite the fact that they clearly indicate the impact of climate change on communities.

As previously stated, the Disaster Management Act is linked to the United Nations General Assembly-approved Hyogo Framework for Action (2005-2015) and Sendai Framework for Disaster Risk Reduction (2015- 2030)¹⁸³. Both provide a set of responsibilities for countries in terms of disaster preparedness for their citizens. The Sendai Framework recognizes that disaster risk management aims to protect people and their property, as well as their health, livelihoods, and productive assets, as well as cultural and environmental assets, while also promoting and protecting all human rights, including the right to development.

Critically examining the assertion above, one may assert the view that the Disaster Management Act promotes the protection of culture as envisaged in the Act as well as the Hyogo Framework Action and the Sendai Framework for Disaster Risk Management. Countries can refer to the directives and principles drawn in the Sendai Framework in order to implement their human rights obligations with respect to climate-related disaster planning and risk reduction which implies culture as well as cultural rights.

¹⁸⁰ National Water Policy for South Africa, 1997

¹⁸¹ Disaster Management Amendment Act 57 of 2002.

¹⁸² Spatial Planning and Land Use Management Act 16 of 2013.

¹⁸³ Sendai Framework for Disaster Risk Management.

The National Climate Change Response Policy in 2011¹⁸⁴, which included climate action, for both greenhouse gas (GHG) mitigation and climate change adaptation for the country was also published¹⁸⁵. All these have played a fundamental role in protecting the environment and ensuring that the effects of climate change are not as severe as predictions have shown. The Climate Change Response Policy as well does not address issues related to culture. It addresses the impacts of climate change at length.

South Africa's Nationally Determined Contributions (NDCs) climate policies as well as the National Climate Change Response White Paper and the National Development Plan (NDP) which proffers a 2030 vision to shape the country's sustainable development path and activism, intended to eradicate poverty and inequality by 2030¹⁸⁶. Subsequently, this is based on the following context, that climate change and a climate-resilient society is of paramount importance to eradicate poverty and inequality. In South Africa, economic development is determined by a vibrant and efficient energy policy.

The energy sector in South Africa is heavily dependent on coal and coal-producing plants which are responsible for emitting carbons. Thus, as a responsible global citizen, the entry point of its contribution is hinged on the Intergovernmental Panel on Climate Change (IPCC). In terms of its implementation of the NDCs, South Africa adopted six elements: adaptation planning, costing of adaption needs, investment in adaptation, equity, and means of implementation. These are said to be based on the obligation of parties to the Paris Agreement, Article IV and X11¹⁸⁷. The Nationally Determined Contributions makes implied reference to culture in the context of sustainable development of communities through preservation of communities' beliefs and ways of life. The content of NDCs is still

¹⁸⁴ The National Climate Change Response Policy in 2011.

¹⁸⁵ Department of Forestry, fisheries and environment. 2017. National Climate Change Adaptation Strategy Republic of South Africa. Available at: https://www.environment.gov.za/sites/default/files/legislations/session2_draftnational_adaptationstrategy.pdf. (Accessed on 18 April 2021)

¹⁸⁶ New Climate Institute. *Assessment of subnational and non state climate action* (2019)

¹⁸⁷ Department of Environmental Affairs.(2015). *Discussion document: South Africa's intended nationally determined contribution (INDC)*. Pretoria: Government of RSA. Retrieved from https://www.environment.gov.za/sites/default/files/docs/sanational_determinedcontribution.pdf (accessed 13 March 2022)

chosen at the national level and is nonbinding, but it should reflect a party's goals. The standards apply to NDCs filed in 2025, but Parties are encouraged to update their NDCs in 2020 using an agreed-upon format. Parties who want to incorporate adaptation measures in their NDC should follow the rules on how to report them. Given the foregoing, one may argue that, despite the lack of a particular reference to culture in the provisions or instruments, they are crucial in terms of climate change implications.

The Disaster Management Act also forms part of the South African Climate Change Regulatory Framework. Chapter 1 of the Disaster Management Act of 2002 defines “disaster as any event natural or manmade which damage property, infrastructure or environment or disruption of the people’s way of life”¹⁸⁸. Since cultural rights are understood in the context of protection of an individual or community culture, arts and artefacts, and their environment, this piece of legislation is a step in the right direction towards the protection of cultural rights in South Africa. This provision addresses culture in that it relates to aspects that deal with displacement of people’s way of life due to climate change related impacts, for instance, disasters like floods which cause displacement of people from certain areas that have a distinct cultural value.

However, like many or most of the pieces of the legislation, it is marred with some weaknesses in as far as it tries to protect cultural rights that are violated due to the devastating effects of climate change. Besides, chapter 1 of the Disaster Management Act states that if the cultural violation is deemed too effectively to be dealt with at local and not at the National level it can be covered under this Act¹⁸⁹. The Acts dealing with impacts of climate change on culture are few. For example, the NEMA requires periodic assessment on heritage impact to be carried out according to the National Heritage Resources Act.¹⁹⁰ The National Heritage Resources Act gives rights to protection of national heritage sites and monuments which then speaks to cultural protection. Protection of national heritage sites and monuments is also linked to indigenous knowledge systems which are the grand canals of cultural preservation. However, the

¹⁸⁸ JA Van Wyk, ‘The African Union’s response to climate change and climate security’ in DA Mwiturubani, & J Van Wyk (eds) (2009) Climate change and natural resources conflicts in Africa (2009) Monograph 3-23

¹⁸⁹ Disaster Management Act of 2002

¹⁹⁰ National Heritage Resources Act

climate change discourse has not adequately permeated these areas of legislation, albeit visible negative impacts. Such creates a gap in the South African legislation on the protection of culture especially those affected by the devastating effects of climate change.

EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others is a pivotal case in increasing the scope of climate lawsuits. The court sought to review and set aside the Department of Environmental Affairs' decision to grant approval for the construction of a 1200-MW coal-fired power station, as well as the Minister's decision to dismiss an appeal by EarthLife, in the Thabametsi case. EarthLife argued that the Department of Environmental Affairs was required to examine the proposed power station's climate change impact before granting environmental approval. The Department of Environmental Affairs, according to EarthLife, neglected to conduct a climate change impact assessment.

The Minister stated in the appeal that the proposed coal-fired power station's climate change impact was not completely studied or considered before the environmental licence was granted. This example is significant because it emphasizes the vitality of undertaking climate change impact assessments. Climate change impacts on culture would have been studied if a Climate Change Impact Assessment had been completed, as the project would likely do more harm to the cultural heritage of the villages where the proposed coal-fired power plant was to be built.

Another land-mark case was the *Philippi Horticultural Area food and campaign et al v MEC for Local Government, Environmental Affairs and Development Planning et al*¹⁹¹ whose findings were that neither the City of Cape Town nor the provincial government considered the full impact of development on the Cape Flats Aquifer in the Philippi Horticultural Area. The Area was described as an integral part of Cape Town's food security. Since May 2011 the Province and City of Cape Town had taken steps to allow urban development in the area. Such development was challenged by the Applicants on the premise that it would threaten a local aquifer. In February 2020 a South African High

¹⁹¹ *Philippi Horticultural Area Food and Farming Campaign, et al. v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape et al*, 2020.

Court Judge found that the Province and City had made several errors and remanded with instructions to, among other things, reconsider the decision's effect on existing rights related to the aquifer in context of climate change and water scarcity. This is an important case as it looked at preservation of a cultural heritage, the aquifer and the environmental impact on existing human rights in relation to climate change in Western Cape.

Climate litigation, has the potential to favourably contribute to adequate climate change policy. Climate litigation has the potential to reduce the growing threat of climate change in the global setting. Furthermore, the United Nations Report on the Status of Climate Change Litigation elucidates the critical role of climate litigation in its regulatory context and analyses the importance of climate litigation not only from a global perspective, but also from the perspective of different international jurisdictions. To summarize, given the previous research, the climate regulatory framework fails to appropriately address the negative effects of climate change on culture due to a lack of policy alignment and coordination, resulting in a very complex policy landscape that is difficult to implement. According to a spokesperson from a business association, "the regulations aren't defined clearly, so it's tough to tell if you're complying since there's a lot of it that's open with interpretation." As previously stated, the vast majority of rules and frameworks are too ambiguous, they're vague about what needs to be done, and there's a lot of room for interpretation as to how to execute it. Stakeholders who do not have expertise on climate change are misled by the climate change framework.

3.4 Conclusion

The chapter explored on the climate change regulatory framework and the protection of cultural rights. An analogy was drawn from an analysis of international climate change regulatory framework which highlighted the key instruments under the UN and the AU. The study further explored on the South African regulatory framework on climate change. The UNFCCC instruments have been helpful in strengthening international collaboration, battling climate change, and establishing methods to manage with its repercussions, according to the study's findings. The Convention is the first worldwide accord to recognize climate change as a global problem, as well as the overarching framework for global climate action coordination. It established the responsibility of States Parties to

take precautionary steps to predict, prevent, or mitigate climate change's causes and severe impacts. It specifies that the negative consequences of climate change have a significant detrimental impact on cultural rights.

The current climate change regime of the United Nations Framework Convention on Climate Change (UNFCCC) is primarily concerned with reducing greenhouse gas emissions, placing cultural heritage on the periphery of debate and policy. However, countries vulnerable to climate change may suffer considerable cultural loss in the years ahead if climate change is combined with generally weak law and policy for culture and customs. Although South Africa's jurisprudence on climate change impacts on cultural rights has evolved over time, this study found that the country's climate change regulatory framework does not effectively protect indigenous peoples' traditions in Africa. This is due to a lack of policy coherence, which resulted in South Africa's unclear Climate Regulatory Framework. The growing regional climate change regulatory framework has the potential to be linked to cultural rights to protect indigenous people's culture and history. In view of the regional approach, the Preamble of the United Nations Framework Convention on Climate Change (UNFCCC) recognises the vulnerability of populations to the impact of climate change and calls for regional policies and programmes on mitigation and adaptation. However, states are yet to fully utilise the added value of regional environmental architecture. Finally, the United Nations Framework Convention on Climate Change (UNFCCC) Preamble recognizes the susceptibility of populations to the effects of climate change and calls for regional policies and programs on mitigation and adaptation in light of the regional approach. States, on the other hand, have yet to fully realize the benefits of regional environmental architecture.

CHAPTER FOUR

IMPLEMENTING CLIMATE CHANGE REGULATORY FRAMEWORK TO PROTECT CULTURAL RIGHTS IN SOUTH AFRICA.

4.1 Introduction

This chapter unpacks several ways in which the climate change regulatory framework can aid the protection of culture against adverse effects of climate change in South Africa. This chapter will explore the application of cultural rights regime under the United Nations, African Union as well as at domestic level in line with the key provisions of the South African constitution. This chapter further explores the application of cultural rights regime through the courts and demonstrates how the court interpretive approach can aid the implementation. This chapter also addresses the role of the NGO as well as contextualizing the significance of the implementation of climate change regulatory framework in a bid to protect culture against the devastating effects of climate change in South Africa.

4.2 Application of cultural rights regime

Cultural rights are human rights concerned with the protection of the art and culture of the community.¹⁹² Thus, cultural rights are also human rights, and they contribute to the socio-economic development of the local people and their communities. In the context of this study, cultural rights are perceived as central to the climate change mitigation and adaptation for the indigenous people. Climate change alters the economic environment of indigenous people hence, an intrinsic link exists between cultural rights and economic development such as the right to life, health, food, water and housing.¹⁹³ Thus, it is imperative to be protected for the betterment of the local people's livelihoods. Like any other rights, cultural rights are inalienable and, in most cases, contextual. Due to their importance in people's lives, indigenous culture needs to be protected.

¹⁹² Human Rights Commission

¹⁹³ Pillay (Same as 51 above)

Climate change-induced damage and destruction of culture and cultural heritage can have a particularly significant effect on indigenous peoples, for whom connections to place, land and landscape and relationships with culturally important animals, plants, habitats and ecosystems play such an important role in shaping heritage, laws, worldviews, practices and identity. As such the application of cultural rights is a global, regional and national phenomenon which is applied by various countries, regional and international bodies. The application of the cultural rights regime is through policies, legal instruments like conventions, treaties and through the judicial system.

4.2.1 Cultural rights as human rights regime under the United Nations

Climate change is a matter of international human rights law¹⁹⁴. It has the potential to jeopardize most of the Universal Declaration of Human Rights' human rights, ranging from the right to life to the ability to participate in cultural life and beyond¹⁹⁵. Individuals and groups should be empowered as active agents of change rather than passive victims in a human rights perspective which prevent and respond to the effects of climate change¹⁹⁶.

Climate change related human rights requirements should be considered at both the national and global levels.¹⁹⁷ These instruments can be used to address culture and reference will be made based on decisions of the UN treaty monitoring bodies that deal with culture. Through their practice, they constructed an understanding of the normative content of cultural rights and thus helped overcome the seemingly insurmountable political difficulties of states.¹⁹⁸ Through an international law perspective, the study unties this practice and presents a critical analysis of the new developments in this area.

The conventional academic narrative on the relationship between cultural variety and universal human rights respect suggests a tension that must be managed at best.¹⁹⁹ On the other hand, there is a lack of consensus on the best method to reconcile or resolve

¹⁹⁴ Universal Declaration of Human Rights

¹⁹⁵ UN (n 193)

¹⁹⁶ MJ Massey. Climate Change, Culture and Cultural Rights. In Preparation for the Report by the UN Special Rapporteur in the field of cultural rights, Karima Bennoune

¹⁹⁷ F Viljoen, N Orago. An argument for South Africa's accession to the optional protocol to the international covenant on economic, social and cultural rights in the light of its importance and implications

¹⁹⁸ Pillay n 53 and 163 above)

¹⁹⁹ Massey (n 195 above)

this conflict, resulting in an intellectual divide between universalist and cultural relativist schools of thought that has come to define major areas of diplomatic practice.²⁰⁰ Based on the practice of the United Nations human rights treaty organizations, this study examines an alternative strategy to managing this issue.

These supervisory bodies' working procedures, particularly the constructive discourse on national periodic reports, imply that they take a legal approach in which cultural diversity and universal human rights respect complement and support one other.²⁰¹ In the same vein, treaty organizations question specific cultural practices that they believe are detrimental or in violation of human rights provisions, focused on effective protection. Although the approach taken by treaty bodies to this issue is still evolving, it provides important doctrinal lessons about the universality of human rights rules.

The Treaty based bodies derive their existence from provisions contained in a specific legal instrument. They have more limited mandates, defined as a set of issues stated in a legal document²⁰². The treaty bodies are made up of independent experts who meet to discuss State parties' reports on human rights issues relating to climate change, as well as individual complaints or correspondence. They may also make broad comments on human rights issues that are relevant to the treaties they monitor. The treaty-based bodies tend to follow similar documentation practices. Ever since the introduction of the Universal Declaration of Human Rights in 1948 there has been a debate on the topic of universality and cultural variety between Universalists and cultural relativists.²⁰³

This debate is now more often framed in terms of reconciliation in terms of opposites²⁰⁴. Under the international human rights framework, States can take cultural particularities into account when implementing the treaties. The bodies that monitor states' implementation of treaties play a vital role in establishing a proper balance between preserving the universality of the rights while also allowing for cultural differences in the

²⁰⁰ F. Vijilloen (Same as n 196 above)

²⁰¹ UN Human Rights Commission

²⁰² Same as above (n 200)

²⁰³ F Viljoen. A n introduction to the Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa.

²⁰⁴ Same as above (n 202)

interpretation and execution of those rights by states. This research looks at how the UN treaty bodies, specifically the Human Rights Committee and the Committee on Economic, Social, and Cultural Rights, carry out this function in South Africa which is currently grappling with the effects of climate change.

Civil and political rights, as well as economic, social, and cultural rights, such as the right to life, safe food and water, health, security, housing, and culture, are all jeopardized by the adverse effects of climate change. On a national or local level, the poor, members of minority groups, women, children, the elderly, people with chronic diseases and disabilities, those living in areas with a high prevalence of climate-related diseases and workers exposed to extreme heat or increased weather variability are among those most vulnerable to the negative environmental and health consequences of climate change.²⁰⁵ On a global basis, there is tremendous inequity, with low-income countries, which generate the fewest greenhouse gases (GHGs), being more badly affected by climate change than high-income countries, which release significantly more GHGs but are less directly affected.²⁰⁶

On a global basis, the International Covenant on Economic, Social, and Cultural Rights is critical for the protection of people's cultural rights²⁰⁷. Because the world community has entrusted it with the job of monitoring state party compliance, the Committee on Economic, Social, and Cultural Rights performs an essential role. The Committee on Economic, Social, and Cultural Rights (CESCR) has defined three distinct elements of the fundamental right to participate in cultural life.²⁰⁸ Access to cultural life, participation in cultural life, and contribution to cultural life are all rights.

It is beyond the scope of this study to examine all economic, social, and cultural rights, so this study will mainly focus on Article 15 of the International Covenant on Economic, Social, and Cultural Rights, which addresses the right to culture and the right to benefit

²⁰⁵ JF Jarso. Africa and the Climate Change Agenda: Hurdles and Prospects in Sustaining the Outcomes of the Seventh African Development Forum. " Sustainable Development Law & Policy 11, no. 2 (2011): 38-44, 86-89.

²⁰⁶ Same as above (n 204).

²⁰⁷ Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right of everyone to take part in cultural life, paras. 11 and 12.

²⁰⁸ General comment 21, the committee on economic, social and cultural rights (CESCR)

from scientific advancement in cultural heritage. Members to the contemporary Covenant recognises that everyone has the right to participate in cultural life, to benefit from scientific progress and its applications, and to have their moral and material interests safeguarded because of any scientific, literary, or artistic production of which they are the author, as stated in Article 15.²⁰⁹

The determinations that member countries affiliated to the present Covenant must take in order to fully realize this right include those that are a prerequisite for the development, dissemination and conservation of science and culture. The states signatories to the present Covenant agree to uphold the freedom required for scientific research and creative endeavours. Furthermore, the nation states to the present Covenant recognize the benefits that can be accrued from encouraging and developing international scientific and cultural contacts and collaboration. Article 15 is built on the rights to enjoy culture, participate in cultural life, and benefit from technical and scientific advancement.²¹⁰

Article 27(1) of the 1948 United Nations Universal Declaration of Human Rights and Fundamental Freedoms states that everyone has the right to freely participate in communal cultural life, to enjoy the arts, and to profit from scientific advances. Articles 15(1) and (2) of the 1966 ICESCR confirm these rights: The nations affiliated to the existing convention recognize the right of every person to partake in traditional life, to benefit from scientific development and its applications, and to benefit from the protection of moral and measurable material interest accruing from any scientific, literary or artistic production of which he is the author. The efforts that state parties to the present covenant must take to fully realize this right include those that are required for the conservation, development and dissemination of science and culture. Human rights are highlighted in Articles 4 and 5 of the 2001 Universal Declaration on Cultural Variety as safeguards of cultural diversity and an enabling environment for it.

The Preamble to the 2003 Declaration Regarding the Intentional Destruction of Cultural Heritage emphasizes the negative repercussions of cultural heritage destruction for

²⁰⁹ UNESCO, Culture 2030 Indicators, 2019, <https://unesdoc.unesco.org/ark:/48223/pf0000371562>, pp. 41-42.

²¹⁰ R.T Watson, M.C Zinyowera and RH Moss RH (eds) "the regional impacts of climate change: an assessment of vulnerability" (2007 IPCC Working Group II Cambridge University Press) 225-265

human dignity and human rights. This frequent inclusion, as Watson et al point out, has not only demonstrated their significance, but has also aided in the development of the idea of cultural human rights.²¹¹ Despite the fact that the phrase "cultural heritage" is not referenced in international human rights agreements, international organizations such as the Human Rights Council have taken an interest in the subject and strengthened the link between cultural legacy and cultural rights. Farida Shaheed, an independent expert and Special Rapporteur on cultural rights, states that "cultural legacy is related to human dignity and identity."²¹² In the absence of a universal definition, Shaheed uses a non-exhaustive list to explain cultural heritage from a human rights perspective.

Article 27(1) of the Universal Declaration of Human Rights (UDHR) provides that everybody has a fundamental right to freely participate in their communities' cultural life. Article 15 of the International Covenant on Economic, Social, and Cultural Rights, as well as similar parts of the International Covenant on Civil and Political Rights, are examples of articles that emphasize the importance of cultural rights.

Article 15 (4) of the International Covenant on Economic, Social, and Cultural Rights emphasizes the importance of national and international collaboration in preserving these fundamental human rights. Because the most serious threats to the world's science and technology, such as climate change and the rapid loss of biodiversity, involve multiple countries and cannot be adequately addressed without strong international cooperation, "the UN's international instruments promote cultural rights, which are specifically protected through domestic legislation in all of its forms."²¹³ It is important to have the right to participate in the understanding, development and interpretation of cultural heritage, as well as the reorganization of cultural identities.²¹⁴

Cultural rights of specific communities are subject to specific requirements. According to article 31 of the UN Declaration on the Rights of Indigenous Peoples, ethnic groups of indigenous communities have the right to protect, maintain, control and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the

²¹¹ Wyk (n 165 above) 51.

²¹² F Shasheed. Special Rapporteur on Human Rights

²¹³ https://www.ohcr.org/Documents/Issues/CulturalRights/A_75_298_Annexdocx

²¹⁴ Human Rights Commission A 40/53, para.15

manifestations of their sciences, technologies, and cultures, including human and genetic resources, medicines and knowledge of the properties of plants and animals.²¹⁵ Nations overtly confirmed that indigenous people's knowledge and strategies to sustain themselves were included in the outcome document adopted at the World Conference on Indigenous Peoples in 2014.²¹⁶

South Africa must comply with their specific international duties to tackle climate change, according to the pronouncement on the rights of farmers and other people working in rural areas. Peasants and other rural workers have the right to participate in the development and execution of local and national climate change adaptation and mitigation policies, through the application of traditional knowledge and practices.²¹⁷ In terms of article 25 peasants and village people have the right to climate change training as well as the respect, acknowledgement and protection of their traditional knowledge.²¹⁸

Everyone has the right to contribute in the traditional life of their indigenous communities and to benefit from scientific development and its applications, according to Article 15 of the International Covenant on Economic, Social, and Cultural Rights. The Covenant affirms the right to have the moral and material interests of any scientific, literary, or artistic output of which one is the creator protected, as well as the freedom required for scientific inquiry and creative activity.²¹⁹ "Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, and knowledge of the properties of flora and fauna," according to article 31 of the United Nations Declaration on the Rights of Indigenous Peoples.²²⁰

Adaptation actions "shall be founded on and directed by the greatest available research and when applicable traditional knowledge, indigenous peoples' knowledge, and local

²¹⁵ Oulu (n 36 above)14

²¹⁶ General Assembly Resolution 69/2, para 36, cited in A/HRC/36/46, para 56

²¹⁷ Kim (n 41) 15.

²¹⁸ https://www.ohchr.org/Documents/Issues/CulturalRights/A_75_298_AnnexDocx

²¹⁹ Article 15 of the International Covenant on Economic, Social and Cultural Rights

²²⁰ 1966 International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR),

knowledge systems," according to Article 7 (5) of the Paris Agreement. Climate change puts cultural rights, such as cultural practices, meaningful venues for cultural interactions, and ways of life, at jeopardy²²¹. The Special Rapporteur in the field of cultural rights underscored how landscapes suffer severe jeopardies from climate change, such as the wearing off of water's edge or fires due to droughts²²². There has been further emphasis on the need for an operative and timely response to the climate emergency for affected persons to continue enjoying the cultural rights related to these spaces²²³. Natural areas, such as the erosion of water's edge or fires caused by droughts, are seriously endangered by climate change, according to the Special Rapporteur on cultural rights.

For individuals affected to continue to enjoy their cultural rights in these settings, the Special Rapporteur emphasised the significance of an operational and quick response to the climate emergency. Effective climate change solutions will necessitate changes in production, consumption, and mobility practices to mention a few, as well as in global modes of life, for which culture, science and creativity, as well as the exercise of cultural rights will be critical. The Special Rapporteur extensively highlighted the 18 implications of climate change on culture and cultural rights in a proclamation on the initial outcomes and observations of a visit to South Africa in 2018. Many global heritage sites, according to the Special Rapporteur, are endangered by increasing sea levels²²⁴. In this vain, the proclamation described climate change as a pressing human rights issue and risk multiplier, which enlarged prevailing threats to heritage and which must be understood and responded to as such.

Cultural heritage, according to the Special Rapporteur, "represents a valuable resource for addressing the difficulties posed by climate change"²²⁵. The Special Rapporteur identified the climate emergency as an existential threat to life, human rights, and human cultures in her yearly report to the United Nations General Assembly at its seventy-fifth

²²¹ Article 7 (5) of the Paris Agreement, United Nations Framework Convention on Climate Change.

²²² AMCEN (2011): Addressing Climate Change Challenges in Africa; A Practical Guide Towards Sustainable Development.

²²³ Human Rights Commission A/74/255, para. 69

²²⁴ Africa Partnership Forum (APF) (2007): Climate Change in Africa. Briefing Paper No. 1. Paper Presented to 8th Meeting of the Africa Partnership Forum in Berlin, Germany on 22-23 May 2007. Available at: <http://www.africapartnershipforum.org/dataoecd/57/7/38897900.pdf>

²²⁵ (A/HRC/40/53, para. 70).

session. It was noted that cultural rights are at risk of extinction because of climate change in many cases, emphasizing the need for climate change programs to fully reflect this. To avoid a devastating climatic catastrophe, the Special Rapporteur highlighted the urgency of sweeping cultural change²²⁶.

The Committee on Economic, Social, and Cultural Rights has raised concern about how climate change is affecting indigenous peoples' ability to exercise their Covenant rights. Traditional knowledge, especially indigenous peoples' knowledge, provides a vital basis for climate change adaptation and mitigation programs, according to the Special Rapporteur on the rights of indigenous peoples²²⁷. The acknowledgement of indigenous communities is a clear indication that culture plays a fundamental role in communities. Societal values, beliefs and ways of life form an important milestone in humanity. In order to combat climate change, the International Indigenous Peoples' Forum on Climate Change has underlined the significance of honouring indigenous peoples' traditional knowledge. In order to maintain and promote cultural rights, states are legally required to adopt actions to reduce and adapt to climate change, thereby preventing anticipated threats to these rights.

In addition, the Declaration demands for prior, free and informed consent for acts that affect indigenous peoples' rights, such as climate change mitigation and adaptation measures²²⁸. Indigenous peoples are inexplicably affected by climate change. For example, indigenous peoples' cultural survival, traditional livelihoods, and right to self-determination are threatened by displacement and the probable loss of their customary lands, territories, and resources²²⁹. Indigenous peoples have traditionally lived in fragile habitats that are particularly vulnerable to climate change. Extreme weather events, drought, melting glaciers, sea-level rise and species transitions are wreaking havoc on indigenous territory, making indigenous peoples more vulnerable.

Progress on cultural rights obligations and the Sustainable Development Goals are two sides of the same coin because they are dependent on each other. One cannot talk of

²²⁶ International Covenant on Economic, Social and Cultural Rights, Article 15

²²⁷ International Covenant on Economic, Social and Cultural Rights (n 201 above)63.

²²⁸ International Covenant on Economic, Social and Cultural Rights (n 201 above)63

²²⁹ (A/HRC/38/21, para. 19)

cultural rights obligations without noting the issue of sustainable development. Furthermore, maintaining and developing culture helps directly to many of the goals, such as safe and sustainable cities, good jobs and economic growth, reduced disparities, the environment, gender equality, and peaceful and inclusive societies. Cultural rights are also important tools for attaining objectives that specifically reference culture, such as Target 11's goal 4 on improving efforts to preserve and safeguard the world's cultural and natural heritage²³⁰.

Critically examining this goal one may assert the view that such a goal is critical for the realisation of cultural rights in terms of the sustainable development goals and as such it ensures that all people have access to cultural resources²³¹. Cultural rights are a necessity, not luxury. They are critical to the full realization of fundamental human rights, as well as a critical component of many current concerns, such as climate change, discrimination and poverty²³². Cultural rights are transformative and uplifting opening up new possibilities for other human rights to be realized. People find it difficult to exercise their civil and political rights, as well as their right to development, due to a lack of equitable cultural rights, as well as economic and social inequities²³³.

Indigenous peoples have the right to sustain, regulate, help defend, and build their culture and heritage, traditional knowledge, and traditional cultural expressions, as well as expressions of their sciences, technologies, and cultures, which include human and genetic resources, medications and comprehension of the characteristics of plants and animals according to article 31 of the UNDRIP²³⁴. Parties acknowledge that adaptation action should follow a cultural, gender-responsive, collaborative and comprehensive approach, taking into account disadvantaged groups, communities, and biodiversity, and should be premised on and directed by the scientific evidence and, as acceptable, traditional knowledge, indigenous cultures and local information systems, with just a perspective to incorporating adaptation action, according to Article 7 paragraph 5 of the

²³⁰ Natural Justice (n 39) 14.

²³¹ United Cities and Local Governments-Secretariat of the Committee on Culture of United cities and local Governments, Culture21-Culture, Climate change and Sustainable Development: Briefing (2016)2

²³² Pillay (n 42 above) 15.

²³³ Human Rights Commission A/36/46, para 56.

²³⁴ Report of the Special Rapporteur on the rights of Indigenous Peoples (2017)11, para 54

Paris Agreement. The acknowledgement of these knowledge systems lays a crucial foundation for climate change adaptation and mitigation policies²³⁵.

Indigenous peoples knowledge and strategies for environmental sustainability should be respected and taken into account in continuing to develop national and international strategies to climate change mitigation and adaptation, according to the outcome document adopted at the 2014 World Conference for Indigenous Peoples States²³⁶. Indigenous knowledge is challenged by climate change consequences and is often overlooked in policy and research, according to the IPCC's Fifth Assessment Report, and that its mutual acknowledgement and integrating with scientific knowledge would improve the success of adaptation methods. Local and indigenous knowledge, as well as different stakeholder interests, attitudes and expectations are essential for developing confidence in climate change decision-making processes, according to Pillay²³⁷.

Moreover, the Cancun Agreements adopted at the sixteenth Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change and the African Commission on Human and Peoples' Rights Resolution in which the Commission expressed concern about the consequences of climate change on the enjoyment of human rights in Africa took cognisance of the link²³⁸. Thus, there is a clear link between human rights and climate change which warrants the assumption of a human rights-based approach to climate change.

Scholars have argued that the application of a human rights-based approach should be guided by human rights obligations and principles.²³⁹ However, the approach calls for the fulfilment of the duty of states to cooperate under International human rights law²⁴⁰. It also requires the extraterritorial application of human rights law due to the transboundary nature of climate change which sometimes creates challenges whenever a country infringes on the rights of another neighbouring nation.

²³⁵ United Nations Doc. E/C.12/2000/4, (2000), para 33; Committee on Social, Cultural and Economic Rights, General Comment No.15, UN Doc. E/C.12/2002/11, (2003); Committee on Social, Cultural and Economic Rights, General Comment No.19, UN Doc. E/C.12/GC/19, (2008), paras 47-49.

²³⁶ Human Rights Commission A/36/46, para 55.

²³⁷ Pillay (n 42 above) 15.

²³⁸ Limon (n 50 above) 16.

²³⁹ Pillay (n 42 above)

²⁴⁰ Schapper & Lederer (n 52 above) 16.

The discourse of human rights provides an important framework within which to think through and assess the risks associated with climate change and the policy structures and mechanisms required to provide effective relief to those that are affected. Attending to human rights also means appreciating and recognizing that in taking steps to grow our economies, we must not do so in a manner that is detrimental to the most vulnerable, as is currently the case. In this vein, the courts play a fundamental role in adjudicating climate related litigation²⁴¹.

Cultural rights safeguard in particular human creativity in all its diversity and the conditions for it to be exercised, developed and made accessible, the free choice, manifestation and growth of identities, which include the right to choose not to be a part of particular collectives, and the right to exit a collective, and to take part on an equal basis in the process of defining it, the rights of individuals and groups to participate, or not to participate, in the cultural life of their choice, and to conduct their own cultural practices, the right to interact and exchange, regardless of group affiliation and of frontiers, the rights to enjoy and have access to the arts, to knowledge, including scientific knowledge, and to an individual's own cultural heritage, and that of others and the rights to participate in the interpretation, amplification and development of cultural heritage and in the reformulation of cultural identities²⁴².

4.2.2 Cultural rights regime under the African Union

Two institutions namely the United Nations Economic Commission for Africa (UNECA) and African Union Commission (AUC) through the Climate for Development in Africa Programme (ClimDev Africa) have jointly strived to build solid science and observational infrastructure to enable strong working partnerships between government institutions, private sector, civil society and vulnerable communities in a bid to promote culture of indigenous communities.

The 1981 African Charter on Human and People's Rights was the first international human rights instrument to include the right to a general satisfactory environment favourable to development among its guarantees. The impact of climate change on the

²⁴¹ Maus (n 53 above) 17.

²⁴² (A/HRC/40/53, para.15

enjoyment of human rights in Africa was acknowledged by the AU in its resolution 153 of 2010 on climate change and human rights in Africa²⁴³. This resolution emphasised the need for the AU to take legal measures for the protection of vulnerable groups such as children, women, the elderly, indigenous communities and victims of natural disasters as well as their cultural heritage²⁴⁴.

Most African countries are signatories of human rights instruments and their monitoring bodies that deal with climate related cases. The African Charter is one good example of these human rights instruments that aims to bring those who violate climate related human rights to justice. The African Charter on human and people's rights is the principal instrument that underpins a human rights framework in the African Union (African Charter)²⁴⁵. The African Convention on the Conservation of Nature and Natural Resources plays a fundamental role as a standard for assessing the protection of indigenous peoples' land rights in the context of adverse climate change effects; it is arguably the most successful tool at the regional level due to its widespread ratification. Individual and collective rights are both recognized by the Charter. Other collective rights in the African Charter include the right to exist and the right to self-determination, in addition to the right to a satisfactory environment, which is provided for in article 24²⁴⁶.

The African Charter provides for specific obligations such as the adoption of suitable legislative or other measures to give effect to the rights guaranteed under the Charter, and the establishment and improvement of appropriate national institutions with a view to protecting rights²⁴⁷. Articles 60 and 61 of the African Charter empower the African Commission on Human and Peoples rights to draw inspiration from international law and international human rights laws and consider such as part of subsidiary measures to

²⁴³ African Union Commission Resolution 153 of 2010 on Climate Change.

²⁴⁴ Pillay (n 42 above) 15

²⁴⁵ African(Banjul) Charter on Human and people's rights, adopted on 27 June 1981, OAU Doc CAB /LEG/67/3 rev5, 21 ILM 58(1982), entered into force 21 October 1986 (African Charter)

²⁴⁶ African Charter, art 20

²⁴⁷ African Charter 22

determine legal principles. It signifies that the African Charter can be used as a basis to imply human rights instruments²⁴⁸.

The African Commission and the United Nations Economic Commission for Africa has been instrumental in promoting cultural rights due to climate change induced impacts. The Commission has applied a human rights-based approach which incorporates the aspect of cultural rights. A human rights perspective offers guidance for addressing climate change impacts through a wide-ranging lens that includes the economic, social, cultural and political dimensions of climate change. It can also reduce arbitrariness in climate change programs and objectives and ensure that climate action benefits those who are most in need who includes indigenous communities.

Article 20(3) International Covenant on Economic, Social and Cultural Rights (ICESCR) signifies that the provisions of the convention are enforceable under the African human rights system as a result of its endorsement of the right of internally displaced regions to lodge a complaint with the commission or the African court of justice and human rights, or any other competent international body²⁴⁹. South Africa like most countries throughout the world subscribes to international human rights conventions such as International Covenant on Economic, Social and Cultural Rights (ICESCR). Being a signatory to this convention and a member of the United Nations obliges South Africa to all its human rights prescribed by these international bodies.

The state is mandated by the Constitution to protect collective groups' rights whenever they are violated. In most instances groups' rights are violated when resources that benefit the whole community are threatened or damaged due to climate change. In most instances, non-state actors like multilateral corporations are responsible.²⁵⁰ Thus, failure by a state to formulate appropriate legislation for the protection of indigenous peoples' land tenure and use in the context of climate change at national level is incompatible with the levels of duties imposed on states by African regional jurisprudence. As such, states

²⁴⁸ On implied rights, see Viljoen International human rights law in Africa (2012)327-329 which is explained by the author as the acceptance and application by the commission of rights implicit but not explicitly guaranteed under the African Charter.

²⁴⁹ Articles 20(3) International Covenant on Economic, Social and Cultural Rights (ICESCR)

²⁵⁰ A Averchenkova KE Gannon P Curran. Governance of climate change policy: A case study of South Africa. 2019.

like South Africa are implored to protect groups' collective rights. Failure to legislate at country levels violates article 3(h) of the Kampala Convention which places accountability obligation on the state for all non-state human rights offenders²⁵¹. In short, countries should strengthen their legislative capacity level in conformity with regional and international standards. This can arguably suggest that cultural rights forms part of the agenda of the Kampala Convention.

Accordingly, it can be argued that South Africa like any other country in Africa whose marginalised and rural communities are feeling the brunt of climate change should strengthen its laws and statutes that protect climate change induced displaces who are detached from lands and resources of cultural significance to them due to climate change.²⁵²

4.2.3 Cultural rights regime at the domestic level

The application of cultural rights at domestic level is well articulated in the Vienna Declaration and Programme of Action²⁵³. While the Committee on Economic, Social and Cultural Rights can assist in the implementation of the Covenant from an international perspective, the ultimate effectiveness of this instrument is reliant on the measures taken by Governments to give concrete effect to their international legal obligations.

In view of the above, the Committee has recognized the essential importance of the adoption by States of appropriate legislative measures and the provision of judicial remedies, indicating the very real legal nature of economic, social and cultural rights.²⁵⁴ The necessity of implementing the provisions of the Covenant through domestic legislation is consistent with article 27 of the 1969 Vienna Convention on the Law of Treaties, which states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Undeniably, the Convention frequently needs legislative action to be taken in circumstances where existing legislation is in violation of the commitments anticipated under the Covenant²⁵⁵.

²⁵¹ Kampala Convention, article 3(i)

²⁵²A Averchenkova (n 249 above)

²⁵³ Vienna Declaration and Programme of Action section 10, part II, para 98

²⁵⁴ Kim (n 41 above) 15.

²⁵⁵ General comment 21, the committee on economic, social and cultural rights

Furthermore, South Africa has endorsed a number of regional and international human rights instruments, indicative of its obligation to international human rights. The provisions in the South African Constitution that extend protection for cultural rights, according to Van der Vyver, are designed to apply the international norm found in article 27 of the ICCPR²⁵⁶. As previously stated, by ratifying the most important international and regional human rights instruments that promote cultural rights in the context of climate change, South Africa has demonstrated its pledge to protecting international human rights law.

Section 233, which gives constitutional validity to the interpretive presumption of compliance of national legislation with international law, strengthens international law's position. The section states as follows, "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law"²⁵⁷. The consequence of this provision is to spread the obligation to use international law as an explanatory aid beyond the confines of the Bill of Rights as provided for in section 39, making it applicable to all legislation. International law has, since the drafting of the Constitution, thus played a noteworthy part in the development of human rights protection in South Africa, a role which is endorsed and encouraged by the Constitution itself. Protection of cultural rights in the South African Constitution is clearly heavily influenced by international human rights law and reflects the broad conception of culture contemplated by the ICCPR. Sections 30 and 31 provide particularly for the protection of culture.

According to recent research, countries like South Africa can use these regional bodies' human rights laws to enhance their regulatory framework in the face of climate change. When local institutions and frameworks fail to safeguard indigenous populations from human rights breaches, regional and international accords should be invoked to protect them²⁵⁸. As a result, it may be claimed that invoking regional conventions or aligning local

²⁵⁶ Jegede (n 45 above) 16.

²⁵⁷ Section 233 of the South African Constitution.

²⁵⁸ M Ssenyonjo 'Strengthening the African regional human rights system' in M Ssenyonjo (ed) *The African regional human rights system: 30 Years after the African Charter on Human and Peoples' Rights* (2011) 456.

legislative frameworks with regional frameworks and conventions is a strategy for shielding vulnerable communities from the disastrous effects of climate change.

Academics have endorsed and advocated regionalism or a regional orientation. Regional and international organizations, for example, constitute an important part of the global architecture for environmental governance, according to Aryal et al²⁵⁹. Hettne mirrored the comments of Aryal et al, who stated that regionalism is important in resolving transboundary environmental issues, particularly those that have not been properly addressed at the national level²⁶⁰. In a similar vein, Birdsall and Lawrence stress this point when they state that regional organizations aid in the resolution of complaints to cultural rights violations arising from environmental protection²⁶¹. Invoking international and regional regulations and agreements to which a country is a signatory might thus be advocated as a means of assisting indigenous groups in their pursuit of justice for cultural rights violations. In this case, the South African government is urged to align its legal framework with international and regional norms, which would increase local groups' ability to suit violations of their cultural rights at international and regional levels. The United Nations Framework Convention on Climate Change (UNFCCC), for example, recognizes the cultural sensitivity of communities as a result of climate change and encourages regional mitigation and adaptation policies and initiatives²⁶².

In as much as regionalism has been offered as a mitigation option for the cultural violations of indigenous people in South Africa, it is important to note that, this solution is not exclusive. Firstly, it needs to appreciate that, individual countries have their plans as far as climate change mitigation strategies which are premised on their development agenda. Suing international and non-state actors who are the major culprits in as far as climate-related cultural rights violations are concerned is quite problematic when using the domestic courts²⁶³. For example the EIA report indicate the cultural erosion due to

²⁵⁹ JP Aryal et al "Climate change and agriculture in South Asia: Adaptation options in smallholder production systems" (2020) 22(6) *Environment, Development and Sustainability* 5065.

²⁶⁰ E Vivares & M Cheryl "The global political economy of regionalism." In *the Routledge Handbook to Global Political Economy: Conversations and Inquiries* (2020).

²⁶¹ Vivares (n215 above) 68

²⁶² United Nations Framework Convention on Climate Change (UNFCCC) adopted at the World Conference on Environment and Development at Rio de Janeiro, 3-14 June 1992, Preamble & art 4(1)(b).

²⁶³ Vivares (n215 above) 68.

climate related impacts in parts of Umthata in the Eastern Cape Province of South Africa.²⁶⁴ Regular reports on environmental status are encouraged by the NEMA but the cultural impact of such has not been adequately addressed. Thus, creating a gap where cultural rights are overlooked.

Some scholars like Timothy Hodgson have propagated the need for South Africa to utilise the tripartite obligation that is provided for in the Constitution.²⁶⁵ Constitutionally the state is bestowed with the duty to respect, protect and fulfil human rights. Thus, states must refrain from disturbing the enjoyment of people`s cultural rights. This obligation implies that states are duty bound to ensure that they refrain from causing harm on other countries owing to climate induced impacts. Cultural rights violations of either groups or individuals should be condemned by the state especially by non-state actors. On the same note, states are implored to take all the positive steps in the enjoyment of all human rights including cultural rights even of the minorities²⁶⁶. To date, the tripartite approach has gained international acceptance among scholars of human rights starting with those working on the right to food and later to the socio-economic and cultural rights activities²⁶⁷.

Currently, South Africa has made significant inroads by producing world class and elaborate climate change framework. The frameworks are conclusive in terms of several dimensions to promote sustainability. For example, the promulgation of the Climate Change Act which is also guided by the National Environmental Management Act of 1998 seeks to broker a more robust approach to solving climate change from a scientific point of view.²⁶⁸ Meanwhile, in the realm of cultural rights, South Africa`s framework recognises the National Heritage Resources Act and the Indigenous Knowledge Systems Act. These are crucial in the preservation of cultural activities and protecting the national heritage sites from the adverse effects of climate change.

²⁶⁴ Environmental Impact Assessment Report 2019.

²⁶⁵ T Hodgson

²⁶⁶ P Alston "The Committee on Economic, Social and Cultural Rights." (2020) 20-24 *NYU Law and Economics Research Paper*.

²⁶⁷ Alston (n 219 above) 69.

²⁶⁸ National Environmental Management Act

Despite having such as an elaborate framework which embraces the role of various cultural groups in reducing climate change, it is argued that the major roadblock is the lack of policy alignment.²⁶⁹ Policy adaptation and resilience has received very little attention such that the vitality of culture in fighting climate change is partially obscured. Furthermore, the policies are lack vertical and horizontal alignment from government to local levels and intergovernmental organs.²⁷⁰ This creates confusion and conflict because intercultural groups should be managed through an effective construct of policies. Lately, it was noted that lack of a financial budget to enhance the implementation of climate change has hampered the implementation of policies. This lack of financing, affect the preservation of cultural rights because culture can be only understood through research and public engagement.

The South African government has the COGTA, which embraces the role of traditional leaders in inspiring culture-led initiatives for fighting climate change.²⁷¹ Traditional leaders link the government to culture, and this is important in preserving the cultural rights of various social groupings.²⁷² Although, traditional leaders and the government seem to work together in solving many of societal challenges, the efficacy of cultural resources and activities are less pronounced in the realm of climate change adaptation.²⁷³ This gap needs appropriate intervention strategy to ensure that government ambitions and the activities at local levels are synchronised. It is against this backdrop that the tripartite approach is encouraged and recommended as a regulatory framework that South Africa can adopt to protect the violation of cultural rights in the context of climate change.

4.3 Application of cultural rights regime through courts in South Africa

The constitutional court has stated from the beginning of its jurisprudence that while interpreting the Bill of Rights, comparative law sources from outside of South Africa or

²⁶⁹ A Avenchenkova, KE Gannon, P Curran Governance of Climate change policy: A case study of South Africa.

²⁷⁰ Avenchekova (n 268 above)

²⁷¹ J Mawere PE Matshidze SL Kugara T Madivhandila. The role and significance of Traditional Leadership in South African Local governance. 2021. Handbook of Research on Protecting and Managing Global Indigenous Knowledge system

²⁷² Mawere (n 270 above)

²⁷³ Muledu and Baleni

universal international jurisdictions must be consulted²⁷⁴. The use of a judicial interpretative method can help with the execution of South African ESCR, which are unique. The concept of the minimum core and the reasonableness approach when analysing socio-economic rights give rise to this connotation.²⁷⁵ It is important to note that cultural rights are a part of socioeconomic rights in this setting.

Domestic judges, at the very least, interpret domestic law in accordance with the States' duties under the ICESCR, according to the CESCR²⁷⁶. Through bolstering the international law baseline with domestic law protections, this holistic human rights-oriented position enables for the development of personalized, contextualized domestic norms. In this vein, South Africa has proven to be effective in adjudicating matters relating to climate change law by applying section 39 (1), b) of the South African Constitution, which requires courts to interpret international law when dealing with violations of rights as enshrined in the bill of rights²⁷⁷. The CESCR defines these immediate duties as "obligations that have immediate effect but are not clearly tied to a minimum core" in General Comment 3.

The need to actualize ESCR without discrimination (Article 2) and the obligation on states to "take actions toward the achievement of ESCR" are two instances of such "immediate impact" responsibilities. Although General Comment 3 of the CESCR refers to "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights," it is only in subsequent General Comments on specific ESCR that this obligation is described as an obligation. In a nutshell, the CESCR deems the specific responsibilities in the ICESCR text, such as progressive realization, to be a primary responsibility that is binding on governments. Given this context, it's unsurprising that the CESCR clearly places the state's minimum core obligation on the executive, legislature and the judiciary.

²⁷⁴ Duyck (n 157 above)47.

²⁷⁵ Duyck (n157 above)47.

²⁷⁶ The International Commission of Jurists, "Practitioners Guide on Adjudicating Economic, Social and Cultural Rights at National Level, No.8" (2014), available at: <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf>, accessed 13 March 2022.

²⁷⁷ Section 39(1),b) of the South African Constitution

International law is in tandem with South African law which promote the necessity for reasonable interpretations of international and domestic principles that are consistent²⁷⁸. Construction ought to be applied when the court's approach to the minimum core and reasonable approach standard for interpreting socio-economic and cultural rights is employed. It should be understood in a way which is in tandem with CESCR's approach to minimum core standards. South Africa already has a comprehensive constitutional framework and institutional mechanisms in place for the vindication of socio-economic rights, but localised remedies are needed to promote the development of international jurisprudence, which in turn would stimulate the development of domestic jurisprudence on economic, social, and cultural rights, strengthen international accountability, allow the adjudicating body to study concrete cases, and so on.

In order for the South African government and judiciary to fulfil their international legal obligations, they must adhere to a minimum core standard based on the ICESCR's requirements. The CESCR interprets those phrases in accordance with the ICESCR. South Africa may adopt a minimum core that exceeds the CESCR's requirements, but it should go above the reduced minimum. What is evident is that denying the existence of any minimum core duties, in any form, whether defined and decided, would be in violation of South Africa's commitments under the ICESCR²⁷⁹.

The South African Constitutional Court has considerably shown progressiveness and consistency in the area of law that concerns land. The Court has revealed a considerable understanding for the consequences of land dispossession that was central to the brutal apartheid regime. This level of judicial perception is illustrated in the Maledu case²⁸⁰. The case involved members of the Lesetlheng community. In 1916 their forebears purchased a farm whose land could not be transferred into their names due to the racial legal system at that time. The transfer was passed to the Minister who held the land even up to the date of court case. In the long run, Itereleng obtained a prospecting right over the farm from the Department of Mineral Resources. A deal was concluded between Itereleng and

²⁷⁸ Alston (n 219 above) 69.

²⁷⁹ The International Commission of Jurists, "Practitioners Guide on Adjudicating Economic, Social and Cultural Rights at National Level, No.8" (2014), available at: <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf>,

²⁸⁰ Maledu and others v Itereleng Bakgatla Minerals Resources (Pty) Limited and Another (2019) 2 SA 1 ZACC 41.

Pilannesburg Platinum Mines to commence mining activities thereby affecting the lives of the applicants living on the farm. An order was sought from the High Court to restore their peaceful enjoyment of their land, the success which was short lived due to an obtained eviction order.

The Applicants turned to the Constitutional Court which referred to the Interim Protection of Informal Land Rights Act (IPILRA)²⁸¹. The Act provides for the protection of those whose rights and interests are not adequately protected by the law. This legislation further protects people like the applicants who, by virtue of the racist legal system of the past, were denied rights of ownership to property which had been bought by their forebears.

The Court described this as having “an invasive nature” which meant the exercise thereof would intrude on the rights of the owner of the land on which the mining takes place. Thus, the mining operations could not take place as the land was still being occupied which led to a clear basis for their eviction. The Constitutional Court lifted its judicial gaze above legal formalism to see the history behind this kind of dispute. In its mandate to conclude the matter amicably, the Court applied section 25 (6) of the Constitution²⁸² which sets out to redress inequalities of the past with regards to property. This section provides that any person whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to tenure which is legally secure or to comparable redress. Consequentially, IPILRA seeks to provide for the protection of certain rights to and interest in land that were previously not otherwise protected by law.

As a result, the Court held that the IPILRA was to assist those informal occupiers of land who lacked a legal right, in this case, to ownership, only because of our egregious past. This case shows the protection of cultural rights of a community at the face of impending mining operations whose activities would cause environmental degradation. The Court recognised informal rights to land amongst other decisions which supported the community.

²⁸¹ Interim Protection of Informal Land Rights Act of 1996.

²⁸² S(25) (6) Constitution of the Republic of South Africa, 1996

Another crucial case to note is the *Baleni v Minister of Mineral Resources*²⁸³ which sought to interpret the application of the IPILRA in a mining context. The judgement held amongst others that the Department of Mineral Resources cannot approve a mining right over communal land unless it had obtained consent from the community. The finding is premised predominantly on s 2(1) of the IPILRA²⁸⁴ which states that no person may be deprived of any informal right to land without their consent. The Court duly followed judicial guidance provided in *Maledu v Itereleng Bakgatla* case which made an important pronouncement on the rights of people who hold informal land tenure. In its application of judgment the Court concluded that the provisions in the MPRDA²⁸⁵ must also be read together with the IPILRA when determining the level of consent required. The Court found that a community's consent as required by IPILRA and not merely consultation with a community as required by MPRDA is necessary before a mining right can be obtained over a community's property.

Thus the *Maledu* and *Baleni* judgments set an important judicial precedent protecting informal land owners against the potentially harmful effects of mining activities and establish a higher standard for obtaining a mining right over such property.

One could argue that if the South African judiciary rejects any role for the courts in establishing, interpreting, or enforcing a minimum fundamental responsibility, this would be contrary to rule of law principles about the role of the judiciary and its vital purpose as arbiters of what the law offers. In *Grootboom*, the Court stated that what the CESCR has established as a minimum core must nonetheless be "tangibly" and "practically" specified in a given context by some duty holding entity²⁸⁶.

In relationship to environmental impact assessment South Africa has adopted a comprehensive impact assessment regime governed by NEMA and its regulations with the latest regulations published in 2014. In light of these regulations, a basic assessment

²⁸³ *Baleni and Others v Minister of Mineral Resources and Others*(2019) 2 SA 453 GP

²⁸⁴ IPILRA (n232 above) 74

²⁸⁵ Mineral and Petroleum Resources Development Act 28 of 2002

²⁸⁶ IM Rautenbach, R Venter, Rautenbach – Malherbe: Constitutional Law. 7th ed. Durban, South Africa: LexisNexis; 2018.

report is required before any environmental authorisation is granted. This sets out environmental outcomes, impacts, and residual risks of a proposed activity²⁸⁷.

It further sets out a process involving an environmental impact report (EIR) and a scoping report whose purpose is to engage in a consultative process which requires amongst others; identification of applicable policy and legislation and a motivation for the proposed activity, considering alternatives through an impact and risk assessment and ranking process, identifying key issues in the assessment phase, agreeing on the level of assessment to be undertaken and determining residual risks to be closely monitored²⁸⁸.

The EIA process is undertaken in line with the approved plan of study for EIAs. It sets out the environmental impacts, mitigation and closure outcomes and the residual risks associated with the proposed activity²⁸⁹. Thus the nature of the activity to be undertaken and the impacts on the environment affects whether or not a basic assessment process or EIA process must be followed.

Based on the previous analysis, it is reasonable to conclude that South Africa's minimum core responsibilities are legally obligatory. As a mandatory requirement of international human rights law, these minimum core requirements apply to all ESCR rights. As a result, there is a defined international framework for cultural rights that corresponds to state regulations on the effects of climate change on culture. According to a number of studies, the executive and/or legislative may set the minimal core commitments in accordance with international law. Minimum core requirements are established under international law in accordance with current domestic conditions, which are set by the administration and/or legislative in accordance with the CESCR and other human rights treaties, as well as the constitution.

All components of ESCR that are not subject to instant manifestation are covered by the notion of progressive realization. The CESCR's jurisprudence, beginning with General Comment 3 on the Nature of State Parties Obligations, has clarified the meaning of

²⁸⁷ Environmental Impact Assessment Regulations 2014.

²⁸⁸ EIA Regulations (n244 above) 76.

²⁸⁹ EIA Regulations (n 244 above) 76.

progressive realization under the ICESCR.²⁹⁰ The Committee explains that States have a primary responsibility to ensure that the rights guaranteed in the present Covenant are gradually realized through all appropriate measures. Although there are notable exceptions, the South African Constitution consistently uses the phrase of "progressive realization" from the ICESCR.

In light of the foregoing sentiment, one may argue that due to different international instruments and policies that promote socio-economic and cultural rights, South Africa has assured the progressive realization of cultural rights as a result of climate change-related impacts. The South African Constitution and the International Covenant on Economic, Social and Cultural Rights are strikingly similar in terms of the ongoing fulfilment of ESCR. Given this uniformity, the Constitutional Court drew directly on the General Comments of the CESCR in this case. The African Commission's jurisprudence is founded on the assumption that, while the African Charter does not directly refer to the principle of progressive realization, it is widely recognized in the interpretation of economic, social, and cultural rights.

The Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights emphasize the need of judicial remedies for cultural rights enforcement. States parties must provide effective remedies, including, where applicable, judicial remedies, according to the Limburg principles²⁹¹. The researcher claims that because there is no legal system based on current policy instruments that allows individuals to file individual complaints under the Covenant, the full realization and application of the rights that this instrument professes is impossible. As part of the implementation matrix, this reveals a legal problem that necessitates the adoption of suitable legislation and remedies at national level²⁹².

States parties' judiciaries have an obligation to treat international human rights treaties like the Covenant as interpretative aids to domestic law, ensuring that domestic law is

²⁹⁰ M Van der Bank, J Karstern. Climate Change and South Africa: A Critical Analysis of the Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16 (2017) Case and the Drive for Concrete Climate Practices. Air, Soil and Water Research Volume 13: 1–11 (2020)

²⁹¹ Principle 19 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights

²⁹² Fawzy (n 1 above) 7.

construed and applied in accordance with the terms of international human rights treaties ratified by the State. The essential concept of international law is that courts should not put their government in violation of the conditions of an international treaty that it has ratified. In this regard, the South African constitution plays an important role in domesticating international law, as seen by section 39(1), b), which specifies that while interpreting the Bill of Rights, a court, tribunal or forum must take international law into account.

Since South Africa has accepted the UNFCCC as well as several other UN, AU, and SADC treaties, the courts in the country are advancing cultural rights through its jurisprudence on cultural rights litigation²⁹³. In addition to cultural rights law, South Africa provides judicial remedies for rights that may be considered justiciable under the national legal system.

The African Commission and a few national courts have built up a substantial corpus of jurisprudence on these socioeconomic rights. The government's application of this jurisprudence, on the other hand, has been woefully inadequate²⁹⁴. The failure to put these lofty goals into action effectively makes a mockery of them. It reduces them to symbolic gestures made by a progressive judiciary in defining the scope of these rights.

In the case of the deletion of the provision requiring effective domestic remedies, it has been suggested that the CESCR address these concerns by adopting the Human Rights Committee's jurisprudence, which affirmed in the case of *Patino v Panama* that only remedies that are reasonably effective and offer claimant reasonable prospects of redress must be exhausted²⁹⁵.

In a nutshell, the courts in South Africa are duty bound to promote the provisions of section 39(1), b) and address all cultural rights which are violated as a result of climate change impacts in South Africa. The courts ensure that government is responsive and accountable to its people, not only through democratic processes but also through

²⁹³ Jegede (n 45 above) 16.

²⁹⁴ Alston (n 219 above) 69

²⁹⁵ *Patino v Panama* Communication No 437/1990, UN Doc CCPR/C/52/D/437/1990 (1994)

litigation. This further promotes government to abide by the decisions of the courts on socio-economic claims.

4.4 The role of the NGO

Local and international NGO's play an active role in environmental issues, and participate in legislative changes. While international environmental NGO's play a vital role in South Africa, local environmental NGO's tend to be centred towards issues most relevant to the South African and Sub Saharan context. At local level, they play a catalytic role in building up community awareness of climate change and its likely impact on their lives, livelihoods and habitats. They can help build up their capacities to undertake the needed adaptive actions to reduce vulnerability, mitigate risks and build resilience²⁹⁶. Some of the active NGO;s include Natural Justice, The Centre for Environmental Rights, Friends of the Earth, Earth Life Africa, Amadiba Crisis Committee, Life After Coal, The Climate Justice Movement to mention but a few. These and other NGOs work to protect cultural rights in the face of climate change²⁹⁷.

Non-governmental and civil society organizations play a critical role in bringing cases to the African Commission and collaborating with the Commission on other projects. On issues relating to the negative effects of climate change, the World Health Organization (WHO), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP), the United Nations Industrial Development Organization (UNIDO), and various other Non-Governmental Organizations play a critical role.

NGO's and other stakeholders like the South African Human Rights Commission who are cultural rights defenders should engage in capacity-building on environmental issues for cultural rights defenders and on cultural rights issues for environmental human rights defenders and others, and consider more joint initiatives and advocacy campaigns that bring these sectors together. The mandate of non-governmental organizations (NGOs) is to attend all conferences or meetings on environmental issues in order to contribute to

²⁹⁶ Crispino Lobo : Mainstreaming Climate Change Adaptation : The Need and Role of Civil Society Organisations

²⁹⁷ www.foei.org/south-africa

knowledge. Such advocacy is critical because it supports community sustainability and acts as a mitigation tool against emissions that contribute to climate change's negative consequences²⁹⁸.

In order to defend indigenous people' cultural and human rights, NGOs must engage in environmental decision-making. The NGOs' distinctive role is rooted in policy formulation, regulation and facilitation of methods for mitigating climate change-related impacts, as well as the establishment of legislation that protects cultural rights from the negative effects of climate change. The importance of non-governmental organizations (NGOs) is particularly apparent in developing and less developed countries.

NGOs further provide a unifying and learning forum, articulate and represent their driving concerns to government and other agencies and serve as intermediary agencies channelling resources between entities and their constituencies. NGOs are also acquiring a defined legal role in international environmental law. They are important in that they stimulate and increase public awareness on climate change. Their profound role is on public awareness related to climate change and encouragement of humanity on the widest participation in this process.

In a nutshell, NGOs around the globe play a fundamental role on mitigation of the effects of climate change owing to their increased advocacy role in various communities that are affected by the global effects of greenhouse gas emissions.

4.5 Conclusion

The chapter assessed the application of cultural rights regime under the UN, AU as well as under the domestic law. The study further observed that mechanisms should be employed by the international and regional bodies on how to ensure that practices of state parties are climate-friendly, and explore ways to decrease carbon footprint. NGO's and other stakeholders that are cultural rights defenders should engage in capacity-building on environmental issues for cultural rights defenders and on cultural rights issues for environmental human rights defenders and others, and consider more joint initiatives and

²⁹⁸ Visscher et al (n30 above) 13

advocacy campaigns bringing these groups together. Most countries in the area lack effective strategies for communicating to the public about climate-related dangers to culture, cultural heritage, and cultural rights, according to the results of this chapter. As a result, non-governmental organizations (NGOs) should investigate the potential of culture and cultural heritage, as well as traditional, indigenous, and local knowledge, to improve mitigation and adaptation efforts, as well as raise awareness of and respect for cultural rights, as well as traditional knowledge's importance in responding to the climate emergency.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

This was a literature-based study on climate change regulatory framework and the protection of cultural rights in South Africa. Critically, the debates around the efficacy of the climate change regulatory framework for addressing the negative effects of climate change on culture in South Africa informed the quest to undertake a study of this nature. The study adopted a desktop research method that reviewed and analyzed the current literature, legal framework, policies and work of institutions on human rights and negative effects of climate change on the right to culture. Key questions in the conceptualization of climate change regulatory framework and the protection of cultural rights were approached utilizing available documents in the University of Venda library and online sources of information.

Chapter two of the study presented an extensive and comprehensive review of the literature exploring thematic aspects of the study such as climate change and legal frameworks, culture, climate change interface with the environment and implications of adverse effects of climate change on cultural rights. The study referred to global conventions which include the UNFCCC, the Kyoto Agreement, the Paris Agreement, the ICESCR, which provides a template for addressing the impact of climate change on individual and collective rights. Another point of reference was the International Covenant on Economic, Social and Cultural Rights that provided a basis for the causes and effects of global climate change. A comprehensive approach to the conceptualization of culture and climate change was adopted in the chapter. This approach was a combination of primordial and symbolic factors such as the use of language, symbols, norms and values, rituals and artefacts. An instructive definition of culture was from an African perspective grounded in the notion that African culture is multiple in perspectives. It is not only confined to beliefs, rituals and values, rather it encompasses everyday activities such as

farming, traditional medical methods, and whatever they drink or eat that affects their health. As a result, climate consequences in Africa, such as reduced yields, extinction of animals and particular plants that can be used for healing, dry spells, food scarcity, and other associated difficulties, could have

been explained using cultural reasons. This is true because, about African cultural beliefs, calamities can't occur without a reason which can only be interpreted spiritually. This reasoning informed the basis of the study which sought to interrogate the link between climate change and its impact on culture in South Africa.

Chapter three focused on the discussion of the regulatory framework on the protection of cultural rights in respect of climate change at the country level with the case study of South Africa. The chapter highlighted the need for the alignment of existing South African laws to international statutes they are signatory to. Existing laws such as the Disaster Management Act of 2002, Spatial Planning and Land Use Management Act of 2013 and the National Environmental Management Act of 1998²⁹⁹ have a profound effect on the transformation of the securitization of human and cultural rights in the context of South Africa's approach to the climate change agenda. The point of departure in the chapter is that these pieces of legislation are relevant to the protection of the environment where climate change is of concern and the protection of cultural heritage is critiqued. Therefore, the chapter establishes the relationship between the climate change legal framework and the protection of cultural rights among the communities of South Africa.

The study observed that a comprehensive analysis of these laws suggests a disconnection between the intended purposes of the laws and the goals attained. That is to say, not much has been done to effectively operationalize and enforce available legislative policies to safeguard the cultural rights of the indigenous people. The chapter also unpacked various ways which could be infused in South Africa's regulatory framework to cushion local communities that are exposed to the devastating effects of climate change. This was critical in the development and analysis of the relationship between the South African legislative framework and the protection of cultural rights.

299 National Environmental Management Act 107 of 1998.

Chapter four deviates from the traditional view of climate change as a developmental and environmental concern to a modernist and humanistic paradigm that locates the discussion within the broader framework of human rights. This took in the form of the internationalization and institutionalization of human rights and climate change issues that find expression in various protocols and fora. The chapter explored the application of the cultural rights regime under the UN, AU, domestic law and under the courts and also assessed the role of the NGOs in the protection of cultural rights. The chapter observed the view that both international and regional instruments conform to domestic laws as observed in the constitution of South Africa. Though in principle the UNFCCC, UN and AU have played a pivotal role in promoting cultural rights, one may argue that cultural rights are underpinned as human rights hence there is need for development of cultural rights in the context of climate change related issues.

5.2 Recommendations

This study is focused on assessing the climate change regulatory framework and the protection of cultural rights in South Africa. Although the study has furnished factors that influence climate change regulatory framework and the impact on cultural rights in South Africa, further research should be conducted as comparative studies between South Africa and another country in Southern Africa. This is in line with the view that climate change and its impact are global phenomena that deserve scholarly attention.

Although the study has demonstrated a commitment to understanding climate change as an intrinsic security matter, there has not been goodwill in the form of firm political actions and economic resources directed towards funding sustainable regulatory frameworks and activism of cultural rights. A study that focuses on the reasons for the missed opportunities, the lack of political and economic will in climate change and cultural rights activism is important.

There is need for thorough integration of cultural rights obligations, standards and principles in national climate policy and strategic action plans. Finally, the creation of a

legal instrument or development of practice direction to protect culture in the context of adverse consequences of climate change is essential in South Africa.

BIBLIOGRAPHY

TEXT BOOKS

Aono, Y Cherry blossom phenological data since the seventeenth century for Edo (Tokyo), Japan, and their application to estimation of March temperatures (2015) 594 (4) International Journal of biometeorology 432.

Currie, I Minority Rights: Education, Culture, and Language in Chaskalson et al (eds) Constitutional Law of South Africa (1999) Juta: Kenwyn (1996).

Doi, H & Takahashi, M “Latitudinal patterns in the phenological responses of leaf colouring and leaf fall to climate change in Japan” (2008) 17(4) Global Ecology and Biogeography 558.

Duyck, S Sébastien J and Johl, A, eds. Routledge handbook of human rights and climate governance. Routledge, 2018.

Field, CB & Barros VR Climate change 2014–Impacts, adaptation and vulnerability: Regional aspects Cambridge University Press: Cambridge (2014).

Haritz, M, An inconvenient deliberation: the precautionary principle's contribution to the uncertainties surrounding climate change liability (Vol. 5). Kluwer Law International BV. (2011).

Hodgson, TF Religion and culture in public education in South Africa Basic Education rights handbook in South Africa: South Africa (2017).

Jaakkola, JJ Juntunen, S & Näkkäläjärvi, K “The holistic effects of climate change on the culture, well-being, and health of the Saami, the only indigenous people in the European Union” (2018) 1(5) Current Environmental Reports 412.

Kim, S, Whitford, M & Arcodia, C “Development of intangible cultural heritage as a sustainable tourism resource: the intangible cultural heritage practitioners’ perspectives” (2019) 14(5-6) Journal of Heritage Tourism 425.

Mason, S The Cancun agreements and legal preparedness for climate change in developing countries (2011) Legal Working Paper Series, International Development Law Organisation

Naing, IC Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change Cambridge: Cambridge University Press (2014).

Oulu, M Climate Change Governance: Emerging Legal and Institutional Frameworks for Developing Countries in Handbook of climate change adaptation. Springer: Berlin Heidelberg (2015).

Pillay, AG Economic, Social and Cultural Rights and Climate Change. In Climate Change: International Law and Global Governance (pp. 243-260) Nomos Verlagsgesellschaft MBH & Co. KG (2013)

Van den Pol, B The connection between culture and climate change Case Studies in Cultural Diplomacy/Cultural Diplomacy News (2010).

Van Wyk, L Cultural and heritage sensitive adaptation measures and principles in climate change adaptation plans for South African metropolitan cities. Smart and Sustainable Cities Conference. Pretoria (2017).

Vivares, E & Cheryl, M "The global political economy of regionalism." The Routledge Handbook to Global Political Economy: Conversations and Inquiries (2020)

ARTICLES

Alston P "The Committee on Economic, Social and Cultural Rights" (2020) 20-24 *NYU Law and Economics Research Paper*

Article 1 of the United Nations Framework Convention on Climate Change, 1992.

Barnett, WN, Brown, Marshall, J. K & O'Brien, K 'Cultural dimensions of climate change impacts and adaptation' (2013) 3(2) *Nature climate change*.

Boyle, AE "Some reflections on the relationship of treaties and soft law" 1999 *The International and Comparative Law Quarterly* No. 4, 901-913. See for example Art 4(1) and (2).

Brierley, GJ "The Socio-ecological River: Socio-economic, Cultural and Environmental Relations to River Systems." In *Finding the Voice of the River* Palgrave Pivot, Cham, (2020) 29-60.

CRS Report R44092, (2018) Greenhouse Gas Pledges by Parties to the United Nations Framework Convention on Climate Change, by Jane A. Leggett.

Department of Arts and Culture. 1996. <http://www.dac.gov.za/white-papers>. (Accessed 20 April 2020).

Department of Arts and Culture. 1996. White Paper on Arts, Culture and Heritage. Retrieved from <http://www.dac.gov.za/white-papers>. (Accessed 20 April 2020).

Department of Forestry, fisheries and environment. 2017. National Climate Change Adaptation Strategy Republic of South Africa. Available at: https://www.environment.gov.za/sites/default/files/legislations/session2_draftnational_adaptationstrategy.pdf. (Accessed on 18 April 2021)

Fawzy, S Osman, Al Doran, J & Rooney, DW 'Strategies for mitigation of climate change: a review' (2020) Environmental Chemistry Letters.

Geoghegan, H & Leyson, C 'On climate change and cultural geography: farming on the Lizard Peninsula, Cornwall, UK' (2012) 113(1) Climatic Change.

Hoff, MD 'Effects of global warming on human cultural diversity' (2002) 1(1) Climate Change, Human Systems, and Policy.

Intergovernmental Panel on Climate Change (IPCC) 'Impacts, adaptations and mitigation of climate change: Scientific-Technical Analyses' Contribution of Working Group II to IPCC SAR (1995)

Intergovernmental Panel on Climate Change, Climate Change 2014: Synthesis Report, p. 69

Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the*

Intergovernmental Panel on Climate Change Cambridge University Press: Cambridge (2013).

Jegade, A.O The Climate Regulatory Framework and Indigenous Peoples Lands in Africa: Pretoria University Law Press (2016) 221,223, 224, 228, 229, 235, 237 Human Rights Implications.

Jegade, AO & Makulana, AW 'Climate change interventions in South Africa: the significance of Earthlife Africa Johannesburg v Minister of Environmental Affairs (Thabametsi case) [2017] JOL 37526 (GP)' (2019) 40(2) *Obiter*.

Kim, HE 'Changing climate, changing culture: adding the climate change dimension to the protection of intangible cultural heritage' (2011) 18 (2) *International Journal of Climate Change Publications*.

Limon, M 'Human rights and climate change: Constructing a case for political action' (2009) 33(3) *Harvard Environmental Law Review*.

Maus, S 'Hand in hand against climate change: Cultural human rights and the protection of cultural heritage' (2014) 27(4) *Cambridge Review of International Affairs*.

Mcnutt, M, Ramakrishnan, V *Climate Change Evidence and Causes: The Royal Society and The US National Academy of Sciences* (2020)

Michael, B, Metzger, D, *Global Climate Litigation Report: United Nations Environment Programme* (2020)

Mimura, N *Perspectives and issues of adaptation as responses to global warming: Global Environmental Research* (2006) (11)

Pan, SYG, Kim, Shah, M Pei, SL & Chiang, PC "Advances and challenges in sustainable tourism toward a green economy" (2018) 635 *Science of the Total Environment* 459.

Patten, A "Populist multiculturalism: Are there majority cultural rights?" (2020) 46(5) *Philosophy & Social Criticism* 543.

Polonsky, MJ Miles, MP& Grau, SL *Climate change regulation: implications for business executives* (2011) 23(4) *European Business Review*.

Rhodes, E Scott, WA & Jaccard, M “Designing flexible regulations to mitigate climate change: A cross-country comparative policy analysis” (2021) 156 Energy Policy 112419.

Rogerson, CM “Climate change, tourism and local economic development in South Africa” (2016) 31(1-2) Local Economy 325.

Schapper, A & Lederer, M Introduction: Human rights and climate change: mapping institutional inter-linkages (2014) 33 (5) Cambridge Review of International Affairs.

Sesana, E Gagnon, AS Bertolin, C & Hughes, J “Adapting cultural heritage to climate change risks: perspectives of cultural heritage experts in Europe” (2018) 8(8) Geosciences 305.

Setzer, J & Vanhala, LC “Climate change litigation: A review of research on courts and litigants in climate governance” (2019) 10(3) Wiley Interdisciplinary Reviews: Climate Change 580.

Stevens, LB Henri, J Van Nierop, M van Staden, E Lodder, J & Piketh SJ Towards the development of a Green House Gas emissions baseline for the Agriculture, Forestry and Other Land Use (AFOLU) sector, South Africa (2016) 26(2) Clean Air Journal.

Strauss, S Are cultures endangered by climate change? Yes, but.... (2012) 3(4) Wiley Interdisciplinary Reviews: Climate Change.

Straza, T Lui, B & Burfitt, B Effects of Climate Change on Society, Culture and Gender Relevant to the Pacific Islands (2018) 201(2) Pacific Marine Climate Change Report Card: Science Review.

Szpak, A “Arctic Athabaskan Council’s petition to the Inter-American Commission on human rights and climate change—business as usual or a breakthrough?” (2020) 162(3) Climatic Change 1575.

Tontodimamma, M.M & Biermann, P “Environmental and climate migrations: an overview of scientific literature using a bibliometric analysis” (2019) 29(2) International Review of Sociology 145.

Ugochukwu, B “Litigating the impacts of climate change: The challenge of legal Polycentricism” (2018) 7 (1) Global Journal of Comparative Law 93.

Ugochukwu, BE Climate change and human rights: How? Where? When? (2015) Osgoode Legal Studies Research Paper No. 45/2016.

Visscher, H Laubscher, J & Chan, E Building governance and climate change: Roles for regulation and related polices. (2016) 44(5) Building Research & Information.

Wang, L Ning, Z Wang, H & Ge, Q “Impact of climate variability on flowering phenology and its implications for the schedule of blossom festivals” (2017) 7 Sustainability 1127.

CASES

Philippi Horticultural Area Food and Farming Campaign, et al v MEC for Local Government, Environmental Affairs And Development Planning: Western Cape Others 2020 (3) SA 486 (WCC)

Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC)

Baleni v Minister of Mineral Resources 2019 (2) SA 453 (GP)

Earth life Africa Johannesburg v Minister of Environmental Affairs and Others 2017 (2) All SA 519 (GP).

INTERNATIONAL INSTRUMENTS AND RESOLUTIONS

Internet Sources

<https://reliefweb.int/report/south-africa/south-africas-water-crisis-bigger-cape>>

(accessed 5 May 2020).

IPCC, 2022: Summary for Policymakers H.-O. Pörtner *et al* (eds.) In: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press. In Press

Kampala Convention, article 3(i)

Kharina, A, Malins, C and Searle, S Biofuels Policy in Indonesia: Overview and Status Report (2016)

Kyoto Protocol, article 2(1)(a)(ii).

LEGISLATION

Act 107 of 1998 The National Environmental Management Act, 1998 Section 3(2)

Act 16 of 2013 The Spatial Planning and Land Use Management Act, 2013 section 6(2a)

Act 25 of 1999 The National Heritage Resources Act 25

Act 57 of 2002 The Disaster Management Act of 2002 Section 5(3) &6(1a)

Afrika, R.V.S., 2016. Government Gazette Staatskoerant.

Climate Change Bill of South Africa, 2018.

Disaster Management Amendment Act 57 of 2002.

Environmental Impact Assessment Regulations 2014

Integrated Pollution and Waste Management Act of 2000

National Environmental Management Act 107 of 1998.

National Environmental Management: Air Quality Act 39 of 2004.

National Water Act 36 of 1998.

Spatial Planning and Land Use Management Act 16 of 2013.

The Constitution of the Republic of South Africa, 1996.

The South African Climate Change Bill of 2018.

List of book Chapters

Massey, J.M Climate Change, Culture and Cultural Rights: University of California Davis School of Law (2020)

National Climate Change Response Policy of 2011

National Water Policy for South Africa of 1997

Nations General Assembly Res 43/53, 70th plenary meeting 6 December 1988 (United Nations General Assembly Resolution 43/53).

Natural Justice, *Submission to the Special Rapporteur for in the Field of Cultural Rights: Cultural Rights and Climate Change* (2020) Retrieved from: <https://naturaljustice.org/wp-content/uploads/2020/05/Natural-Justice-Submission-Climate-Change-and-Cultural-Rights-1-May-2020.pdf>. (Accessed on 10 February 2021).

Office of the United Nations High Commission for Human Rights *Cultural Rights: International Standards* (2020) Available at <https://www.ohchr.org/en/issues/culturalrights/pages/internationalstandards.aspx>. (Accessed on 1 February 2021).

Office of the United Nations High Commissioner for Human Rights, *Cultural Rights: International Standards* (2020) Available at <https://www.ohchr.org/en/issues/culturalrights/pages/internationalstandards.aspx>. (Accessed on 1 February 2021).

Paris Agreement under the United Nations Framework Convention on Climate Change 2015, adopted by Conference of the Parties, 21st Session Paris, 30 November 11 December 2015FCCC/CP/2015/L.9/

Protection of global climate for present and future generations of mankind' United

Ssenyonjo M "Strengthening the African regional human rights system" In *the African Regional Human Rights System* (2012) 480

Statistics South Africa, 2019 Report on social inequalities and the poverty datum line.

The Office of the High Commissioner for Human Rights, *Climate Change and Indigenous People* (The United Nations, Geneva, Switzerland 2008) <http://www.ohchr.org/EN/NEWSEVENTS/Pages/ClimateChangeIP.aspx> (accessed 8 August 2021)

The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD), FAO, UNDP, UNEP Framework Document (2008), 4, <http://www.undp.org/mdtf/UN-REDD/docs/Annex-A-Framework-Document.pdf> (accessed 25 May 2021).

U.N. Treaty Collection, Chapter XXVII Environment, 7.1, “Kyoto Protocol to the United Nations Framework Convention on Climate Change,” December 11, 1997, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en

UN Framework Convention on Climate Control (UNFCCC) 1992. South Africa became a member in 1997

UNFCCC, “Mechanisms Under the Kyoto Protocol,” <https://unfccc.int/process/the-kyoto-protocol/mechanisms>

United Nations Framework Convention on Climate Change Decision 1/CP.16, *The Cancun Agreements*, p. 8, UN Doc. FCCC/CP/2010/7/Add.1 (March 15, 2011).

United Nations Framework Convention on Climate Change, 1992