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## THE ROLE OF HUMAN RIGHTS SOFT LAW INSTRUMENTS IN CLARIFYING THE OBLIGATIONS OF FOSSIL FUEL COMPANIES FOR CLIMATE CHANGE INTERVENTIONS IN AFRICA

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### Abstract

This chapter considers two human rights soft law instruments that set out the human rights obligations of companies, namely, the United Nations Guiding Principles on Business and Human Rights and the African Commission on Human and Peoples' Rights State Reporting Guidelines and Principles related to the extractive industries environment and human rights (ACHPR Guidelines). These two soft law instruments are assessed against the background of the increasing and diversifying climate change litigation, including against corporations, to determine the extent to which these instruments strengthen or add to the arguments already being made before courts in relation to the obligations of corporations in the fossil fuel industry for climate change interventions. The chapter finds that both the UNGPs and the ACHPR Guidelines support the arguments already made before courts globally, encompassing not only cases based on human rights obligations, but also on public nuisance, negligence, the duty of care and unlawful enrichment. The chapter contributes to clarifying the climate-related corporate human rights obligations, which continue to be a matter of contestation, despite widespread recognition of the need for such obligations as well as the legal and equitable bases thereof.

**Key words:** *corporate human rights obligations; United Nations Guiding Principles; ACHPR Guidelines Commission; fossil fuel companies*

### 1 Introduction

Climate change has already started to impact on a whole range of human rights on the African continent, as in the rest of the world. It is not an overstatement to say that if climate change continues its current trajectory, no area of human rights will remain unaffected. It also no longer is in dispute that human activities are the main cause of current climate

change.<sup>1</sup> It is trite that the activities of companies,<sup>2</sup> in particular companies involved in the production of energy through fossil fuels, result in some of the largest greenhouse gas (GHG) emissions responsible for climate change. A 2017 study by the Carbon Disclosure Project (CPD) found that 50 fossil fuel companies account for half of the global industrial GHG emissions.<sup>3</sup> The fact that these companies are from developed states in the north brings to light the increasing tension of whether, for the purpose climate justice, they should not have a substantial role to play in addressing the global climate crisis.

Also, the consequences of climate change on human rights in Africa are dire and are projected to increase. The 2019 Report on the State of the Climate in Africa, published in October 2020, sets out some of the serious climate change consequences experienced across the African continent for the year 2019.<sup>4</sup> Rainfall was ‘remarkably below long-term means’ in Southern Africa, while above average rainfall was recorded in Central and Eastern Africa.<sup>5</sup> Some areas, such as the Horn of Africa, experienced more erratic rainfall, with extreme drought through most of 2018 to 2019, followed by flooding towards the end of the year. Severe climatic events, such as cyclones Idai and Kenneth, also caused devastation along the eastern and southern coast of Africa.

According to the 2019 report, drought-prone countries have seen the number of undernourished people increase ‘by 45.6 per cent since 2012’ due to impacts on agriculture, food security and water resources.<sup>6</sup> Apart from drought, factors such as heat stress, pests and disease also impact adversely on food security.<sup>7</sup> Extreme events, drought and food insecurity result in the displacement of vast numbers of people, with the 2019 cyclones

1 LV Alexander et al ‘Working Group I contribution to the Intergovernmental Panel on Climate Change’s Fifth Assessment Report, Summary for Policy Makers’ (2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5\\_SPM\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf) (accessed 23 March 2021).

2 The terms ‘companies’ and ‘corporations’ are used interchangeably.

3 The Carbon Majors Database ‘CDP carbon majors report 2017’, <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf> (accessed 24 March 2021).

4 World Meteorological Organisation (WMO) ‘State of the climate in Africa 2019’ (2020), [https://library.wmo.int/doc\\_num.php?explnum\\_id=10421](https://library.wmo.int/doc_num.php?explnum_id=10421) (accessed 2 November 2021).

5 WMO (n 4) 3.

6 WMO (n 4) 3, 5.

7 WMO (n 4) 23.

resulting in the displacement of ‘hundreds of thousands’ of people.<sup>8</sup> Projections for coming years include continuously rising temperatures and lower rainfall in Southern and Northern Africa, with more rainfall over the Sahel region.<sup>9</sup> Higher rainfall and warmer temperatures also create conditions for the spread of vector-borne diseases, with diseases such as malaria and dengue fever spreading into areas where previously they were not present.<sup>10</sup>

It is clear from this brief exposition that climate change cuts across a wide range of human rights, from the right to life to the right to health, adequate food, a place to live and water and sanitation.<sup>11</sup> Core rights such as the right to dignity, to equality and to freedom of choice are impacted. Importantly, climate change also impacts on the right of people to a satisfactory environment suitable for their development.<sup>12</sup> Furthermore, climate change has the most far-reaching impacts on groups that already are vulnerable, including refugees and displaced persons, women, children and indigenous peoples/communities.<sup>13</sup> Thus, it can not be disputed that the disproportionality and inequity features around climate change make it a human rights challenge which should, among others, be addressed through human rights-based approaches.

While human rights provide a basis for claims in relation to climate change and climate justice, there are some challenges. The most important hurdle in this regard is that in order to claim loss and damages under a human rights regime, litigants have to prove not only the link between the climatic change and human rights violations, but also the link between specific instances of emissions and specific meteorological effects.<sup>14</sup>

8 WMO (n 4) 18.

9 WMO (n 4) 11.

10 WMO (n 4) 24.

11 Amnesty International ‘Climate change’, <https://www.amnesty.org/en/what-we-do/climate-change/> (accessed 2 November 2021).

12 While debates are ongoing internationally about whether such a right exists, it is explicitly recognised in art 24 of the African Charter on Human and Peoples’ Rights.

13 OHCHR ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’ (2009) A/HRC/10/61, <https://www.refworld.org/docid/498811532.html> (accessed 2 November 2021).

14 F Otto et al ‘The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts’ Environmental Change Institute, [https://unfccc.int/files/adaptation/workstreams/loss\\_and\\_damage/application/pdf/attributingextremeevents.pdf](https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf) (accessed 3 November 2021); J Peel ‘Issues in climate change litigation’ (2011) 5 *Carbon and Climate Law Review* 19.

Climate change, being a form of ‘slow violence’,<sup>15</sup> where the cause and effect are dispersed over space and time, makes it difficult to link specific actions to specific consequences.

Second, in international law, states are the main duty bearers, and obligations in relation to climate change are no exception. States’ consensus in relation to climate change are set out in international instruments, namely, the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement under the UNFCCC adopted in 2015.<sup>16</sup> The UNFCCC sets out several substantive commitments and principles framed around four core issues of mitigation, adaptation, financing and loss and damages. For example, states may not use scientific uncertainty as an excuse for harmful conduct (precautionary principle). Developing states should cooperate, while industrialised countries are expected to assist developing states through financial and technical resources. From a human rights perspective, states have duties to respect, protect and fulfil human rights, including socio-economic rights, and have a duty to protect and fulfil procedural rights, such as the rights to access information, to participation and to access justice.<sup>17</sup> It is not yet fully settled which of these responsibilities can be attributed to corporations, even when it is clear that it is necessary and fair to do so.

Third, there are many procedural challenges that litigants face in bringing climate change claims, including issues of standing,<sup>18</sup> jurisdiction, the requirements of imminent harm<sup>19</sup> and significant impact<sup>20</sup> and the

15 A term coined by Rob Nixon in his seminal work *Slow violence and the environmentalism of the poor* (2011).

16 The Paris Agreement requires of states to prepare, communicate and maintain Nationally Determined Contributions towards keeping the increase in global average temperatures to ‘well below 2°C’.

17 OHCHR (n 13) 25-26.

18 The Plaumann test in the European legal system makes it difficult to bring cases on climate change, because it requires that litigants must be individually and specifically impacted, which means that litigants would not have standing in relation to climate change impacts that affect everyone. See eg Case T-330/18 *Armando Carvalho & Others v Parliament and Council* (2019).

19 Because many climate change consequences are projected harm, it is a challenge for human rights which tends to be backward-looking at harm that already took place. While not related to human rights, the *Urgenda* case made an important stride by determining that the risk of climate change may be imminent even if it materialises over a long time. See *Urgenda v the Netherlands* (2019) para 2.3.3, <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> (accessed 3 March 2021).

20 Many jurisdictions require a ‘significant environmental impact’ for cases to be admissible, with polluters being able to argue that their contribution is only a ‘drop in the ocean’ of global climate change and does not meet this threshold. See eg Peel (n 14) 16.

threat of companies lodging claims against states before international arbitration tribunals, in which fora human rights are given little or no consideration. Despite these challenges, in the last few years there has been a substantive increase in cases being brought by both state actors and private individuals and non-governmental organisations (NGOs) against companies for climate change accountability. Increasingly, sophisticated arguments and access to climate science are showing positive results.

So, what are the human rights obligations of fossil fuel companies in relation to climate change? After considering the existing case law and related developments on the climate obligations of companies in part 2 of this chapter to establish the extent to which certain obligations have been recognised, part 3 turns to the soft law instruments relevant to the African context, which set out the human rights obligations of fossil fuel companies. The aim is to determine the obligations that are set out in these instruments, the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the State Reporting Guidelines and Principles on Extractive Industries, Human Rights and Environment (Guidelines and Principles), developed by the African Commission on Human and Peoples' Rights (African Commission), which may be relevant in a climate change context. The chapter concludes in part 4 with an assessment of the contribution of these instruments, as well as recommendations on how a human rights lens may be more effectively applied in determining corporate climate change liability, through stronger recognition of these soft law obligations.

## **2 Fossil fuel companies: Accountability for climate change**

Corporations, particularly those in the energy production sector, are responsible for generating more than half of the global GHG emissions. An equitable and fair response to climate change should include corporations as they have a crucial role to play in terms of mitigating climate change through reducing emissions. However, corporations have an important role in relation to adaptation to climate change, due to their involvement in 'infrastructure provision, development and land use'.<sup>21</sup> Furthermore, the enormous and disproportionate wealth of corporations, accumulated through inequitable externalisation of environmental costs and exploitation of the capitalist international financial and labour systems, would go a long way towards covering some of the substantial financial costs of addressing climate change and thereby enhance climate

21 G Ganguly et al 'If at first you don't succeed: Suing corporations for climate change' (2018) 38 *Oxford Journal of Legal Studies* 845.

justice. As an example, the fossil fuel industry spent \$265 773 915 on lobbying during the United States mid-term election in 2017-2018, along with millions in contributions to candidates, 'bringing the total spending by the industry to more than \$359 million in two years' or \$500 000 per day.<sup>22</sup> While such sums may seem small in comparison to the trillions likely needed to stabilise climate change,<sup>23</sup> it is money that could be made available for climate action by corporations. These factors at the very least place a strong moral obligation on corporations to contribute to mitigation and adaptation to climate change. This part considers some of the most important case law and other steps to date in holding companies accountable for climate change damage.

While climate litigation against corporations only started taking off in the last decade or so, by July 2020 there were more than 40 cases of climate litigation against corporations ongoing worldwide.<sup>24</sup> A similar number of climate cases have been brought on a human rights basis, but the majority of these cases are against states.<sup>25</sup> Nevertheless, there is a proliferation of climate cases worldwide, with new cases continuously being filed, and a few human rights-based cases have been instituted against companies.

The very first human rights-based climate case was brought in 2005 by the Inuit people against the United States, before the Inter-American Commission on Human Rights.<sup>26</sup> Unfortunately, the complainants in this case were not successful, and a judgment was never issued. Nevertheless, even where cases are unsuccessful, they may still make important contributions. This may be either through the courts using *obiter dicta* to indicate circumstances or arguments that may successfully be applied in future litigation, or it could play a broader role in society, and in that way

22 K Kirk 'Fossil fuel political giving outdistances renewables 13 to one' (2020) *Yale Climate Connections*, <https://yaleclimateconnections.org/2020/01/fossil-fuel-political-giving-outdistances-renewables-13-to-one/> (accessed 30 June 2021).

23 BM Sanderson & BC O'Neill 'Assessing the costs of historical inaction on climate change' (2020) 10 *Scientific Reports*, <https://www.nature.com/articles/s41598-020-66275-4> (accessed 30 June 2021).

24 J Setzer 'Climate litigation against "carbon majors": Economic impacts' (2020) *Open Global Rights*, <https://www.openglobalrights.org/climate-litigation-against-carbon-majors-economic-impacts/> (accessed 30 June 2021).

25 C Rodríguez-Garavito 'Climate litigation and human rights: Averting the next global crisis' (2020) *Open Global Rights*, <https://www.openglobalrights.org/climate-litigation-and-human-rights-averting-the-next-global-crisis/> (accessed 30 June 2021).

26 UN Human Rights Council Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009) A/HRC/10/61, <https://www.refworld.org/docid/498811532.html> (accessed 30 June 2021).

it may ‘help to raise social awareness and may contribute to a change in attitudes’.<sup>27</sup>

Unfortunately, to date climate cases in Africa were only brought against state institutions, rather than companies. However, the outcome of these cases often does have implications for companies, and it underscores the basic duty of states to regulate corporate conduct in relation to climate change. For example, in the case of *Save Lamu v National Management Authority*<sup>28</sup> in Kenya, the National Environment Tribunal revoked an environmental impact assessment (EIA) licence issued to Amu Power Company Limited.<sup>29</sup> While climate change was not the main argument, the tribunal found that the government, among others, had breached its obligations under the Climate Change Act 2016 by allowing a project with potentially grave climate implications to continue. Consequently, the company was not able to proceed with building a coal power plant. In a similar case related to the climate change impact of coal mining in Australia, the *Gloucester Resources* case,<sup>30</sup> the Court found that the Planning Assessment Commission was correct in not granting a licence to a major coal mine. In this case the Court based its decision on constitutional grounds, in that it decided that the coal mine was not in the public interest, would harm the quality of life of affected people and was contrary to approved land uses.<sup>31</sup>

Turning to cases on climate change and human rights obligations of companies, a ground-breaking case was recently decided by the Commission on Human Rights of the Philippines. The Philippines Commission in 2019 found 47 corporations legally liable for human rights harms suffered by people in the Philippines due to climate change.<sup>32</sup> The Commission found that ‘major fossil fuel companies are morally obligated

27 Ganguly et al (n 21) 866.

28 *Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another* [2019] eKLR.

29 P Moodley ‘Litigation to challenge large extractive projects is gaining traction in Africa’ (2020) *Open Global Rights*, <https://www.openglobalrights.org/litigation-to-challenge-extractive-projects-gaining-traction-in-africa/> (accessed 30 June 2021).

30 *Gloucester Resources Limited v Minister for Planning* [2019], Land and Environment Court, New South Wales (Australia).

31 Business and Human Rights Resource Centre ‘Gloucester resources lawsuit (re mine’s impact on climate change, Australia)’ (2018), <https://www.business-humanrights.org/en/latest-news/gloucester-resources-lawsuit-re-mines-impact-on-climate-change-australia/> (accessed 30 June 2021).

32 Amnesty International ‘Philippines: Landmark decision by Human Rights Commission paves way for climate litigation’ (2019), <https://www.amnesty.org/en/latest/news/2019/12/landmark-decision-by-philippines-human-rights-commission-paves-way-for-climate-litigation/> (accessed 30 June 2021).

to respect human rights', as articulated in the UN Guiding Principles on Business and Human Rights.<sup>33</sup> In *Milieudefensie & Others v Royal Dutch Shell plc*,<sup>34</sup> a case decided in May 2021 explicitly based on human rights arguments, the complainants before a Dutch court argued that

given the Paris Agreement's goals and the scientific evidence regarding the dangers of climate change, Shell has a duty of care to take action to reduce its greenhouse gas emissions. The duty is said to arise from the Dutch Civil Code as further informed by the ECHR which guarantees rights to life (Article 2) and rights to a private life, family life, home, and correspondence (Article 8).<sup>35</sup>

The ground-breaking decision of Hague District Court on 26 May 2021 confirmed the obligation on Royal Dutch Shell to reduce its carbon dioxide emissions by 45 per cent by 2030, as compared to 2019 levels.<sup>36</sup> Because such major fossil fuel companies generally are not based in African countries, it is difficult to envision similar cases being instituted before African courts. Nevertheless, decisions such as these by courts of the home countries of companies would also have implications for the operations of these companies in African countries. Additionally, cases based on damages and compensation already used by litigants from other developing countries are more likely to be brought in coming years.

However, even in such cases where the court allows a case, or accepts certain initial arguments on the side of the litigants, this points to important changes in the thinking about these matters. A recent case in the French court against oil and gas company Total (responsible for about 1 per cent of global GHG emissions) saw the Court confirming its jurisdiction and ruling that Total did not take sufficient steps to reduce its GHG emissions.<sup>37</sup> It further confirmed the duty on companies such as Total to take mitigating and prevention measures to manage risks of human rights and environmental violations.<sup>38</sup>

33 E de Wit et al 'Climate change litigation update' (2020) Norton Rose Fulbright, <https://www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update#autofootnote13> (accessed 30 June 2021).

34 *Vereniging Milieudefensie et al v Royal Dutch Shell*, The Hague District Court, C/09/571932 2019/379.

35 De Wit (n 33).

36 De Rechtspraak 'Uitspraken: ECLI:NL:RBDHA:2021:5339', <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> (accessed 30 June 2021).

37 *Association Notre Affaire à tous et al c S.A. TOTAL*, Tribunal Judiciaire De Nanterre, 1ère Chambre, 11 Février 2021, <https://www.asso-sherpa.org/wp-content/uploads/2021/02/110221-MINUTE-Total-climat-compe%CC%81tence.pdf> (accessed 30 November 2021).

38 *Association Notre Affaire à tous* (n 37) 8.



In some cases litigants have sought damages to compensate for climate change injuries, such as rising sea levels, heat waves and increased precipitation that are unequally spread and experienced globally. An important and frequently-cited case is *Lluyva v RWE*.<sup>39</sup> In this case a farmer from Peru instituted a claim in the German courts against RWE, a German company, for its contribution to global climate change, which is resulting in glacial melting in Peru, posing flood risks.<sup>40</sup> The case currently is on appeal before German courts, and the Higher Regional Court is awaiting 'expert opinion on the RWE's CO<sub>2</sub> emissions, the contribution of those emissions to climate change, the resulting impact on the Palcaraju Glacier, and RWE's contributory share of responsibility for causing the preceding effects'.<sup>41</sup> This proves not only that it is possible to determine the contributions of specific companies to global GHG emissions, but that it is possible to make causal connections between such emissions and consequences, such as melting ice.

In a case brought by the US State of Baltimore against various oil and gas companies in 2018, the state sought to hold companies, including BP, Shell and Chevron, accountable on these charges on the basis of consumer protection laws. While it was not framed in this way, the damages sought in this case may be understood as holding states accountable for adaptation measures, similar to the *RWE* case. Public nuisance is the approach used in most US-based litigation.<sup>42</sup> However, several public nuisance cases have been thrown out by the courts, either because they consider the selling of fossil fuels as a lawful activity on which the economy is built or because they consider that these are matters to be determined by the legislature and not the judiciary under the doctrine of separation of powers.<sup>43</sup> Other arguments have relied on negligence claims, strict liability and unjust enrichment.<sup>44</sup>

To date the climate litigation in Africa remains scant, and no climate cases have yet been brought against corporations on the continent. Even

39 *Saul Luciano Lluyva v RWE* (2017) 20171130 Case No-2-O-28515.

40 Sabin Centre for Climate Change Law '*Luciano Lluyva v RWE AG*' Non-US Climate Litigation Chart, <http://climatecasechart.com/non-us-case/lluyva-v-rwe-ag/?cn-reloaded=1> (accessed 30 November 2021).

41 As above.

42 E Larson 'Making big oil pay for climate change may be impossible' (2020) *Insurance Journal*, <https://www.insurancejournal.com/news/national/2020/01/24/556341.htm> (accessed 30 November 2021).

43 As above.

44 For a full exposition of the various climate change litigation strategies used, see Business and Human Rights Research Centre 'Climate litigation against companies: An overview of legal arguments' (2019).

in cases against the state, climate change arguments usually are secondary. However, it is clear from the case law discussed above that fossil fuel corporations can be and are being held liable for the negative consequences of their contributions to climate change in different parts of the world, in both developed and developing countries. A wide range of strategies are being employed, from nuisance law to consumer protection, to access to information, to hold companies accountable. Human rights, such as the right to life, are recognised as the basis of such claims. The main aim of the litigation is to ensure that companies reduce their future GHG emissions – correlating to a duty to mitigate climate change. Litigants are also seeking damages for the consequences of the company's contribution to climate change, as a fraction of the total costs incurred because of climate impacts. The latter is in line with the polluter-pays principle, a well-known principle in environmental law, and now increasingly recognised in relation to climate change. It correlates with the duty to adapt to climate change, as the damages paid are used to put in place measures to 'climate proof' communities,<sup>45</sup> in extreme cases by relocating them or, for example, by building sea walls.<sup>46</sup> Some areas that are not yet sufficiently explored through case law, and where the existing human rights soft law instruments on corporate obligations could be relevant, relate to corporate due diligence and positive obligations on companies to fulfil human rights.

### 3 Obligations derived from human rights soft law instruments

Despite the recognition that corporations can engage in activities that have far-reaching adverse human rights impacts,<sup>47</sup> and that they have a human rights role to ensure climate mitigation and adaptation,<sup>48</sup> to date there are no international instruments creating binding obligations on corporations to respect human rights. Holding states accountable at the international level through international (human rights) courts and tribunals for failing

45 *Kivalina v ExxonMobil* 696 F.3d 849 (9th Cir. 2012).

46 *Rhode Island v Chevron Corp.* 2019 WL 3282007 (D.R.I. July 22, 2019).

47 United Nations Human Rights Council Resolution A/HRC/26/L.22/Rev.1 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' adopted on 25 June 2014, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement> (accessed 30 November 2021).

48 The UN Office of the High Commissioner for Human Rights has confirmed that corporations 'must be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights'. OHCHR 'Understanding climate change', submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2015), <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (accessed 30 November 2021).

to provide adequate protection against the actions of corporations only provides an indirect route that often leaves victims without adequate or enforceable redress and, in many cases, allows the main perpetrators to go scot-free, a development that begs the question as to what constitutes climate justice and when would it be achieved by populations that suffer wrongs associated with climate change. This is further revealed by the accountability gap in instances where national justice systems are not able to provide adequate protection for victims of human rights violations by corporations. Such instances include inadequate or outdated national laws for holding corporations accountable, failures of courts and justice systems, particularly in relation to access to justice for indigent communities, or even where intimidation, corruption or the need for foreign direct investment inhibits justice.<sup>49</sup> The limits of the power of national jurisdictions are illustrated by a recent development in Nigeria. After losing on appeal in a Nigerian court in a case related to their role in environmental pollution, Shell lodged a claim against Nigeria in the International Centre for Settlement of Investment Disputes, with possible far-reaching implications for the state and the affected communities.<sup>50</sup>

Furthermore, focusing only on states for human rights accountability no longer is effective given the inequitable modern world economic order.<sup>51</sup> Yet, global networks of interconnected companies are subject only to national level laws, where the ‘corporate veil’ protects them from extensive scrutiny. Additionally, subsidiary companies operating in developing countries are ‘often deliberately under-capitalised, essentially making them judgment-proof’.<sup>52</sup> Finally, Strategic Lawsuits against Public Participation (SLAPP suits) are used to harass human rights defenders. For instance, between 2015 and 2018 a report shows that 12 major oil, gas and mining corporations filed about 24 SLAPPs against 71 defenders, claiming the cost of US \$904 million in damages.<sup>53</sup> A recent judgment in South Africa against an Australian company, *Mineral Sands Resources (Pty)*

49 T Thabane ‘Weak extraterritorial remedies: The Achilles heel of Ruggie’s “Protect, Respect and Remedy” Framework and Guiding Principles’ (2014) 14 *African Human Rights Law Journal* 43.

50 J Ballantyne ‘Shell takes Nigeria to ICSID’ (2021) *Global Arbitration Review*, <https://globalarbitrationreview.com/shell-takes-nigeria-icsid-0> (accessed 30 November 2021).

51 S Burrow ‘UN treaty on business and human rights vital for economic and social justice’ (2019) *Social Europe*, <https://www.socialeurope.eu/un-treaty-on-business-and-human-rights-vital-for-economic-and-social-justice> (accessed 30 November 2021).

52 As above.

53 M Zorob ‘The lengthy journey towards a treaty on business and human rights’ (2019) *Open Global Rights*, <https://www.openglobalrights.org/the-lengthy-journey-towards-treaty-on-business-and-human-rights/> (accessed 30 November 2021).

*Ltd v Reddell*,<sup>54</sup> which found that SLAPP suits are an abuse of process, is considered a significant victory in addressing this challenge, and could also set a precedent for the wider mining and fossil fuels industries.<sup>55</sup> More importantly, it signals that voices can always be raised in court rooms, where it matters most, by climate defenders in the quest for climate justice of vulnerable populations. Non-binding soft law instruments form part of the emerging norms in international human rights law that are addressing challenges, including by adapting and extending human rights standards and norms that apply between states to the conduct of corporations. This part considers potential human rights obligations for climate change arising from the UNGPs and the African Commission Guidelines and Principles, to supplement the arguments before courts. It should be borne in mind that these are soft law instruments that are not binding on states, much less companies, except to the extent that they restate existing obligations, but they may have persuasive power and could help to develop customary international law.

### 3.1 The UNGPs and the African Commission Guidelines

The UNGPs, adopted a decade ago, set out guidance to both companies and states to ensure corporate respect for human rights. Yet, they do not explicitly provide any guidance on the climate obligations of companies. The UN Working Group on Business and Human Rights, the body mainly responsible for implementing the UNGPs, has indicated that it plans to formulate a document embodying what the three pillars of the UNGPs signify for states and business enterprises in relation to climate change.<sup>56</sup> However, at the time of writing this work was not yet available. Other key sources on human rights and climate change recognise the potential role of the UNGPs, but do not discuss them in detail.<sup>57</sup> The ‘three pillars’

54 *Mineral Sands Resources (Pty) Ltd & Another v Reddell & Others; Mineral Commodities Limited & Another v Dlamini & Another; Mineral Commodities Limited & Another v Clarke* (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22 (9 February 2021).

55 S Bega ‘High Court gives Australian mining company a big SLAPP(P)’ (2021) *Mail & Guardian*, <https://mg.co.za/environment/2021-02-10-high-court-gives-australian-mining-company-a-big-slapp/> (accessed 30 November 2021).

56 Office of the High Commissioner for Human Rights (OHCHR) ‘Climate change and the UNGPs’, <https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change-and-the-UNGPs.aspx> (accessed 30 November 2021).

57 See eg United Nations Environmental Programme (UNEP) ‘Climate change and human rights’ (2015), [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate\\_change\\_and\\_human\\_rights.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf) (accessed 30 November 2021); International Bar Association ‘Achieving justice and human rights in an era of climate disruption’ (2014), <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> (accessed 30 November 2021), the latter dedicates two pages in a report of more than 200 pages to the UNGPs

referred to by the UN Working Group as comprising the UNGPs are the state duty to protect human rights, the corporate responsibility to respect and access to a remedy.<sup>58</sup>

The State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter on Human and Peoples' Rights related to the Extractive Industries (Guidelines and Principles)<sup>59</sup> were adopted by the African Commission in 2018. In addition to containing specific questions that guide state reporting before the Commission, the document contains an extensive 'explanatory note' that provides background on the content of the rights in articles 21 and 24, as well as the resultant entitlements and obligations that flow from these rights. Article 24 of the African Charter provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. While the Guidelines and Principles nowhere refer to climate change, it is evident that a satisfactory environment favourable to development cannot be realised if climate change were to continue unabated and without steps being taken to adapt to the changing climate.

There are a few preliminary considerations before coming to the specific duties of companies in this instrument. One important clarification made by the African Commission that is of relevance to climate change is that the term 'peoples' under article 24 may refer to the entire population of a state, and '[l]ocal communities or individuals who are most immediately affected by activities of extractive industries' can constitute a people.<sup>60</sup> This draws attention to the unequal burden of impact suffered at different levels in that it suggests that the extent of national as well as localised impacts of climate change linked to extractive industries is relevant and should be taken into account when determining the obligations in relation to human rights violations suffered as a result.

Second, the Guidelines and Principles clarify that the right to a satisfactory environment is not the same as a right to an unpolluted environment, but rather is an environment that is 'clean enough for a safe and secure life and development of individuals and people'.<sup>61</sup> If considered in the climate change context, this is in line with the pragmatic approach

and mainly focuses on the responsibility of states to regulate corporations.

58 United Nations 'Guiding principles on business and human rights' (2011) 1.

59 While the Guidelines and Principles are narrower than the UNGPs in that they focus only on the extractive industries sector, this chapter is limited in its consideration to oil and gas companies, which fall within their ambit.

60 State Reporting Guidelines 11-12.

61 State Reporting Guidelines (n 60), para 27.

followed in the UNFCCC, which has as its objective ‘stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.<sup>62</sup> Therefore, the obligations on companies from this perspective are not to prevent all activities leading to climate change, but rather to prevent dangerous interference with the climate system.

### 3.2 State obligations to protect in the context of climate change

The UNGPs, following the conventional state-centric model of human rights,<sup>63</sup> set out the responsibility of states to protect the rights of individuals within their jurisdictions. Under this framework, states are expected to protect against abuses by third parties and provide adequate remedies when non-state actors are in breach of human rights.<sup>64</sup> Roos argues that in the climate change context, this will translate into duties on states to ensure compliance by companies with disclosure obligations, to introduce regulations for companies on GHG emissions, and to enforce human rights accountability.<sup>65</sup> In relation to state climate change duties under the UNGPs, the International Bar Association recognises states as the main duty bearers and proposes that ‘states need to clarify regulatory mechanisms relating to climate change, including for overseas violations and require increased transparency from corporations by requiring more detailed reporting of GHG emissions’.<sup>66</sup> These obligations provide an important first level of protection. However, Roos notes that the legal regimes of many states are not adequate to support complaints and adjudication for the prevention and protection of climate change-related corporate harm to human rights.<sup>67</sup>

As in the case of the UNGPs, the African Commission Guidelines place the first obligation to address adverse human rights consequences on the shoulders of states.<sup>68</sup> State obligations to protect people against third party action include standard setting regarding the protection of

62 UNFCCC art 2.

63 SR Roos ‘Climate change and human rights: What follows for corporate human rights responsibility?’ in OC Ruppel et al (eds) *Climate change: International law and global governance* (2013) 304.

64 UNEP (n 57) 29.

65 For a full exposition of the duties of states under the UNGPs in relation to climate change, see Roos (n 63).

66 International Bar Association (n 57) 148.

67 Roos (n 63) 306.

68 State Reporting Guidelines (n 60) para 56.

the environment, finances and the development of natural resources.<sup>69</sup> Taking account of the reality in many African countries, the Guidelines also require that measures should be taken to address corruption.<sup>70</sup> The Guidelines further state that the ‘duty to protect encompasses the laying down of ... criteria for the granting of concession or licences to extractive companies for exploration and extraction of natural resources’ and ‘ensure that the general public and local people are protected from licensing terms that are exploitative’.<sup>71</sup>

In the climate change context, the foregoing might potentially mean that states should ensure that funds are equitably allocated for climate interventions and are properly utilised and not misused. It also means that extraction permits for oil, gas and coal purposes are not to be granted uncritically, in order for the world to stay within the temperature increase envisioned in the Paris Agreement.<sup>72</sup> The State Reporting Guidelines highlight the importance of undertaking human rights, social and environmental impact assessments prior to any activity being undertaken.<sup>73</sup> National legislation should be adopted to ensure that such assessments take full account of the contribution of such activities to climate change. A positive precedent was set in this regard in the South African case,<sup>74</sup> in which the South African High Court held that in taking a decision to build a new coal power station, the government should have carried out a climate change impact assessment.<sup>75</sup>

### 3.3 Accountability of companies for climate change

The main duty on companies under the UNGPs is to respect human rights, a duty that ‘exists independently of states’ abilities and/or willingness to fulfil their own human rights obligations’.<sup>76</sup> General Principle (GP) 18 requires corporations to undertake human rights impact assessments. In principle this means that they have a duty to identify and assess actual

69 State Reporting Guidelines (n 60) para 45.

70 As above.

71 State Reporting Guidelines (n 60) para 48.

72 Paris Agreement (n16).

73 State Reporting Guidelines (n 60) para 64.

74 *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others* [2017] JOL 37526 (GP) (2019).

75 See discussion in AO Jegede & W Makulana ‘Climate change interventions in South Africa: The significance of *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others* [2017] JOL 37526 (GP)’ (2019) 15 *Obiter* 399; also see LJ Kotze & A du Plessis ‘Putting Africa on the stand: A bird’s eye view of climate change litigation on the continent’ (2020) 50 *Environmental Law* 627.

76 UNGPs Principle 11.

and potential human rights impacts. This provision can aid climate justice as it suggests that corporations themselves do not wait to be taken to court before determining or calculating the climate change impacts of their operations, but that they should do so preventatively, and take the necessary steps to prevent and address these impacts in communities prone to the adverse consequences of their operations.

The UNGPs explicitly recognise the importance of paying attention to the rights of vulnerable groups.<sup>77</sup> This is important in the context of climate change that compounds the vulnerability of various groups. Additionally, there is a duty on companies to track the effectiveness of their interventions on vulnerable or marginalised populations. This means that in addition to taking the needs of vulnerable groups into account when doing impact assessments and designing climate change responses, corporations should take follow-up steps to ensure that their measures in fact do not impact negatively or fail to address negative climate consequences for these groups.

Importantly, the UNGPs not only provide for obligations on corporations to prevent human rights impacts from their own activities, but also for activities associated with their operations.<sup>78</sup> This is relevant in the climate change context, especially in relation to the activities of energy sector/fossil fuel companies. In line with this principle, the burning of fossil fuels in the production of energy or the burning of fuel by vehicles, even if carried out by other companies or individuals, is directly linked to their operations. This is a counterargument for the issue raised before some courts by corporations that their operations are an integral part of modern society and the development of economies around the world, as they have a duty to prevent the human rights consequences, notwithstanding the extent of their contribution to climate change impact.<sup>79</sup>

Another aspect of the UNGPs that is relevant in the climate context is GP 14, which states that human rights obligations apply to all corporations, regardless of their size (among other characteristics). While the top 50 'carbon majors' are responsible for a large proportion of GHG emissions, smaller corporations, including those operating on the African continent, have obligations, proportionate to their contribution to global climate change, which is becoming measurable. This is significant as of

77 UNGPs Principles 11, 18, 20.

78 UNGPs Principle 13.

79 As above.



the 20 largest companies in Africa in terms of turnover, five are related to the energy, petroleum and gas sectors.<sup>80</sup>

An important aspect of the duty to respect is the duty to ‘do no harm’. According to Toft, ‘from the date that the carbon majors first became aware of fossil fuels causing climate change ... they have violated their basic responsibility to do no harm’.<sup>81</sup> While this increases the historic obligations of these largest companies, in today’s world no person or company can claim that they are unaware of the causes or consequences of climate change. Therefore, for ongoing exploitation of fossil fuels and for the active exploration for additional sources, which is prevalent on the continent, all companies involved would be in violation of this obligation. While in the Kenyan case cited above it was the government body rather than the corporation that was sued, this ‘do no harm’ principle might be applied in future cases against corporations seeking to exploit oil and gas resources on the continent.

In terms of corporate obligations for human rights violations, the African Commission Guidelines go beyond the UNGPs to include both positive and negative, direct and indirect obligations. The Guidelines situate the human rights obligations of corporations within article 27(2) of the African Charter which requires that rights and freedoms should be exercised ‘with due regard to the right of others, collective security, morality and common interest’.<sup>82</sup> Clearly, climate change impacts not only on the rights of others, as discussed above, but also on collective security and common interest, and corporations operating on the continent thus have a duty to exercise their rights within these limits.

As in the case of the UNGPs, the Guidelines recognise a duty on companies to do no harm, by ensuring that their activities do not occasion harm and should avoid intentional acts that may infringe on human rights.<sup>83</sup> This correlates with the obligations set out under the UNGPs. In addition to limiting GHG emissions, in the African context a duty to do no harm would include, for example, not exacerbating climate-induced drought by polluting or using up limited water sources for mining purposes.

80 Think Africa ‘Largest companies in Africa: Top 20’, <https://thinkafrica.net/largest-companies-in-africa-top-20/> (accessed 30 November 2021).

81 KH Toft ‘Climate change as a business and human rights issue: A proposal for a moral typology (2020) 5 *Business and Human Rights Journal* 1 11.

82 Art 27(2) African Charter.

83 State Reporting Guidelines (n 60) para 57.

The Guidelines further recognise the duty of due diligence on companies, which require them to be aware of, prevent and rectify negative human rights impacts. Still in keeping with the UNGPs, the Guidelines require companies to undertake human rights, social and environmental impact assessments to ascertain the extent of their impacts and require that they consider the rights of vulnerable groups.<sup>84</sup> In undertaking such impact assessments, corporations should provide for access to information, and participation of affected persons. Up to this point the same consequences discussed above under the UNGPs would apply.

The Guidelines additionally set out obligations on corporations in relation to 'fiscal and transparency requirements arising from the operations of their activities', including declaring of profits and fees due to the government.<sup>85</sup> Where a state has put in place carbon tax or caps on emissions, these would have to be reported under this requirement. Transparency would also require that impact assessments and due diligence reports be made public and accessible, along with details of the preventative and reparative measures that have been taken, particularly in relation to most vulnerable groups.

The Guidelines go far beyond that envisioned in the UNGPs, by providing not only for a duty to respect, but also for positive legal obligations to fulfil human rights, in circumscribed circumstances. In particular, it provides for a duty on companies to contribute to the 'development needs of host communities', arguably based on the adverse impacts of the companies on their host communities.<sup>86</sup> Based on their climate impacts, corporations would have obligations to address the adaptation needs, as part of broader development needs, both at national and local levels. Positive duties to address human rights challenges resulting from climate change may include far-reaching activities, such as assisting host communities in shifting to green energy, assisting drought-stricken communities or communities affected by extreme weather events in accessing food and other necessities, or contributing to medical research into eliminating vector-borne diseases. Such actions would be justified based on the profits that they have made through climate-inducing activities, their relative power in relation to both communities and governments in Africa, as well as their own interests in ensuring a transition to sustainable business activities.

84 State Reporting Guidelines (n 60) paras 58 & 64.

85 State Reporting Guidelines (n 60) para 63.

86 State Reporting Guidelines (n 60) para 65.

Nevertheless, in practice such obligations may pose some serious challenges, not least the fact that through illicit financial flows companies syphon off their profits, which would limit their obligations to contribute to the communities in which they operate. Second, there may be a challenge in determining where government obligations end and corporate obligations start. It is important that states should not turn over all their positive obligations to corporations but should aim to adequately regulate foreign corporations operating in the country. Finally, there is no clear guidance in the document or elsewhere on the level of obligations that would accrue to corporations in relation to development and socio-economic needs of the community. While these challenges may not be insurmountable,<sup>87</sup> there is a need for further development of these guidelines, also in its general application beyond the climate context.

### **3.4 Access to remedies in the climate crisis**

GPs 15 and 17 require corporations to apply human rights due diligence, to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts'. The UN Working Group considers human rights due diligence to be an important aspect of corporate duties in the context of climate change, and notes that corporations have a duty to 'integrate climate change considerations into their human rights due diligence processes'.<sup>88</sup> The guidance of the International Bar Association on human rights in climate change interprets this duty to mean that companies must implement due diligence to identify, prevent and address (by minimising or reversing) the actual impacts from its operations on climate change.<sup>89</sup> This would make due diligence a critically important tool of climate justice, since corporations would have to take positive actions to reverse the effects of climate change from their GHG emissions. This would require that they not only take steps to reduce their future emissions to zero, but that they would have to adopt initiatives, such as planting trees, carbon capture technology, or other ecosystem-renewing activities, to repair some of the damage.

The UNGPs do not require physical proximity alone for accountability. They acknowledge that violations may also result from weaker exercise of control by parent companies.<sup>90</sup> Hence, it deploys the yardstick of impact, instead of sphere of influence, in defining and determining the scope of

87 D Bilchitz *A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles* (2013) 128-135.

88 OHCHR (n 58).

89 International Bar Association (n 57) 149.

90 Toft (n 81) 19.

corporate responsibility.<sup>91</sup> This means that while corporations may have specific duties towards the people in the area where they operate, their duties are not limited to these. This is crucial in the climate change context where harm often manifests far away from the origins.

One further characteristic of the UNGPs that is important in the context of climate change is the fact that they provide for progressive responsibilities,<sup>92</sup> including those related to due diligence, human rights impact assessments and the prioritisation of interventions that respond to real and actual negative consequences for human rights.<sup>93</sup> This is important, in that human rights often are remedial in that they are concerned with damage that has already manifested. Climate change, as a global dilemma that is manifesting at different speeds in different places, and which will pose a challenge to future generations, requires a forward-looking approach. The UNGPs thus are useful in this regard.

As far as the obligations for remedying breaches are concerned, the African Commission Guidelines place the full responsibility on the corporation to compensate for both material and non-material damages suffered by affected persons even where such damages constitute irreparable harm to health and environment.<sup>94</sup> This could be a strict application of the polluter-pays principle, based on strict liability. In doing so, it could be argued that they go further than the UNGPs, which require corporations to ‘provide for *or cooperate in their remediation*’.<sup>95</sup> In a climate context, this becomes complex. Whereas in the case of localised environmental damage it is possible to identify the affected persons in the climate context, all people would in a sense be affected. Would affected people then be limited to those who take cases to court, as has been the practice in jurisprudence thus far? It is difficult to say how ‘affected people’ should be defined. It may be argued, with Toft, that companies have stronger (at least moral) obligations to the people in the area where they operate (proximity argument) even in a climate context.<sup>96</sup> While only a few of the top 50 fossil fuel companies are headquartered on the African continent, the majority of the other major polluters either have operations on the continent or have expressed an interest in obtaining a share in such operations.<sup>97</sup> Coupled with the fact that some of the most

91 Roos (n 63) 318.

92 Toft (n 81) 3.

93 UNGPs Principle 24.

94 UNGPs (n 93) para 59.

95 UNGPs (n 93) Principle 22 (my emphasis).

96 Toft (n 81) 19.

97 Saudi Aramco is the largest, and currently is partnering with South Africa’s Central

severe consequences of climate change are being felt on the African continent, this makes a strong case for corporations to have an obligation to compensate people in Africa whose human rights can be proved to have been violated.

While it would not be feasible to do so through individual payments to all Africans, it could impose a duty on corporations at the very least to make damage payments to governments in countries where they operate, to contribute to adaptation measures (as has been seen in some cases in the US) and, additionally, to compensate the local communities where their operations are hosted. Such contributions would likely have to be larger than their contributions to total global climate change, because of the heightened obligations due to proximity. Toft argues for other factors to be considered in determining the forward-looking obligations of corporations, as including their ‘power, privilege, interest and collective ability’.<sup>98</sup> The Guidelines reflect this argument relating to the power of companies by insisting on a high level of duty of care and diligence.<sup>99</sup>

## **4 Conclusion**

This chapter considered two human rights soft law instruments that set out the human rights obligations of companies, namely, the UNGPs and the African Commission Guidelines and Principles, against the background of the increasing and diversifying climate change litigation, particularly against corporations, to determine the extent to which these two soft law instruments strengthen or add to the arguments already being made before courts in relation to the obligations of corporations in the energy sector. By doing so, it contributes to the process of clarifying the climate-related human rights obligations of corporations, an important theme in climate justice, which continues to be a matter of contestation, despite widespread recognition of the need for such obligations as well as the legal and moral bases thereof.

Both the UNGPs and the African Commission Guidelines place the main responsibility in relation to corporate conduct squarely on the shoulders of the state, as the main duty bearer under international human rights law. Thus, many of the obligations of corporations can most

Energy Fund (CEF). Gazprom is another of these largest companies operating on the African continent. Total is developing a large-scale oil operation in Uganda, with one of the longest pipelines, which would also run through Tanzania. Others that have shown an interest include Coal India (South Africa and Mozambique), Shenhua Group (South Africa) and Rosneft (Nigeria).

98 Toft (n 81) 5.

99 State Reporting Guidelines (n 60) para 58.

effectively be fulfilled within a functioning and effective national system. As soft law instruments, the implementation thereof against companies also largely relies on the political will of states, either home states or host states. Nevertheless, as these duties exist separate from the obligations of state, the possibility does exist for corporations to be held accountable in other national courts based on extraterritorial jurisdiction<sup>100</sup> or in international fora.

Furthermore, there is the potential in Africa, similar to that which is ongoing in the US, of state actors at different levels, from cities to countries, suing fossil fuel companies to hold them accountable for climate change damage – both that which has already manifested, and with developing climate science – also for the adaptation to the projected localised climate consequences. Both the UNGPs and the African Commission Guidelines provide for backward-looking duties of due diligence by identifying and paying damages for actual harm resulting from climate change, as well as forward-looking duties to ‘do no harm’, including through conducting human rights impact assessments, making information publicly available and reducing GHG emissions. In these respects, the two soft law instruments support the arguments that have already been made before courts, whether based on human rights obligations or public nuisance, negligence, duty of care and unlawful enrichment. The African Commission Guidelines, however, take the possibility of corporate liability into new territory and beyond the routine duty to respect, by providing for obligations on companies to contribute fairly to the development needs of host communities. While such an approach has not yet been tested in the courts, the scope of responsibility of corporations that courts are willing to accept has been expanding, and it cannot be ruled out that such an approach may one day succeed.

100 See eg the human rights litigation by affected communities in Zambia and Nigeria, respectively, against parent companies in the UK, in the cases of *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe & Others* (Respondents) [2019] UKSC 20 and *Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC 3. A full discussion of extraterritoriality falls beyond the scope of this chapter.