

# **A PROPOSAL FOR TRANSNATIONAL LITIGATION AGAINST CLIMATE CHANGE VIOLATIONS IN AFRICA**

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## **ABSTRACT**

Climate change is a global phenomenon that will require concerted measures in order to be addressed effectively. The vulnerable countries in Africa will be adversely affected by the consequences of climate change and the impact of the release of greenhouse gases (GHGs) into the atmosphere. International and domestic measures have been employed to address the problem of climate change, taking into account commitments made by nations on the basis of common but differentiated responsibilities and capabilities. This paper examines the existing legal regime that allows for transnational litigation or liabilities, as seen in jurisdictions such as Canada, the Netherlands, and the United States. It analyzes transnational jurisdiction jurisprudence to assess the extent to which transnational litigation can be used to address the concerns of climate change in Africa. This article proposes the use of transnational litigation on climate change across the various African states. It, therefore, examines the practicability of the proposed arrangement, making a case for addressing the challenges likely to be encountered.

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## INTRODUCTION

Extreme changes in weather conditions have been attributed to climate change.<sup>1</sup> Climate change, which is often viewed as a tragedy of the commons,<sup>2</sup> is a global phenomenon that transcends national boundaries.<sup>3</sup> African states constitute the majority of the most underdeveloped countries in the world that have been hit by the negative impacts of climate change.<sup>4</sup> The consequences of climate change have affected vulnerable populations and have adversely impacted the enjoyment of fundamental rights in most African states. Various human rights abuses have been implicated in the anthropogenic activities leading to climate change. These anthropogenic activities are becoming prevalent in African states because of the desire to exploit the countries' natural resources and engage in industrial activities targeted at the development of the economy.<sup>5</sup> These activities have adversely impacted the realization of the human rights to life, food, dignity, water, a healthy environment, and development, among other rights, for the citizens of African states. These rights are enumerated in the United Nations Declaration of Human Rights<sup>6</sup> and the African Charter on Human and Peoples' Rights,<sup>7</sup> among other international and regional instruments.<sup>8</sup>

This paper also makes a case for the possible enforcement of climate change litigation judgments against any subsidiary of a corporation found liable for breach of their climate change obligations in another African state. This is a departure from the principles that require the establishment of causation or a link between the activities of the

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<sup>1</sup> Christian Huggel et al., *Potential and Limitations of the Attribution of Climate Change Impacts for Informing Loss and Damage Discussions and Policies*, 133 CLIMATIC CHANGE 453, 454 (2015).

<sup>2</sup> See Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 183 (2005).

<sup>3</sup> See Surabhi Ranganathan, *Global Commons*, 27 EUR. J. INT'L L. 693, 693–717 (2016).

<sup>4</sup> Intergovernmental Panel on Climate Change [IPCC], *Africa, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY* 443 (2007).

<sup>5</sup> See Bonnie Ayodele, *Silence on Climate Change and the Natural Resources Conflict in Nigeria: The Niger Delta Region Experience*, in CLIMATE CHANGE AND NATURAL RESOURCES CONFLICTS IN AFRICA 105, 106 (Donald Anthony Mwiturubani & Jo-Ansie van Wyk eds., 2010).

<sup>6</sup> See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>7</sup> Org. of African Unity [OAU], *African Charter on Human and Peoples' Rights (Banjul Charter)*, at 217, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981).

<sup>8</sup> E.g., G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

corporation and their headquarters to show that the parent company authorized such conduct. This article shall review the existing governance framework provided under the African Charter on Human and Peoples' Rights to demonstrate that actions resulting in the release of greenhouse gases (GHGs) into the atmosphere could amount to breaches of human rights. The need for accountability for such breaches and avenues to right the wrongs that have been occasioned by such breaches will be addressed in this article.<sup>9</sup>

Litigation is a tool that can be used to address climate change.<sup>10</sup> Litigants may be able to fill the gaps in the African States' implementation of international climate change law.<sup>11</sup> Thus, through strategic climate change litigation, the courts may be approached to compel government agencies to observe their duty to regulate climate change. The courts may also be persuaded to order persons violating climate change regulations to refrain from such actions. Transnational litigation has been employed as a form of public interest litigation to seek redress for the breach of international norms and laws from countries far away from where the breaches occurred.<sup>12</sup> Transnational litigation incentivizes states to check their corporations' extraterritorial activity in order to avoid liability for the human rights breaches of their corporations.<sup>13</sup> Litigation can pressure states to monitor the affairs of their corporations when they operate outside of their jurisdiction and help prevent human rights violations in other countries.<sup>14</sup>

Part I of this paper presents the international legal response to climate change. Part II discusses how the pollution haven theory explains the low level of regulation of GHGs in African states. Part III examines how climate change violations also violate human rights as guaranteed in international legal instruments. Part IV analyzes transnational litigation in

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<sup>9</sup> See Justice Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 863 (1961).

<sup>10</sup> Joyeet Gupta, *Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change*, 16 REV. EUR. CMTY. & INT'L ENV'T L. 76, 76–86 (2007).

<sup>11</sup> JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 338–40 (2015).

<sup>12</sup> Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 253–54 (2006).

<sup>13</sup> See Muthucumaraswam Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 491, 501 (Craig M. Scott ed., 2001).

<sup>14</sup> See Francesco Francioni, *Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations*, in ECONOMIC GLOBALISATION AND HUMAN RIGHTS 245, 260–65 (Wolfgang Benedek et al. eds., 2007).

the context of climate change litigation, while Part V proposes using transnational litigation to address the challenges of climate change violations in African states through the reliance on domestic, sub-regional, and regional courts in Africa. Part VI concludes by reflecting on the need for a robust regime for transnational climate change litigation in African states.

## I. THE INTERNATIONAL LEGAL RESPONSE TO CLIMATE CHANGE

In response to the adverse effects of climate change, there has been significant international development of international climate change regimes such as the United Nations Framework Convention on Climate Change (UNFCCC),<sup>15</sup> the Kyoto Protocol,<sup>16</sup> and, more recently, the Paris Agreement.<sup>17</sup> The UNFCCC was the first international step towards controlling climate change and was the main framework for climate change control until the Kyoto Protocol. The ultimate objective of the UNFCCC is to ensure that GHG emissions are mitigated and sustainable development is promoted. The UNFCCC, however, did not provide targets for GHG emissions. The Kyoto Protocol subsequently provided targets for GHG reduction for developed economies. Developing countries, however, did not set targets. The Paris Agreement replaced the Kyoto Protocol in 2020 and seeks to mitigate climate change.

The Paris Agreement aims to limit the increase in temperature by 1.5 degrees Celsius (°C) above pre-industrial levels.<sup>18</sup> The Paris Agreement will “strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty” by ensuring that temperature is “well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.”<sup>19</sup> Success in actualizing these objectives will be determined by “the ability to adapt to the adverse

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<sup>15</sup> *E.g.*, United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

<sup>16</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

<sup>17</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

<sup>18</sup> *Id.* art. 2.1(a).

<sup>19</sup> *Id.*

impacts of climate change and foster climate resilience and low GHG emissions development, in a manner that does not threaten food production,”<sup>20</sup> and ensuring that financing is “consistent with a pathway towards low GHG emissions and climate-resilient development.”<sup>21</sup>

Therefore, under the Paris Agreement, African countries are required to set certain targets that they deliberately impose on themselves known as the Nationally Determined Contributions (NDCs), which is an undertaking of ambitious efforts to reduce climate change and communication.<sup>22</sup> The Paris Agreement mandates that each State Party “prepare, communicate and maintain successive nationally determined contributions that it intends to achieve” by putting in place “domestic mitigation measures, with the aim of achieving the objectives of such contributions.”<sup>23</sup> The NDC becomes binding on nations that have committed themselves to it under the Paris Agreement.<sup>24</sup> It provides that “as nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts.”<sup>25</sup> It is notable that the Paris Agreement takes into account the need to mainstream human rights concerns into climate change matters.<sup>26</sup>

The regulatory framework for climate governance is very fragmented.<sup>27</sup> Climate control efforts must continue to be directed from domestic, subregional, regional, and international levels in the bid to mitigate and adapt to climate change. The United Nations system has also risen to the call, with a move towards addressing human rights implications associated with climate change.<sup>28</sup>

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<sup>20</sup> *Id.* art. 2.1(b).

<sup>21</sup> *Id.* art. 2.1(c).

<sup>22</sup> *See id.* art. 3.

<sup>23</sup> *Id.* art. 4.2.

<sup>24</sup> *See Lavanya Rajamani, The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations*, 78 *MOD. L.J.* 826, 828 (2015).

<sup>25</sup> Paris Agreement, *supra* note 17, art. 3.

<sup>26</sup> Sandrine Maljean-Dubois, *Climate Change Litigation*, in *MAX PLANCK ENCYC. OF PROC. L.* ¶ 46 (2019).

<sup>27</sup> William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32 *U. PA. J. INT’L L.* 457, 548 (2010).

<sup>28</sup> *See OHCHR and Climate Change*, U.N. OFF. OF HIGH COMM’N ON HUM. RTS., <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> [<https://perma.cc/BSR8-3UYN>] (last visited Feb. 23, 2021).

## II. AFRICA AND THE POLLUTION HAVEN THEORY

The pollution haven theory is a theory that corporations prefer to locate their business in places with the least stringent regulatory measures.<sup>29</sup> Pollution prevention can be a heavy burden on enterprises that are mainly motivated by profits. These enterprises consider it more favorable to invest in countries where they are unlikely to encounter strict rules of compliance.<sup>30</sup>

African countries have largely been exposed to the effect of GHGs because of their vulnerability.<sup>31</sup> A number of African countries lack sufficient capacity to hold corporations accountable for polluting the environment and releasing GHGs into the atmosphere. In African countries, governments are quick to approve projects in breach of environmental laws because of the economic gains that may be derived from the execution of such projects.<sup>32</sup> The development and implementation of climate change laws and policies have not been a major consideration in the developing countries of Africa. This is in contrast to developed countries where there are more stringent environmental regulations.<sup>33</sup> For example, several Gulf of Mexico oil spills saw the United States government take drastic remedial action to ensure that cleanups were done and liabilities were allocated in accordance with the law, without allowing the spill to escalate in a way that would damage the ecosystem or harm people.<sup>34</sup> The United States government was very

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<sup>29</sup> Kevin R. Gray, *Foreign Direct Investment and Environmental Impacts: Is the Debate Over?*, 11 REV. EUR. CMTY. & INT'L ENV'T L. 306, 307 (2002).

<sup>30</sup> Grégoire Garsous & Tomasz Koźluk, *Foreign Direct Investment and the Pollution Haven – Evidence from Listed Firms* 7 (Org. for Econ. Coop. & Dev., Working Paper No. 1379, 2017).

<sup>31</sup> See David H. Shinn, *The Environmental Impact of China's Investment in Africa*, 49 CORNELL INT'L L.J. 25, 27 (2016).

<sup>32</sup> The situation is different in developed countries where litigants scrutinize actions of the government and ensure that there is compliance. There is a plethora of climate change related cases in the UK where actions have been challenged for not complying with the Clean Air Directives of the EU. See, e.g., *ClientEarth v. Sec'y of State for the Env't, Food & Rural Affs.* [2014] All ER (D) 210; *R (on the application of ClientEarth) v. Sec'y of State for the Env't, Food & Rural Affs.* [2015] UKSC 28.

<sup>33</sup> Spyridon Stavropoulos, Ronald Wall & Yuanze Xu, *Environmental Regulations and Industrial Competitiveness: Evidence from China*, 50 APPLIED ECON. 1378, 1381 (2018).

<sup>34</sup> See Joe Nocera, *BP Is Still Paying for the Deepwater Horizon Spill*, BLOOMBERG BUSINESSWEEK (Feb. 4, 2020), <https://www.bloomberg.com/news/articles/2020-02-04/bp-is-still-paying-for-the-deepwater-horizon-spill> [<https://perma.cc/7ZZ3-YGAZ>].

responsive in addressing the problem. Remedies and redresses were sought and obtained through the courts.<sup>35</sup>

However, this would have been a different situation had it occurred in developing countries with weak regulations where governments may be reluctant to protect the state's interest over parochial or immediate economic gains. For example, multinational companies such as Kosmos, ExxonMobil, Anadarko, and Tullow are well represented in the exploration and production of petroleum in Ghana.<sup>36</sup> Petroleum was discovered in Ghana in 2007, and by 2010 it became a hub for multinational oil companies.<sup>37</sup> The Ghana National Petroleum Corporation, which is the national oil company in Ghana, has an interest in the stake granted to the oil and gas companies that have commenced commercial operation in Ghana.<sup>38</sup> This might, therefore, be a situation in which both countries bear joint liability for their actions. The state will, therefore, be reluctant to punish its agencies.

In Nigeria, the 1979 Associated Gas Reinjection Act made it an offense to flare gas without obtaining the requisite permit.<sup>39</sup> However, an audit conducted by the Nigerian Extractive Industries Transparency Initiative (NEITI) discovered that Shell has been flaring gas without payment of the permits.<sup>40</sup> It is bad enough to flare gas in the country but much worse when payment of the permits, which they are required to pay, is circumvented. A considerable amount of gas is flared in Nigeria without the appropriate penalties imposed on multinational corporations.<sup>41</sup>

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<sup>35</sup> See, e.g., *U.S. v. BP Expl. & Prod., Inc.*, 21 F. Supp. 3d 657 (E.D. La. 2014); Amended Complaint, *Alabama v. BP Expl. & Prod., Inc.*, No. 2:10-CV-04182 (E.D. La. Apr. 7, 2011); Amended Complaint, *Florida v. BP Expl. & Prod., Inc.*, No. 5:13-cv-00123 (N.D. Fla. Apr. 20, 2013); Amended Complaint, *Louisiana v. BP Expl. & Prod., Inc.*, Nos. 11-cv-0516 and 10-cv-03059 in MDL 2179 (E.D. La. Apr. 19, 2011); Amended Complaint, *Texas v. BP Expl. & Prod., Inc.*, No. 13-cv-4677 (E.D. La. June 18, 2013); Complaint, *Hood v. BP Expl. & Prod., Inc.*, No. 1:13-cv-00158 (S.D. Miss. Apr. 18, 2013).

<sup>36</sup> *ExxonMobil Pursues Ghana's Deepwater Exploration Acreage*, WORLD OIL (Feb. 28, 2018), <https://www.worldoil.com/news/2018/2/28/exxonmobil-pursues-ghana-s-deepwater-exploration-acreage> [<https://perma.cc/E6J4-NHA8>].

<sup>37</sup> PUBLIC INTEREST AND ACCOUNTABILITY COMMITTEE (PIAC), REPORT ON PETROLEUM REVENUE MANAGEMENT FOR 2011, at 1, 3 (2011) (Ghana).

<sup>38</sup> *Id.* at 1.

<sup>39</sup> Associated Gas Re-injection Act (1979) §§ 3–5 (Nigeria).

<sup>40</sup> LORNE STOCKMAN ET AL., SHELL'S BIG DIRTY SECRET: INSIGHT INTO THE WORLD'S MOST CARBON INTENSIVE OIL COMPANY AND THE LEGACY OF CEO JEROEN VAN DER VEER 15–16 (2009) (available for download at [https://www.foei.org/wp-content/uploads/2014/08/shellbigdirtysecret\\_June09.pdf](https://www.foei.org/wp-content/uploads/2014/08/shellbigdirtysecret_June09.pdf) [<https://perma.cc/B9AG-JSHA>]).

<sup>41</sup> GODWIN UYI OJO & NOSA TOKUNBOR, ACCESS TO ENVIRONMENTAL JUSTICE IN NIGERIA: THE CASE FOR A GLOBAL ENVIRONMENTAL COURT OF JUSTICE 3 (2016).

Breaches that are connected to the release of GHGs have been increasing, particularly in the extractive industries. These have, in turn, affected the human right to life and the right to a healthy environment. For example, Human Rights Watch reported that

government inaction on climate change impacts children's rights to life, water, food, and health. Children from Indigenous communities are often particularly vulnerable to climatic changes because their culture and livelihood are tied to their land, and such marginalized groups typically lack the resources and government support to adapt to climate change impacts.<sup>42</sup>

It noted further that “climate change has limited local Indigenous communities’ access to food and clean water and contributed to children’s ill-health. Girls often have to walk long distances to find water, exposing them to dangers along the route and leaving them with less time to attend school or rest.”<sup>43</sup>

Nevertheless, there are cases where environmental degradation has been challenged by host communities or citizens. These actions have mainly been brought in domestic courts against multinational corporations. One notable case is *Gbemre v. Shell Petroleum Development Company* (SPDC),<sup>44</sup> where the court held that the environmental pollution caused by Shell resulting from the Associated Gas Reinjection Act, which allows for permissible flaring, was unconstitutional and violated the rights to a healthy environment and life. Before *Gbemre*, in *Oronto Douglas v. SPDC*, an environmental impact assessment was not conducted by the defendants before the commencement of a liquified natural gas (LNG) construction project at Bonny in the Niger Delta region.<sup>45</sup> The plaintiff’s action challenging the construction was struck down by the court on the ground that the plaintiff lacked standing to bring the action.<sup>46</sup> The challenges of gas flaring and other environmental pollution continue to

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<sup>42</sup> *Children’s Right to a Healthy Environment: Submission by Human Rights Watch to the Office of the High Commissioner for Human Rights*, HUM. RTS. WATCH (Oct. 8, 2019, 6:30 AM), <https://www.hrw.org/news/2019/10/08/childrens-right-healthy-environment> [<https://perma.cc/XUC3-LGTD>].

<sup>43</sup> *Id.*

<sup>44</sup> *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd. and Others* [2005] AHRLR 151, ¶¶ 2, 4 (Nigeria).

<sup>45</sup> *Oronto Douglas v. Shell Petroleum Dev. Co.* [1999] 2 NWLR (Pt 591) 466 (Nigeria).

<sup>46</sup> *Id.* at ¶ 156.



affect the people of Niger Delta.<sup>47</sup> There is much to be done to address the problem of gas flaring in Nigeria. The new gas flaring regulation has yet to control gas flaring, the major contributor of GHGs in the atmosphere.

Ghana is said to have many climate change policies such as the National Climate Change Adaptation Strategy 2011 (NCCAS) and the National Climate Change Policy 2013 (NCCP), but they lack legally binding provisions and mechanisms to encourage climate change litigation.<sup>48</sup> The case of *Save Lamu and Others v. National Environmental Management Authority and Amu Power Co. Ltd*<sup>49</sup> illuminates the lax environmental laws in African states. In *Save Lamu*, the construction of a coal fire plant was challenged for failure to comply with the law on environmental and social impact assessments, as stipulated in the Climate Change Act 2016.<sup>50</sup> The tribunal held that the project be halted until an environmental and social impact assessment could be conducted, as required by the law. Similarly, the case *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others*<sup>51</sup> has also shown the failure of noncompliance with the requirements for environmental impact assessments in the construction of a coal plant. The court ordered that environmental impact assessment with details of climate change impact be carried out.<sup>52</sup>

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<sup>47</sup> Hemen Philip Faga & Uguru Uchekchukwu, *Oil Exploration, Environmental Degradation, and Future Generations in the Niger Delta: Options for Enforcement of Intergenerational Rights and Sustainable Development Through Legal and Judicial Activism*, 34 J. ENV'T L. & LITIG. 185, 195 (2019); see Emeka Polycarp Amaechi, *Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation*, 6 L. ENV'T & DEV. J. 322, 330 (2010). However, given the current state of affairs in Nigeria, the striking out of the action on grounds of *locus standi* is not likely, as the doctrine has been liberalized by the Fundamental Rights Enforcement Procedure Rules of 2009. See Allan Ingelson & Chilenye Nwapi, *Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis*, 10 L. ENV'T & DEV. J. 37, 43–44 (2014).

<sup>48</sup> Bolanle Erinsho, *Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law*, 114 AM. J. INT'L L. 51, 52–53 (2020).

<sup>49</sup> *Save Lamu v. Nat'l Env't Mgmt. Auth. (NEMA)* (Judgment 2019) Tribunal Appeal No. Net 196 of 2016 (NET) (Kenya).

<sup>50</sup> *Id.* at 1, 2, 27.

<sup>51</sup> *Earthlife Afr. Johannesburg v. Minister of Env't Affs.* 2017 ZAGPPHC 58; 2017 (2) SA 519 (GP) (S. Afr.); see Jean-Claude N. Ashukem, *Setting the Scene for Climate Change Litigation in South Africa: Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58 (2017) 65662/16, 13 L. ENV'T & DEV. J. 37, 37–43 (2017), for further analysis of the case.

<sup>52</sup> *Earthlife Afr. Johannesburg*, *supra* note 51, ¶ 126.

On the other hand, in the US case of *Massachusetts v. Environmental Protection Agency (EPA)*,<sup>53</sup> the United States Supreme Court held that regulators are required to make an informed judgment on the negative impacts of the release of carbon dioxide. The Court reasoned that if the authority makes an “endangerment finding” that GHGs could be harmful, it has an obligation to take action to reduce the emissions. The aftermath of the decision led the EPA to make an Endangerment Finding on GHGs.<sup>54</sup> The judgment is a source of motivation for the EPA, which has set out rules and regulations to control emissions from use of oil and gas.<sup>55</sup> The above case from the United States is an indication that developed countries are quite responsive in managing pollution.

### III. CLIMATE CHANGE VIOLATIONS AS BREACHES OF HUMAN RIGHTS

The United Nations Declaration on Human Rights (UNDHR) is wide enough to accommodate a variety of breaches and infractions arising from the release of GHGs into the atmosphere.<sup>56</sup> Chief among the rights recognized in the UNDHR are the right to life, the right to a healthy environment, the right to property, and the protection of human dignity.<sup>57</sup> The rights contained in the UNDHR assumed the status of customary international law.<sup>58</sup> It is illuminating to note that the African Charter on Human and Peoples’ Rights has incorporated such rights, particularly, the right to life and a healthy environment, which can constitute the basis of the duty to protect human rights, pursuant to obligations to address climate change.<sup>59</sup> The African Charter, therefore, expresses the perspective of

<sup>53</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>54</sup> Francis Choi, *Coalition for Responsible Regulation v. EPA: An Analysis of Judicial Deference and Regulatory Discretion*, 40 *ECOLOGY L.Q.* 525, 526 (2013).

<sup>55</sup> *See id.* at 526–532.

<sup>56</sup> *See* GLOBAL NETWORK FOR HUMAN RIGHTS AND THE ENVIRONMENT [GNHRE], DECLARATION ON HUMAN RIGHTS AND CLIMATE CHANGE, <http://gnhre.org/declaration-human-rights-climate-change> (last accessed Feb. 5, 2021); *see* Declaration of Human Rights, *supra* note 6, arts. 8, 25; *CTR. FOR INT’L ENV’T L. CLIMATE CHANGE & HUMAN RIGHTS: A PRIMER*, 1, 3 (2013).

<sup>57</sup> *See* U.N. ENV’T PROGRAMME (UNEP), CLIMATE CHANGE AND HUMAN RIGHTS (2015), [https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate\\_Change\\_and\\_Human\\_Rights](https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rights) [human-rights-climate-change.pdf.pdf?sequence=2&BisAllowed=](https://perma.cc/CN4N-DLQ9) [https://perma.cc/CN4N-DLQ9].

<sup>58</sup> Anne Lowe, *Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute*, 23 *IND. INT’L COMPAR. L. REV.* 523, 544 (2013).

<sup>59</sup> Werner Scholtz, *The Promotion of Regional Environmental Security and Africa’s Common Position on Climate Change*, 10 *AFR. HUM. RTS. L.J.* 1, 21 (2010). There is much correlation

Africans on human rights.<sup>60</sup> Climate change has negative impacts on human life. The increasing rate of health impacts such as cancer, asthma, and bronchitis have been attributed to climate change.<sup>61</sup> Changing weather conditions have affected the agricultural sector and food production. These, in turn, impact the right to life.

The Paris Agreement provides in its preamble that:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.<sup>62</sup>

The preamble articulates the need for states to take human rights into account when considering mitigation and adaptation. The Paris Agreement envisions that measures to address climate change should be planned to ensure that they do not pose adverse consequences on vulnerable people. Anthropogenic activities that contribute to climate change affect the enjoyment of human rights. The United Nations Environmental Program noted in a report that

Anthropogenic climate change is the largest, most pervasive threat to the natural environment and human rights of our time. Climate change has already begun to have far-reaching environmental impacts, including many adverse effects on wildlife, natural resources and the ecological processes that support access to clean water, food, and other basic human needs. These impacts, combined with direct harms to people, property, and physical infrastructure, pose a serious threat to the enjoyment and exercise of human rights across the world.<sup>63</sup>

The above extract from the report of the United Nations Environmental Programme is in accord with the stance of the United Nations Human Rights Council (UNHRC). In 2008, the UNHRC passed a Resolution stating that climate change is an “immediate and far-reaching

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between international human rights law and constitutionally guaranteed human rights. See generally Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749 (2008).

<sup>60</sup> Onje Gye-Wado, *A Comparative Analysis of the Institutional Framework for the Enforcement of Human Rights in Africa & Western Europe*, 2 AFR. J. INT'L & COMPAR. L. 187, 190–91 (1990).

<sup>61</sup> Ioannis Manisalidis et al., *Environmental and Health Impacts of Air Pollution: A Review*, FRONTIERS IN PUB. HEALTH, (Feb. 20, 2020) at 2, 7.

<sup>62</sup> Paris Agreement, *supra* note 17, pmb1.

<sup>63</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 57, at 1.

threat to people and communities around the world and has implications for the full enjoyment of human rights.”<sup>64</sup> The impact and consequences of climate change are transboundary in nature.<sup>65</sup> Nevertheless, African countries are the most vulnerable to the various risks of climate change, such as flood, disease, and hunger, among other disasters.<sup>66</sup> This is made more complicated given the poverty rate, lack of infrastructural development, and facilities to adapt to climate change.

Countries have, through the UNFCCC, Kyoto Protocol, and Paris Agreement, taken measures to protect against climate change through reducing and controlling the anthropogenic activities that lead to the consequences of climate change. The UNFCCC set up the framework for coordination of states to prevent the continuous release of GHGs into the atmosphere. As a follow up, the Kyoto Protocol created binding targets and commitments for states to continue to develop measures that will ensure they meet their obligations. Developing countries who do not have binding targets should strive to prevent climate change with support from developed countries.<sup>67</sup> The Paris Agreement, on the other hand, requires countries to develop and maintain NDCs.<sup>68</sup> It is hoped that the NDCs will be able to establish frameworks for the reduction country emissions.<sup>69</sup>

UNFCCC offers a series of policy responses to the challenges of climate change. These are well documented through the Intergovernmental Panel on Climate Change (IPCC), which has released a series of reports depicting the consequences that are likely to result if climate change continues.<sup>70</sup> These consequences have enormous impacts

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<sup>64</sup> Human Rights Council Res. 7/23, U.N. Doc A/HRC/Res/7/23 (March 28, 2008).

<sup>65</sup> See Benjamin J. Richardson et al, *Beauty: A Lingua Franca for Environmental Law?*, 8 TRANSNAT'L ENV'T L. 59, 60 (2019).

<sup>66</sup> See Michael Addaney, Elsabe Boshoff & Bamisaye Olutola, *The Climate Change and Human Rights Nexus in Africa*, 9 AMSTERDAM L.F. no. 3, 5, 9–10 (2017).

<sup>67</sup> See U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC), KYOTO PROTOCOL REFERENCE MANUAL ON ACCOUNTING OF EMISSIONS AND ASSIGNED AMOUNT 12 (2008) [https://unfccc.int/sites/default/files/08\\_unfccc\\_kp\\_ref\\_manual.pdf](https://unfccc.int/sites/default/files/08_unfccc_kp_ref_manual.pdf) [<https://perma.cc/XDX3-HUGX>].

<sup>68</sup> Paris Agreement, *supra* note 17, at arts. 3–4.

<sup>69</sup> See Lavanya Rajamani, *The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations*, 78 MOD. L. REV. 826, 827–28 (2015).

<sup>70</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY (2007), [https://www.ipcc.ch/site/assets/uploads/2018/03/ar4\\_wg2\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf) [<https://perma.cc/7XMZ-9996>].

on the guarantees and actualization of rights that are contained in international instruments.<sup>71</sup>

It is largely accepted that people have the right to health, as demonstrated in the various international instruments on human rights.<sup>72</sup> States should guarantee these rights and take measures to ensure that they are not violated. Because unregulated emissions from the energy, industrial, and transportation sectors of the economy lead to death of the citizens that have been affected by GHG emissions, failing to address climate change is failing to keep to terms with the right to a healthy environment. In the same vein, the right to life is affected because diseases have resulted in an increased mortality rate in underdeveloped countries. According to the World Health Organization (WHO), “changes in climate are likely to lengthen the transmission seasons of important vector-borne diseases and to alter their geographic range.”<sup>73</sup> It observed that “malaria is strongly influenced by climate. Transmitted by Anopheles mosquitoes, malaria kills over four hundred thousand people every year – mainly children under five years old in certain African countries.”<sup>74</sup> As a result, overall life expectancy will obviously be reduced. Generally, the guarantee of the right to life is therefore questionable in the event of continuous release of GHGs into the atmosphere. The Supreme Court of India, in the case of *Enviro-Legal Action v. Union of India*,<sup>75</sup> held that industrial waste discharge into water and air is a threat to life. GHGs present a threat to life directly comparable to the industrial waste discharge in the above case from India.

Food is connected to the right to life. Climate change has an adverse impact on food security generally. Climate change raises critical concerns for food security, thereby leading to food scarcity that can affect

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<sup>71</sup> Notable among these instruments are the Universal Declaration of Human Rights (UDHR) 1948, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Children (CRC), etc. International human rights law is well recognized in international law. See DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 103 (3rd ed. 2015).

<sup>72</sup> African Charter on Human and Peoples’ Rights, *supra* note 7, art. 16; International Covenant on Economic Social and Cultural Rights, *supra* note 8, art. 12

<sup>73</sup> *Climate Change and Health*, WORLD HEALTH ORG. (Feb. 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> [<https://perma.cc/4CDQ-8PY9>].

<sup>74</sup> *Id.*

<sup>75</sup> *Indian Council for Enviro-Legal Action v. Union of India*, 1996 3 SCC 212 (1996) (India).

the health and wellbeing of the world's population.<sup>76</sup> The right to property can be affected by the displacement of people from their homes occasioned by climate change-induced disasters.<sup>77</sup> The right to human dignity can also be affected in such circumstances.<sup>78</sup> The Inuits, in their petition before the Inter-American Commission on Human Rights (IACHR) against the United States, stated that emissions are dangerously impacting the Arctic and have affected their means of subsistence, led to loss of resources, thawed ice, and undermined the right to their cultural heritage.<sup>79</sup> The displacement of persons owing to the movement of persons occasioned by global warming has increased.<sup>80</sup> According to Amnesty International,

climate change threatens our right to housing in a variety of ways. Extreme weather events like floods and wildfires are already destroying people's homes, leaving them displaced. Drought, erosion, and flooding can also over time change the environment whilst sea-level rises threaten the homes of millions of people around the world in low-lying territories.<sup>81</sup>

Climate change, therefore, increases the loss of lives and property. An IPCC report has confirmed that "the gravest effects of climate change may be those on human migration as millions are displaced by shoreline

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<sup>76</sup> FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, THE STATE OF FOOD AND AGRICULTURE: CLIMATE CHANGE, AGRICULTURE AND FOOD SECURITY at v (2016) (<http://www.fao.org/3/a-i6030e.pdf> [<https://perma.cc/Q7X5-X975>]).

<sup>77</sup> U.N. HIGH COMMISSIONER FOR REFUGEES, CLIMATE CHANGE AND DISASTER DISPLACEMENT: AN OVERVIEW OF UNHCR'S ROLE 4 (2017) <https://www.unhcr.org/protection/environment/5975e6cf7/climate-change-disaster-displacement-overview-unhcrs-role.html> [<https://perma.cc/56LN-6XJG>].

<sup>78</sup> Dug Cubie, *Promoting Dignity for All: Human Rights Approaches in the Post-2015 Climate Change, Disaster Risk Reduction and Sustainable Development Frameworks*, 8 HUM. RTS. & INT'L LEGAL DISCOURSE 36, 39 (2014).

<sup>79</sup> It is identified that the challenges faced by the Inuit due to climate change include "retreat of protective sea ice, impaired access to vital resources and other infrastructure—rise to the level of human rights violations"; and that "climate change exacerbates these health threats making the danger to the Inuit all the greater." Martin Wagner & Donald M. Goldberg, *An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change*, CIEL, [https://www.ciel.org/cop10\\_handout\\_ejciel/](https://www.ciel.org/cop10_handout_ejciel/) [<https://perma.cc/N7CZ-AHDS>] (last visited Sept. 4, 2019).

<sup>80</sup> See Barney Thomson, *Climate Change and Displacement: How Conflict and Climate Change form a Toxic Combination that Drives People from Their Homes*, U.N. HIGH COMM'R FOR REFUGEES (Oct. 15, 2019), <https://www.unhcr.org/news/stories/2019/10/5da5e18c4/climate-change-and-displacement.html> [<https://perma.cc/7LFC-2HQ8>].

<sup>81</sup> *Climate Change*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/climate-change/> [<https://perma.cc/54RA-8WHP>] (last visited Feb. 5, 2021).

erosion, coastal flooding and severe drought.”<sup>82</sup> The Office of the High Commissioner for Human Rights (UN Human Rights) has expressed that climate change “poses great risks and threats to the environment, human health, accessibility and inclusion, access to water, sanitation and food, security, and economic and social development” noting that the impacts “interfere with the effective enjoyment of human rights.”<sup>83</sup>

#### IV. TRANSNATIONAL LITIGATION AND THE WINDOW FOR CLIMATE CHANGE LITIGATION IN AFRICA

Multinational corporations have been sued in their home countries by litigants from other African countries who are aggrieved by the activities of the corporations in the litigants’ countries. A fleet of cases on the subject of transnational litigation has shown that there are limitations in its application.<sup>84</sup> *Choc v. Hudbay Minerals Incorporation* confirmed that transnational litigation could be instituted in Canadian courts.<sup>85</sup> The case was against a Canadian corporation with a subsidiary in Guatemala, which was alleged to have been involved in rape and murder at mining site it operated., The court dismissed the preliminary objection, finding that “the plaintiffs have properly pleaded the elements necessary to recognize a novel duty of care.”<sup>86</sup> By the same token, the case of *Nevsun Resources Ltd v. Araya*<sup>87</sup> is instructive. The case concerned actions for breach of human rights by forced labor, the violation of the right to human dignity, and inhuman and degrading treatment in Eretria by a Canadian corporation. The Supreme Court of Canada held the corporation breached international customary law in Eretria. Accordingly, it was held that “[c]ustomary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not ‘plain and obvious’ to me that

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<sup>82</sup> *Policymakers’ Summary of the Potential Impacts of Climate Change: Report from Working Group II to IPCC*, [1990] at 103, <https://digitallibrary.un.org/record/763957?ln=en> [<https://perma.cc/U6YD-QQ9Q>].

<sup>83</sup> See OFFICE OF HIGH COMM’R FOR HUM. RTS., STATEMENT OF THE UNITED NATIONS SPECIAL PROCEDURES MANDATE HOLDERS ON THE OCCASION OF THE HUMAN RIGHTS DAY GENEVA (Dec. 10, 2014), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E> [<https://perma.cc/6C6X-TAVD>].

<sup>84</sup> See Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT’L L. 835, 841 (2013).

<sup>85</sup> *Choc v. Hudbay Materials, Inc.*, [2013] 116 O.R. 3d 674, ¶¶ 85–86 (Can. Ont. Sup. Ct. J.).

<sup>86</sup> *Id.* at ¶ 75.

<sup>87</sup> *Nevsun Resources Ltd. v. Araya*, [2020] 443 D.L.R. 4th 183 (Can.).

the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.<sup>88</sup>

In *Wiwa v. Royal Dutch Petroleum (RDP)*,<sup>89</sup> the plaintiff, son of the late Saro Wiwa who was executed by the Nigerian government, brought an action under the Alien Torts Statute (ATS) in New York claiming that Shell Nigeria offered support for the Nigerian military government to torture Ken Saro-Wiwa and others. The plaintiff contended that RDP (with headquarters in Netherlands) and Shell Transport and Trading (with headquarters in the UK) were in control of Shell and were therefore the agent of the defendant.<sup>90</sup> The Court agreed with the contention, holding that, despite the fact the defendants were listed on the stock exchange, the defendant's "wholly owned US subsidiary maintains an investor relations office that is dedicated to their investment activities," it has sufficient ties to confer jurisdiction over the defendant.<sup>91</sup>

In the case of *Kiobel v. RDP*,<sup>92</sup> which was brought in the US, the plaintiffs, who were Nigerians, brought an action against RDP and Shell Transport and Trading Company, a Dutch and British company, respectively, alleging that through their subsidiary, Shell Petroleum Development Company Limited of Nigeria, they were complicit in violating the rights of the plaintiffs in violation of the law of nations, seeking damages relying on the ATS. It was held that the action could only commence upon violation of the laws of nations.<sup>93</sup> *Re South African Apartheid Litigation (The Khulumani Case)*<sup>94</sup> illustrates the use of transnational litigation for human rights abuses in South Africa, where it was alleged that some sets of US companies aided and abetted the apartheid regime in tortious acts and extrajudicial killings of South Africans.

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<sup>88</sup> *Id.* at ¶ 132.

<sup>89</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92–93 (2d Cir. 2000).

<sup>90</sup> *Id.*

<sup>91</sup> Jonathan Drimmer, *Human Rights and the Extractive Industries: Litigation and Compliance Trends*, 3:2 J. WORLD ENERGY L. & BUS. 121, 125–26 (2010).

<sup>92</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F.Supp.2d 457 (S.D.N.Y. 2006). Other notable transnational litigation cases with causes of action arising from Nigeria include *Akpan v. Royal Dutch Shell*, C/09/337050 / HA ZA 09-1580 (District Court of the Hague, 2013) (Neth.); *Okpabi v. Royal Dutch Shell* [2017] EWHC (TCC) 89 (Eng.); *The Bodo Community v. Shell Petroleum Dev. Co.* [2014] EWHC (TCC) 1973 (Eng.).

<sup>93</sup> *Kiobel*, 456 F.Supp.2d at 457.

<sup>94</sup> *In re South Africa Apartheid Litigation*, 617 F. Supp. 2d 228, 297 (S.D.N.Y. 2009).



From the conception of the international regime on climate change, African countries have been part of the process. The prevailing argument in the various climate change negotiations has been for the countries within the Global North (developed countries) to take proactive measures towards the mitigation of the climate change because they are historically responsible for the level of environmental degradation and are also better positioned for mitigation and adaptation.<sup>95</sup> To this end, the basis for the justification is that the developed economies have largely been more responsible as historical emitters of GHGs.<sup>96</sup> Developing countries were much more reluctant to commit to taking reduction targets.<sup>97</sup> Numerous states have questioned the need for climate targets because they do not feel individually responsible.<sup>98</sup> The US, for example, refused to commit to the Kyoto Protocol, protesting that major emitters were not forced to make binding targets.<sup>99</sup> The US therefore passed the Byrd–Hagel Resolution<sup>100</sup> which forbade them from signing any treaty that

would (A) mandate new commitments to limit or reduce greenhouse gas emissions for Annex I Parties, unless the protocol . . . also mandates new specific scheduled commitments . . . for Developing Country Parties within the same compliance period, or (B) results in serious harm to the economy of the United States.<sup>101</sup>

The developed countries of the world are quite proactive in the enforcement of human rights norms or standards, some of which are connected to climate change litigation. Some have provided the enabling environment for extraterritorial jurisdiction in order to make corporations

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<sup>95</sup> Phillip Stalley, *Principled Strategy: The Role of Equity Norms in China's Climate Change Diplomacy*, 13 GLOB. ENV'T POL. no. 1, 1, 3 (2013). It is recommended that an ideal approach will be to create a compromise as inequalities of nations tend to adversely affect global cooperation. See Bradley C. Parks & J. Timmons Roberts, *Inequality and the Global Climate Regime: Breaking the North-South Impasse*, 21 CAMBRIDGE REV. INT'L AFFS. 621, 621–648 (2008).

<sup>96</sup> Parks & Roberts, *supra* note 95, at 623–24.

<sup>97</sup> Inga Fritzen Buan, *An Introduction to Chinese Climate Change Policy: A Run-up to Copenhagen*, in ENERGY INFRASTRUCTURE AND POLICY OPTIONS FOR A SUSTAINABLE FUTURE 57, 64–65 (Michael Rodi ed. 2013).

<sup>98</sup> See, e.g., Daniel A. Farber, *Climate Justice and the China Fallacy*, 15 HASTINGS W. NW. J. ENV'T L. & POL'Y 15, 16 (2009).

<sup>99</sup> Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L. J. 307, 312–13 (2007).

<sup>100</sup> Aarthi S. Anand, *The Importance of Being Factual: The U.S., China, and the Future of the Kyoto Protocol*, 24 DUKE ENV'T L. & POL'Y F. 1, 8 n.31 (2013).

<sup>101</sup> See S. RES. 98, 105th Cong. (1997), cited in F. William Brownell & Scott J. Stone, *The Hard Reality for International Climate Agreements in the United States*, THE ATLANTIC COUNCIL OF THE UNITED STATES (Apr. 2014).

accountable for infractions committed in other countries.<sup>102</sup> However, the developing countries in Africa have experienced challenges in observing these rights because of the failure of regulatory bodies to enforce existing legislation, the impact of corruption, and the limitations in the judicial process.<sup>103</sup> Access to justice is adversely restricted.<sup>104</sup> There are many challenges with respect to the breach of fundamental rights arising from activities that release GHGs into the atmosphere. There is, therefore, a need to address the human rights violations that have been occasioned by climate change defaulters. Taking account of the pollution haven theory, multinational corporations or entities engaged in international business transactions will prefer to invest in regions with less stringent measures of environmental protection. African countries have been found to fall under such a category, as there is no replication of the international climate change regime at the regional level, which would have enabled closer supervision or control of environmental degradation.<sup>105</sup> The European Union (EU) is a classic example of a supranational entity that has committed itself to the control of climate change by taking positive steps.<sup>106</sup> Thus, the EU has been very proactive in the promotion of climate change mitigation.<sup>107</sup> In the same respect, its member states also made individual commitments towards mitigation.<sup>108</sup> This, however, is not the case with African states where individual states are making their respective commitments. The implication of this situation is the lack of unified climate change objectives for the continent of Africa.

While it is the duty of the legislative arm of government to ensure that the laws of the land are crafted in a manner that conforms with its obligations assumed under any relevant climate change treaty, there is the inherent duty of the court within its jurisdiction to take proactive measures

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<sup>102</sup> See, e.g., *Choc v. Hudbay Materials, Inc.*, [2013] 116 O.R. 3d 674 (Can. Ont. Sup. Ct. J.); *Akpan v. Royal Dutch Shell*, C/09/337050 / HA ZA 09-1580 (District Court of the Hague, 2013) (Neth.); but see *Kiobel v. Royal Dutch Petroleum, Co.*, 569 U.S. 108, 124–25 (2013).

<sup>103</sup> Amaechi, *supra* note 47, at 322.

<sup>104</sup> Eghosa O. Ekhaton, *Improving Access to Environmental Justice Under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria*, 22 AFR. J. INT'L & COMPAR. L. 63, 67 (2014).

<sup>105</sup> David H. Shinn, *The Environmental Impact of China's Investment in Africa*, 49 CORNELL INT'L L.J. 25, 40–42 (2016).

<sup>106</sup> See Joshua M. Chanin, *The Regulatory Grass is Greener: A Comparative Analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility*, 12 IND. J. GLOB. LEGAL STUD. 745, 778 (2005).

<sup>107</sup> JOSEPH CURTIN, *THE COPENHAGEN CONFERENCE: HOW SHOULD THE EU RESPOND?* 2 (2010).

<sup>108</sup> Kyoto Protocol, *supra* note 16, at Annex B.

to ensure that the government keep their obligations and are accountable in ensuring that the commitments are met and enforced.<sup>109</sup> Climate change litigation becomes expedient, giving full effect to the implementation of the measures in place or ensuring that both the government and private sector are checked.

Climate change litigation can be strategically conceived to bring claims that are directed at private persons, public entities, or the government. This is known as “strategic public climate litigation,” or “strategic private climate litigation.”<sup>110</sup> The private litigation could be much more expensive and the indigent may find it difficult to pursue.<sup>111</sup> The trend is increasing in different countries from the Global North and South, where litigants have sought claims or declarations either against the state or private entities regarding their actions or omissions that are contributing or have contributed to GHGs in the environment.<sup>112</sup> Public lawsuits seeking to redress violations of both international and domestic laws in a country by approaching a foreign jurisdiction have evolved into what is known today as transnational litigation.<sup>113</sup> In the case of the *Skirotes v. Florida*,<sup>114</sup> the US Supreme Court asserted that international law does not preclude the country from calling into account the actions of corporations in another country.<sup>115</sup> In the same vein, the Supreme Court of Canada, in *R v. Hape*,<sup>116</sup> has appreciated that international law provides “the limits of state jurisdiction, while domestic law determines how and to what extent a state will assert its jurisdiction within those limits.” This is further buttressed by the fact that there are no clear and readily available mechanisms to penalize corporations that have committed crimes against

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<sup>109</sup> Lord Carnwath, *Climate Change Adjudication After Paris: A Reflection*, 28 J. ENV'T. L. 5, 9 (2016).

<sup>110</sup> See Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J.L. STUD. 841, 843 (2018).

<sup>111</sup> See generally HELEN DUFFY, *STRATEGIC HUMAN RIGHTS LITIGATION: UNDERSTANDING AND MAXIMISING IMPACT* (2018).

<sup>112</sup> See JOANA SETZER & REBECCA BYRNES, *GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2020 SNAPSHOT 14–15* (2020) (available for download at [https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation\\_2020-snapshot.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf) [<https://perma.cc/ZS6Y-VW9T>]).

<sup>113</sup> Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348 (1991).

<sup>114</sup> See *Skirotes v. Florida*, 313 U.S. 69, 73–74 (1941).

<sup>115</sup> See J.G. CASTEL, *EXTRATERRITORIALITY IN INTERNATIONAL TRADE: CANADA AND THE UNITED STATES OF AMERICA PRACTICES COMPARED* 5 (1988).

<sup>116</sup> *R. v. Hape*, 2007 SCC 26, 59 (Can.).

citizens.<sup>117</sup> It is the duty of the state, going by the rationale behind making corporations accountable for actions taken abroad, to ensure that corporations are not only accountable in their home states but in other jurisdictions where they operate.<sup>118</sup>

Corporations may be liable for breaches of human rights or losses suffered from their activities. In civil actions, citizens may be entitled to damages or measures that could restrain corporations from future occurrences. Regarding criminal liability, the application of criminal sanctions against a corporation is still a major concern in some jurisdictions given the fact that corporations have no autonomy themselves and the intentions and actions of individuals acting within the hierarchy of management will be attributed to that of the corporation.<sup>119</sup> Usually the ingredients of crime in most countries are *mens rea* and *actus reus*, which respectively mean intention and act.<sup>120</sup> For a crime to have been committed,” there must be an *actus reus*, an act associated or linked to the accused person. There must also be *mens rea*, which is the intention that a person intends to commit the crime. In most instances there is the tendency to maintain that corporations have no mind of their own and therefore it would be difficult to attribute *mens rea* to companies.<sup>121</sup> However, exculpating corporations on the grounds of lack of *mens rea* and *actus reus* is not the current state of affairs in most jurisdictions as the *mens rea* and *actus reus* will be inferred from the actions taken by the officers, members, or employees of the company that approved such actions.<sup>122</sup> Top executives are referred to as the directing minds of the company and the corporation is liable for their actions.<sup>123</sup>

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<sup>117</sup> Wolfgang Kaleck & Miriam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges*, 8 J. INT’L CRIMINAL JUSTICE no. 2, 699, 710.

<sup>118</sup> Surya Deva, *Corporate Human Rights Violations: A Case for Extraterritorial Regulation*, in HANDBOOK OF THE PHILOSOPHICAL FOUNDATIONS OF BUSINESS ETHICS 1077–90, (Christoph Luetge ed., 2013).

<sup>119</sup> Tesco Supermarkets Ltd. v. Natrass, [1972] AC 153, 171 (UK).

<sup>120</sup> *Id.*; see also R. v. Hamilton, 2005 SCC 47, ¶ 2; Abeke v. State [2007] 2 NLR 1 (Nigeria).

<sup>121</sup> C.M.V. Clurkson, *Kicking Corporate Bodies and Damning Their Souls*, 55 MOD. L. REV. 557, 557–72 (1996).

<sup>122</sup> See United States v. Dye Constr. Co., 510 F.2d 78, 82 (10th Cir. 1975); See Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETH. INT’L L. REV. 333, 337 (2009).

<sup>123</sup> Todd Archibald et al., *The Changed Face of Corporate Criminal Liability*, 48 CRIM. L.Q. 367, 368 (2004).

With the success recorded in the application of transnational litigation claims arising from environmental harm, it may be further argued that such claims can largely be linked to human rights, particularly the right to life.<sup>124</sup> Consequently, climate change has been seen as capable of leading to environmental harm and thereby affecting the right to life because of its attendant consequences.<sup>125</sup> Litigating against climate change has been increasing. The essence of climate change litigation is to ensure that states take actions to regulate GHGs.<sup>126</sup> Therefore litigants can, through litigation, compel the state to observe their duty of ensuring that climate change is kept within regulatory limits.<sup>127</sup>

The Australian Court, in the case of *Thomson v. The Minister for Climate Change Issues*,<sup>128</sup> held that Australia's target should take the IPCC report into account. In the case of *Urgenda Foundation v. The Netherlands*,<sup>129</sup> the plaintiffs brought a class action challenging the Netherlands' commitments to reduce GHGs. The action was brought on the grounds that the defendants breached the right to life and private family life under the provisions of Articles 2 and 8 of the European Convention on Human Rights and Article 21 of the Dutch Constitution. It was also contended that there was a breach of the duty of care provided for under the Dutch Civil Code. The District Court, however, only found that the breach was in regard to the duty of care requiring the taking of precautionary measures that check against hazardous impacts. The government was therefore found to be negligent for reducing the target for CO<sub>2</sub> emission reduction by 17 percent in comparison to the 1990 levels, and not by 25 percent. A further appeal to the Court of Appeals in The Hague upheld the decision of the District Court and also held that there was a breach of the provisions of the European Convention on Human Rights.<sup>130</sup>

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<sup>124</sup> Richard L Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 574 (2000).

<sup>125</sup> HUM. RTS. WATCH, *supra* note 42.

<sup>126</sup> See Hari M. Osofsky, *Is Climate Change "International"?: Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 587 (2009).

<sup>127</sup> See Peter Kayode Oniemola, *International Oil & Gas Operators and Decarbonization*, in *DECARBONISATION AND THE ENERGY INDUSTRY LAW, POLICY AND REGULATION IN LOW-CARBON ENERGY MARKETS* 211 (Tade Oyewunmi et al., 2020).

<sup>128</sup> *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 at ¶ 133 (N.Z.).

<sup>129</sup> *Urgenda Foundation v. The Netherlands*, C/09/456689 / HA ZA 13-1396, at 2.6, 2.7 (District Court of the Hague, 2015) (Neth.).

<sup>130</sup> *Urgenda Foundation v. The Netherlands*, C/09/456689/ HA ZA 13-1396 (Court of Appeals of the Hauge, 2018); see Petra Minnerop, *Integrating the 'Duty of Care' Under the European Convention*

Climate change litigation can therefore offer checks.<sup>131</sup> Climate change violations leading to the release of GHGs in the environment can be seen to be a violation of the law of nations, provided where it is such that it can be presented to have amounted to the breach of fundamental rights to life and a healthy environment. This right is guaranteed in the constitutions of nations, the United Nations Declaration on Human Rights, and the African Charter. Since these rights have assumed the status of customary international law, they can be seen to form part of the law of nations envisaged to be breached under the ATS.

## V. APPROACHING THE GLOBAL CHALLENGE AND OPTIONS OF TRANSNATIONAL CLIMATE CHANGE LITIGATION IN AFRICA

The use of litigation to seek redress for climate change violations has been discussed. Transnational climate change litigation is also an option. It is, however, important to note the matter of damages arising from climate change poses many challenges in international climate law as “international law is ill-equipped when confronted with a complex situation, such as compensation for climate change damages.”<sup>132</sup> Ideally, persons that have suffered due to climate change violations should be able to explore institutions and procedures of justice to get the required redress.<sup>133</sup>

Because climate change is transboundary in nature, litigation to mitigate its effects should be both domestic and international to create a meaningful impact in climate governance.<sup>134</sup> Much has been said on the need for the evolution of binding international law instruments that should make corporations address climate change through corporate social

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*on Human Rights and the Science and Law of Climate Change: The Decision of the Hague Court of Appeal in the Urgenda Case*, 37 J. ENERGY & NAT. RES. L. no. 2, 149, 149–79 (2019).

<sup>131</sup> Navraj Ghaleigh, “Six Honest Serving Men”: *Climate Change Litigation as Legal Mobilization and the Utility of Typologies*, 1 CLIMATE L. 31, 45 (2010).

<sup>132</sup> Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT’L L. 1, 2 (2008).

<sup>133</sup> See Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9 CLIMATE L. 224, 227 (2019) (“Victims of human rights violations—including those associated with climate change—are entitled to access remedial institutions and procedures affording them a fair hearing and, ultimately, substantive redress.”).

<sup>134</sup> Dan Bodansky, *Climate Change: Transnational Legal Order or Disorder?*, in TRANSNATIONAL LEGAL ORDERS 287 (Terence C. Halliday & Gregory Shaffer eds., 2015).

responsibility.<sup>135</sup> From the fleet of cases that have been brought against multinational corporations, most were not completed on the merits.<sup>136</sup> Some of the cases were dismissed due to technicalities in the application.<sup>137</sup> The responsibility to protect should be expansive in ensuring that there is regulation to ensure control of the activities of corporations in their home country and abroad.<sup>138</sup> In the words of the African Commission, “Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties.”<sup>139</sup> By the same token, the African Commission in *Jawara v. The Gambia*<sup>140</sup> maintained that going by the provisions of the African Charter, the rights and freedoms of individuals “can only be fully realized if governments provide structures which enable them to seek redress if they are violated.”<sup>141</sup> An arrangement for transnational litigation across African states will meet the essence of the protection of rights that have or are about to be breached due to violations of domestic and international law on climate change.

The trend of climate change litigation, which is largely influenced by public interest litigation, is becoming popular. Citizens in Africa are waking up to the possibility of addressing climate change violations through litigation.<sup>142</sup> Thus, climate change litigation is becoming popular.

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<sup>135</sup> Ciara Hackett and Luke Moffett, ‘Mapping the Public/Private-Law Divide: A Hybrid Approach to Corporate Accountability’, 12:3 INT’L J.L. CONTEXT 312, 312–36 (2016).

<sup>136</sup> Meetal Jain & Bonita Meyersfeld, *Lessons from Kiobel v. Royal Dutch Petroleum Company: Developing Home Grown Lawyering Strategies Around Corporate Accountability* 30 S. AFR. J. HUM. RTS. 430, 449 (2014).

<sup>137</sup> See, e.g., *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118, 2002 WL 31082956, at \*1 (S.D.N.Y. Sept. 17, 2002), *vacated in part*, *Abdullahi v. Pfizer, Inc.*, 77 F. App’x 48 (2d. Cir. 2003) (illustrating the procedural difficulties that these cases often face).

<sup>138</sup> See generally Daniel Augenstein & David Kinley, *When Human Rights “Responsibilities” Become “Duties”: The Extra-Territorial Obligations of States that Bind Corporations*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271 (David Bilchitz & Surya Deva eds., 2013).

<sup>139</sup> *Social & Economic Rights Action Centre v. Nigeria*, Communication 155/96, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 57 (May 27, 2002), <https://www.esccrnet.org/sites/default/files/serac.pdf> [<https://perma.cc/3849-78GD>].

<sup>140</sup> *Jawara v. The Gambia*, Communications, 147/95 & 149/96, Decision, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 74 (May 11, 2000), <https://www.achpr.org/sessions/descions?id=117> [<https://perma.cc/6UDZ-C36M>].

<sup>141</sup> *Wewerinke-Singh*, *supra* note 133.

<sup>142</sup> *Save Lamu v. Nat’l Env’t Mgmt. Auth. (NEMA)* (2016) Tribunal Appeal No. Net 196 of 2016 (NET) (Kenya); *Earthlife Afr. Johannesburg v. Minister of Env’t Affs.* 2017 ZAGPPHC 58; 2017 (2) SA 519 (GP) (S. Afr.).

Much can be achieved if it is expanded in such a way that actions and claims can be brought against companies in any in addition to where such breaches occurred. African states are, nevertheless, required to be proactive in the fight against climate change. One option is creation of an enabling environment for climate change litigation in African states. Taking the case of Africans into their hands is a crucial consideration. Going by the attitude of European countries as seen in the various *amicus curiae* briefs filled in *Kiobel*, it becomes obvious that the level of support for the promotion of transnational litigation is largely limited until the particular circumstances surrounding the action appear to be quite compelling.<sup>143</sup>

This paper intends to change the narrative by arguing that African countries should also approach climate change beyond the doctrine of common but differentiated responsibilities.<sup>144</sup> Accordingly, to implement the Paris Agreement, it is provided that its operation should “reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”<sup>145</sup> The doctrine, which has permeated international climate law, appears to be applied based on morality. States therefore are not legally obliged in actuality to follow the doctrine to the letter but are largely persuaded to do so morally. To attain this goal, efforts should be made within the region to hold climate change defaulters accountable for the wrongs committed across the African states.<sup>146</sup> This paper supports an Africanist approach to the creation of liabilities for climate change violations, whereby African countries within the African Union are considered to have jurisdiction to challenge actions which raise human right concerns. This would require the creation of a regional treaty in Africa or an arrangement that allows for climate change torts committed in one African state to be redressed in the courts of other African states.

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<sup>143</sup> Cedric Ryngaert, *Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v. Shell Litigation in the Netherlands*, 8:2 MCGILL INT’L J. SUST. DEV. L. & POL’Y 245, 255 (2013).

<sup>144</sup> See Christopher Smith, *The Bali Firewall and Member States’ Future Obligations Within the Climate Change Regime*, 6 L., ENV’T & DEV. J. 284, 287 (2010) (explaining that the state obligation to check climate change is grounded in the principle of common but differentiated responsibilities); see also Lavanya Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime*, 9 REV. EUR. CMTY. & INT’L ENV’T L. 120, 124 (2000).

<sup>145</sup> Paris Agreement, *supra* note 17, art. 2.2.

<sup>146</sup> See Lisa Schenck, *Climate Change “Crisis” – Struggling for Worldwide Collective Action*, 19 COLUM. J. INT’L ENV’T L. & POL’Y 319, 334–35 (2008) (indicating that multilateral action is needed to address climate change).



Thus, cases in which an African state would ordinarily not be able to assume jurisdiction could be determined in another African state on the basis of extraterritorial jurisdiction for climate change breaches as established under the proposed regional instrument. For example, a breach of climate change regulation for actions leading to violations of human rights due to the release of GHGs in Nigeria may be redressed in any African country even if the act was committed in Nigeria. In climate change matters, universal jurisdiction will be assumed. This will require a shift from the established principles connected to extraterritorial jurisdiction.

There are prospects for climate change litigation through the African Court of Justice and Human and Peoples' Rights (ACJHPR), which is also intended to provide an avenue for corporate liability actions against corporations. Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights established ACJHPR, while Article 46C expressly grants criminal jurisdiction over corporations.<sup>147</sup> This is a starting point to move the debate further to encourage the establishment of universal jurisdiction that seeks to promote transnational climate change litigation. This will be the situation if the breach is brought pursuant to the provisions of the African Charter or the Protocol.<sup>148</sup> Much can be drawn from the African Commission, which has evolved its jurisprudence in response to challenges brought on the infringement on human rights. Thus, the African Commission is established to check and protect human rights guaranteed under the African Charter. The ACJHPR can, therefore, grant remedies to victims, which may take the form of compensation or reparations.<sup>149</sup>

African states can take a cue from the European Union, which has considerable climate change litigation stemming from rights arising from the European Court of Human Rights (ECtHR).<sup>150</sup> The European

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<sup>147</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Arts. 1 & 46C, Org. of African Unity, June 10, 1998, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and> [https://perma.cc/SE4Y-5B5B].

<sup>148</sup> *Id.* art. 3(1).

<sup>149</sup> Duffy, *supra* note 111.

<sup>150</sup> J. M. Verschuuren, *Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe*, in REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT 363 (Werner Scholtz & J.M. Verschuuren eds., 2015).

commitments will be required to be made by states in the observance of the obligations to allow access to courts. That is why there is the prevailing argument that the EU appears to be a more favorable forum for pro-climate transnational litigation than the United States.<sup>151</sup> In the case of *Okyay v. Turkey*,<sup>152</sup> an action was brought to prevent the continuous operation of three coal thermal plants as the coal utilized was poor quality. The plaintiff argued that the coal plant resulted in pollution of the air quality thereby impacting biodiversity. The applicant placed reliance on the right to a healthy, balanced environment contained in Article 56 of the Constitution of Turkey and the relevant provisions of environmental law which make it obligatory for the authorities to prevent and mitigate pollution. The argument before the Turkish court was that the plant was unlawful as the requisite license was not obtained and such should constitute grounds for stopping the operation of the coal plant. The Turkish court found in favor of the applicant, stating the requisite license was not obtained and ordered the plant to cease operation. The authorities, however, failed to comply with the order. This led the applicant to approach the ECtHR, which found that there was a breach of the right to fair hearing by the refusal to enforce the decision of the Turkish court and granted compensation to the applicant.

There are other subregional courts such as the Economic Community of West African States (ECOWAS) Court of Justice, East African Community Court of Justice, and Southern African Development Community (SADC) Tribunal.<sup>153</sup> It is proposed that jurisdiction can be assumed either in domestic courts or in regional courts of African states. The ECOWAS Community Court of Justice has emerged as a dispute resolution mechanism that can be used to seek redress against human rights violations occurring in any state within the ECOWAS subregion.<sup>154</sup> It may operate as a forum for the litigation of climate change disputes

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<sup>151</sup> See, e.g., Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT'L L. 846, 846–51 (2013).

<sup>152</sup> *Okyay v. Turkey*, App. No. 36220/97, Eur. Ct. H.R. at ¶¶ 9–11 (July 12, 2005), <https://www.eufje.org/images/docConf/buc2016/CASE%20OF%20OKYAY%20AND%20OTHERS%20%20v.%20TURKEY.pdf> [<https://perma.cc/78EH-9PG5>].

<sup>153</sup> See Solomon Ebobrah, *Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges*, 17 AFR. J. INT'L & COMPAR. L. 79, 80 (2009); Lucyline Murungi & Jacqui Gallinetti, *The Role of Sub-Regional Courts in the African Human Rights System*, 7 SUR INT'L J. HUM. RTS. 119, 119 (2010).

<sup>154</sup> See generally Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737 (2013).

arising in countries that are not within the ECOWAS subregion. However, much will not be achieved under the current legal framework that does not allow actions to be brought directly against companies. The ECOWAS Community Court of Justice has shown that there is a limit to holding corporations accountable in international law under the decision in *SERAP v. Federal Republic of Nigeria*,<sup>155</sup> where seven corporations—Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria Plc, Chevron Oil Nigeria Plc., Total Nigeria Plc., and ExxonMobil—were alleged to have been responsible for human rights violations in the Niger Delta region because of their activities leading to the degradation of the environment. Granting the preliminary objection brought by the corporations to strike their names from the suit, the court reasoned that it lacked jurisdiction to hold corporations accountable:

Objection calls for the consideration by the Court of one of the most controversial issues in International Law which relates to the accountability of Companies, especially multinational corporations, for violation or complicity in violation of Human Rights especially in developing countries. In fact, one of the paradoxes that characterize International Law presently is the fact that States and individuals can be held accountable internationally, while companies cannot.<sup>156</sup>

The Southern African Development Community (SADC) Tribunal, established pursuant to the SADC treaty, has also shown that there is no viable mechanism to bring about the redress of human rights in SADC following the tribunal's suspension after the inability to enforce the outcome of *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, where a set of farmers obtained judgment against Zimbabwe over the take-over of their farmlands without lawful compensation.<sup>157</sup> It had consistently shown, before it went into moribund, that it was not in a position to address

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<sup>155</sup> *SERAP v. Nigeria*, Judgment N° ECW/CCJ/JUD/18/12, Court of Justice of the Economic Community of West Africa, ¶¶ 3,8 (Oct. 27, 2009), <https://www.escr-net.org/caselaw/2010/socio-economic-rights-and-accountability-project-serap-v-federal-republic-nigeria-and> [<https://perma.cc/4BVJ-BH3W>].

<sup>156</sup> *See, e.g., id.*

<sup>157</sup> *Campbell v. Zimbabwe*, Case No. 2/2007, Southern African Development Community Tribunal, 41, 57 (Nov. 28, 2008), <http://www.saflii.org/sa/cases/SADCT/2008/2.html>.

the violation of rights.<sup>158</sup> With the lobbying of Zimbabwe, the operation of the SADC Tribunal was eventually suspended.<sup>159</sup>

Likewise, the East African Court of Justice was established by the 1999 Treaty Establishing the East Africa Community.<sup>160</sup> In *James Katabazi & 21 Others v. the Secretary-General of the EAC & Another*,<sup>161</sup> the East African Court of Justice held that the court was not expressly granted jurisdiction on human rights, the court has jurisdiction to entertain human right violations.<sup>162</sup> The court, which has maintained that it could assume jurisdiction upon a breach of the provisions of the African Charter, has not been active in the actualization of remedies for breaches.

The absence of viable mechanisms for transnational litigation in the courts in Africa calls for a need to develop a proactive framework that will accommodate transnational climate change litigation in regional, sub-regional, and domestic courts in African states. Under the arrangement, a breach in East Africa can be challenged in ECOWAS Community Court of Justice or any other court in West Africa by virtue of the proposed arrangement. Creating the possibility for use of regional courts within the African Union will be a way forward to expand the venue and may enable countries to access such courts. The arrangement should be complementary in that domestic courts can still be approached to seek redress on claims arising from climate change litigation. For example, whilst the ECtHR exists, citizens could approach domestic courts to exercise their rights that emanate from the European Convention on Human Rights.<sup>163</sup>

Generally, for states to assume jurisdiction in certain transnational litigation claims, there will be a need for a nexus between the state and the

<sup>158</sup> *Id.* at 156–57; see also Basil Ugochukwu, “First, Put Out the House Fire”: *The Future of the African Human Rights System*, 35 WIS. INT’L L. J. 367, 385–86 (2018).

<sup>159</sup> *Id.*

<sup>160</sup> Treaty for the Establishment of the East African Community art. 9, Nov. 30, 1999, [https://www.eacj.org/?page\\_id=33](https://www.eacj.org/?page_id=33) [<https://perma.cc/VY2E-WETW>].

<sup>161</sup> *Katabazi v. Secretary General of East African Community*, reference No. 1 of 2007, East African Court of Justice, 15–16 (Nov. 1, 2007), <https://www.eacj.org/?cases=james-katabazi-and-21-other-vs-secretary-general-of-the-east-african-community-and-attorney-general-of-the-republic-of-uganda> [<https://perma.cc/XA2V-7AZ9>].

<sup>162</sup> See Victor Lando, *The Domestic Impact of the Decisions of the East African Court of Justice*, 18 AFR. HUM. RTS. L.J. 463, 467 (2018).

<sup>163</sup> See *R v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15, ¶ 29, [2007] 1 AC (HL) 100 (appeal taken from Eng.) (“[T]he purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg.”).

disputing party.<sup>164</sup> Africa should be taken as a universal jurisdiction for the purpose of transnational climate change litigation, taking into account the rule of *forum conveniens* and *non conveniens* based on fairness and justice. There are differences in legal traditions and approaches to attainment of justice. The obstacles likely to be faced can be accommodated within a treaty that seeks to reconcile the approaches employed for the purpose of ensuring that victims have their rights protected and are compensated, reparation is offered, and above all, victims feel satisfied with the remedies.

## VI. CONCLUSION

The impact of climate change is worse in African countries because of the activities of multinational corporations. These activities have been in breach of the commitments by states to ensure that GHG emissions are kept within the barest minimum level. The mitigation of climate change has been coordinated at international and domestic levels. Persons, national entities, and supranational entities are developing measures and a series of techniques to keep climate change under control, which is seen as posing threats to man and the environment. One measure that can be employed to address the phenomenon is the use of climate change litigation, which can be strategically positioned by approaching the courts to ensure that the state and its subjects continue to implement means that will keep the impact of climate change under control.

The laws in African countries are still developing and making serious climate change commitments continues to be a concern of African countries because of the potential impact on their economies. Transnational climate change litigation could become handy to redirect the government and companies to act in manners that will enhance climate change mitigation either through the jettisoning of unsustainable practices that are inimical to the environment or developing measures that seek to control the rise in GHGs in the natural resources sector. The courts in African states, as well as regional and sub-regional courts, will have to be positioned to meet the challenges. Within the instrumentalities of the domestic and international law, opportunities are opened for civil societies, communities, and individuals to continue to question the actions

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<sup>164</sup> Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 168 (Stephen Macedo ed., 2004).

of the government and corporations to ensure that victims of climate change violations are able to get redress either in their home country or in any other suitable forum.