British Institute of International and Comparative Law

Global Perspectives on Corporate Climate Legal Tactics: Nigeria National Report

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Executive Summary

Nigeria has the largest economy, and is the most populous nation, in Africa. Although its contribution to climate change is relatively minimal, it is about the 2nd and 25th biggest emitter of greenhouse gases (GHGs) in Africa and the world, respectively. To be sure, Nigeria's oil and gas industry is both the backbone of the nation's economy and its major source of GHG emissions, mostly through gas flaring. Against this backdrop, this report explores the emerging mechanism of corporate climate litigation as a possible measure for reducing Nigeria's GHG emissions and contribution to climate change, within the context of the following themes: (1) Causes of Action, (2) Procedures and Evidence, and (3) Remedies.

On causes of action, this report reveals that human rights law and tax law have grounded relatively successful corporate climate litigation in Nigeria, in light of the court judgments in *Gbemre v Shell* and *FIRS v Mobil Producing Nigeria Unltd*, respectively. It also demonstrates other promising bases for corporate climate litigation in Nigeria, especially in light of recent legislative developments. For example, the 2020 Companies and Allied Matters Act and the 2021 Climate Change Act contain provisions that can ground successful climate litigation against erring corporations. The report further discussed other possible causes of action under which it would be challenging to successfully bring climate actions against polluting corporation. This was exemplified by some torts law mechanisms, under which the climate action in negligence in *Chinda v Shell* crumbled under the weight of the unduly high standard of proof which the claimant was expected to bear.

Regarding procedures and evidence, the analysis in the report reflects the facts that, in Nigeria, while significant procedural challenges remain, technical hurdles to access to climate justice through the courts are increasingly being removed. Some of the progress includes: (1) the allowance for representative action which, among other positives, helps climate claimants to pull their resources together in order to mitigate the high cost of litigation in Nigeria, as well as (2) the recent modernization of Nigeria's unduly restrictive standing rule in the case of *COPW v NNPC*, whereby public interest litigation is now permissible in environmental and climate action. However, among others, the following challenges remain: (1) the rules on limitation period remain largely unfavourable for corporate climate action, as the time allowed to bring tort claims could laps before the claimant is even aware of the pollution and its immediate effect, and (2) the cost awarded to successful claimants is usually inadequate to cover their litigation cost.

Lastly, the report focused on the available remedies in corporate climate litigation in Nigeria. It identified the pecuniary remedy of damages, as well as the non-pecuniary remedies of injunctive and declaratory reliefs. The analysis revealed that while Nigerian courts are usually willing to award claimants damages, it is reluctant to grant injunctions

against polluting corporation, especially those in the oil and gas industry, due to their economic significance for the nation. In other words, while claimants may be compensated for the direct harm of corporate activities, the contribution of the latter to climate harm may regrettably be allowed to go on unabated. The popular Nigerian corporate climate case of *Gbemre v Shell* has attempted to turn the tide, with the Federal High Court ordering the defendant to *refrain* from further gas flaring, and *declaring* that such activities are, among others, contrary to the constitutional right to life. However, this decision has been appealed, and an affirmative outcome anxious awaited by all who place environmental and climate protection above financial profit.

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Introduction

Nigeria has the largest economy, and is the most populous nation, in Africa. Although its contribution to climate change is – like that of other African countries – relatively minimal, '[i]t was the world's 25th biggest emitter of greenhouse gases (GHGs) in 2019, the second highest in Africa after South Africa.'[1] Nigeria is increasingly experiencing loss and damage mostly from human-induced climate change, in terms of frequent deadly floods, droughts, storms, deforestation and loss of biodiversity, acid precipitation, significant rise in sea level, among other effects that are negatively impacting on the nation's socio-economic wellbeing.[2] To be sure, Nigeria's oil and gas industry, which attracts the participation of various multinational and national corporations, accounts for more than 90% of its export revenue;[3] it is, nonetheless, the nation's major source of GHG emissions – mostly through gas flaring – which is the primary cause of climate change and global warming.[4] It is commendable that the percentage of gas flared in Nigeria has been reducing since 2002.[5] Yet, Nigeria still ranks unenviably as one of the top nine gas flaring countries responsible for 74% of global gas flare volumes and 45% of global oil production.[6]

Thus, all necessary measures to ultimately reduce Nigeria's contributions climate change should be a priority for the government and civil society. Climate change litigation is one of such measures, and is the primary focus of this report especially as it related to corporations. Climate change litigation 'has a wide-ranging scope… it does not only include legal proceedings related to the causes and consequences of anthropogenic climate change, but potentially includes all activities aimed to reduce climate-related damage as well as to stop climate-damaging project.'[7] Indeed, it is an emerging mechanism that 'provides an alternative and attractive pathway to encourage mitigation of the causes and adaptation to the effects of climate change.'[8] Considering

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[1] Carbon-Brief Profile – Nigeria <https://www.carbonbrief.org/the-carbon-brief-profile-nigeria/>

[2] RO Ehiemua, 'Climate Change in Nigeria and the Quest for Autochthonous Solutions: A Legal Appraisal' (2013) 2 *Journal of Contemporary Law* 87-101.

[3] See Carbon-Brief Profile – Nigeria (n 1).

[4] KK Aaron, 'Human Rights Violation and Environmental Degradation in the Niger Delta', in E Porter and B Offord, (eds), *Activating Human Rights* (Peter Lang, 2006) 193-215.

[5] PwC, *Assessing the Impact of Gas Flaring on the Nigerian Economy* (PwC, 2019) 3 <https://www.pwc.com/ng/en/assets/pdf/gas-flaring-impact2.pdf>. See also, C Okafor, 'Between NLNG and Nigeria's Global Warming Challenges', *ThisDay,* 12 November, 2020 <https://www.thisdaylive.com/index.php/2019/11/12/between-nlng-and-nigerias-global-warming-challenges/>

[6] The World Bank, *Global Gas Flaring Tracker Report* (The World Bank, March 2023) 7 <https://thedocs.worldbank.org/en/doc/5d5c5c8b0f451b472e858ceb97624a18-0400072023/original/2023-Global-Gas-Flaring-Tracker-Report.pdf>

[7] British Institute of International and Comparative Law (BIICL), *Global Perspectives on Corporate Climate Legal Tactics* (BIICL, February 2023) 5.

[8] E Onyeabor, H Agu, and NJ Nwanta, 'Litigating Loss and Damage as a Panacea for Abatement of Climate Change' (2016) 7(2) *Journal of Economics and Sustainable Development* 144, 146-147.

the direct and widespread impact of the activities in Nigeria's oil and gas industry on communities and the environment, most of what may be considered corporate climate litigation in Nigeria relates to corporate actors in that industry. This report discusses these cases, as well as future possibilities regarding corporate climate litigation in Nigeria, within the context of the framework provided for the report which is in three parts: (1) Causes of Action, (2) Procedures and Evidence, and (3) Remedies.

1. Causes of Action

A. Climate Change Law/Environmental Law Statutory Provisions

In Nigeria, the only set of statutory provisions that can be enforced in the domestic courts are those that are duly enacted into national law by the legislature. To be sure, considering Nigeria's status as a dualist state, international treaties and commitments entered into by the Nigerian government are only justiciable in Nigerian courts to the extent to which their provisions have been enacted into the body of Nigerian laws by the legislature.[9] In other words, Nigeria's international climate commitments, including: (1) its updated Intended Nationally Determined Contributions (INDC) commitment, made under the Paris Agreement,[10] to unconditionally reduce its greenhouse gases by 20% and conditionally by 47% upon the receipt of international support by 2030,[11] and (2) its pledge under the Glasgow Climate Pact[12] at COP26 to reach net-zero greenhouse gas emissions by 2060,[13] can only constitute the bases for a cause of action against a corporate polluter to the extent that their fulfilment is provided for and pursued under domestic statutes. Thus, the focus of this subsection will be on the relevant Nigerian statutes central to addressing climate-damaging pollution, starting with its specialized climate legislation.

It was only in 2021 that Nigeria enacted its Climate Change Act.[14] Prior to this time, Nigeria had no binding, detailed legislative instrument specifically focused on climate change. The Climate Change Act provides a framework for achieving low GHG emissions, mainstreaming climate actions in accordance with national development priorities and attaining a net zero target for 2050-2070 in line with Nigeria's

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[9] Section 12 of the Nigerian Constitution, 1999 (as amended) provides that, 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.' However, international human rights treaties that have not been domesticated may indirectly influence the court's interpretation of domestic statutes, considering, for instance, Para 3 of the Preamble to the 2009 FREP Rules which provides that: 'For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions.' 2002 FREP Rules – made by the Chief Justice of Nigeria pursuant to powers conferred on him by section 46(3) of the 1999 Nigerian Constitution (as amended) <http://www.refworld.org/pdfid/54f97e064.pdf>

[10] Entered into force on 4th November 2016 <http://unfccc.int/paris_agreement/items/9485.php>

11 The Federal Government of Nigeria, Nigeria's Nationally Determined Contribution – 2021 Update (Federal Ministry of Environment, 2021) v <https://unfccc.int/sites/default/files/NDC/2022-06/NDC_File%20Amended%20_11222.pdf>

[12] Document FCCC/PA/CMA/2021/L.16 – UNFCCC.

[13] R Olurounbi, 'Nigeria Pledges to Reach Net-Zero Emissions by 2060', *Bloomberg*, 2 November 2021 <https://www.bloomberg.com/news/articles/2021-11-02/nigeria-targets-to-reach-net-zero-emissions-by-2060-buhari-says#xj4y7vzkg>

[14] Available at: <https://faolex.fao.org/docs/pdf/NIG208055.pdf>

international climate commitments.[15] While no corporate climate action has been brought on the basis of the Act, it is obvious to scholars that its provisions clearly have the potential to increase successful climate litigation in the near future against corporations with climate-harmful practices in Nigeria.[16]

For example, the Act: provides for the imposition of climate obligations on public entities (other than government ministries, departments and agencies);[17] it imposes climate obligations on '[a]ny private entity with employees numbering 50 and above', including the establishment of measures to reduce their carbon emissions and ensure climate adaptation in accordance with the extant National Climate Action Plan;[18] and stipulates for carbon tax[19] which, among others, will help to discourage climate pollution by internalizing its economic costs to a large extent. The Act further provides that:

1) A person, or private or public entity that acts in a manner that negatively affects efforts towards mitigation and adaptation measures made under this Act commits an offence and is liable to a penalty to be determined by the Council.
2) A Court, before which a suit regarding climate change or environmental matters is instituted, may make an order –
    a. to prevent, stop or discontinue the performance of any act that is harmful to the environment;
    b. compelling any public official to act in order to prevent or stop the performance of any act that is harmful to the environment;
    c. compensation to the victim directly affected by the acts that are harmful to the environment.[20]

These provisions open new doors for corporate climate litigation in Nigeria, especially in light of: (1) the Nigerian Supreme Court's decision in *Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC)*[21] that any person, including NGOs, can bring an action against public and private entities, 'seek[ing] in the law court the due performance of statutory functions or enforcement of statutory provisions or public laws, especially laws designed to protect human lives, public health

[15] Section 1, Climate Change Act, 2021. See PwC Nigeria, 'Nigeria's Climate Change Act – Things to Know and Prepare for' (January, 2022) <https://www.pwc.com/ng/en/assets/pdf/nigeria-climate-change-act%20.pdf>
[16] See EO Ekhator and EO Okumagba, 'Climate Change, Multinationals and Human Rights in Nigeria: A Case for Climate Justice', in K Bouwer, U Etemire, T Field and J Ademola, *Climate Litigation and Justice in Africa* (Bristol University Press, 2023 – *forthcoming*); and MT Ladan, 'A Review of Nigeria's 2021 Climate Change Act: Potential for Increased Climate Litigation', *IUCN,* 28th March 2022 <https://www.iucn.org/news/commission-environmental-economic-and-social-policy/202203/a-review-nigerias-2021-climate-change-act-potential-increased-climate-litigation>
[17] Section 23, Climate Change Act, 2021.
[18] Section 24, *ibid*.
[19] Section 15(1)(e), *ibid*.
[20] Section 34, *ibid*.
[21] (2019) 15 NWLR 1666.

and [the] environment',[22] and (2) the aim of the Climate Change Act to improve climate change awareness in Nigeria by requiring the integration of climate change into the curriculum of the various disciplines 'across all educational levels'.[23]

Despite the non-existence of a specific climate change legislation in Nigeria pre-2021, there were other environmental laws in the country, that remain extant, upon which corporate climate litigation can or has been instituted. For example, there is the Environmental Impact Assessment (EIA) Act[24] which aims to mainstream environmental-related concerns into development decisions, including through EIA studies and public participation in the decision-making process.[25] The EIA Act applies to a wide range of possible projects and activities that are potential significant GHG emitters, including in the agricultural, industrial, mining, petroleum, transportation and other subsectors.[26] If properly applied, the EIA procedure could lead to the rejection or alteration of a proposed project or activity that would otherwise be significantly harmful to the environment and climate.

In *Oronto Douglas v Shell Petroleum Development Company Nigeria Limited & Ors,*[27] the plaintiff, an environmentalist and public-spirited individual, attempted to enforce the aforementioned procedure in what may be considered a corporate climate litigation case. The plaintiff sued the defendants, which included several oil companies, for non-compliance with the procedural requirements of the Nigerian EIA Decree No. 86 of 1992 (now an Act) in the process of establishing the Nigeria Liquified Natural Gas (NLNG) project. To be sure, the NLNG project is largely a 'greening' mechanism that converts gas that would have been flared (in the process of crude oil production) to cleaner fuel for domestic and industrial use.[28] However, it could also be a source of GHG emissions (in the course of gas production and transportation),[29] which situation may be avoided or minimized by strict compliance with the EIA law that aims to ensure that such projects are environmentally sustainable and, by implication, more climate

[22] *Ibid,* 595. The Supreme further stressed that there is nothing under Nigerian law that says that the Attorney General is the only proper person clothed with the standing to enforce the performance of a public duty. *Ibid,* 595-596-596.

[23] Section 26, Climate Change Act, 2021.

[24] Cap E12, Laws of the Federation of Nigeria, 2004.

[25] See U Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Routledge, 2016) 196-230.

[26] Section 2 and Schedule 1, EIA Act, 1991.

[27] Unreported Suit No: FHC/L/CS/573/96, 17 February 1997.

[28] See NLNG, 'Who We Are' <https://www.nigerialng.com/the-company/Pages/Who-We-Are.aspx>; and C Okafor, 'Between NLNG and Nigeria's Global Warming Challenges', *ThisDay,* 12 November, 2020 <https://www.thisdaylive.com/index.php/2019/11/12/between-nlng-and-nigerias-global-warming-challenges/>

[29] See CNC Ugochukwu and J Ertel, 'Negative Impacts of Oil Exploration on Biodiversity Management in the Niger Delta Area of Nigeria' (2008) 26 (2) *Impact Assessment and Project Appraisal* 139, 144.

friendly. Based on its old, unduly restrictive standing rules in environmental cases, the court held that he lacked *locus standi* to litigate the matter.[30]

Furthermore, by virtue of the powers conferred on the Nigerian Minister of Environment in Section 34 of the National Environmental Standards and Regulation Enforcement Agency (Establishment) Act, 2007,[31]the Minister has in the last two decades made several environmental regulations that could form the basis for corporate climate litigation. Some of these regulations, among other goals, aim to reduce or eliminate climate pollutants emitted by actors in certain heavy polluting industries and, to this end, impose necessary enforceable obligations on them.[32] The relevant regulations include the: National Environmental (Mining and Processing of Coals, Ores, and Industrial Minerals) Regulations, 2009;[33] National Environmental (Control of Bush, Forest Fire and Open Burning) Regulation, 2011;[34] National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, 2011;[35] National Environmental (Air Quality Control) Regulations, 2014;[36] and National Environmental (Energy Sector) Regulations, 2014.[37]

These regulations provide the opportunity for corporate climate litigation in at least two ways: (1) *anyone* can enforce or seek in court the compliance by relevant corporations with the climate-related obligations in those regulations, and (2) the regulations on vehicular emissions and air quality uniquely contain 'a right to clean air' which, at least within their scope, could ground a rights-based climate claim by victims who directly suffer the effects of GHG emissions, and secure for them additional reliefs like damages.[38]

What is more, through specialized laws and provisions, the Nigerian government has intensified legal efforts to reduce and possibly eliminate the practice of routine gas flaring in the oil and gas industry. Previous legislative efforts aimed at reducing and ending this major contributor to climate change provided too much leeway for the continuation of the practice,[39] and could arguably not support effective climate litigation against corporations flaring gas. The recent approach to addressing this challenge by

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[30] See section 2 B (i) of this report for a fuller discussion on standing in environmental cases in Nigeria.
[31] Federal Republic of Nigeria Official Gazette, Vol 94, No 92 (31st July, 2007).
[32] See MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8 (1) *Law, Environment and Development Journal* 116-140.
[33] Federal Republic of Nigeria Official Gazette, Vol 96, No 63 (12th October, 2009).
[34] Federal Republic of Nigeria Official Gazette, Vol 89, No 42 (6th May, 2011).
[35] Federal Republic of Nigeria Official Gazette, Vol 98, No 47 (17th May, 2011).
[36] Federal Republic of Nigeria Official Gazette, Vol 101, No 142 (26th December, 2014).
[37] Federal Republic of Nigeria Official Gazette, Vol 102, No 141 (11th December, 2014).
[38] Regulation 1(a), National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, 2011; and Regulation 1(b)(i), National Environmental (Air Quality Control) Regulations, 2014.
[39] See OJ Olujobi, TE Yebisi, OP Patrick, and AI Ariremako, 'The Legal Framework for Combating Gas Flaring in Nigeria's Oil and Gas Industry: Can It Promote Sustainable Energy Security? (2022) 14 *Sustainability* 1-20.

the government is largely reflected in the 2018 Flare Gas (Prevention of Waste and Pollution) Regulations.[40] These Regulations aim, among other things, to protect the Nigerian environment from the deleterious effects of gas flaring and climate change.[41]

Unlike previous efforts, the Regulations introduce a gas flare commercialization scheme, whereby the Federal Government is empowered to appropriate flare gas held by oil producing companies, and put it to useful purposes.[42] The Regulations also provide for improved penalties for gas flaring (subject to some exceptions[43]), as well as for non-compliance with the gas flare commercialization scheme.[44] Unfortunately, like previous regimes, while the Regulations outlaw gas flaring, they still grant the relevant Minister unrestricted discretion to permit the same.[45] This provision somewhat compromises the value of these Regulations for corporate climate litigation purposes; major oil companies, from experience, will usually use their influence to get the Minister's approval to flare gas, even in arguably undeserving cases, considering their shared business interest in the context of the government's joint venture/product sharing agreements with the multinational oil companies.[46]

Additionally, the more recent 2021 Petroleum Industry Act,[47] (PIA) which is the industry's major legal framework, contains new important provisions disincentivizing gas flaring. Although it still empowers the relevant authority to permit gas flaring, notwithstanding, it requires oil companies to: (1) pay fines when they flare gas outside the permissible circumstance stated in the PIA,[48] (2) submit for approval, between six months to a year, an 'environmental management plan' regarding projects that require an EIA, to the Authority which shall approve same if the plan conforms with extant environmental laws and the applicant has or can provide for the capacity to rehabilitate and manage the negative impacts of its operations on the environment,[49] (3) submit, within 12 months of the effective date, a 'natural gas flare elimination and monetisation plan',[50] and (4)

[40] Federal Republic of Nigeria Official Gazette, Vol 105, No 88 (9th July 2018). The Flare Gas (Prevention of Waste and Pollution) Regulations issued by the Nigerian President, in his capacity as the Minister of Petroleum Resources, in accordance with his powers under Section 5 of its parent Act – the Associated Gas Re-Injection Act, Cap A25 Laws of the Federation of Nigeria 2004.

[41] Paragraph 1, Flare Gas (Prevention of Waste and Pollution) Regulations, 2018.

[42] Regulation 2(2), *ibid*.

[43] The relevant entities will not be liable where gas is flared as a result of an act of war, community disturbance, insurrection, storm, flood, earthquakes or other natural phenomenon which is beyond the reasonable control of the entity. Paragraph 13, *ibid*.

[44] Paragraph 13 and 14, *ibid*.

[45] Paragraph 12, *ibid*.

[46] U Afinotan, How Serious is Nigeria about Climate Change Mitigation through Gas Flaring Regulation in the Niger Delta? (2022) 24 (4) *Environmental Law Review* 288, 298.

[47] Federal Republic of Nigeria Official Gazette, Vol 108, No 142 (27th August, 2018).

[48] Section 104, PIA, 2021.

[49] Section 102, *ibid*.

[50] Section 108, *ibid*.

contribute to an 'environmental remediation fund' set up by the relevant authority for the restoration or management of negative environmental impacts of the licence or lease, this being a prerequisite for the award of the oil licence or lease and the approval of the environmental management plan by the authority; the amount to be contributed shall be based on the size of the operations and the level of environmental risk that may exist, and may be increased annually according to the environmental liability of the licensee or lessee.[51]

Even where the authority permits gas flaring under the PIA, the requirements in (1) - (4) above are enforceable by anyone, and are potentially useful in litigation for getting corporate actors to internalize much of the economic costs of their climate-harmful activities, and to ultimately reduce and cease gas flaring in Nigeria.

B. Human Rights Law

As with other African countries, a human rights approach to climate litigation is evolving in Nigeria.[52] In Nigeria, two classes of substantive human rights provisions can potentially constitute the basis of corporate climate litigation. The first is the specific right to a healthy environment embodied in a provision like Article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[53](the African Charter Act) – that domesticates the African Charter on Human and Peoples' Rights[54] – which is directly related to climate concerns. The second category relates to other general, traditional human rights, such as the right to life in Section 33 of the 1999 Nigerian Constitution (as amended),[55] into which climate concerns could be read. This is supported by the case of *COPW v NNPC* where the Nigerian Supreme Court for the first time acknowledged the challenges of 'climate change' and 'global warming', as well as the need for stronger and more protective environmental measures.[56] It went on, again, for the first time, to not only *specially* recognise the enforceability of Article 24 of the African Charter Act, but to hold that the right to life in the Nigerian Constitution implicitly includes and constitutes a fundamental right to a clean and healthy environment for all, considering their obvious linkage.[57]

Nigeria has witnessed a few cases that may be termed corporate climate litigation based on human rights law. The foremost in this regard is the 2005 case of *Gbemre v*

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[51] Section 103, *ibid*.
[52] P Obani and E Eghosa, 'Transnational Litigation and Climate Change in Nigeria', *AfronomicsLaw,* 4 December, 2021 <https://www.afronomicslaw.org/category/analysis/transnational-litigation-and-climate-change-nigeria>
[53] Cap A9, Laws of the Federation of Nigeria, 2004.
[54] 27 June 1981, 1520 UNTS 217.
[55] Cap 23, Laws of the Federation of Nigeria, 2004.
[56] *COPW v NNPC* (n 21) 580-581
[57] *Ibid,* 580, 587 and 597.

Shell Petroleum Development Company Nigeria Ltd and Ors.[58] This is the first Nigerian case where the court adopted a constitutional human rights approach to environmental protection regarding activities in the oil and gas sector fueling climate change. In this case, coming under a simplified constitutional procedure for enforcing human rights,[59] the plaintiff, suing for himself and on behalf of members of his community, alleged that the flaring of gas by the defendant companies in the course of their oil production activities violated their human rights to life and dignity, considering the adverse effect of these activities on their health and immediate environment. Importantly, the plaintiff cited, amongst others, the contribution of gas flaring to climate change and its impact on their community as a basis for their constitutional and human rights claims.

The Federal High Court, Benin Judicial Division, held, *inter alia,* that: (1) the rights to life and dignity of the human person guaranteed under Sections 33(1) and 34(1) of the Nigerian Constitution,[60] and reinforced by Articles 4 (on right to life), 16 (on right to health) and 24 (on to a healthy environment) of the African Charter Act,[61] 'inevitably included the right to clean poison-free, pollution-free and healthy environment'; (2) the failure of the defendants to carry out an EIA in the plaintiff's community concerning the impacts of their gas flaring activities was a violation of Section 2(2) of the EIA Act, and contributed to the violation of the plaintiff's fundamental rights to life and dignity; and (3) the actions of the defendants in continuing to flare gas in the course of their oil production activities in the plaintiff's community 'is a violation of their rights to life (including healthy environment) contained in the aforementioned statutory provisions'.[62]

In reaching its final decision, the court considered, among others, the plaintiff's assertions that 'gas flaring leads to the emission of carbon dioxide, the main greenhouse gas' and 'contributes to adverse climate change'.[63] The court therefore ordered the defendant to stop gas flaring in the plaintiff's community.[64] It also ordered the federal government to take steps to legally, expressly and permanently prohibit gas flaring in Nigeria, while declaring that Section 3 of the (now repealed) Associated Gas Re-Injection Act[65] (and any other Regulations thereunder) under which gas flaring may be and is being permitted in Nigeria, is inconsistent with the aforementioned provisions

[58] Unreported, Suit No: FHC/B/CS/53/05, 14 November 2005.
[59] Nigerian Constitution, Section 46. 6 and 19.
[60] Cap 23, Laws of the Federation of Nigeria, 2004.
[61] Cap A9, Laws of the Federation of Nigeria, 2004.
[62] *Gbemre v Shell* (n 58) 30.
[63] *Ibid,* 4-5. The court did 'not explicitly analyze the question of whether and under what circumstances climate change impacts can provide a basis for finding a violation of that right.' A Sinden, 'An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria' (Temple University Legal Studies Research Paper Series, Research Paper No. 2008-77, 30 October, 2008) 8.
[64] *Ibid*, 31.
[65] Cap A25, Laws of the Federation of Nigeria, 2004.

of the Nigerian Constitution and the African Charter Act, and is thus unconstitutional, null and void by virtue of Section 1(3) of the Nigerian Constitution.[66]

The appeal which the dissatisfied defendants were said to have filed against the trial court's decision, was shrouded in uncertainties and was never heard.[67] Also, efforts by the plaintiff's counsel to enforce the judgment are reported to have failed,[68] in a manner that suggests the complicity of law enforcement agencies and the judiciary, considering perhaps the wider impact which the decision would have had on the operations of other corporate actors in the industry.[69] However, newspaper reports have now confirmed that the defendants in 2021 instituted an appeal against the trial court's decision in the Court of Appeal, and that the case was scheduled for hearing in January 2023.[70] Many now look forward to the exhaustion of the appellate process as it 'will arguably create an opportunity for the Nigerian judiciary to provide more clarity on the implications of the *Gbemre* case for environmental justice (including climate justice) in the country.'[71]

In the aftermath of *Gbemre's* case, the Federal High Court, Port Harcourt Judicial Division, had to decide in the same year (2005) a case with similar facts – *Ikechukwu Okpara and 3 Ors v. Shell Petroleum Development Company of Nigeria Limited and Ors*.[72] In this case, the plaintiffs, suing for themselves and on behalf of members of their respective communities, sought identical reliefs as in *Gbemre's* case.[73] Based on preliminary objections by some of the defendants, the court struck out the suit. Allowing the objections, the court held, among others, that: (1) the two reliefs sort regarding the Associated Gas Re-Injection Act and non-compliance with the EIA Act cannot be initiated under the then 1979 Fundamental Right (Enforcement Procedure) Rules (FREP Rules), as they contain no rights covered by the fundamental rights provision of the

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[66] *Ibid*.

[67] KSA Ebeku 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited' (2007) 16(3) Review of European Community and International Environmental Law 312, 319.

[68] *Ibid*.

[69] Friends of the Earth, *Shell Fails to Obey Gas Flaring Court Order* (May 2, 2007) <http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007.html> accessed 1 June, 2021. See also, U Etemire, 'Climate Change Litigation in Nigeria: Challenges and Opportunities', in F Sindico and MM Mbegue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer, 2021) 409 – 426.

[70] E Addeh, 'Shell Challenges Judgement Ordering Halt to Gas Flaring in N'Delta Community', *ThisDay,* 26th December 2021 <Shell Challenges Judgement Ordering Halt to Gas Flaring in N'Delta Community – THISDAYLIVE>

[71] Ehkator and Okumagba (n 16).

[72] Suit No. FHC/PH/CS/518/2005 (Unreported).

[73] The reason for this similarity is that the plaintiffs in this case had initially instituted legal action together with Mr Jonah Gbemre (of the *Gbemre* case) in the Benin Judicial Division of the Federal High Court, which they later withdrew, presumably because they realized that some of the plaintiffs (particularly those in *Ikechukwu's* case), whose cause of action arose within the Port Harcourt Judicial Division of the Federal High Court could not legitimately have their matters heard in Benin. See section 2 B (iii) of this report.

Constitution, (2) the rights under the African Charter cannot be considered as 'fundamental rights' as envisaged under Section 46(1) of the Constitution and cannot be litigated through the 1979 FREP Rules, and (3) the plaintiffs cannot sue for other community members in a representative capacity because the fundamental rights in the Constitution are personal, and not communal in nature.[74] The court, holding on to its unduly conservative stance, expressly refused to follow the progressive and purposive perspective and decision of the court in *Gbemre's* case, stating that it is not bound by the decision of that court which is of coordinate jurisdiction.[75]

In any event, the more recent and extant 2009 FREP Rules, which abrogate the 1979 FREP Rules,[76] arguably clarify the above contentious issues in favour of the court's position in *Gbemre's* case. To be sure, the 2009 FREP Rules consider the rights under the African Charter as fundamental rights similar to those under the Nigerian Constitution, and expressly accommodate their enforcement.[77] The Rules also welcome human rights litigation from anyone acting, among others, 'in his own interest', 'on behalf of another person', 'as a member of, or in the interest of a group or class of persons', or 'in the public interest'.[78] Importantly, the Rules discourage the restrictive application of human rights provisions, as they require that such provisions be 'expansively and purposefully interpreted and applied' with a view to realizing their full potential,[79] including as it relates to curbing environmental and climate harm.

From several perspectives, these newer constitutional and human rights approaches collectively provide a better alternative opportunity for private climate litigation in Nigeria, than other climate/environmental legislative and common law (discussed hereunder) mechanisms. First, in the hierarchy of laws in Nigeria, they represent a stronger claim and a superior mechanism compared to common law and climate/environmental legislation, given that the Constitution is the grundnorm,[80] while the African Charter Act is only inferior to the Constitution but ranks higher than other domestic legislation and common law as it is clothed with international flavour.[81] Next, they are relatively easier to litigate upon, as they are not limited by several hurdles associated with litigating a tort in common law or enforcing other legislation; for

[74] N 72 above, 12-13. For a discussion of *Ikechukwu's* case, see A Morocco-Clarke, 'The Case of *Gbemre v Shell* as a Catalyst for Change in Environmental Pollution Litigation?' (2021) 2 (12) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 28, 39-41.
[75] *Ibid*, 20.
[76] Order XV(1).
[77] E.g., see *Ibid,* Order II (1).
[78] *Ibid,* Preamble, paragraph 3.
[79] *Ibid*.
[80] See Sections 1 and 4 of the 1999 Nigerian Constitution; and Hobert Community Legal Service, 'Legislation v Common Law', (Hobert Community Legal Service, 13 December, 2017) <https://www.nobertlegal.org.au/handbook/the-justice-system/the-law/legisislation/legislation-vs-common-law/>
[81] This was the position of the Nigerian Supreme Court in *Abacha and Ors. v Fawehinmi* (2000) FWLR 585.

example: (1) unlike other civil cases, statutes of limitation (discussed hereunder) do not apply to human rights litigation,[82] (2) while some other civil cases can drag on for years,[83] the 2009 FREP Rules contain provisions for ensuring, relatively, the prompt dispensation of justice in human rights litigation, [84] and (3) while the relevant constitutional and human rights provisions can be deployed proactively to prevent acts and omissions with potential adverse or irreversible environmental and climate effects, common law mechanisms are unfortunately reactive in nature as they can only provide remedies to injured parties after the pollution has occurred,[85] and would be unhelpful where irreversible harm has been occasioned.

C. Tort Law

Being a common law country, torts law mechanisms have been frequently utilized in addressing situations involving environmental harm in Nigeria. Generally, these mechanisms provide a potential platform mainly for individuals and communities to institute corporate climate litigation, and pursue the achievement of climate justice in deserving cases. But as noted earlier in this report, these mechanisms harbour certain limitations that usually affect their effectiveness.[86] In this light, several causes of action under torts laws are discussed below in relation to their potential to underpin corporate climate litigation in Nigeria.

i. Public and Private Nuisance

Nuisance may be private or public in nature. While *private nuisance* is the unreasonable and unlawful interference with another's enjoyment or use of land or some right in relation to it,[87] *public nuisance* is the unreasonable and material interference with the comfort or convenience of the public or a right common to the general public, such as the right to clean, unpolluted air in a public place.[88] It is however the latter that is most relevant as a mechanism for possibly tackling the sources of climate change, such as the significant emission of GHGs, as it more adequately captures the widespread public nature of the problem. Apart from public officials, a representative cross-section of the affected public can band together and bring a group action in public nuisance against a climate polluter. In addition, an individual can successfully sue a polluter for public

[82] FREP Rules, Order III.
[83] JG Frynas, 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' (2001) 10 (3) Social and Legal Studies 397, 410 – 411.
[84] *Ibid*, Preamble 3(f), orders II & IV.
[85] DS Olawuyi, *The Principles of Environmental Law in Nigeria* (Afe Babalola University Press, 2015) 81-84.
[86] Section 1 B of this report.
[87] See *A.E. Ipadeola & Co v Oshowole & Anor* (1987) 5 SC 376.
[88] See *Adediran v Interland Transport* (1991) 9 NWLR (Pt 214) 155.

nuisance, only if s/he can prove that s/he suffered untold hardship or damages over and above that suffered by the public as a result of the public nuisance.[89]

There are cases on private and public nuisance, especially as it relates to atmospheric pollution, that demonstrate the potential usefulness of these mechanisms in stopping or limiting major GHG emission (as there has been no climate litigation based on nuisance in Nigeria). In those cases, the injured parties have successfully enforced their rights and secured some remedies. For instance, regarding private nuisance, the plaintiff in *Tebite v Nigeria Marine Co Ltd*[90] complained that the noise and smell caused by the defendant while carrying on the business of boat building and repair was interfering with the enjoyment of his law chambers. The court found on evidence that though the area was a mixed commercial and residential area, the noise and smell generated by the defendant amounted to substantial interference with the plaintiff's comfort and convenience and awarded damages and an injunction restraining the defendant. With respect to public nuisance, in the case of *Hasley v Esso Petroleum Co Ltd*,[91] the plaintiff's car that was parked in the street was damaged by acid smuts blowing from the defendant's factory. The court upheld her claim in public nuisance and for damages.

ii. Negligent failure to mitigate or adapt to climate change

The tort of negligence arises from (1) the breach (2) of legal duty to take care (3) resulting in damage to the plaintiff (4) which, though not intended by the defendant, was nevertheless foreseeable.[92] To be successful in a suit in negligence, these four elements must be successfully proved by the injured party. In this respect, a *duty of care* is owed whenever it is foreseeable that if the polluter/defendant does not exercise due care (through acts and omissions), the injured party/plaintiff will be harmed. To prove *breach of the duty,* the court will consider whether the defendant acted as a 'reasonable man' would have acted in the circumstances.[93] For a party to prove breach of duty, it might also be relevant to show that the polluter/defendant failed to establish good industry practice coupled with non-observance of industry standards and guidelines. To prove that *the breach caused the damage,* the injured party/plaintiff must clearly establish the nexus between the action/inaction of the polluter/defendant and the damage suffered, usually through scientific evidence.

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[89] *Amos and Ors v Shell BP Petroleum Development Company of Nigeria Ltd* (1974) 4 ECSLR, 486.
[90] (1971) 2 All NLR 268.
[91] (1961) 2 All ER 145.
[92] *Donoghue v Stevenson* (1932) A.C. 562.
[93] To be sure, the standard of the "reasonable" man is not that of a man of exceptional skill or mental agility, just as it is not that of a man of subnormal skill or mentality. A person may fall short of the highest standard of care, and not be negligent in law.

The huge burden of proving negligence rests on the plaintiff, and is usually not easy to discharge. In *Chinda & Ors v Shell Petroleum Development Co. Ltd*,[94] which may be considered a corporate climate suit, the plaintiffs engaged the mechanism of negligence to stop the defendant's gas flaring activities affecting their communities. They sued the defendant company for heat, noise, vibration and damage to their properties which they claimed were the result of the defendant's negligent management and control of their gas flaring infrastructure. The court held that their action must fail, for reasons that include their inability to prove the tort of negligence on the part of the defendant regarding the management of their gas flare equipment. Frynas demonstrated that plaintiffs can more easily prove negligence in some cases than in others; referencing *Chinda's* case, he concludes that, while not impossible, 'it is… difficult to prove negligence' in cases of 'gas flaring', not least because of the 'technical nature of oil operations' over which the 'oil industry normally has a superior technical knowledge compared to individual litigants. Consequently, it may often be difficult for the plaintiff to argue [successfully with proof] that the oil company was unreasonably negligent or did not adopt accepted standards during its operations',[95] the proof of which may be within the exclusive knowledge of the oil company.

iii. Negligent or strict liability for failure to warn

The tort of negligent or strict liability for failure to warm does not exist as a recognised cause of action within the Nigerian legal system and, thus, has not and cannot constitute a ground for climate litigation in Nigeria.

iv. Trespass

The aspect of trespass which may be the basis for an action relating to the climate is trespass to land. Trespass to land is committed where a defendant without lawful justification enters, or remains upon land in possession of the plaintiff, or directly places or projects any material or substance on or above or beneath such land.[96] Only persons who are in actual or constructive possession of the land can bring an action in trespass.[97] As trespass is actionable *per se,* the party bringing the action will not – unlike nuisance, for example – have to prove that the trespass has caused actual damage. In deserving cases, this characteristic would make it a relatively easier route to justice for climate litigants. While it has not been the basis for a corporate climate claim in Nigeria, the utility of trespass to land in climate cases in the country will largely depend on the readiness of the Nigerian court to extend trespass to *intangible* incursion, in order to

[94] (1974) 2 RSLR 1.
[95] JG Frynas, 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43(2) *Journal of African Law* 121, 124.
[96] See CR Kodilinye, *The Nigerian Law of Tort* (Ibadan: Spectrum Publishers,1996) 177; and *Oyewusi v Olagbami* [2018] 14 NWLR (Pt 195) at 297.
[97] Oyewusi v Olagbami, *ibid*.

cover activities like GHG emissions. Although, in some jurisdictions, like Canada, the courts prefer to treat intangible interference (e.g., through smoke, sound, etc.) with property interest as nuisance rather than trespass,[98] some others appear willing to (also) consider it as trespass to land. An example of the latter position is reflected in the case of *McDonald & Ors v. Associated Fuels Ltd. & Ors,*[99] in which the British Columbia Supreme Court held, though in *obiter,* that carbon monoxide blown into a house from an exhaust pipe could constitute trespass to land.

v. Impairment of public trust resources

The tort of impairment of public trust resources does not exist as a recognised cause of action within the Nigerian legal system and, thus, has not and cannot constitute a ground for climate litigation in Nigeria.

vi. Fraudulent misrepresentation

Fraudulent misrepresentation has been defined by the Nigerian court as a false representation made by a person which he does not actually and honestly believe to be true.[100] Where a representee, relying on such misrepresentation, alters his economic position (to his detriments), e.g., by entering a contract with the representor, he will be entitled to maintain an action for repudiation of the said contract and for damages.[101] While fraudulent misrepresentation as a tort is actionable in Nigeria,[102] it has not been the basis for climate litigation in Nigeria. However, it could potentially ground a climate action as a viable cause of action where, for example, a car producer or importer fraudulently misrepresents his cars as being the most energy efficient and climate-friendly cars in the world, in order to make a large sale to a customer who has expressly requested such a product.

vii. Civil conspiracy

The tort of conspiracy is an agreement or combination of two or more persons or corporations with the primary purpose of willfully causing harm to the business of another person using unlawful means which actually results in damage to that other person.[103] Where the purpose of the combination is 'to forward or defend the trade of those who entered into it, then no wrong is committed and no action will lie, although damage to another ensues' from the combination.[104] While the purpose of the tort of

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[98] See J MacDonald, 'Electronic Trespass in Canada: The Trespass in Canada: The Protection of Private Property on the Internet' (2006) 5(3) *Canadian Journal of Law and Technology* 163, 169; and *Phillips v. California Standard Co* [1960] A.J. No. 8 (S.C.) (QL).
[99] [1954] 3 D.L.R. 775 (B.C.S.C.).
[100] *Afegbai v Attorney-General, Edo State and Anor* (2001) 14 NWLR (Pt. 733) 425.
[101] Ibid.
[102] *James v Mid-Motors (Nigeria) Co. Ltd* (1978) 1 LRN 187.
[103] *Allen v Flood* (1898) AC 1 HL.
[104] *Sorrell v Smith* (1925) AC 700 HL.

conspiracy is to engender free and fair competition within the boundaries of the law, it has been noted that its 'role in the sphere of economic relations is now minimal, if not almost forgotten in a free market and global economy.'[105] Also, the House of Lords in *Lonrho v Shell Petroleum Co. Ltd*[106] has described it as a 'highly anomalous cause of action.' In this light, while conspiracy as a tort is actionable in Nigeria, it is yet to, and may hardly constitute a viable ground for corporate climate litigation in the country.

viii. Product liability

In Nigeria, product liability as a tort falls under the realm of the common law of negligence. Specifically, the tort of product liability in Nigeria is anchored on the fault-based principle enunciated in the celebrated case of *Donoghue v Stevenson,*[107] which has been adopted by Nigerian courts in resolving product liability disputes.[108] This principle 'postulates that, where a party has suffered injury as a result of a breach of duty of care owed by a manufacturer, the manufacturer may be liable to compensate the injured party if the injury is a reasonably foreseeable consequence of the act [or omission] of the manufacturer.'[109] Scholars have noted that '[p]roduct liability in Nigeria is still in its infancy' and that there is a 'dearth of Nigeria cases' on the subject.[110] Although, there has also been no corporate climate litigation in Nigeria based on the rules of product liability, this may be possible were, for instance, badly made fossil fuel products cause harm to (potential) consumers and proximate bystanders. However, the viability of the tort of product liability as a ground for climate litigation remains limited by the aforementioned shortcomings of the negligence regime in Nigeria.[111]

ix. Insurance liability

Insurance liability as a tort does not exist as a recognised cause of action within the Nigerian legal system and, thus, has not and cannot constitute a ground for climate litigation in Nigeria.

x. Unjust enrichment

The law on unjust enrichment in Nigeria is still in its nascent state.[112] Nonetheless, the Nigerian Supreme Court has identified unjust enrichment as a cause of action in the

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[105] E Malemi, *Law of Tort* (2nd ed., Princeton Publishing Co., 2017) 664.
[106] (1981) 2 All ER 456 HL.
[107] (1932) AC 562.
[108] E.g., see the case of *Nigerian Bottling Company Ltd v Ngonadi* (1985) 1 NWLR (Pt 4) 739.
[109] BA Sodipo, 'Nigeria', in GL Fowler and S Castley, *Product Liability* (Law Business Research Ltd, 2019) 77, 81.
[110] G Akinrinmade, 'The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory' (2016) 7 (2) *Afe Babalola University: Journal of Sustainable Development Law and Policy* 188, 194.
[111] *Ibid,* 189.
[112] RN Nwabueze, 'Introduction', in RN Nwabueze, *Modern Essays on Nigerian Law* (Cambridge Scholars Publishing, 2019) xii, xiii.

case of *First Bank of Nigeria Plc v Ozokwere*.[113] The court adopted the Black's Law Dictionary (8th ed.) definition of unjust enrichment (as 'a benefit obtained from another, not intended as a gift and not legally justifiable, which the beneficiary must make restitution or recompense'), while noting that the cause of action is not only limited to cases of contract alone, but is designed to discourage unjust enrichment at the expense of others which may arise in any other circumstance.[114] To be sure, unjust enrichment has not been the basis for climate litigation in Nigeria. However, it could potentially ground a climate action where, for example, a corporation is making financial gains from its climate-unfriendly activities at the expense of members of the public who are directly suffering the deleterious effects of those activities.

D. Company and Financial Laws

In this section, company law and tax law provide a (potential) basis for corporate climate litigation in Nigeria. They are discussed below.

i. Company Law

The major company law in Nigeria is the Companies and Allied Matters Act (CAMA), 2020.[115] While no corporate climate litigation has arisen on the basis of Nigerian company law, the recent CAMA 2020 has a clear potential to engender and support such an action. The latter view is based on relatively new thinking that the primary purpose of a company should extend beyond the maximization of the welfare of its shareholders (shareholder primacy theory), and include consideration for other stakeholders like the society and non-shareholder factors like the environment (stakeholder value approach).[116] The latter and more progressive approach is now reflected in varying degrees in many company laws around the world, include Nigeria's CAMA 2020. To be sure, Section 305(3) of the CAMA, imposes on directors – through whom the company acts – the duty to:

> *act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a* ***faithful, diligent, careful and ordinarily skilful [sic] director would act*** *in the circumstances and, in doing so,* ***shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations***. (Emphasis added)

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[113] (2013) 12 (Pt II) M.J.S.C 60.
[114] *Ibid*, 77-78.
[115] Available at:<https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf>
[116] C Mayer, 'Reinventing the Corporation' (2016) 4 *Journal of the British Academy* 53; and KV Jackson, 'Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis' (2011) 7 *Hastings Business Law Journal* 309.

The implication of this provision is that in managing the operations of the company, failure to take account of the impact of the company's actions and omissions on the environment, including its activities that may also contribute to climate change, 'amounts to a breach of the director's duty in Nigeria, and attracts potential legal liability.'[117] Section 305(3) is further supported by Section 308 of CAMA which provides that:

1) *Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and **in the best interests of the company**, and shall exercise that degree of care, diligence and skill **which a reasonably prudent director would exercise in comparable circumstances**.* (Emphasis added)
2) *Failure to take reasonable care in accordance with the provisions of this section, is a ground for an action for negligence and breach of duty.*

With reference to the above provision, Muriungi notes that:

> *Given the global momentum toward dealing with environmental issues and climate-related risks, it is possible that foresighted and prudent directors will take decisions that take account of such ecological and climate concerns. Accordingly, if a director in another company fails to take similar measures, such a director may be construed to have fallen foul of this provision, upon juxtaposition with the other prudent directors.*[118]

Indeed, the legal duties of directors under both provisions discussed above can arguably be construed as encompassing the need to 'consider, assess, manage and report on climate-related… risks',[119] as well as take decisions that, to a reasonable extent and as they concern the activities of the company, ultimately aid climate change mitigation and adaptation.[120] This is because of the increasing recognition that climate change poses significant risks to companies,[121] including physical risks (e.g. to their premises and safety of employees), transition risks (e.g. financial and reputational risks associated with reducing their carbon footprints), and liability risks (e.g. legal liability for a company's contribution to climate change, or misleading reporting).[122]

While, as highlighted above, company directors can potentially be held liable for breach of duty under CAMA in a climate suit, there may be a challenge regarding the successful

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[117] M Muriungi, 'Directors' Duties and Climate Change in Africa: Evidence from Kenya, Nigeria and South Africa' (2023) *ex/Ante* 65, 71. Available at: <https://ex-ante.ch/index.php/exante/article/view/219/125>
[118] *Ibid*, 72.
[119] *Ibid*, 66.
[120] See generally, H Korine and M Hilb, 'Reinterpreting the Role of the Board of Directors', *London Business School – Think*, 2 August 2022 <https://www.london.edu/think/reinterpreting-the-role-of-the-board-of-directors>
[121] See RH Weber and A Hösli, 'Corporate Climate Responsibility – the Rise of a New Governance Issue' (2021) *Sui Generis* 83-92.
[122] Muriungi (n 117) 65.

institution of such an action. Generally, considering that the director's duties are owed to the company, it is only the latter – acting through other directors – that can seek remedy in court for such a breach. This accords with the position in Section 305(9) of CAMA that, '[a]ny duty imposed on a director under this section is enforceable against a director by the company.' It has however been argued that, '[i]n practical terms, it is unlikely that a director who has breached their duty or whose fellow director has breached their duty will resolve to take action either against self or against their fellow directors, in the name of the company.'[123] However, principled and 'activist' directors may take action against their fellow director who is in breach of his/her duty and, according to Muriungi, even new directors may take action against former directors who breached their duties.[124]

ii. Tax Law

In Nigeria, tax laws have indirectly provided a basis for what may be considered corporate climate litigation. Efforts by corporate actors in the country's oil and gas industry to treat as tax deductible, payments made to the government as fees for gas flaring, have been the subject-matter of litigation. To be clear, while Section 3(1) of the Associated Gas Reinjection Act (AGRA) expressly prohibits gas flaring by oil companies, it empowers the Minister in Section 3(2)(b) to issue a certificate to any oil and gas company, in cases he deems appropriate, permitting it to flare gas upon the payment of charges prescribed by the Minister. The prescribed gas flare fees over the years have been deemed too low.[125] Nonetheless, the idea behind the charge is to ultimately discourage and bring an end to the climate-harmful activity of gas flaring. Thus, if oil companies are allowed to avoid the charge – by paying it with one hand and retrieving it with the other as tax deductible – it makes nonsense of its supposed deterrent nature and reduces the incentive for oil firms to work towards the stoppage of gas flaring. In fact, such will amount to transferring the burden of the charge back to the government and the common 'purse' of the people.[126]

A report by the Nigeria Extractive Industries Transparency Initiative (NEITI) covering the oil and gas industry for the years 2006-2008, and delivered in 2011,[127] revealed an anomaly – that oil companies were discounting gas flare fees from tax payments made in that period. This drew the attention of the Nigerian Federal Inland Revenue Service

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[123] *Ibid*, 75.
[124] *Ibid*.
[125] O Adewunmi, 'Gas Flaring Charges in Nigeria' (20 November 2018) <www.mondaq.com/nigeria/oilgas-electricity/756460/gas-flaring-charges-in-nigeria>
[126] SC Arubike and C Okafor, 'Nigeria', in JJ Schwartz and SSO Edgar, *The Corporate Tax Planning Review* (Law Business Research Ltd, 2019) 143, 153.
[127] NEITI Executive Summary Report 2006–2008 (July 2011) <https://neiti.gov.ng/phocadownload/executive-summary-report-final-300112.pdf>

(FIRS), who on that basis reassessed the taxes of Mobil Producing Nigeria Unlimited for 2006-2008 and demanded from them an additional petroleum profit tax of US$7,633,850 for that period. Mobile lodged an appeal against this decision before the Tax Appeal Tribunal (TAT),[128] giving rise to the case of *FIRS v Mobil Producing Nigeria Unltd*.[129]

Apart from the fact revealed in this case that Mobile had been flaring gas without the requite Ministerial permission,[130] the community interpretation of the following legal provisions was central to determining whether gas flare charges could be legitimately treated as tax deductible: (1) the last paragraph in Section 3(2)(b) of AGRA which states that: 'Provided that, any payment due under this paragraph [i.e., the gas flare charge to be prescribed by the Minister] shall be made *in the same manner and be subject to the same procedure as for the payment of royalties* to the Federal Government by companies engaged in the production of oil',[131] and (2) Section 10(1) of the Petroleum Profits Tax Act[132] (PPTA) which, regarding taxes to be paid by oil companies, permits deductions of 'all outgoings and expenses *wholly, exclusively and necessarily incurred*, whether in Nigeria or without' for the purpose of its petroleum operations in a given tax accounting period.[133] Although the AGRA provision is arguably ambiguous, the literal interpretation of both provisions suggests that, just like royalties to which Section 10(1) applies, gas flare charges are tax deductible expenses. This is so, especially as gas flare charge is not included in Section 13 of the PPTA which provides for deductions not allowed for PPTA purposes.

Based on that literal approach, the TAT held in favour of Mobil. Its decision was that, if the Minister had sanctioned the appellant (for flaring gas before obtaining the gas flare certificate which it has applied for from the Minister), then, the gas flare fees paid by the appellant for 2006, 2007, and 2008, would be considered illegal payments which would disqualify the appellant from taking benefit of Section 10(1) of the PPTA; but that in the absence of any sanction, it meant that the Minister did not consider the action of

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[128] TAT is an administrative tribunal empowered by legislation to resolve tax disputes. Section 59 (1) Federal Inland Revenue Service (Establishment) Act (No 13 of) 2007. Appeals from TAT goes to the Federal High Court, then to the Court of Appeal and finally to the Supreme Court. *CNOOC Exploration and Production Nig. Ltd & Anor v NNPC & Anor* (2017) 32 TLRN 34 at 56.

[129] (2018) 37 TLRN 1 26 March 2018 (Case suit no: FHC/3A/2017).

[130] This conduct appears to be common in the Nigerian oil and gas industry. It has been noted that 'upstream companies that flare gas have established the practice of simply applying for the permission to flare gas, making relevant payments and taking deductions for such expenses for PPT purposes without necessarily awaiting the Minister's approval.' Anderson – Tax Alert, 'Federal High Court: Payments for Gas Flaring without Prior Permission of the Minister are not Tax-Deductible' (1 June, 2018) <https://ng.andersen.com/federal-high-court-payments-for-gas-flaring-without-prior-permission-of-the-minister-are-not-tax-deductible/>

[131] Emphasis added.

[132] Cap P13 Laws of the Federation of Nigeria 2004.

[133] Emphasis added.

the appellant flaring gas without express permission as illegal, thus, the payments made for gas flaring were legal and, therefore, qualify as tax deductible under Section 10(1). (This decision by the TAT has been followed in other cases brought before the TAT with similar facts involving other corporate actors in the Nigerian oil and gas industry, such as Shell and Chevron[134]).

However, FIRS appealed the matter to the Federal High Court which overturned the decision of the TAT. The court decided in 2018 that, upon a community reading of both Sections 3(2)(b) of AGRA and 10(1) of PPTA, gas flaring payments are tax deductible, only if, as the AGRA requires, there is written evidence of permission from the Minister in the form of a gas flaring certificate. It held that, in the instant appeal, the gas flaring which had been done without a permit or certificate from 2006-2008 was an invalid act and that the gas flare payments made for that period were thus invalid and, therefore, not tax deductible under Section 10(1). The court further clarified that the power of the Minister to issue a written gas flare permission or certificate is discretionary and not mandatory upon application. Therefore, the non-response of the Minister to the respondent company's application for permission to flare gas and the non-issuance of the certificate cannot be presumed to be an approval (as the decision of the TAT suggested).[135]

The Federal High Court must be hailed, at least, for interpreting the relevant statutory provisions in a manner that is less permissive and encouraging of the corporate climate-destructive conduct of gas flaring than the decision of the TAT. It discourages oil and gas companies from skipping the hurdle of Ministerial approval of their gas flaring activity, especially if they hope to reduce their tax burden by deducting the gas flaring charge therefrom. However, the aspect of the court's judgement concluding that gas flare charges are tax deductible if backed by the Minister's written gas flare permit, on the basis of its literal interpretation of the relevant statutory provisions, has been criticized as flawed.

According to Okoye, the court ought to have interpreted the relevant provisions in a purposive manner that gives effect to the ultimate aim of the AGRA: 'The purpose of the AGRA… was to reduce and stop gas flaring [which the court acknowledged, but did not allow to sufficiently influence its interpretation of the relevant provisions[136]]. The issue of fees for exceptionally permitted gas flaring, then ascribed as tax deductible

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[134] See, *Shell Petroleum Development Company Nig Ltd v FIRS* (2016) 21 TLRN 86 27 October 2015 (no: TAT/LZ/040/2013); and Chevron Nigeria Ltd v FIRS (2016) 22 TLRN 1 30 October 2015 (no: TAT/ LZ/045/2013).
[135] See, Ernst & Young – Global Tax Alerts, 'Nigeria's Federal High Court Rules that Minister's Approval is Required for Tax Deductibility of Payment's Made on Gas Flares' (29 June, 2018) <https://taxnews.ey.com/news/2018-1336-nigerias-federal-high-court-rules-that-ministers-approval-is-required-for-tax-deductibility-of-payments-made-on-gas-flare>
[136] *FIRS v Mobile* (n 129) 21.

expenses incurred in in [sic] the course of petroleum operations, could be seen as a defeat of the spirit of the legislation.'[137] In making this argument, the author relied on the newer practice by English courts where statutory provisions affecting taxes are given a purposive construction with the aim of preventing tax avoidance,[138] which is also reflective of the Nigerian Supreme Court's position, that: '[i]n considering a statute, regard shall be given to the cause and necessity of the Act and then such construction shall be put upon it as would promote its purpose and arrest the mischief which it is intended to deter.'[139] Importantly, in dismissing Mobile's appeal of the Federal High Court's judgment, and affirmed the decision of the latter (without addressing the aforementioned shortcoming), the Court of Appeal expressly noted that the requirements of Section 3 of the AGRA are not cosmetic, but vital for discouraging or arresting the mischief of gas flaring and its 'climate change' consequence.[140]

It is noteworthy that while tax computation for oil companies up until 15 August 2021 will continue to be affected by the relevant provision of the AGRA, the 2021 PIA – which repeals the AGRA[141] – will be relevant from its commencement date of 16 August, 2021. Unlike under the AGRA, the relevant government authority is not empowered to stipulate gas flare charges for oil companies it permits to flare gas under the PIA.[142] It is only empowered with the authority to impose a 'fine' on any company flaring gas outside the exceptions and permissible situations stated in the PIA.[143] Similar to Section 3(2)(b) of the repealed AGRA, the PIA in Section 104(2) states that the fine 'shall be paid in the same manner and be subject to the same procedure as for the payment of royalties to the Federal Government by companies engaged in the production of oil.'[144] But as if to avoid the ambiguity in the erstwhile provision of AGRA, and prevent any judicial interpretation that threatens the aim of the gas flare penalty, Section 104(3) of the PIA expressly provides that '[a] fine paid under this section shall not be eligible for cost recovery or be tax deductible.'

[137] A Okoye, 'Tax-deductible Flare Gas Penalty Payments in Nigeria: Context, Responsibilities and Judicial Interpretation' (2021) 39 (3) *Journal of Energy & Natural Resources Law* 345, 361-362.
[138] *Ibid,* 362-364.
[139] *Mobil Oil Nigeria Ltd v Federal Board of Inland Revenue* (1977) 1 NCLR 1.
[140] *Mobile v FIRS* (2021) LRELR – 53436 (CA), 24-25.
[141] Section 310, PIA, 2021.
[142] Section 107, *ibid*.
[143] Section 104, *ibid*.
[144] Section 104 (2).

E. Consumer Protection Laws

The 2018 Federal Competition and Consumer Protection Act,[145] is the primary legislation that governs and protects the rights of consumers in Nigeria. It generally aims, among others, to promote and protect the interest of consumers of goods and services, including safeguarding them against unfair practices in the marketplace.[146] Importantly, Section 2 of the Act indicates that it applies broadly to all undertakings and commercial activities in the public and private sectors, within or having effect within Nigeria. Although, there has been no corporate climate litigation in Nigeria based on consumer protection rules, this may be possible were, for instance, badly made fossil fuel products cause harm to consumers.

F. Fraud Laws

Fraud laws have not been the basis for climate litigation in Nigeria. However, it could potentially ground a climate action where, for example, a car dealer, through false pretence, defrauds a client by collecting the latter's money for the supply of expensive energy efficient and climate-friendly electric cars, but delivering cheaper regular petrol vehicles. This will be contrary to Section 419 of the Criminal Code Act[147] which criminalizes obtaining by false pretence.

G. Contractual Obligations

Contractual obligations have not been the basis for climate litigation in Nigeria. However, it could potentially ground a climate action where, for example, a car dealer negligently or fraudulently misrepresents his cars as being the most energy efficient and climate-friendly cars in the world, in order to make a large sale to a customer who has expressly requested such a product. Such negligent misrepresentation will be considered a vitiating factor under Nigerian law of contractual obligations, and will entitle the customer to adequate remedies.[148]

H. Planning and Permitting Laws

Planning and permitting laws have not been the basis for climate litigation in Nigeria. However, where climate-harmful projects have been established contrary to existing planning and permitting laws, such as the Nigeria Urban and Regional Planning Act,[149] the legality of those projects can be subjected to judicial review and appropriate penal and corrective orders issued.

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[145] Federal Republic of Nigeria Official Gazette, Vol 106, No 18 (1st February, 2019).
[146] Section 1, *ibid*.
[147] Cap C38, Laws of the Federation of Nigeria, 2004.
[148] See *Imarsel Chemical Co. Ltd v National Bank of Nigeria* (1974) 4 ECSLR 355.
[149] Cap N138, Laws of the Federation of Nigeria, 2004.

2. Procedures and Evidence

A. Actors Involved

i. Who brings climate actions against corporations in Nigeria?

In Nigeria, existing climate cases reveal that climate actions against corporations have been brought by a variety of actors, including state and non-state actors.

The first category of claimants are the *individuals who are directly and immediately affected* by the GHG-emitting activities of the defendant corporations, beyond the general climatic effect of these activities. They usually commence legal proceedings against these corporations, for themselves and *as representatives of their entire affected community*. This approach not only helps to avoid the unwieldiness of several members of a community with the same grievances bringing different actions against the same defaulter, it also enables poor communities to mobilize and focus their resources against a common polluting adversary. An example of this approach is the *Gbemre* case where Mr. Jonah Gbemre sued Shell and others 'for himself and as representing Iwherekan Community of Delta State, Nigeria', and the court granted him leave to so do.

The second category of actors who bring climate litigation against corporations in Nigeria are *non-governmental organizations (NGOs)* who gratuitously act to at least protect poor communities from the direct and immediate effects of corporate pollution. Resource-wise, they are usually better placed in relation to a lot of affected communities to effectively pursue such claims to the end. NGOs, in line with their *modus operandi*, also attract much publicity to such cases which has the effect of not only shaming polluting corporates and compromising their efforts at 'greenwashing', it also puts them under pressure to be more climate-responsible. An example of this is the *COPW* case, where an NGO, the Centre for Oil Pollution Watch, commenced legal action against a statutory corporation whose oil production activities have damaged two streams that were the major sources of water for two local communities.

The third category of actors are *public-spirited individuals* who, like NGOs, bring climate actions against corporate polluters, acting solely in the best interest of the public. An example of this is the 1997 *Oronto Douglas* case, where Mr. Oronto Douglas, an environmentalist and public-spirited individual, brought legal action against Shell and other entities for noncompliance with extant laws affecting their development of the NLNG project. Although, under old standing rules in environmental cases, the court held that he lacked *locus standi* to litigate the matter, the latest Nigerian Supreme Court decision in the more recent *COPW* case which now allows for public interest litigation in environmental matters by public-spirited individuals and NGOs will now avail such litigants.

The fourth and last category of actors who incidentally bring climate actions are multinational oil and gas companies looking to avoid the onerous effect of decisions made by government regulators seeking to hold them accountable under the law for gas flaring. These actions give the government regulator a chance to get judicial approval for the claims against the oil firms. One such example is the aforementioned *Mobil v FIRS* case where Mobil sought to quash a decision by FIRS that would require it to cease its practice of deducting gas flare fees from the petroleum profit tax it pays to the government (thus relieving itself of the deterrent effect of the gas flare charge).

ii. Against whom has climate action been brought?

In Nigeria, the available cases show that the only corporations against whom climate actions have been brought are producers of fossil fuel. This includes multinational and national oil and gas corporations, like Shell and the NNPC (now NNPC Ltd[150]), respectively. This focus on oil and gas companies is due to the fact that the oil and gas industry is the major extractive industry in Nigeria and it is the sector with the most devastating ecological effects in the country, as well as the largest national contributor to climate change.

On the other hand, the lack or dearth of climate litigation against corporate actors in other (sub-)sectors may be due to several factors, including: (1) the relative small size of those (sub-)sectors and their carbon footprint, (2) the fact that affected communities may lack knowledge of their legal rights, and (3) the penchant for such communities to settle out-of-court and receive compensation from those companies for direct damages suffered, mostly to avoid the difficulties of accessing justice through the courts in Nigeria, such as delay, high financial costs and unfavourable legal technicalities. This latter practice of out-of-court settlement is also common in the oil and gas sector, hence the limited number of climate cases from a sector with such a large national carbon-footprint.

iii. Who are/might be the third-party intervenors?

In the judicial circle, third-party intervention is the method by which a person or an entity (i.e., the intervenor), who is not involved in a particular litigation, provides specialist information or expertise to the court to enable the latter reach a just decision.[151] Indeed, '[t]hird party interventions are usually made in cases where the final decision may have a broad impact beyond the parties involved in the particular case,

[150] The NNPC Act, Cap N123, Laws of the Federation of Nigeria, 2004, was repealed by the PIA and the NNPC was converted by the latter from a public to a private company.

[151] Public Law Project, Third Party Interventions – A Practical Guide (2008) 3 <https://publiclawproject.org.uk/content/uploads/data/resources/120/PLP_2008_Guide_3rd_Party_Interventions.pdf>

in an effort to ensure the development of sound precedents.'[152] Thus, third-party intervenors – such as an *amicus curiae* ('friend of the court') – are expected to be objective in their presentation of facts, laws and practices relevant to the case at hand.

One corporate climate case in Nigeria that showed the useful role which such third-party intervenors may play in achieving climate justice in a particular case, and laying the foundation for a similar result in future cases, is the *COPW* case. In that case, the Supreme Court in reaching its novel decision to liberalize the restrictive age-long standing rule in environmental matters in Nigeria, for reasons that expressly included the need to achieve climate justice,[153] relied on the submissions of some *amici curiae*. The latter, composed of highly regarded and knowledgeable lawyers in Nigeria, were invited by the court to address it on the need, or otherwise, of allowing for public interest litigation in environmental matters in the country.[154]

iv. Potential claimants, defendants and third-party intervenors

Apart from those identified in sections A I, II, and III above, there are other *potential* claimants, defendants and third-party intervenors that may be involved in future pursuits of corporate climate justice through the courts in Nigeria.

Potential Claimant

Considering the present situation, a potential claimant in future corporate climate cases will be children who were born with health defects linked to climate pollutants emitted by corporations *before* their birth. For instance, available literature now shows that gas flaring may put pregnant women and their fetus at risk and may lead to adverse pregnancy outcomes, including birth defects and health complications for the newborn.[155] Such a case is likely to be based on a rare provision in Nigeria's Child's Right Act,[156] that is, Section 17 which is titled 'Right of the *unborn child* to protection against harm, etc.' and provides that '[a] child may bring an action for damages against a person for harm or injury caused to the child willfully, recklessly, negligently or through neglect *before*, during or after the birth of that child' (emphasis added). Such actions will indeed give 'teeth' to the principles of intra- and inter-generational equity in corporate climate cases in Nigeria.[157]

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[152] European Court of Human Rights, 'Third Party Intervention before the European Court' <https://www.echr.am/en/functions/representation/third-party-intervention.html>

[153] COPW v NNPC (n 21) 580-581.

[154] Ibid, 548-571.

[155] See O Oghenetega, G Ana, M Okunlola, and O Ojengbede, Oil Spills, Gas Flaring and Adverse Pregnancy Outcomes: A Systematic Review (2020) 10 Open Journal of Obstetrics and Gynecology 187-199; and UCLA Health, 'Natural Gas Flaring Poses Pregnancy Risks', UCLA Health, 15 June 2020 <https://www.uclahealth.org/news/natural-gas-flaring-poses-pregnancy-risks>

[156] Available at: <https://www.refworld.org/pdfid/5568201f4.pdf>

[157] See U Etemire and IL Worika, 'Environmental Ethics and the Nigerian Oil and Gas Industry: Rumpus and Resolution' (2018) 26 (2) *University of Botswana Law Journal* 58, 63 and 72.

Potential Defendant

Furthermore, in the near future, corporate climate litigation in Nigeria is expected to feature a more diverse spectrum of defendants compared to the present situation. At least two factors will fuel this development. The first is Nigeria's 2021 Climate Change Act, which imposes on '[a]ny private entity with employees numbering 50 and above' climate change obligations, including the establishment of measures to reduce their carbon emissions and ensure climate adaptation in accordance with the extant National Climate Action Plan.[158] This provision applies to relevant companies in sectors like transportation, agricultural, mining, manufacturing and power, whose operations in Nigeria have been identified as involving the significant emission of climate pollutants.[159] Thus, public interest litigation can be brought to enforce their climate obligations under the Act, in line with the decision of the court in the *COPW* case. The second factor is the current effort to develop largely dormant natural resources which are notorious for their negative impact on the environment and climate. One of these is bitumen, the extraction of which results in '17 percent higher greenhouse gas emissions than conventional oil extraction… [and] is often regarded as one of the dirtiest fossil fuel sources.'[160]

Potential third-party intervenor

On third-party intervenors, it is also foreseeable that in future climate cases, Nigerian courts may require the input of an independent body of scientists, called by the courts to provide dispassionate scientific evidence on causation of harm allegedly emanating from the emission of climate pollutants by corporations. This will be mostly needed in situations where the plaintiff and defendant put forth conflicting scientific evidence. Though not a climate case, the approach of the Nigerian court in *Shell v Farah & Ors*[161] demonstrates the usefulness of such third-party intervenors. In this case, five families who lived near an oil well in Nigeria operated by Shell sued the company seeking, among other reliefs, the rehabilitation of their land. Shell, which accepted responsibility, provided expert evidence indicating that they had fully rehabilitated the land. This was contrary to the expert evidence provided by the claimant families showing that the land had not been rehabilitated to pre-impact conditions. Considering the conflicting evidence from the claimants and respondents, the court was innovative in its approach

[158] Section 24.

[159] Nigeria's National Action Plan to Reduce Short-Lived Climate Pollutants (December, 2018) iii-iv <https://www.ccacoalition.org/en/resources/nigeria%E2%80%99s-national-action-plan-reduce-short-lived-climate-pollutants>

[160] C Milos, Bitumen in Nigeria: Weighing the True Cost of Extraction (Heinrich Böll Foundation Nigeria, 2015) 21 <https://ng.boell.org/sites/default/files/bitumen_in_nigeria.pdf>

[161] (1995) 3 NWLR (Pt 382) 148.

to resolving this conflict, unlike other oil spill cases with the same situation,[162] by *appointing two expert referees* to investigate the disputed fact. The report from this investigation largely supported the claimants' evidence, and the court relied on it to make a pecuniary award against Shell for the rehabilitation of the land.

B. How the Courts in Nigeria have Addressed the Issues of:

i. Standing

In civil suits, the Nigerian courts for many years applied an overly restrictive standing rule that constituted a major barrier to environmental and climate litigation in the country. This rule did not admit of public interest ligation or any action not completely based on one's *private* legal rights, even where it was clear that corporations were involved in unlawful acts and omissions that contribute to climate change.[163] To be clear, according to the court-created rule, standing was only to be accorded to claimants who could show that their 'civil rights' – narrowly construed by the courts to mean 'private legal rights' – have been or are in danger of being violated or adversely affected by the act or omission complained of.[164] This standing rule had a 'court-closing' effect,[165] especially regarding environmental and climate-related claims.

The above point is clearly exemplified by the climate case of *Oronto Douglas v Shell Petroleum Development Company Nigeria Limited and Ors.*[166] The plaintiff in the case sued the defendants, which included several oil companies, for non-compliance with the procedural requirements of the Nigerian EIA Decree No. 86 of 1992 (now an Act) in the process of establishing the Nigeria Liquified Natural Gas (NLNG) project. Yet, the Federal High Court in the case struck out the matter on the ground that the plaintiff, who had a private interest in the suit as a native of a village affected by the project, and a public interest as a well-known environmentalist – had no standing to sue. The court, applying the popular unduly restrictive Nigerian standing rule to discard the plaintiff's claim, held that 'the plaintiff shows no *prima facie* evidence that his [private] right was affected nor any direct injury caused to him' by the non-compliance with the EIA Act.[167]

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[162] AB Abdulkadir, 'Gas Flaring in the Niger Delta of Nigeria: A Violation of the Right to Life and Comment on the Case of *Jonah Gbemre v Shell Petroleum Development Company of Nigeria Limited*' (2014) 22(1) *IIUM Law Journal* 75, 87.

[163] MT Ladan, 'Judicial Approach to Environmental Litigation in Nigeria', a paper presented at the 4–Day Judicial Training Workshop on Environmental Law in Nigeria, in Abuja, Nigeria, on 5-9 February 2007, 16.

[164] *See Adesanya v President of the Federal Republic of Nigeria* (1981) 1 All Nigerian Law Report 1; *Ejiwunmi v Costain (WA) Plc.* (1998) 12 Nigeria Weekly Law Report 149, 164H; and JG Frynas, Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities (LIT/Transaction, 2000) 207.

[165] TI Ogowewo, 'Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria' (2000) 26 *Brooklyn Journal of International Law* 527, 542.

[166] Unreported Suit No: FHC/L/CS/573/96, 17 February 1997.

[167] *Ibid*, 2.

The Nigerian Supreme Court in the case of *COPW v NNPC* has now liberalized this restrictive standing rule by allowing for public interest litigation in environmental and climate matters, on the back of global trends on this issue, the writings of academic scholars[168] and, more importantly, the need for the court to play a role in addressing the challenges of 'climate change' and 'global warming'.[169] In this case, the appellant NGO, COPW, commenced legal action against the respondent, NNPC, at the Federal High Court, over an oil spillage in Acha Community of Abia State, Nigeria, allegedly caused by the respondent's negligence. The NGO claimed that the oil spillage had negatively affected the community and its environment, including contaminating two streams that were the major sources of water supply to the community. The NGO therefore claimed: (1) the reinstatement, restoration and remediation of the impaired and/or contaminated environment, especially the two streams; (2) the provision of potable water supply to the community as a substitute for the contaminated streams; and (3) provision of medical facilities for the evaluation and treatment of affected victims of the oil spillage.

The respondent argued that the appellant had no standing to institute the action, and sought an order striking out the suit *in limine*. Both the trial court and the Court of Appeal agreed with the respondent on the basis of the restrictive standing rule. Hence, the appellant appealed to the Supreme Court which unanimously granted the appeal and remitted the matter back to the trial court for the determination of the substantive matter. In arriving at this landmark decision, the dynamic and multifaceted reasoning of the Supreme Court indicates a paradigm shift in the judiciary's attitude to environmental and climate change-related matters, regarding the subject of standing. The court held that 'public-spirited individuals and organizations' can bring an action in court against relevant public authorities and private entities to demand their compliance with relevant laws and to ensure the remediation, restoration and protection of the environment.[170] It stressed that:

> *Accordingly, every person, including NGOS, who bona fide seek in the law court the due performance of statutory functions or enforcement of statutory provisions or public laws, especially laws designed to protect human lives, public health and [the] environment, should be regarded as proper persons clothed with standing in law to request adjudication on such issues of public nuisance.*[171]

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[168] *COPW v NNPC* (n 21) 548-571

[169] *Ibid,* 580-581.

[170] *Ibid,* 590-591, 597-598.

[171] *Ibid,* 595. The Supreme further stressed that there is nothing under Nigerian law that says that the Attorney General is the only proper person clothed with the standing to enforce the performance of a public duty. *Ibid,* 595-596-596.

This new liberal approach to standing will likely encourage potential climate litigants who were hitherto discouraged by the old restrictive standing rule to file their cases against culpable corporations.[172] In other words, a future 'Oronto Douglas' will no longer have their environmental and climate change actions struck out for want of proof of any effect on their 'private legal rights' arising from the actions or omissions of corporations. The Supreme Court also acknowledged that recognizing public interest litigation will help to address some other barriers to access to justice, as poor communities without 'the financial muscle to sue', which usually and disproportionately bear the brunt of environmental and climate change problems, will have the benefit of public-spirited persons and organizations fighting their causes.[173] Indeed, this change is a materialization of the decades-old popular view expressed by Tobi JCA (as he then was) in the case of *Busari v Oseni*,[174] that the concept of standing must move with time and in the spirit of a dynamic society to be able to address unique and evolving challenging circumstances in society and the litigation process.

ii. Justiciability

Justiciability refers to the amenability of a matter to the lawful adjudicatory powers of the court.[175] It is concerned with the question of whether or not a matter is suitable for judicial resolution or intervention.[176] In Nigeria, the major question on justiciability which affects corporate climate litigation that the courts have had to address is whether the constitution provides for or supports a litigable socio-economic right to a healthy environment. The relevance of this query is found in the fact that if climate related claims have a constitutional character that can be pleaded in court, it not only re-enforced the human rights basis of the claim, but will serve to raise its profile and status in relation to competing claims, such as those of an economic nature.

To be sure, the Nigerian Constitution does not specifically provide for an environmental right like the South African Constitution does. However, under Chapter II of the Nigerian Constitution titled 'Fundamental Objects and Directive Principles of State Policy', Section 20 thereof provides that '[t]he State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.' By virtue of Section 6(6)(c) of the Nigerian Constitution, Chapter II, including Section 20, of the Constitution are non-justiciable 'except as otherwise provided by this Constitution.' Based on the

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[172] See EP Amechi, U Etemire and A Ihua-Maduenyi, 'Access to Justice through Environmental Public Interest Litigation: Exploring Contemporary Trends in Nigeria' (2021) 54 (3) *World Comparative Law* 398-414.
[173] *COPW v NNPC* (n 21), 581.
[174] (1992) 4 Nigeria Weekly Law Report (Pt 237) 557 at 589.
[175] International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Human Rights and Rule of Law Series No. 2, 2008) 1 <https://www.refworld.org/pdfid/4a7840562.pdf>
[176] K McLean, Constitutional Deference, Courts and Socio-Economic Rights in South Africa (Pretoria University Law Press, 2009) 109.

latter provision, some lawyers and scholars in Nigeria took the erroneous view that not only is Section 20 absolutely non-justiciable, but that Article 24 of the African Charter Act (on the right to a healthy environment in Nigeria) may not be considered to have 'elevate[d] environmental rights from non-justiciable to justiciable'[177] and that the environmental right it contains 'may be an illusion',[178] as it appears to be inconsistent with the Constitution that is superior to the Charter.[179] This view, which was shared by many others, likely discouraged many potential litigants from seeking to enforce their Article 24 right, hence the dearth of cases based on the Charter or that provision.

The Supreme Court in the case of *COPW v NNPC* has however clarified the status of Section 20 of the Constitution in a manner that arguably increases the possibility of successful climate change litigation in the country.[180] It *specifically* held, for the first time, that Section 20 in Chapter II of the Nigerian Constitution dealing with environmental protection is justiciable. The Supreme Court, relying on earlier decisions on the point,[181] held that the aforementioned proviso in Section 6(6)(c) meant that the section did not render Chapter II absolutely and totally non-justiciable, and that it is possible for other provisions of the Constitution to make section(s) of Chapter II, including Section 20, justiciable.[182] Thus, as Section 4(2) of the Constitution empowers the National Assembly to make laws to promote and enforce the observance of matters contained in Chapter II,[183] this provision read together with the laws resulting therefrom and the specific provision(s) of Chapter II to which they relate, makes the latter justiciable.[184] On the basis of this reasoning, the Supreme Court held that Section 20 is justiciable when read together with, and in the context of, a provision like Section 4(2) and other environmental legislation (and provisions like Article 24 of the African Charter

[177] L Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria: Theory and Practice* (2nd ed., Ambik Press, 2010) 204.
[178] *Ibid,* 286.
[179] See *Ibid,* 204. See Section 1(3), Nigerian Constitution.
[180] U Etemire, 'The Future of Climate Change Litigation in Nigeria: *COPW v NNPC* on the Spotlight' (2021) *Carbon and Climate Law Review* 158, 168.
[181] See *Federal Republic of Nigeria v Anache & Ors* (2004) 3 Monthly Judgement of the Supreme Court of Nigeria 1, 46-50, *per* Belgore, JSC. Based on a community reading of the proviso to Section 6(6)(c), Section 4(2), as well as Items 60(a), 67 and 68, the court held that Chapter II can no longer be considered 'a toothless dog which could only bark but cannot bite…Chapter 2 becomes clearly and obviously justiciable'.
[182] *COPW v NNPC* (n 21) 569.
[183] Especially when read together which Items 60(a), 67 and 68 of the Exclusive Legislative List that is expressly incorporated in Section 4(2) of the Constitution.
[184] Indeed, in *Attorney General of Ondo State v Attorney General of the Federation & 35 Ors* (2002) 7 Monthly Judgement of the Supreme Court of Nigeria 1, the Supreme Court noted that '[i]t is not the intention to introduce these principles… as mere pious declarations. It is the intention… that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the basis of all legislative and executive action[s].'

Act) made to 'activate' or give effect to Section 20.[185] This can only be good news for climate litigants as the decision is clearly supportive of their cause.

iii. Jurisdiction

The Nigerian Supreme Court simply defined jurisdiction as 'the authority, which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision.'[186] According to the courts, the '[j]urisdiction of a court is a matter of law and it is [usually] vested on a court by the Constitution and the statute establishing the court';[187] it is generally the 'fulcrum, centrepin, or the main pillar upon which the validity of any decision of any court stands and around which other issues rotate. It cannot be assumed or implied, it cannot also be conferred by consent or acquiescence of parties.'[188] Generally, an objection to jurisdiction can be raised at any time before, during and after a proceeding before the same court or even for the first time on appeal at the higher courts, including the Supreme Court.[189] And if a case is found wanting for jurisdictional reasons, it must be struck off and the claimant is at liberty to commence the case *de novo* in the appropriate judicial venue.[190]

Apart from the composition of the court, other basic components that will determine whether or not a court has jurisdiction over a matter, including corporate climate cases of a civil or human rights nature, include: (1) whether the *subject matter of the action* is within the court's jurisdiction, (2) whether the action is within the court's *territorial jurisdiction*, and (3) whether any *condition precedent* to the exercise of the court's jurisdiction has been fulfilled.[191]

Subject-Matter Jurisdiction

Subject matter jurisdiction as it relates to corporate climate action in Nigeria is largely controlled by Section 251 of the Nigerian Constitution which covers most of the major industries presently responsible for significant GHG emissions. That provision gives the Federal High Court jurisdiction in civil matters relating to 'mines and minerals (including oil fields, oil mining, geological surveys and natural gas)', 'taxation of companies', 'any Federal enactment relating to… commercial and industrial monopolies… standards of goods and commodities and industrial standards', among others. Any corporate

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[185] *COPW v NNPC* (n 21) 569-570.

[186] *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency and Ors* (2002) 12 S.C (Pt I) 26.

[187] *Arjay Ltd v AIMS Ltd* (2003) 7 NWLR (Pt 820) 879.

[188] *Shell Petroleum Development Company Nigeria Ltd v. Isaiah* (2001) 5 SC (Pt 11) 1.

[189] *PetroJessica Enterprises Ltd v Leventis Technical Co. Ltd.* (1992) 5 NWLR (Pt 244) 693.

[190] *Ports & Cargo Handling Services Company Ltd v Migfo Nigeria Ltd* (2012) 18 NWLR (Pt 1333) 555.

[191] *Madukolu v. Nkemdilim* (1962) 1 ALL NLR (Pt. 4) 557, per Baramian JSC. The issues of standing, limitation period, among others, also affect the jurisdiction of the court to hear a matter. They have excluded from the discussion here as they have been discussed elsewhere in this report under their specific heads.

climate claim that falls within the ambit of this provision, and is instituted outside the Federal High Court, will suffer the same fate as the claim in the case of *Shell Petroleum Development Company of Nigeria Limited v Abel Isaiah and Ors.*[192]

In that case, oil spillage from the appellant's facility caused damages to the respondents' land and crops. The respondents (as plaintiffs) in consequence instituted an action in the Rivers State High Court claiming, *inter-alia*, the sum of ₦22million being fair and reasonable compensation for the damages caused to them. The High Court held in their favour. Dissatisfied with the decision, the appellants appealed unsuccessfully to the Court of Appeal. Thereupon, the appellant further appealed to the Supreme Court. The main issue before the Supreme Court was whether the Court of Appeal was right in holding that the trial court had jurisdiction to try the case, in light of the fact that by virtue of relevant provisions of the Federal High Court (Amendment) Act and the Constitution (Suspension and Modification) Decree No. 107 of 1993, the jurisdiction of State High Courts had been ousted in favour of the Federal High Court in claims pertaining to mines and minerals, including oil fields, oil mining, geological surveys and natural gas. The Supreme Court unanimously resolved the issue in favour of the appellants, thereby allowing the appeal and setting-aside the judgment of both the Court of Appeal and State High Court.[193]

Territorial Jurisdiction

Regarding territorial jurisdiction, corporate climate civil claims on relevant subject matters contained in Section 251 of the Constitution and others, must generally be commenced in the Federal High Court in the 'judicial division in which the defendant resides or carries on substantial part of his business or in which the cause of action arose', according to the Federal High Court (Civil Procedure) Rules.[194] Similarly, where the climate claims have to do with the enforcement of the plaintiff's human rights, according to Section 46(1) and (2) of the Nigerian Constitution, the action for redress must be brought in a High Court in the state where the violation occurred. But for the contravention of a similar provision, the earlier mentioned *Ikechukwu* case would have been Nigeria's first human rights climate litigation. It was originally instituted on 20th June 2005 before the Benin Judicial Division of the Federal High Court. In fact, Mr Jonah Gbemre representing the Iwherekan community was the 7th plaintiff in the suit. However, it has been noted that:

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[192] (2001) FWLR (Pt 56) 608.

[193] See O Fagbohun, 'Jurisdiction of Nigerian Courts in Environmental Matters: A Note on *Shell v Abel Isaiah*' (2015) 24 (2) *Journal of Energy & Natural Resources Law* 209-220.

[194] Federal Republic of Nigeria Official Gazette (Vol 106, No 72) 10th May 2019, Order 2, Rule 1(3). <https://olumidebabalolalp.com/wp-content/uploads/2021/01/FHC-Rules-2019-Federal-High-Court-Civil-Procedure-Rules-2019-1.pdf>

> *The plaintiffs discontinued the suit and it was withdrawn from the court before a hearing date was set for the court to entertain the matter. Though the reason for withdrawing the suit was not made known,* ***it appears that there may have been issues of jurisdiction which might have been raised by the counsel(s) to the defendants as most of the communities are not in Edo State where the action was instituted*** *and the Nigerian Constitution expressly provides that a person whose fundamental human rights have been contravened in a State may apply to a High Court in the state where the violation occurred for redress/relief.*[195] (emphasis added)

Thereafter, in July 2005, Gbemre decided to reinstitute the action alone in the same Benin Judicial Division of the Federal High Court, in Edo State, where the violation of his human rights and that of his community occurred; on the other hand, four of the original plaintiffs in the *Ikechukwu* case went on to refile the matter in the right jurisdiction – the Port Harcourt Judicial Division of the Federal High Court, where the violation of their human rights and that of their communities took place.[196]

Jurisdiction based on Condition Precedent

Lastly, one condition precedent that commonly affects the jurisdiction of courts in Nigeria, and could affect corporate climate litigation, is the requirement for *pre-action notice*. Pre-action notice is a written notice which a statute requires aggrieved parties or intending plaintiffs to formally serve on prospective defendants, informing the latter of their intention to commencement legal action against them.[197] The rationale is to encourage the parties to dialogue about the prospective legal claim in a manner that may enable the parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings.[198] The requirement for pre-action notice is a regular feature in the enabling law of almost every public corporation in Nigeria. For example, the recently repealed NNPC Act provides in Section 12(2) that a one-month pre-action notice must be given to the corporation before any legal action is commenced against it.

Generally, the effect of failure to give this notice before commencing an action is considered an irregularity that renders the action incompetent and would only *temporarily* deprive the trial court of competence to look into the case until the condition

[195] Morocco-Clarke (n 74) 32.
[196] *Ibid,* 32 and 39.
[197] SC Unachukwu, The Legal Basis of Pre-Action Notice and Implications of the Failure to Comply with its Requirement' (2021) 2 (3) *Law and Social Justice Review* 55.
[198] N Tobi, 'Environmental Litigation', in S Simpson and O Fagbohun (eds.) *Environmental Law and Policy,* (Law Centre, Faculty of Law, Lagos State University, 1998) 177, 191.

is met.[199] However, in recent cases, the courts have held that the defendant can waive its right to such a notice by failing to appropriately plead and raise an objection to the failure to give such a notice.[200] Good as this may be, it still leaves the door wide open for non-compliance to render a suit incompetent and have it struck off. Thus, considering that some environmental and climate risks may require an injunction *quia timet* of *ex parte* nature to avoid an imminent and looming danger or irreversible harm to the environment and humans, some scholars have argued, based on more progressive approaches in other countries, the need for the Nigerian Supreme Court to 'lift the stakes in purposive construction, and at the minimum allow for stay of proceedings while the notice is being served…[as this] will enable courts to be in position to grant orders of injunction in deserving situations.'[201]

iv. Group Litigation

In an article by Norton Rose Fulbright, the essence of group litigation was aptly captured:

> *Group litigation refers to cases where multiple claimants with claims based on common issues seek a remedy against the same defendant. Pursuing these claims on a collective basis can often improve the economic viability of the individual claims, provide efficiencies in the litigation process and enable courts to more effectively manage claims by large numbers of claimants. From the perspective of the defendant, defending multiple claims on a collective basis can be more efficient and mitigate costs.*[202]

Representative action, where a member of a group sues for himself and on behalf of others in the group, is a type of group action.[203] It is one of the slight deviations allowed over the years by the Nigerian courts from its earlier restrictive standing rule based on one's private right to sue.[204] Representative action is suited to, and indeed usually utilized in corporate climate claims in Nigeria as evident in the *Ikechukwu* and *Gbemre* cases, considering the widespread effect – including the direct effect on immediate communities – of significant GHG emissions. For a representative action to be

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[199] See *Nigerian Ports Plc v Ntiero* (1998) 6 NWLR (Pt 555) 640; and *Prince Atolagbe & Anor v Alhaji A. Awuni & 8 Ors* (1997) 9 NWLR (Pt 522) 536.

[200] *Chief Nathaniel Ekwe Ede v Access Bank & Anor* (2020) 4NWLR (Pt 1715) 437-438; *Noclink Ventures Ltd & Anor v Chief Okey Muo Aroh* (2007)7 NWLR, 86; *Mobil Producing (Nig.) Unltd v LASEPA* (2002)18 NWLR (Pt. 798) 1; *Ojo v. National Pension Commission* (2019) 14 NWLR (Pt 1693) 547.

[201] O Fagbohun, Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria's Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability (Nigerian Institute of Advanced Legal Studies, 2012) 64-65.

[202] Norton Rose Fulbright, 'Group Litigation in Environmental Damage Claims – Growth and Challenges' (July 2022) <https://www.nortonrosefulbright.com/en-ug/knowledge/publications/e3cc02c6/group-litigation-article>

[203] *Ibid*.

[204] Frynas (n 95) 136.

successfully instituted, the Nigerian courts are firmly of the view that there must be provable authorization by other members of the group for such an action to be brought on their behalf,[205] and the persons who are to be represented and those representing them must have the same interest in the matter.[206] For instance, in the climate case of *Chinda*, the plaintiffs sued Shell for damages as representative of the Rumuokani Community in Rivers State, Nigeria. Their claim was dismissed partly for the reason, as the judge held, that 'it is not proved that the six named plaintiffs sue as representatives of all the villagers.'[207]

Where the relevant elements are in place, allowance for representative action has and will continue to aid the expansion of access to justice for environmental and climate claimants, especially poor communities, against corporations in Nigeria. Together, they can potentially seek injunctive relief against climate-harmful activities that affect them, as well as damages for damage caused to their shared or communal interests, among other possible reliefs.[208] This may be difficult for them to achieve individually due to the significant financial burden involved in prosecuting such matters and for technical legal reasons, such as the requirement for an individual to have suffered special damage peculiar to himself from interference with a public right for him to claim damages in an action in public nuisance.[209]

v. Apportionment

Where more than one company is held liable for climate related damage in Nigeria, the apportionment of liability among the parties will be governed by the following common and civil law rules on apportionment. At common law, where a number of entities contribute to or participate in the commission of a tort, they will all be both jointly and severally liable for the full amount of the damage caused; thus, the claimant is at liberty to sue all or any one of the joint tortfeasors and recover damages in full from all or any one of them, regardless of the extend of his participation.[210] In the context of corporate climate litigation where – considering the technical nature of the field – it may be challenging to identify all the contributors to the harm in issue, this rule puts the claimant in an advantageous position as he does not need to discover all the polluters to receive full compensation for the damage caused.

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[205] *Ndule v. Ibezim* [2002] 12 MJSC 150.
[206] *Shell Petroleum Development Company Nigeria Limited v Chief Otoko & Ors.* (1990) 6 NWLR (PT 159) 693; *Amos v Shell B.P. Nigeria Limited* (1974) 4 ECSLR 486. See RA Mmadu, Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from *Kiobel'* (2013) 2 (1) *Afe Babalola University: Journal of Sustainable Development Law and Policy* 149, 153 and 161-162.
[207] *Chinda & Ors v Shell* (n 94) 4.
[208] *Shell v Tebo VII* (1996) 4 NWLR 657.
[209] *Amos v Shell-BP* (1974) 4 ECSLR 486.
[210] *Ifeanyi Chukwu (Osondu) Ltd v Soleh Boneh Ltd* [2000] NWLR (Pt 656) 322.

Furthermore, where a claimant sues one of the tortfeasors separately and succeeds, this will not constitute a bar to an action against the others who would also be liable as joint tortfeasors in respect of the same damage.[211] This rule will indeed come in handy where the single tortfeasor is bankrupt or its assets are insufficient to pay the damages awarded, or in any similar circumstance. Additionally, where a single tortfeasor is sued and made to pay the full damages, he is entitled to recover a contribution from any other tortfeasor in respect of the damage in issue, which amount of contribution 'shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage.'[212] Similar rules on apportionment of liability will apply in claims for damages in human rights actions.[213]

vi. Costs

Cost is a pecuniary compensatory remedy that may be available to litigants in a climate action. The rules of most superior courts of record in Nigeria make provision for the award of cost usually at the conclusion or intermediate stages of a case, and the primary rule is that cost follows the event.[214] The award of cost (or not) is entirely at the discretion of the court, and it depends on the particular circumstances of the case. However, in making the award, the court must act judicially and judiciously.[215] Generally, the essence of awarding cost in Nigeria is usually not to punish the losing party, but to indemnify or compensate the winning party for the reasonable expenses incurred in prosecuting or defending the suit or a distinct aspect of the case.[216] However, it has been noted that '[o]ne obvious feature of costs awards in Nigeria is that they are inadequate to indemnify the successful party as they are almost always a far cry from the substantial amounts involved in litigation today.'[217]

To an extent, that inadequacy is discouraging for potential corporate climate litigants who are faced with the possibility of not recouping their litigation cost if their actions are successful. Indeed, considering the technical nature of most climate litigation, the cost of prosecuting a court case in Nigeria – including lawyer's fees, court fees, cost of procuring expert witness and evidence, cost of logistics, etc. – is usually enormous, and

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[211] *Ibid*.

[212] See Section 3 of the Torts Law, Cap. T1, Law of Cross River State of Nigeria, 2004. This particular provision is contained in the torts statutes of the different states in Nigeria.

[213] See CD Ogbe, *Enforcement of Fundamental Rights in Nigerian Courts* (2nd ed., Chudanog Publishers Ltd, 2017) 188; and II Onwuazombe, 'Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing CommAunities in the Niger Delta Region' (2017) 22(1) *Annual Survey of International & Comparative Law* 115, 155.

[214] JD Peters, 'A Discussion on the Award of Cost in Arbitration', being a paper presented at the *National Workshop for Judges on Alternative Dispute Resolution,* organised by the *National Judicial Institute, Abuja* from 18th to 20th September 2019*,* 6.

[215] *Wema Bank Plc & Anor. v Alaran Frozen Foods Agency Nigeria Limited & Anor* (2015) LPELR-25980 (CA)

[216] *Emperion West Africa Limited v Aflon Limited & Anor.* (2014) LPELR-22975 (CA)

[217] I Oreweme, 'Cost Awards in Nigeria' (Watermans Legal Practitioners Law Publications*,* 2010) 3.

has been tagged as 'the most important problem of access to courts in Nigeria' considering the relatively challenging economic situation of the country.[218]

To be sure, climate litigants can hardly rely on the Nigerian legal aid scheme to surmount this challenge of litigation cost, considering, among other factors, the extensive limits bedevilling the scheme.[219] Also, in Nigeria, due to the continuous application of the common law principles of champerty and maintenance, the funding of litigation by third-parties with no legitimate interest in the matter is considered as contrary to public policy, and thus prohibited.[220] However, Nigeran legal practitioners are allowed under Rule 50 of the Rules of Professional Conduct for Legal Practitioners, 2007,[221] to reach a contingency fee arrangement with their clients, whereby the payment for legal services will be contingent, wholly or partly, on the success of the civil suit. Under this framework, it is increasingly common to find lawyers bearing the financial risk of losing a case – especially in the oil and gas industry – by offering their services to clients for free, in consideration of an agreed percentage of any compensation awarded by the court, if the case is successful.[222] For example, in *Shell v Farah,* the plaintiffs were awarded a compensation of ₦4,621,000 Naira by the court, and the lawyers – who did not receive a standard fee for their service – received about ₦2,500,000 Naira of the total compensation payment as contingency fee.[223] Furthermore, while lawyers are prohibited, under Rule 51 of the Rules, from funding their client's litigation, it allows them to, 'in good faith, advance expenses – (a) as a matter of convenience; and (b) subject to reimbursement.' Obviously, Rules 50 and 51 above may be helpful in mitigating or addressing the challenge of litigation cost for potential climate litigants in Nigeria.

[218] Frynas (n 83) 406.
[219] A Ochojila, 'Legal Aid Council and Challenges of Fulfilling its Mandate', *The Guardian,* 1 February, 2022 <https://guardian.ng/features/law/legal-aid-council-and-challenges-of-fulfilling-its-mandate/>
[220] See *Egbor & Anor v. Ogbebor* (2015) LPELR – CA/B/136/2006; and 227-228; and A Akeredolu and C Umeche, 'Nigeria', in M Madden, *Litigation and Dispute Resolution* (6th ed., Global Legal Insights, 2017) 225, 227-228.
[221] Rules of Professional Conduct for Legal Practitioners, 2007 <https://www.nigerianlawguru.com/legislations/RULES/RULES%20OF%20PROFESSIONAL%20CONDUCT%20FOR%20LEGAL%20PRACTITIONERS.pdf>
[222] Frynas (n 83) 406-407.
[223] *Ibid,* 406.

C. Notable Arguments and Defences in or relevant to Corporate Climate Claims

The major arguments and defences deployed or deployable by plaintiffs and defendants in corporate climate litigation in Nigeria are reflected in various aspects of this report. For example, in order to counter a climate-related claim against them, defendant corporations may or have raised the defences of misjoinders of parties and causes of action (see section 2(A)(i) and (B)(iv)), lack of pre-action notice (see section 2(B)(iii)), lack of standing to sue (see section 2 (B)(i)), inadequate scientific evidence establishing causation (see section 2 (D)), contravention of statute of limitation (see section 2 (E)), and the non-possession by the court of subject-matter or territorial jurisdiction over the issue (see section 2(B)(iii)). Generally, as the cases show in some instances, these defences retain the potential to truncate a corporate climate action, especially as most are backed by legislation and have enjoyed rigid interpretation and construction by the courts. So far, it is only on the issue of standing that the plaintiff has been able to successfully argue for the modernization of the rule in a manner that significantly reduces the potency of that defence in corporate climate litigation.

D. Sources of Evidence and Proof of Causation

In civil matters in Nigeria, the responsibility for discharging the evidentiary burden required to hold corporate actors accountable for their actions and omissions which significantly contribute to climate change and are immediately injurious to health and property, usually rests with the plaintiff. In such cases, the plaintiff is required to prove causation, that is, '[not] only is the plaintiff expected to show the connection between pollution and the… [specific] injury suffered, he is also required to show the link between the pollution and the activities of the defendant.'[224] In other words, he must show that the harm would not have occurred but for the (wrongful) action or omission of the defendant. Considering the nature of climate-harmful activities, the plaintiff will be required to establish causation with the aid of adequate and credible scientific evidence.

The strict requirement regarding scientific evidence has proven to be a difficult hurdle for many litigants to surmount as general oil-related cases indicate. These cases mirror the position which the Nigerian courts may take in corporate climate actions where the plaintiff seeks such remedies as damages and injunctions against corporate defendants. First, apart from the fact that science is not always certain and precise on whether or the extent to which the injury were the result of the defendant's activities or other factors, hiring scientists to collect and provide such evidence is as expensive as it is time

[224] Fagbohun (n 201) 73.

consuming.[225] The case of *Shell v Otoko*[226] partly reflects this challenge. The plaintiff sued Shell for damage from an oil spill that occurred in 1981, and provided scientific evidence that was based on sediments and water samples taken in 1983. The court disbelieved the plaintiff's evidence of causation as it did not conclusively show that his injury was caused by the defendant's 1981 oil spillage and other oil spillages that occurred in the years before and after the material year of 1981.

Furthermore, to increase one's chances of success in corporate climate litigation, oil-related cases show that it is crucial to have *expert witnesses* who are specifically skilled in the particular scientific subject-matter in issue, and whose testimonies demonstrating causation in the specific situation are actually based on proper scientific laboratory tests.[227] This much was reflected in the case of *Ogiale v Shell,*[228] where the plaintiff sued the defendants under the rule in *Rylands v. Fletcher*, nuisance and negligence, but could not prove the casual link between the defendant's oil operations and reduced soil fertility. Dismissing the testimonies adduced in support of the plaintiff's case, the court held that the testimonies of the witnesses amounted to a mere 'ocular inspection and [comparison]',[229] and that while the expert witness had specialist knowledge in soil science and agronomy, he lacked additional scientific knowledge of radiation and heat which were important to the case at hand.

Indeed, litigants in an action in negligence can rely on the doctrine of *res ipsa loquitur* (i.e. 'the fact speaks for itself') to surmount this evidentiary burden by shifting same to the defendant to prove that it was not negligent.[230] However, the usefulness of this doctrine is quite limited as it may easily be rebutted by the defendant through expert evidence to the effect that the defendant was not negligent in its operations but took all reasonable care and acted in accordance with the best or standard industry practice.[231]

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[225] Frynas (n 95) 130-132.
[226] (1990) 6 NWLR (Pt 159) 693.
[227] See Frynas (n 95) 131, and *Seismograph Service v Onokpasa* (1972) 1 All NLR (Pt 1) 347.
[228] (1997) 1 NWLR (Pt 480) 148.
[229] *Ibid,* 182.
[230] G Kodilinye and O Aluko, *Nigerian Law of Torts* (Spectrum Books Ltd, Ibadan, 1999) 48. See *Shell British Petroleum Development Co v. Amaro* (2000) 9 NWLR (Pt 671) 44, where the doctrine was successfully applied.
[231] L Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria* (Ababa Press Ltd, 2004) 187. See *Shell British Petroleum Development Company Ltd v Adamkue* (2003) 11 NWLR (Pt 832) 533, on the rebuttal of the doctrine by the defendant.

E. Limitation Periods

A limitation period is the timeframe set by statute, within which an aggrieved person can bring a civil court action against the defendant, the expiration of which period will render the action statute barred and will constitute a defence against the claim.[232] The purpose of limitation periods is to help defendants avoid stale claims and the indefinite threat of legal action.[233] It actually emanated from equitable doctrines, such as 'equity aids the vigilant and not the indolent', aimed at preventing a person from being harassed at an unreasonably distant time after the commission of an injury.[234] Corporate climate litigation in Nigeria is affected by the limitation periods set by relevant statutes which bar civil lawsuits against potential polluting entities after a designated period of time.

In Nigeria, the federal Limitation Act[235] applies to matters involving federal government authorities in general and corporate bodies in Abuja (the capital of Nigeria).[236] In some cases, the legislation creating a statutory corporation may stipulate the limitation period applicable to legal actions against that entity. An example of this is Section 12(1) of the erstwhile NNPC Act which provides that claims against the NNPC – whose chain of refineries, among its other involvement in the industry, are responsible for ongoing destructive gas flaring[237] – must be instituted within a period of twelve months from when the cause of action arose. More broadly, however, limitation periods for various causes of action in the country are mostly dictated by state laws (most of which are similar);[238] this is the case even for legal action commenced within a state where the cause of action relates to a subject matter within the exclusive legislative powers of the federal government, including those brought under federal laws applicable to (multi-)national oil and gas companies.[239]

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[232] *Mercantile Bank of Nig. Plc. v FETECO (Nig) Ltd.* (1998) 2 NWLR (PT. 540) 143 at 156-157.
[233] Fagbohun (201) 65.
[234] *INEC v Ogbadibo Local Government & Ors* (2015) LPELR-24839 (SC).
[235] Cap 522, Laws of the Federal Capital Territory, 2007.
[236] OO Okanga, 'Legal Uncertainty and Conflict of Laws in the Application of Statutes of Limitation in Nigeria' (7 June 2019) 1, 14-17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3401069>
[237] See AI Sodimu, VM Yilwa, and GB Onwumere, 'The Impact of Gas Flaring from the Kaduna Refinery and Petrochemical Industry (KRPC) on Plant Diversity in Kaduna Northern Guinea Savanna Eco-Region of Nigeria' (2017) 69 *World Scientific News* 168-178; and FB Elehinafe, CI Nwizu, OB Odunlami, and FD Ibukun, 'Natural Gas Flaring in Nigeria, its Effects and Potential Alternatives – A Review' (2022) 23(8) *Journal of Ecological Engineering* 141, 144.
[238] A Akeredolu and C Umeche, 'Nigeria', in Global Legal Group, *The International Comparative Legal Guide to: Litigation & Dispute Resolution* (6th ed., Banwo & Ighodalo, 2013) 193, 194 <https://banwo-ighodalo.com/assets/resources/f360ef8eb93dc5d6761c2be6ea63e797.pdf>
[239] B Adaralegbe, 'Application of Limitation Laws to Oil Spill Compensation Claims in Nigeria' (2018) 62(3) *Journal of African Law* 403-425.

That much is evident in the case of *Shell Petroleum Development Company of Nigeria Ltd v Dodoye West,*[240] which is also a pointer to how limitation issues in corporate climate cases relating to the oil and gas industry will be treated. In that case, an action was filed against Shell in Rivers State of Nigeria in 2013 for compensation for alleged damage to fishing nets by Shell's oil spill in 2006. The trial judge dismissed Shell's objection that the action was statute barred as it was filed 'after the expiration of five years from the date on which the cause of action accrued' as stipulated in Section 16 of the Rivers State Limitation Law. In overruling the lower court on appeal and agreeing with Shell's argument, the Court of Appeal held thus:

> *There is no dispute that the Petroleum Act or the Oil Pipelines Act contain no provision on limitation of action but there is also no express exclusion of the application of the existing limitation law to the right of action created therein… Therefore, the Limitation Law of Rivers State should apply to actions resulting from the Oil Pipeline Act within Rivers State since a Claimant cannot wait for an indefinite period of time after the accrual of his right to seek remedies in the Court of Law.*[241]

To be sure, while the claimant in the case above sought remedies under a federal statute, Section 16 of the Limitation Law of Rivers State,[242] (as with the limitation laws in other states) also applies to action founded on tort, among other civil actions, and thus will cover common law climate litigation.

It is important to note that a common factor among the various limitation laws concerning civil claims in Nigeria is that time begins to run from when the cause of action arose, which according to the courts is the time in which the act, omission or default complained of occurred.[243] This conceptualization works hardship for potential environmental and climate litigants. It is indeed problematic that the cause of action accrues from the date of the relevant default of the defendant – and not even the date the injured party became aware of the effects of this default – because consideration is not given to the fact that a significant period of time can pass from the time a pollutant is released into the environment and when its negative impact on the victim becomes apparent.[244] Gathering the necessary scientific evidence may also take years, apart from other difficulties with access to courts in Nigeria that may delay the institution of an action.[245] All these can 'partly explain why little litigation has arisen against the

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[240] (2018) LPELR-44290. See also, *Shell Petroleum Development Company of Nigeria Ltd v Chief Zedie Williams and 2 Ors* (unreported) Appeal No. CA/PH/667/2014.
[241] *Ibid*, 14-15.
[242] Cap 80, Laws of Rivers State, 1999.
[243] See *Horsfall v Shell-BP* (1974) 2 RSLR 126.
[244] Fagbohun (n 201) 65.
[245] See Frynas (n 95) 129-130.

NNPC [and other oil companies] for damage arising from oil operations [especially gas flaring].'[246]

It is for such reasons that some foreign jurisdictions now provide that time runs from the date of victim's knowledge, or from the earliest date the claimant knew that the damage was of such a nature as to justify an action, that it was caused by the alleged wrongful act/omission of the defendant, and the latter's identity.[247] The relevant limitation regimes in the country, it has been rightly suggested, should be reviewed in this light to ensure meaningful protection of the rights of individuals to bring civil climate claims and access justice before Nigerian courts.[248]

While limitation periods appear rigid, like most legal principles, they are not in fact inflexible in Nigeria. The limitation laws in Nigeria admit of certain exceptions in order to ensure justice and fairness in some deserving cases, considering its roots in equity. Among the exceptions, two arguably bear the closest relation to, and perhaps hold the greatest benefit for potential climate litigants. The first is the exception that pauses the time for a person who was an infant at the time the cause of action arose, and allows him/her to bring an action after attaining the age of majority. This arguably helps to facilitate intra- and inter-generational equity, as it reserves for children and young people the opportunity of access to justice against corporate actors contributing to climate change and compromising the quality of their future. The second relevant exception is that which recognizes that 'where there has been a continuance of the damage, a fresh cause of action arises from time to time, as often as damage is caused'.[249] This will ensure that climate litigation is not hindered by the limitation period where the climate-harmful activities of a corporation are ongoing.

An obvious limitation of the provisions for exceptions in limitation laws in Nigeria is that they are maximalist in nature. In other words, they do not grant courts the discretion to extend the limitation period – whether *suo motu* or upon the application of the claimant – in other deserving cases (not captured by the exemption provisions) where it deems it equitable to do so. This is now possible in other jurisdictions such as Alberta in Canada, especially (but not only) in environmental and climate cases.[250] This problem is further compounded by complaints that the five or six years limitation period provided in state

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[246] *Ibid,* 130.

[247] E.g., see Sections 11(4) and 14A and 14B of the UK Limitation Act, 1980.

[248] Fagbohun (n 201) 66.

[249] Highlighted in the case of *Aremo II v Adekanye* (2004) 42 WRN 1, 21.

[250] See the 2000 Environmental Protection and Enhancement Act, which provides in Section 218(1) that 'a judge… may, on application, extend a limitation period provided by a law in force in Alberta for the commencement of a civil proceeding where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment.'

laws for tort actions, under which environmental claims usually fall, are too short.[251] This is so, considering the foregoing discussion that it may take beyond six years before harm from a pollutant manifests or is discovered, and before the required scientific evidence linking the alleged default of the defendant(s) to the harm suffered is established.[252] Nigerian judges appear to be equally frustrated with the lack of reform of limitation laws in Nigeria. Hence, a Supreme Court Justice, Rhodes-Vivour JSC, noted in a judgment that the country's statutory limitation periods are too short, and has also suggested that judges should be conferred with discretion to extend limitation periods when it is just and equitable to do so.[253] The latter suggestion will remedy both the challenges with the brevity of limitation periods and that of the maximalist nature of exemption provisions on limitation, as they affect environmental and climate claims in Nigeria.

Lastly on this subject-matter, it is important to note that the above discussion on limitation periods in civil matters will not apply to climate claims brought under human rights laws in Nigeria. This is because Nigerian courts have held that claims under human rights law are neither civil nor criminal in nature – they are *sui generis* in nature, that is, they are peculiar and in a class of their own.[254] Hence, they enjoy distinct procedural rules that apply across the country, one of which is Order III of the 2009 FREP Rules which provides that: '[a]n Application for the enforcement of Fundamental Right shall not be affected by any limitation Statute whatsoever.' On this basis, climate claims under human rights law in Nigeria can be brought against corporate entities at any time.

[251] T Ogboru and P Lere, 'Statute of Limitation in Environment-Related Harm and Injuries: Time for Reform' (2018) 1(1) *Obafemi Awolowo University Law Journal* 75, 83-84.
[252] A Eze, 'The Limits of the Torts of Negligence in Addressing Oil Sill Damage in Nigeria' (2014) 5 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 50, 55.
[253] *JFS Investment Ltd v Brawal Line Ltd & 2 Ors* (2010) 18 NWLR (Pt 1225) 495.
[254] See *Adekunle v AG Ogun State* (2014) LPELR – 22569 (CA) per Tsammani JCA.

3. Remedies

The end goal of climate litigation, like all law suits, is to get appropriate and adequate remedy regarding the contentious issue, such as will ultimately lead to the decrease in the rate of climate change or respite for victims of climate change or the discontinuance of activities causing climate change. Indeed, the popular Principle 10 of the 1992 Rio Declaration on Environment and Development[255] requires governments at the national level to ensure the provision of effective judicial 'redress and remedies' in environmental, including climate, cases. Nigeria is part of the 175 countries that signed this soft law regime and claims to be committed to its fulfilment.[256] Thus, this section appraises how the Nigerian courts have dealt with the issue of remedies in cases related to climate change.

A. Pecuniary Remedies

In Nigeria, legal disputes between oil and gas companies with climate-harmful practices and those affected by their activities are commonly brought under the Nigerian law of torts or human rights law. The usual, and arguably the foremost remedy for a tort or a human rights violation is 'damages' – a monetary awarded commonly made by a court to a party who has suffered damage, loss or injury to their person, property or right, through the unlawful act or omission of another.[257] The two theoretical bases for damages – which are recognized by Nigerian courts – are 'correction' and 'deterrence'. These theoretical bases respectively inform the classification of damages as both 'compensatory' and 'punitive' in nature.[258]

The rationale for compensatory damages (which could be further broken down into 'general damages' and 'special damages'[259]) is to restore the injured party – as far as

[255] Adopted by the UN Conference on Environment and Development (UNCED), 3-14 June 1992, (1992) 31 ILM 874.

[256] O Ameyan, 'Environmental Impact Assessment: Insight into the Environmental Impact Regulatory Process and Implementation for Qualifying Projects', a paper presented at the seminar titled 'Preparing Business in Nigeria for Environmental Challenges and Opportunities' organised by Manufacturing Association of Nigeria, held in Lagos, Nigeria, on 4 November 2008, 2 <http://softwaresupermart.com/mangreencourses/papers/paper6b.pdf>

[257] See *Shell Petroleum Development Company (Nigeria) Limited v Tiebo & 4 others* (1996) 4 NWLR (Pt 445) 657, 680.

[258] S Tsado, 'Pleading and Particularization of Special Damages in Tortious Claims: A Review of the Decision of the Supreme Court in Onyiorah v. Onyiorah' (Aluko & Oyebode, May 2021) <https://www.aluko-oyebode.com/insights/pleading-and-particularization-of-special-damages-in-tortious-claims-a-review-of-the-decision-of-the-supreme-court-in-onyiorah-v-onyiorah/>

[259] On the one hand, 'general damages' relates to damages that the law will presume to be the direct, natural or probable consequence of the act complained of. On the other hand, 'special damages' are such, as the law will not infer from the nature of the act; they must be claimed specially and proved strictly as they are awarded for actual or exact losses suffered, which losses must have crystalized in terms and value before the trial. See, *Neka B.B.B. Man. Co. Ltd.* v *ACB* (2004) 2 NWLR (Pt 858) 521, and *Luke Nwanewu Onyiorah v Benedict C. Onyiorah & Anor* [2019] LER SC.254/2008.

money can so do – to the position, or as near as possible to the position they would have been if the injury or loss had not occurred.[260] Whereas, punitive damages – which are extra-compensatory – if claimed, would be awarded where (according to the courts) the defendant's conduct is sufficiently outrageous to warrant punishment, such as where its conduct is wanton, cruel, insolent, constitutes a flagrant disregard of the law and/or the plaintiff's right, and the like.[261] Claimants are at liberty to make a case for, and claim general, special and punitive damages together.

If applied effectively and in deserving cases, the compensatory and punitive effects of damages could make the remedy a potent device for limiting and, in some cases, possibly stopping GHG emissions by corporations. It could also help individual claimants mitigate the impact of climate change on their socio-economic wellbeing. However, claimants in Nigeria seeking to hold corporations accountable for their injurious gas flaring activities have either not claimed damages, and were thus not awarded same, or have had their claims for damages denied due to their inability to prove their cases according to the court. For example, in the *Chinda* case, the plaintiffs alleged that their properties had been damaged as a result of the defendant's negligent management and operation of their gas flaring infrastructure. While their allegation that their properties were damaged by the defendant's gas flare activities was necessarily not in doubt, their claim for damages was refused by the court for reasons that include their inability to prove the tort of negligence on the part of the defendant. Another example is the *Gbemre* case where, though the court found that the plaintiff's fundamental rights to life, dignity and healthy environment had been breached by the defendants' gas flaring activity, the judge specifically noted that 'I make no award of Damages, cost or compensation whatsoever'.[262]

In any event, pecuniary remedies alone will be insufficient for holistically addressing anthropogenic sources and challenges of climate change. For instance, in context of the Nigerian oil and gas industry, the courts have been accused of frequently awarding meagre damages that constitute insufficient compensation for the harm suffered by claimants and do not any way deter the polluting corporations.[263] If this general trend does not change, the same fate may befall most future climate cases in Nigeria where damages are successfully claimed. More broadly, the global effect of climate change is arguably incompensable, just as its negative multifaceted impacts on the likes of the

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[260] See *Ibid,* and *Shell v Farah* (n 160) 148.

[261] See *Odobia* v *Azage* (1998) LPELP-2215 (SC), and *J.K.F. Investment (Nig.) Ltd* v *INTEL Plc* (2009) LPELP-1294 (SC).

[262] *Gbemre v Shell* (n 58) 32.

[263] See IKE Oraegbunam, MVC Ozioko and CJ Azoro, 'Remedies for Breach of Environmental Standards in Nigeria' (2019) 7(2) *International Journal of Innovative Legal and Political Studies* 13, 17; and BO Mustapha and OM Ayodele, 'Adequate Compensation as a Tool for Conflict Resolution in Oil-Polluted Wetlands of Niger Delta Region of Nigeria' (2016) 4(2) *Covenant University Journal of Politics & International Affairs* 34-50.

environment, human health, culture, livelihoods, etc., are in many cases irreversible and irremediable through the award of pecuniary remedies.[264]

B. Non-Pecuniary Remedies

The limitations of pecuniary remedies, especially in Nigeria, necessitate the provision of non-pecuniary remedies – such as (1) injunctive reliefs, and (2) declaratory reliefs – that will be more effective in curbing anthropogenic sources of climate change.

i. Injunctive relief

An injunction is essentially a discretionary and equitable order of a court restraining an entity from undertaking a certain activity or requiring, in exceptional situations, the performance of a specified action.[265] Thus, in addition to any pecuniary relief sought by claimants, the court can award injunctions preventing or stopping corporate activities harmful to the climate, considering the inadequacy of damages as a remedy in the situation.

Although an injunction is a discretionary order of the court, the court has a duty to ensure that this discretion is exercised judicially, judiciously and commonsensically, otherwise its decision on the subject will be set aside on appeal.[266] Regrettably, Nigerian courts have generally exhibited over the years an 'inexcusable reluctance' to grant injunctions against (potentially) polluting activities of oil and gas companies in order not to hinder their economic outputs, being the country's major source of revenue.[267] The courts have mostly maintained a historical default attitude of placing the economic interests of the oil and gas industry way above the need to ensure environmental and climate justice in relation to the activities in the industry. This 'pro-economic attitude of the judges [has thus] led to the [partial] failure of many cases… arising from oil operations' in Nigeria.[268]

The above point is clearly exemplified in the case of *Allar Irou v Shell BP Development Company (Nigeria) Ltd.*[269] Here, the plaintiff suffered damage as a result of the defendant's oil operations, and sued for compensation and an injunction against the

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[264] The following observation by the US Supreme Court in the case of *Amoco Production Co. v Village of Gambell, Alaska* (1987) 480 US 531, is true for climate change challenges as well: environmental injury, considering its nature, can seldom be adequately remedied by monetary compensation and is often permanent or long last, and therefore the issuance of an injunction is critical to protecting the environment.

[265] *Babatunde Adenuga and Ors v Odunewu and Ors* (2002) 2 NWLR (Pt 690) 184 at 195, *per* Karibi Whyte, JSC.

[266] See *Karama v Asalemi* (1983) 4 WACA 150, and H Doma-Kutigi, 'Evaluating Injunction as an Indispensable Remedy in Tortious Actions in Nigeria' (2020) 7(2) *Nnamdi Azikiwe University Journal of Commercial and Property Law* 143, 145.

[267] Atsegbua *et al* (n 177) 257.

[268] KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12(2) *Review of European Community and International Environmental Law*, pp. 199-208, at 199.

[269] Unreported, Suit No W/89/71, 26 November 1973.

latter. While the court awarded the damages, it refused to issue an injunction on the grounds that 'it will amount to asking the defendants to stop operating in the area… The interest of third persons must be in some cases considered, for example, where the injunction would cause stoppage of trade or throwing out a large number of work people… [and] It is needless to say that mineral oil is the main source of the country's revenue.'[270]

Similarly, in the aforementioned case of *Chinda v Shell*, the plaintiffs' demand for a court injunction restraining the defendant from carrying out further gas flaring activities close to their village, was rejected by the court, stating that: 'The Statement of Claim demands an order that Defendants [Shell] refrain from operating a similar flare stack within five miles of Plaintiffs' village, an absurdly and needlessly wide demand.'[271] Commenting on this case, Ebeku noted that:

> *While the refusal to grant injunctive relief may be justified, the observation that the relief was 'absurd and needlessly wide' surely indicates that the judge may have been unwilling to use his discretion to grant an injunction in any event, even had the plaintiffs proved a stronger case. From the general tone of the judgment, it appears that the judge gave tremendous weight to the likelihood that an adverse decision may hurt the oil based Nigerian economy.*[272]

However, the 2005 decision of the Federal High Court in *Gbemre's* case revealed that some judges in the system are acutely aware of the need to prioritize, in appropriate cases, environmental and climate justice concerns over the economic interests of actors in the Nigerian oil and gas industry. In this case, the court granted the applicant's prayer for a perpetual injunction restraining the respondents from the further flaring of gas in his community – Iweherakan community in Delta State of Nigeria, and ordered them to take immediate steps to give effect to this order.[273] While this decision arguably suggests the dawn of a gradual and positive shift in the willingness of the Nigerian judiciary to use the injunctive relief to halt climate-harmful activities of corporate and other actors in the oil and gas industry, the outcome of its appeal will confirm its jurisprudential value in this regard.

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[270] *Ibid*.
[271] *Chinda v Shell* (n 94) 14.
[272] Ebeku (n 268) 202.
[273] *Gbemre v Shell* (n 58) 31.

ii. Declarative relief

A *declarative relief* – a little less popular than others – is another important form of remedy that can be sought through the court against corporations contributing to climate change.[274] In Nigeria, a declarative relief is essentially an equitable relief granted by a court, in exercise of its discretionary jurisdiction, whereby it simply pronounces on the existing and proper state of affairs of the law as it affects the rights and obligations of the parties.[275] For a declaratory relief to be granted, the claimants seeking same must prove – through credible evidence – their entitlement to those reliefs on the strength of their own case, as they are precluded from relying on any admission by the defendant or weakness of the defence, if any.[276]

Unlike an injective relief, a declarative relief does not compel a defendant to take or refrain from any action, or lead to a contempt proceeding where ignored. However, a declarative relief offers two benefits to potential climate litigants: (1) by clarifying the rights and obligations of each party, it could deter or incentivize corporations to stop or limit their GHG emissions, and (2) where a defendant acts contrary to a declarative judgment, the claimant can seek an injunction or other coercive remedy against the latter (where such coercive relief is not sought alongside the declarative relief), citing the declarative judgment as evidence.[277]

In that connection, the Nigerian case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd and Others* reflects the potential of declarative reliefs to remove entirely the legal defences relied upon by corporations to justify their continued emission of a significant amount of GHGs. In that case, the applicants sought from the court various declaratory reliefs including, *inter alia*: that the guaranteed rights to life and dignity inevitably included the right to clean poison-free, pollution-free and healthy environment; and that the provisions of Section 3(2) (a) and (b) of the Associated Gas Reinjection Act and Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations under which the continued flaring of gas by oil and gas corporations could be permitted, were inconsistent with the applicants' rights to life and/or dignity as guaranteed under the 1999 Constitution and the domesticated African Charter, and are therefore null and void. Against the backdrop of sufficient evidence adduced by the applicants, the Federal Hugh Court granted the declaratory reliefs (together with the injunctive relief sought).

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[274] See EM Akpambang, 'Promoting the Right to a Healthy Environment through Constitutionalism in Nigeria' (2006) 4(3) *International Journal of Environment and Pollution Research* 40, 60.
[275] *Osuji v Ekeocha* (2009) LPELR-2816 (SC) 31, F, per Adekeye, JSC.
[276] *Nduul v Wayo* (2018) LPELR-45151(SC) 53-54, C-B, per Kekere-Ekun, JSC.
[277] J Blackman, 'Declaratory Judgment as a Quasi-Injunction', *Law & Liberty,* 25 March, 2014 <https://lawliberty.org/declaratory-judgment-as-a-quasi-injunction/>

If those declaratory reliefs are upheld by the upper court(s) (as the matter is presently on appeal), it could be a stepping stone to the voidance of similar laws in other sectors that arguably support significant GHG emissions in Nigeria. Such a confirmatory decision will also discourage the enactment of legislation that provides cover for corporate emitters and fosters climate change. Apparently, where declaratory reliefs are targeted at the validity of laws that significantly contribute to climate change, they have the effect of providing a more comprehensive remedy to a climate change challenge as they address the issue at the most fundamental and strategic level.

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