8 EXTRATERRITORIAL LITIGATION AGAINST MULTINATIONAL CORPORATIONS FOR CLIMATE-RELATED HUMAN RIGHTS VIOLATIONS: LESSONS FROM *OKPABI V SHELL*

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1 Introduction

Environmental justice as a protection mechanism is instituted to hold entities accountable for their activities that may have resulted in environmental degradation, marginalisation of affected communities, deprivation of benefits and compensations to resource-host communities and direct or indirect abuse of human rights. As indicated in the preceding chapter, an example was provided of how a legal entity could be subjected to a process of accountability through a mechanism of alternative adjudicatory tools. The Cortec Mining case in Kenya tested the domestic judicial system before opting for the alternative system in the International Centre for Settlement of Investment Disputes (ICSID). However, the factors at stake in Cortec's case are economic and not environmental. However, it is noteworthy that Cortec, a multinational company, is influential and could afford the best lawyers to defend it against the claims of the state. Also, the state was the claimant in the case, and not a private citizen or a group of private citizens. In a distinct situation, which is more common in African countries where multinational companies are accused of complicity in human rights abuse through activities that are hazardous to human health, there is always the challenge of getting the government to be on the side of the claimants and making the judicial system fair enough to guarantee environmental justice. The above challenges drive victims of human rights abuse to seek justice from extraterritorial jurisdictions that allow the universal application of justice for human rights abuses.

The universality of human rights has been a foundation of the international human rights system, but this has yet to translate into the accountability of multinational corporations (MNCs) for wrongs beyond the national borders of their establishment. Redressing such wrongs is problematic where global crises such as environmental degradation and climate change are involved. While there are guiding principles developed

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under international human rights law for that purpose, the reluctance of MNCs to accept the extraterritorial dimensions of their obligations is notorious. However, in 2021, while reversing the decision of the Court of Appeal in *Okpabi v Royal Dutch Shell Plc (Okpabi v Shell)*, the United Kingdom's Supreme Court concluded that it was at least arguable, based on the degree of control and de facto management, that courts have jurisdiction over litigation against a parent company for the activities of their subsidiaries overseas. With a focus on the extraterritorial link between the activities of MNCs relating to climate change and its effects on human rights abroad, this chapter explores the lessons that *Okpabi v Shell* holds for jurisdictional issues in extraterritorial climate litigation.

The universality of human rights is a core feature of the international human rights system. By this principle, human rights apply to everyone everywhere in the world, and negotiations or 'trade-offs' should not result in human rights violations.[1] By extension, extraterritoriality reflects the notion of universality in that human rights realisation or violations are often a territorial contestation that can occur outside territorial borders. However, before the human rights treaty monitoring bodies, neither the concept of universality nor its extraterritorial dimension had translated into direct accountability for non-state actors, particularly MNCs, for wrongs outside the national border of their establishment. One fundamental reason for this development is that, by design, states are generally the negotiators and the primary subjects of international law, including international human rights law.[2] Human rights instruments primarily confer rights on individuals to enjoy and assert states, not MNCs, as duty bearers. The idea of making states duty-bearers of rights emanates mainly from the reasoning that they are also the biggest violators of rights.[3] Hence, before treaty monitoring bodies, wrongs committed by non-state actors can only be addressed by taking legal action against the states for failure to regulate their activities. Direct litigation against MNCs only exists at the domestic level within the remits of criminal laws,[4] common law,[5] and tort law.[6]

1 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, UN Doc A/CONF.157/23 (1993) paras 1 and 5.

2 P Alston (ed) *Non-state actors and human rights* (2005).

3 F Viljoen *International human rights law* (2012).

4 A Reinisch 'The changing international legal framework for dealing with non-state actors' in P Alston (ed) *Non-state actors and human rights* (2005) 37 at 38.

5 MP Newitt & RV Percival 'Could official climate denial revive the common law as a regulatory backstop?' (2018) 96 *Washington University Law Review* 441.

6 RF Blomquist 'Comparative climate change torts' (2012) 46 *Valparaiso University Law Review* 1053.

Yet, the influence of MNCs *vis*-à-*vis* human rights violations has been a subject of increasing debate over the years. Whereas their actions can help fulfil human rights, their activities can also lead to human rights violations. On the latter, the adverse reach of their actions can be demonstrated in terms of their connection with the most pressing challenge in contemporary times: climate change. The activities of MNCs are at the heart of global climate change.[7] How these activities may constitute human rights violations requires clarification, as it is uncertain, at least in the leading international instruments, namely the International Covenant on Civil and Political Rights (ICCPR)[8] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[9] It is also not mentioned in climate pillar instruments such as the United Nations Framework Convention on Climate Change (UNFCCC),[10] the Kyoto Protocol,[11] and the Paris Agreement,[12] which recognise climate change's global threat. There have been positive efforts with ongoing high-level discussion in the international community, leading, for instance, to the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGP)[13] and promotional activities of treaty monitoring bodies. Also, the Maastricht Principles on Extraterritorial Obligations of States in the area of economic, social and cultural rights require the state's responsibility to ensure that its organisation acts responsibly abroad.[14]

Yet, the most evident possibility with regard to the accountability of MNCs is at the domestic level. But even where chances of success exist at that level, the power of the MNCs and the lack of political will of the state to implement courts' decisions often render remedies hollow. The practicality of litigating against the state in climate change and the challenge of implementing the judgement obtained against non-state

7 Active Sustainability '100 companies are responsible for 71% of GHG emissions' https://www.activesustainability.com/climate-change/100-companies-responsible-71-ghg-emissions/ (accessed 19 November 2023).

8 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966 UNTS 171 (1966).

9 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 3 (1966).

10 UN Framework Convention on Climate Change (UNFCCC) ILM 851 (1992).

11 UN Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998) entered into force 16 February 2005.

12 Paris Agreement under the United Nations Framework Convention on Climate Change adopted 30 November - 11 Dec 2015 at the 21st Sess Conference of the Parties, FCCC/CP/2015/L.9/Rev.1 (2015).

13 United Nations Guiding Principles on Business and Human Rights (UNGP) (2011).

14 Principle 25 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2012).

actors can be illustrated with examples. For instance, in the context of the state, through a careful analysis of *Friends of the Irish Government CLG v Government of Ireland, Ireland and the Attorney General* decided by the Irish Supreme Court in 2020,[15] Adelmant, Alston and Blainey show in their recent work that all is not entirely well with the human rights approach to climate change. They contend that the Court's pronouncements on standing, the relevance of human rights provisions, and the right to a healthy environment are counterproductive.[16] According to the authors, the Court's position on standing is unjustifiably restrictive, its rejection of the human rights approach is outdated, and its failure to recognise the right to a healthy environment as a derived right is regressive.

In contrast, litigation was successful against the respondent in *Gbemre v Shell Petroleum Development Company Nigeria Limited*.[17] Still, due to a lack of political will on the part of the state, the judgement in *Gbemre* has not been enforced, and gas flaring continues unabated in the Niger Delta area.[18] It is more relieving with the decision of the Supreme Court of Nigeria in the case of *Centre for Oil Pollution Watch (COPW) v NNPC (2018)*[19] where it held that the duty to protect the environment by the state is justiciable when section 20 of the Nigerian Constitution is read together with, and in the context of, a provision like section 4(2) of the Constitution,on the power to make laws to give effect to section 20. Hence, there is some optimism that litigations against the state or corporate entities in the context of climate change hold chances of success or implementation by African states.

Various legal solutions have been preferred along the lines of deploying the human rights approach.[20] Recently, Oniemola proposed a transnational platform for litigating climate change in Africa and suggested that African states adopt universal jurisdiction among themselves when having climate

15 *Friends of the Irish Environment CLG v Government of Ireland, Ireland and the Attorney General* (2020) IESC 49.

16 V Adelmant, P Alston & M Blainey 'Human rights and climate change litigation: One step forward, two steps backwards in the Irish Supreme Court' (2021) 13 *Journal of Human Rights Practice* 1.

17 *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) AHRLR 151 (Federal High Court, Nigeria).

18 Knoema 'World Data Atlas 2021 Nigeria – CO2 emissions' https://knoema.com/atlas/Nigeria/CO2-emissions (accessed 19 November 2023).

19 Suit number SC319/2013.

20 AO Jegede 'Arguing the rights to a safe climate under the UN human rights system' (2020) 9 *International Human Rights Law Review* 184; AO Jegede 'Climate change in the work of the African Commission on Human and Peoples' Rights' (2017) 31 *Speculum Juris* 136.

change litigated in their territories.[21] However, as interesting as Oniemola's proposition seems, some missing links exist. The proposition ignores the influence of MNCs often at the heart of climate-related activities; it assumes that states in Africa will exercise the necessary will to implement court decisions against the anthropogenic activities of MNCs that have led to climate change. Besides reinforcing the whole concept of the state as duty bearer for human rights, the proposition is restrictive; it ignores the broader possibility of deploying extraterritorial litigation against the parent company of any corporate entity anywhere in the world involved in violations of rights in Africa that are climate change-related.

Hence, the central question that informs this contribution is whether human rights violations associated with climate-related activities of MNCs can be addressed through extraterritorial litigation. With reflection on the extraterritorial nature of the case of *Okpabi v Royal Dutch Shell Plc*,[22]22 and how issues around jurisdiction are resolved, this chapter argues the possibility of addressing jurisdictional issues that may arise while litigating a parent company for the human rights violations associated with climate-related activities of subsidiary companies. However, from the onset, a caveat is required: climate change is not the specific subject of the *Okpabi case*. Rather, this chapter sets out to draw lessons on jurisdictional questions that may guide litigants who wish to sue MNCs for violations of rights associated with climate change. Following this introduction is section 2, which sketches the connection between climate change, MNCs, and human rights violations. Section 3 presents a summary and a reflection on *Okpabi* facts in the context of extraterritoriality. In contrast, section 4 discusses the salient lessons in *Okpabi* for litigating wrongs associated with MNC extraterritorial activities. Section 5 concludes this chapter.

2 Climate change, MNCs and wrongs: Extraterritoriality in context

Extraterritoriality connotes the exercise of legal power outside territorial borders.[23] That climate change is a subject of extraterritoriality is not difficult to imagine. Its global nature and the necessity for a universal solution are evident in the United Nations General Assembly Resolution

21 PK Oniemola 'A proposal for transnational litigation against climate change violations in Africa' (2021) 38 *Wisconsin International Law Journal* 301 at 310-315, 322-329.

22 *Okpabi v Royal Dutch Shell* (2021) UKSC.

23 AJ Colangelo 'What is extraterritorial jurisdiction?' (2014) 99 *Cornell Law Review* 1302; S Besson 'The extraterritoriality of the European Convention on Human Rights' (2012) 25 *Leiden Journal of International Law* 857.

1988[24] and climate pillar instruments such as the UNFCCC, the Kyoto Protocol, and the Paris Agreement. These instruments recognise the global threat of climate change and draw no jurisdictional boundary in their call upon states to respect, promote, and consider their respective human rights obligations towards protecting human rights when taking actions to address climate change. Through two critical linkages, this section demonstrates how the activities of MNCs underlie climate change and result in key human rights violations. It does so by linking climate change to MNCs' activities and human rights violations.

2.1 Linking climate change to MNCs

The scientific reports from the Intergovernmental Panel on Climate Change (IPCC) establish that climate change is real due to human activities.[25] Especially in its 2013 report, the IPCC affirms that owing to the increasing emission of greenhouse gases (GHG), 'the warming of the Earth is unequivocal and the population's vulnerability to its adverse effects is increasing'.[26] Under the 2015 Paris Agreement, state parties agree to reduce GHG, the most potent of which is carbon dioxide (CO2).[27] However, there is no internationally binding guidance on which measures should be used to achieve decarbonisation.[28] Both the 2018 reports of the IPCC on global warming of 1.5°C[29] and the Royal Society and Royal Academy of Engineering[30] also clarify the need to take drastic steps to achieve net-zero carbon dioxide (CO2) emissions and stabilise global temperatures below 2°C under the Paris Agreement.[31] The centrality of MNCs to meeting this target is understated in these two important documents.

24 UNGA Res 43/53 'Protection of global climate for present and future generations of mankind' 70th plenary meeting (6 December 1988).

25 T Stocker et al (eds) *The physical science basis. Contribution of Working Group I to the 5th Assessment Report of the Intergovernmental Panel on Climate Change* (2013).

26 Stocker et al (n 25) 8, 15.

27 Paris Agreement under the United Nations Framework Convention on Climate Change adopted 30 November-11 December 2015 at the 21st Sess Conference of the Parties, 12 December 2015, UN Doc FCCC/CP/2015/L.9/ Rev.1 (2015) (Paris Agreement).

28 As above.

29 V Masson-Delmotte et al (eds) *Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018).

30 Royal Society & Royal Academy of Engineering *Greenhouse gas removal* (2018) 10.

31 Royal Society & Royal Academy of Engineering (n 30) 7.

Yet, due to the massive amount of carbon dioxide generated from coal, oil, and gas reserves, the activities of MNCs pose a severe threat to attaining the globally accepted limit of 2°C in the Earth's temperature.[32] In particular, a 2014 study found that corporations in the fossil fuel and cement industries are among 90 'carbon majors' responsible for significant historical anthropogenic GHG emissions.[33] This position is also reinforced by the 2019 Report of the United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2019 UNSR Report). The report affirms that the burning of fossil fuels produces 70 per cent of GHG emissions and biomass for electricity and heat, while 21 per cent is from industrial processes, 14 per cent is from transportation and 10 per cent is from other indirect energy use.[34] This development is not surprising. The International Monetary Fund estimated that fossil fuel subsidies in 2017 were $5.2 trillion, with coal and oil responsible for 85 per cent of this total.[35] Also, as evident in another report, the world's total energy supply through fossil fuel corporations has remained unchanged at 81 per cent,[36] making the energy supply sector the largest contributor to global GHG emissions.[37]

These emissions are generated through the activities or sources over which a company enjoys control, such as extraction, combustion of fossil fuels, or coal-based energy production. They can also result indirectly from those emissions relating to the company's activities emitted from sources owned or controlled by another company, for example, purchased electricity, rental cars, and commercial airlines.[38] As far back as 2012, the International Energy Agency warned that two-thirds of proven fossil

32 B McKibben 'Global warming's terrifying new math: Three simple numbers that add up to global catastrophe-and that make clear who the real enemy is' *Rolling Stone* 19 July 2012 at 7.

33 R Heede 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2014) 122 *Climatic Change* 229.

34 United Nations General Assembly, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Seventy-fourth session, 15 July 2019, UN Doc A/74/161 (2019) para 12.

35 International Monetary Fund 'Global fossil fuel subsidies remain large: An update based on country-level estimates' IMF Working Paper WP/19/89 (2019).

36 UNEP 'Global environment outlook 6: Healthy planet, healthy people' (2019).

37 T Bruckner et al 'Energy systems' in OR Edenhofer et al (eds) *Climate Change 2014: Mitigation of climate change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014).

38 See for instance TFG 'Sustainability overview' (2018).

fuel reserves must not be burned in order to limit warming to 2°C.[39] A subsequent study concluded that 82 per cent of known coal reserves, 49 per cent of gas reserves, and 33 per cent of oil reserves should remain intact if the world is to avoid dangerous climate change of more than 2°C.[40] As the 2019 report of the UNSR further indicates, complying with the Paris Agreement requires dramatically accelerated climate action and legal interventions that encourage decarbonisation, promote alternative energy, and enhance zero-carbon transportation, including zero-emission.[41]

In its latest report, the Intergovernmental Panel on Climate Change stated that 'limiting global warming to 1.5 °C would require rapid, far-reaching, and unprecedented changes in all aspects of society'.[42] These aspirations have shifted attention to non-state and subnational actors such as MNCs to commit to climate action by signing the Paris Pledge for Action.[43]43 In particular, environmental groups continue to lobby governments to establish GHG emissions regulations and call upon corporate entities to take proactive measures on carbon emission strategies.[44] Most of these efforts remain aspirational and, at best, non-binding in terms of their enforcement. Despite the efforts, studies have shown that MNCs are still responsible for 71 per cent of the global GHG emissions that have caused global warming since 1998.[45] In particular, the mining activities of MNCs with origins in the North but operating in the extractive sectors in most countries of the South, as shown by reports, contribute significantly to the release of greenhouse gases such as carbon

39 International Energy Agency *World energy outlook 2012* (2012) 516.

40 C McGlade & P Ekins 'The geographical distribution of fossil fuels unused when limiting global warming to 2°C' (2015) 517 *Nature* 187.

41 UN SR Report (n 34) paras 20, 25 and 77.

42 IPCC Summary for Policymakers (n 29).

43 UNEP 'Emission gap report 2018' (2018) 20; University of Cambridge Institute for Sustainability Leadership (CISL) (2015); Paris pledge for action https://www.corporateleadersgroup.com/reports-evidence-and-insights/news-items/lappel-de-paris-paris-pledge-for-action#:~:text=Together%20state%20and%20non%2Dstate,to%20a%20low%20carbon%20economy.%E2%80%9D (accessed 20 November 2023).

44 EM Reid & MW Toffel 'Responding to public and private politics: corporate disclosure of climate change strategies' (2009) 30 *Strategic Management Journal* 1157; M Kiliç, C Kuzey & A Uyar 'The impact of ownership and board structure on corporate social responsibility (CSR) reporting in the Turkish banking industry' (2015) 15 *Corporate Governance: The International Journal of Business in Society* 357.

45 '100 companies are responsible for 71% of GHG emissions' *Active Sustainability* https://www.activesustainability.com/climate-change/100-companies-responsible-71-ghg-emissions/ (accessed 20 November 2023).

dioxide and methane, which aggravate climate change.[46] As reported by the UN Environment, such extraction activities have been responsible for 18 per cent of resource-related climate change.[47] Due to a lack of appropriate control by their parent companies, activities can be overlooked as long as they are profitable. There are examples of the extraterritorial reach of these activities in different parts of Africa. For instance, Nigeria has a range of Western oil companies, such as Mobil, Texaco, AGIP, Chevron, Exxon, and Royal Dutch/Shell, holding oil production licenses in the Niger Delta, one of the biggest wetlands in the world. Of all these companies, Shell Nigeria, a subsidiary of Royal Dutch/Shell, was the first to discover oil in Ogoniland, in the Niger Delta area.[48] Persistent oil extraction and gas flaring in Ogoniland contribute to climate change by releasing carbon dioxide underlying global warming into the atmosphere.[49]

2.2 Linking MNCs to violations of rights

Extraterritoriality encompasses the conduct or omission of a 'state, within or beyond its territory, that affects the enjoyment of human rights outside that state territory'.[50] The reluctance or unsatisfactory efforts of the MNCs' in their operation outside their countries of origin to decarbonise, slows down global efforts to address climate change and raises questions about the extraterritorial accountability of their home states. This is because it compounds future climate projections and negatively affects the rights of populations. The emission of carbon and other related activities of the MNCs are linked to human rights because scenarios in the aftermath of climate change have implications for those rights. According to the report of the OHCHR, which draws the link between human rights and climate change, climatic scenarios will seriously affect populations living in acutely vulnerable situations 'due to factors such as poverty, gender,

46 T Bruckner et al 'Energy systems' (2014) in OR Edenhofer et al (eds) *Climate change 2014: Mitigation of climate change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014).

47 'We're gobbling up the Earth's resources at an unsustainable rate' *UNEP* 3 April 2019 https://www.unep.org/news-and-stories/story/were-gobbling-earths-resources-unsustainable-rate (accessed 20 November 2023).

48 E Hennchen 'Royal Dutch Shell in Nigeria: Where do responsibilities end?' (2015) 129 *Journal of Business Ethics* 1.

49 Bruckner (n 46) 522.

50 O de Schutter et al 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084 at 1101.

age, minority status, and disability'.[51] Such scenarios may affect a range of rights, including the right to adequate food,[52] adequate water,[53] health,[54] adequate housing,[55] and the right to life.[56]

Violations of rights emanate from the adverse consequences of climate-related realities such as rising sea levels, flooding, warmer temperatures, deforestation, depletion or destruction of plants and animals, and traditional fishing on the subsistent livelihood of local populations and communities.[57] Such occurrences can threaten the right to food because local populations often depend on natural resources for farming and fishing from which they derive their sustenance. The degradation of water sources will undermine the right to water. At the same time, an increase in global warming because of climate-related activities by MNCs may increase newer episodes of disease and thereby undermine populations' right to health. MNCs' ineffective implementation of climate-related projects, such as alternative energy projects involving land use, may deprive local and vulnerable populations of their right to housing. As the foregoing rights are essential to enjoying the dignity of human life, they may also undermine the right to life of populations. Examples of such populations cited in the OHCHR report as vulnerable in the context of climate change are women, children, and Indigenous peoples.[58] According to the OHCHR report, Indigenous peoples will be unduly impacted. They often live in 'marginal lands and fragile ecosystems that are particularly sensitive to alterations in the physical environment',[59] where MNCs in the extractive sector operate.

The linkage of MNCs to activities that can extraterritorially affect human rights has been an explicit subject of the activities of treaty monitoring bodies, even if the duty to regulate such activities has always been on the state. For instance, General Recommendations 28 of the Committee on the Elimination of Discrimination Against Women on the

51 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, 15 January 2009, UN Doc A/HRC/10/61 (2009) (OHCHR Report).

52 OHCHR Report (n 51) paras 25-27.

53 OHCHR Report (n 51) paras 28-30.

54 OHCHR Report (n 51) paras 31-34.

55 OHCHR Report (n 51) paras 35-38.

56 OHCHR Report (n 51) paras 21-24.

57 AO Jegede *Climate change regulatory framework and indigenous peoples' land in Africa: Human rights implications* (2016).

58 OHCHR Report (n 51) para 44.

59 OHCHR Report (n 51) para 51.

core obligations explains that state parties are under Article 2 of CEDAW to ensure that women are not subject to discrimination by non-state actors, including by national corporations operating extraterritorially.[60] Further reference to non-state actors is visible in General Recommendation 34. The CEDAW Committee requires states to 'regulate the activities of domestic non-state actors within their jurisdiction, including when they operate extraterritorially'.[61] Specifically, echoing General Recommendation 28, the CEDAW Committee requests states to 'prevent any actor under their jurisdiction, including private individuals, companies, and public entities, from infringing or abusing the rights of rural women outside their territory'.[62] Notably, General Recommendation 34 includes implicit reference to due diligence *vis-à-vis* non-state actors, requiring states to take adequate measures to prevent, investigate, prosecute, and punish acts of violence against rural women and girls, including migrant rural women and girls, whether perpetrated by the state, non-state actors, or private persons.[63]

The Committee on the Rights of the Child, through General Comment 16 on state obligations, clarified the impact of business on children's rights. According to the Committee, states must respect, protect, and fulfil children's rights in their jurisdiction and ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated to prevent violations of children's rights. Furthermore, states should avoid the aid and/or abetting of violations in foreign jurisdictions.[64] More importantly, home states have obligations to respect, protect, and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the state and the conduct concerned.[65] According to the Committee, a reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled, or has its central place

60 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13 (1979).

61 CEDAW, General Recommendation 34 on the rights of rural women, 7 March 2016, UN Doc CEDAW/C/GC/34 (2016) para 13.

62 General Recommendation 34 (n 61) para 13; also see CEDAW, General Recommendation 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, UN Doc CEDAW/C/GC/28 (2010).

63 General Recommendation 34 (n 62) para 25(b).

64 UN Committee on the Rights of the Child (CRC), General Comment 16 (2013) on state obligations regarding the impact of the business sector on children's rights, 17 April 2013, UN Doc CRC/C/GC/16 (2013) para 42.

65 General Comment 16 (n 64) 43.

of business or substantial business activities in the state concerned.[66] In addition, the Committee emphasised the importance of doing so while assessing the state reports of many countries in the North. For example, concerning the United Kingdom of Great Britain and Northern Ireland in 2016, the Committee stated that parties should require businesses to undertake child-rights due diligence.[67]

The foregoing may not have mentioned climate change and may have dealt with extraterritorial accountability in the context of states' duties; however, its relevance cannot be overstated. It generally shows that the activities of MNCs have an extraterritorial reach, which can adversely affect human rights. Arguably, the reasoning will apply equally to climate-related activities, as such activities adversely affect human rights. It remains to be seen through an analysis of the facts and decision of the Court in the *Okpabi* case to what extent it exemplifies extraterritorial litigation.

3 Extraterritoriality and the *Okpabi* case

The activities of the MNCs have extraterritorial reach as they can result from the failure of a parent company in another state (developed or developing) to control effectively the conduct or omission of their subsidiaries operating overseas. *Okpabi v Royal Dutch Shell plc*[68] does not specifically deal with human rights and climate change, but its facts illustrate that litigation for environmental wrongs is possible in a territory other than where the wrongs occurred. The *Okpabi case* generates jurisdictional arguments that may arise on subjects of a similar nature, such as climate change, and shapes its judicial direction.

The claimant was HRH Okpabi, who filed the action in the High Court of Justice in England on behalf of himself and the people of the Ogale community, who were part of the Ogoni people in Nigeria. This community comprises about 40 000 women, children, men, youth, and adults who are resident citizens of Nigeria. The prayer was for damages due to pollution and environmental damage caused by oil spills from the defendants' oil pipelines and associated infrastructure in and around the Ogale community. The defendants were Royal Dutch Shell plc (RDS) and Shell Petroleum Development Company of Nigeria Ltd (SPDC). RDS, the parent company, was registered in the United Kingdom, while the

66 As above.

67 CRC, Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, 12 July 2016, UN Doc CRC/C/GBR/CO/5 (2016) para 19(a).

68 *Okpabi v Royal Dutch Shell* (2017) EWHC 89 (TCC).

SPDC was registered in Nigeria. The *Okpabi* case was later consolidated and heard with another similar matter, *Lucky Alame v Royal Dutch Shell plc and the Shell Petroleum Development Company of Nigeria Ltd.*[69] In the latter case, about 2 335 claimants also alleged that pollution and environmental damage in their community was caused by the defendants' pipelines and associated infrastructure.[70]

The idea of lodging the matter at the High Court of Justice in England challenges the traditional notion that a case of that nature against an MNC can only be filed in the territory where the alleged wrongs occur. However, the defendants questioned the jurisdiction of the Court to entertain the matter, arguing that RDS was only being made an anchor by the claimants to maintain an action against SPDC; the proper jurisdiction for the matter was Nigeria.[71] In making this argument, the defendants resonate with the traditional conception that actions against MNCs fall within the remit of the state's domestic law, where the sued MNC operates. In any case, the claimants maintained that both RDS and SPDC were responsible and could only obtain redress in the United Kingdom.[72] The claimants' argument with respect to remedy is significant, as it shows again that the motivation for suing an MNC outside the jurisdiction of their operation is also about the possibility of securing an adequate remedy. This is understandable in the context of a state such as Nigeria, where the SPDC enjoys a lot of influence and patronage from the state, which often makes granted remedies difficult to enforce. In any event, the Court, per Fraser J., decided to determine if the action could be filed against RDS's first.[73]

In determining the issue, the Court considered Article 4 of the recast Brussels Regulation, which stipulated that a person domiciled in a member state could be sued in the courts of that member state irrespective of the person's nationality.[74] It is worth mentioning that the regulation was on conflicts of laws or private international law. The implication is that since RDS was registered in England, it could then be sued in England. The claimants contended that this provision alone had ended the jurisdictional

69 *Lucky Alame v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd*. HT-2015-000430.

70 *Lucky Alame* (n 69) 3.

71 *Lucky Alame* (n 69) 16.

72 As above.

73 *Lucky Alame* (n 69) 19.

74 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation).

challenge mounted by RDS.[75] However, while Fraser J. agreed that the provision alone would make the action maintainable against RDS, he considered whether there was a real issue to be tried against the defendant. He stated that the terms of the Recast Brussels Regulation did not remove that as a step to be considered and that it would be necessary in the instant case to address the question of whether the claims were abusing EU law or whether, on case management grounds, the action could be sustained.[76]

In resolving the question of whether there was a real issue to be tried, the Court applied the three-fold test in *Caparo Industries Plc v Dickman*.[77] First, the damage should be foreseeable. Second, there should exist between the party owing the duty and the party to whom it is owed a relationship of proximity or neighbourhood. Three, the situation should be one in which it is 'fair, just, and reasonable to impose a duty of a given scope upon one party for the benefit of the other'.[78] It then held that even if the damage was foreseeable, there was no proximity between the claimants and RDS and that it would not be fair, just, and reasonable to impose a duty on RDS for the benefit of the claimants. On the test of proximity, the Court noted that there was no proximity because RDS did not have shares in SPDC, did not conduct any operations, was not licensed to conduct operations in Nigeria, was not a party to the joint venture, and imposing a duty of care on RDS would potentially impose 'liability in an indeterminate amount, for an indeterminate time, to an indeterminate class'.[79] On whether it was fair, just, and reasonable to impose a duty on RDS, the Court stated that it would not be fair, just, and reasonable because RDS was prohibited from operating in Nigeria and did not have any pipelines and associated infrastructure, the relevant activities were carried out by SPDC, RDS only had shares as a holding company and did not have superior knowledge compared with that of SPDC.[80]

Dissatisfied with the decision, the claimants filed their appeal in *Okpabi v Royal Dutch Shell plc*.[81] In hearing the appeal, the English Court of Appeal, per Lord Justice Simon, noted that the three separate requirements raised were merely facets of the same thing called proximity.[82] He distinguished

75 *Lucky Alame* (n 69) 63.

76 *Lucky Alame* (n 69) 69.

77 *Caparo Industries plc v Dickman* (1990) 2 AC 605.

78 *Lucky Alame* (n 69) 113.

79 *Lucky Alame* (n 69) 114; citing J Cardozo in *Ultramares Corp v Touche* (1931) 174 NE 441 at 444.

80 *Lucky Alame* (n 69) 115-117.

81 *Okpabi v Royal Dutch Shell* (2018) ECWA Civ 191.

82 *Okpabi* (n 81) 24.

between a parent company that controls its subsidiary or shares and one that just issues mandatory policies or standards to which its subsidiaries must comply.[83] He then concluded that RDS did not control SPDC, and since it did not control it, there was no proximity between them.[84] Strangely, the Court does not respond separately to the requirements. Separate consideration of the test could have arguably yielded a different result at the Court of Appeal. For instance, a careful application of mind to the Business and Human Rights Principles could have been helpful on the question of duty of care. The principles require business enterprises to carry out human rights due diligence to identify, prevent, mitigate, and account for how they address their adverse human rights impacts.[85] In stipulating so, the principles give no indication that such a duty to avoid adverse human rights impacts of their activities cannot exist extraterritorially. Hence, in the context of the case, the issue could have been determined on the point that RDC has a diligence duty over the activities of SHDC in Nigeria.

In any event, Sir Geoffrey Vos, the Chancellor, agreed with Simon LJ with respect to the test to be applied by the Court and dismissed the appeal on three grounds. The first ground was that RDS only laid down policies that applied generally to all subsidiaries, including SPDC. Secondly, as a parent company, there would have been no reason for RDS to establish subsidiaries across the globe if it had intended to assume responsibility on its own. In the instant case, RDS did not have majority shares in SPDC with respect to the joint venture. Thirdly, while RDS was just laying down policies, it was not involved in the operations.[86]

Sales LJ dissented, stating that while simply setting global standards would not justify an inference of a duty of care, in the instant case, either assumed that responsibility or shared it with SPDC to a material degree.[87] In his view, since RDS gave directions to SPDC on essential aspects of managing the pipeline and facilities to avoid pollution and sought to monitor and enforce them, RDS controlled SPDC.[88] He concluded that since RDS executives earned their remuneration based on their success in controlling environmental damage, they desired to monitor and make SPDC behave in a particular way.[89] On the basis of the fact that RDS was

83 *Okpabi* (n 81) 89.

84 *Okpabi* (n 81) 122-127.

85 Business and Human Rights Principles (n 13) para 17.

86 *Okpabi* (n 81) 192-198.

87 *Okpabi* (n 81) 172(iv).

88 *Okpabi* (n 81) 172(xi).

89 *Okpabi* (n 81) 162.

not a party to the joint venture, he reasoned that there was no evidence that the joint venture prevented RDS from exercising material control over SPDC.[90] On the fear that a parent company may have to be held accountable for all the operations of its subsidiaries, which may give rise to imposing liability in an indeterminate amount, for an indeterminate time, to an indeterminate class, he responded that those who can maintain an action against a parent company are those who are affected and falling within the ambit of proximity and that an action can only be maintained against a parent company if it sets standards and proceeds to monitor as well.[91] The dissenting position, at least, agrees with the guidance offered by the Business and Human Rights Principles on the need for businesses to prevent and/or address the adverse implications of their activities on human rights.[92]

Dissatisfied with the majority judgement, the claimants filed their appeal again in *Okpabi v Royal Dutch Shell plc*[93] to the United Kingdom Supreme Court, which gave its judgment on February 12, 2021. The issue before the Court was whether the majority judgement at the Court of Appeal erred in law and, if so, whether there was a real issue to be tried.[94] In delivering the judgment, Lord Hamblen stated that the majority erred in law by applying *Caparo* and that *Lungowe v Vedanta Resources plc* should have been applied.[95] He gave four reasons why the application of *Caparo* was erroneous. First, the suggestion that mere issuance of policy or standards by the parent to the subsidiary could not give rise to liability on the part of the parent was erroneous because if such a standard contains systemic errors that the subsidiary implemented and caused injury to a third party, the parent could be held liable.[96] Secondly, emphasis on control was misplaced. While control may be the starting point, whether the parent intervenes, supervises, or advises the management of the relevant operation of the subsidiary is also important. In fact, the parent may not control the subsidiary and still be held liable if it holds itself out as controlling the subsidiary even though it does not do so.[97] Thirdly, there is no presumption that a parent could not be held liable for the subsidiary's activities, as it all depends on the factual relationship between the parent and the subsidiary. There are instances where the parent is just a passive

90 *Okpabi* (n 81) 172.

91 *Okpabi* (n 81).

92 Business and Human Rights Principles (n 13).

93 *Okpabi v Royal Dutch Shell* (2021) UKSC 3.

94 *Okpabi* (n 93) 74.

95 *Okpabi* (n 93) 25, 141, 142 and 151.

96 *Okpabi* (n 93) 143-145.

97 *Okpabi* (n 93) 146-148.

investor in the subsidiary, while in some instances, the separate legal personality between the parent and the subsidiary is completely blurred.[98] Fourthly, there is nothing novel in a tort committed by a parent company through its subsidiary, and it should not be treated as a distinct category.[99] On whether there was a real issue to be tried, Lord Hamblen stated that there was a real issue. He adopted the analysis and conclusions of *Sales LJ* but placed them within the principles established in *Vedanta* as enunciated above.[100]

In the end, the Supreme Court, in favour of the claimants, reinforces the position that while the MNC cannot be vertically sued before human rights treaty monitoring bodies at the international level, the home state of their parent organisation offers an alternative platform for such litigation. Arguably, the reasoning of the courts has important lessons on the jurisdictional questions that may be involved in prosecuting climate change as an extraterritorial case.

4 Lessons for extraterritorial climate change litigation

The *Okpabi case* shows how important a jurisdiction question is in determining issues around the extraterritorial duty of MNCs for environmental wrongs. Arguably, in doing so, it signals an option to be pursued in litigating the adverse effects of climate change on human rights where the activities of MNC parent companies and subsidiaries are involved. Accordingly, this section explores how the *Okpabi* case can be used to animate arguments that may emerge in such a context. It does so by engaging with four jurisdiction aspects relevant to the judicial system's conventional operation at the domestic and international levels of adjudication. These are territorial jurisdiction (*ratione loci*); subject matter jurisdiction (*ratione materiae*); temporal jurisdiction (*ratione temporis*); and personal jurisdiction (*ratione personae*).[101]

4.1 Territorial jurisdiction (*ratione loci*)

Territorial jurisdiction defines the power of a court over events and persons within the bounds of geographic territory. If a court lacks

98 *Okpabi* (n 93) 150.

99 *Okpabi* (n 93) 149 and 151.

100 *Okpabi* (n 93) 153-159.

101 Generally, for an explanation on the meaning of these elements, see FE Eboibi 'Jurisdiction of the International Criminal Court: Analysis, loopholes and challenges' (2012) *NAUJILJ* 28; R Murray 'The human rights jurisdiction of the African Court of

territorial jurisdiction over the events or persons within, it cannot bind the defendant to an obligation or adjudicate any rights therein.[102] As a general rule of domestic and international law, a state has jurisdiction over acts committed within its territory.[103] The 'territorial principle' reflects the global community's recognition that a state could not exist without the power to control actions or things located in its territory.[104] Due to the nature of climate change, an important factor that may touch the heart of territorial jurisdiction is causation. This factor links an MNC or a state to activities of its subsidiary or any entity that has contributed to climate change and its adverse effects on the human rights of populations abroad. The question is whether such an MNC or state can be deemed extraterritorially responsible for the causation and, therefore, held accountable for its adverse effects.

In that regard, the difficulty often faced by the court is well evidenced in many cases. For instance, in *Macquarie Generation v Hodgson*,[105] the Court held that there was no basis to read into the license for the coal-power plant that CO2 emission would be limited because there was no evidence that CO2 emission caused nuisance since it is 'colourless, odourless and inert'. Also, in *Luciano Lliuya v RWE AG,*[106] the plaintiff claimed that greenhouse gas emissions from a company under German law constituted a nuisance and sought to obtain damages to offset the cost of protecting his town from melting glaciers. However, the Court held no 'linear causal chain' linking the alleged injury with the company's emissions. While the attribution science is developing and making it possible to address the causation challenge by linking a company's conduct to climate harm, it is still uncertain and largely untested in court for its extraterritorial significance.[107]

However, the reasoning of the Supreme Court in the *Okaphi* case may be instructive in addressing the problem. The Court had maintained that where there are errors in the policy and standards of the parent company

Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context* (2019).

102 As above.

103 LP Timbreza 'Captain Bridgeport and the maze of ICC jurisdiction' (2007) 10 *Gonzaga Journal of International Law* 349.

104 T Buergenthal & SD Murphy *Public international law in a nutshell* (2002) 205.

105 *Macquarie Generation v Hodgson* (2011) NSWCA 424 para 45.

106 *Luciano Lliuya v RWE AG* (2015).

107 F Otto, R James & M Allen 'The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts' (2021) https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf (accessed 20 November 2023).

being implemented by the subsidiary abroad, it is enough to establish a linkage of the parent with the activities of the subsidiary MNC. The Supreme Court further noted that such a connection could be drawn from the internal documents of the parent and subsidiary companies. In arriving at that position, the Supreme Court was influenced by the decision in *Lungowe v Vedanta Resources*,[108] which involved the question of whether the parent company had sufficiently intervened in the management of the mine owned by its subsidiary. In that case, Lord Briggs said it was a 'pure question of fact' and that:

> [T]he proof of that particular pudding would depend heavily upon the contents of documents internal to each of the defendant companies, and upon correspondence and other documents passing between them, currently unavailable to the claimants, but in due course disclosable.[109]

Arguably, the above thinking does not only apply to a parent MNC's relationship with its subsidiary; it is applicable where a state, for instance, retains within its legislative framework a standard or approach that encourages the damaging activities of its organisations abroad. In the context of climate change, this reasoning is very useful to draw the causation by looking at the climate-friendliness of policies of a parent MNC or a state behind grave damages to the climate system and associated implications on human rights abroad. The foregoing reasoning agrees with the position of the human rights treaty monitoring bodies, which, as earlier mentioned, stress the importance of parent companies and states to exercising due diligence over their subsidiaries or other actors within their effective control.[110]

4.2 Subject matter jurisdiction (*ratione materiae*)

The *Okpabi* case helps make a case for climate change as a reasonable cause of action over which an appropriate court assumes jurisdiction. Subject matter refers to the cause, the object, or the thing in dispute.[111] It defines the authority of a court to hear cases of a type or cases relating to a specific subject matter. It requires that a court may only assume jurisdiction over a matter in respect of which it can legally entertain and over which

108 *Lungowe v Vedanta Resources plc* (2019) UKSC 20; (2020) AC 1045.

109 *Lungowe* (n 108) paras 44 and 132.

110 See discussion under section 2.2 of this paper.

111 Jurisdiction Ratione Materiae Law and Legal Definition https://definitions.uslegal.com/j/jurisdiction-ratione-materiae/#:~:text=Jurisdiction%20Ratione%20Materiae%2C%20otherwise%20known,or%20the%20status%20of%20things (accessed 20 November 2023).

it is empowered to grant appropriate relief.[112] The *Okpabi* case signifies that an environmental issue of human rights significance to vulnerable populations is a proper subject for the appropriate Court to assume material jurisdiction, even if extraterritorial. To show its importance to the matter, written submissions were received from the rule of law and human rights-related organisations such as the International Commission of Jurists and Corporate Responsibility. Their submissions drew the Court's attention to international and domestic standards pertaining to business, human rights, and environmental protection and some comparative law jurisprudence.[113]

Nothing prevents the court from giving appropriate judicial attention to the subject matter of climate change when filed before the appropriate Court. Climate change is a universal concern; hence, for the long-term safety of the Earth and its populations, whether poor or rich, in the developed or developing world, such interests and practices are addressed.[114] The solution to climate change is also urgent for humankind, a development that makes it an important subject for global attention and all organs of government, including the judiciary. In this regard, the UNFCCC requires states and non-state actors to take national and regional measures to address climate change.[115] Although not visible in the text of the UNFCCC, as non-party stakeholders, the role of civil society in mobilising decisive climate action is evident in both the Preamble and paragraph 134 of the decision that adopted the Paris Agreement.[116] Civil society is also copiously recognised as an important partner for implementing all the goals of the UNSDGs, including Goal 13 on climate action.[117]

As can be discerned from the approach in *Okpabi,* where interventions were received from non-state actors to shed light on the issue, it is possible to expect or require the same role for non-state actors in the climate change context. Consequently, it is acceptable for courts to receive views and analysis from non-state actors in determining issues relating to extraterritorial activities that may have adverse consequences for rights. Such interventions may shed light on the connection between climate change and human rights, which has been made in several resolutions

112 As above.

113 *Okpabi* (n 93) para 73.

114 AO Jegede 'Arguing the right to a safe climate under the UN Human Rights System' (2020) 9 *International Human Rights Law Review* 184.

115 Article 4(1)(f) of the UNFCCC.

116 Adoption of the Paris Agreement UN Draft Decision -/CP.21, UNFCCC/CP/2015/L.9/Rev.1, Preamble, para 134.

117 UNSDGs paras 39, 41 and 52.

of the UN Human Rights Council (UNHCR), such as Resolutions 10/4 (2009), 18/22 (2011), 26/33 (2014),[118] and through the work of treaty monitoring bodies.[119]

4.3 Temporal jurisdiction (*ratione temporis*)

Temporal jurisdiction implies the jurisdiction of a state or of a court of law over a legal action as it relates to the passage of time. The right to litigate may be restrained by the passage of time through the expiry of the times set out in the relevant statute of limitations. Thus, temporal jurisdiction refers to the jurisdiction, usually of a court of law, over a proposed action in relation to the passage of time. A court can either refuse jurisdiction because the deadline for litigation of the action has expired or assume it because it was launched within the prescribed time limitations.[120]

Since the claims in the *Okapbi* case resolve around the negligence liability of a parent company for the acts of its subsidiary under common law, one can assume that it can be prescribed if brought outside the stipulated time. No issue around the passage of time arose for consideration in the *Okpabi* case; hence, the Court made no pronouncement on the issue. However, the non-consideration offers an opportunity to reflect on possible scenarios where the situation was different, which was part of the consideration. A reason for the non-consideration of the passage of time may be that the matter was instituted regarding an ongoing crisis of environmental degradation with massive effects on the rights of populations. The claims allege that numerous oil spills have occurred from oil pipelines and associated infrastructure operated in their communities, which have caused widespread environmental damage, including severe water and ground contamination. Due to this development, the natural water sources in their communities cannot be safely used for drinking, fishing, agricultural, washing, or recreational purposes.[121]

118 See the Preamble of the Resolution on Human Rights and Climate Change (Resolution 10/4) adopted 25 March 2009 at the 41st meeting of the Human Rights Council (Resolution 10/4); Preamble of the HRC, Resolution on Human Rights and Climate Change (Resolution 18/2), 30 September 2011, UN Doc A/HRC/RES/18/2; HRC, Resolution on Human Rights and Climate Change (Resolution 26L/33), 25 June 2014, UN Doc A/HRC/26/L.33 1 (2014).

119 Temporal Jurisdiction Law and Legal Definition https://definitions.uslegal.com/t/temporal-jurisdiction/#:~:text=Temporal%20jurisdiction%20is%20jurisdiction%20based,in%20relevant%20statute%20of%20limitations.Ebiobi (accessed 20 November 2023).

120 As above.

121 *Okpabi* (n 93) para 4.

Various forms of prescription apply under the rules of treaty monitoring bodies regarding when matters of human rights violations can be lodged. With respect to redress for alleged violations of treaty obligations, international courts and most quasi-judicial bodies will generally entertain allegations that occurred post-ratification of treaties.[122] The complaint must address facts that arose after the entry into force of the instruments.[123] Also, some treaty monitoring bodies have set time limits for filing complaints after the alleged violation has occurred and/or domestic remedies have been exhausted. For instance, communications to the Human Rights Committee may be submitted no later than five years after the exhaustion of domestic remedies or, where applicable, three years from the conclusion of another international investigation or settlement procedure.[124] ICERD stipulates a six-month time limit for the exhaustion of domestic remedies. In contrast, the CESCR and CRC may declare communications inadmissible when they have not been 'submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that submission was impossible within that time limit'.[125]

It is legal and logical not to expect that time limits will apply to extraterritorial climate change and human rights violations. The adverse effects of climate change can be sudden, as in a flood or other climate-related disasters occasioning displacement, which can also be slow and continue for long in terms of its impact. In such contexts, it makes no difference to consider whether the act occurred before or after the entry into force of the relevant treaty obligation. The breach extends over the entire period the event continues and violates that obligation. In any event, matters regarding which states have an obligation of prevention, such as climate change, should not be subject to any restriction in terms of the passage of time. For example, in the *Trail Smelter* case, which dealt with the obligation to prevent transboundary damage by air pollution, it was held that a state was in breach of that obligation in so far as the pollution continued.[126] This reasoning is supported by Article 14(3) of the

122 This is the case for complaints brought before CEDAW (art 4(a) of the OP to CEDAW); ICESCR (art 2(b) OP to ICESCR); CRC (art 7(7) of OP3 to CRC); CRPD (art 2(f) to OP to CRPD); and also is the practice of HRC, CERD and CAT.

123 OP as to the state (art 4(c) of the OP to CEDAW; art 2(b) OP to ICESCR; art 7(7) of OP3 to CRC; art 2(f) to OP to CRPD).

124 Rules of Procedure of the Human Rights Committee, adopted 9 January 2019 Hum Rts Comm, 124th Sess, 3567th mtg, UN Doc CCPR/C/3/Rev.11 (2019) r 96 (HRC Rules of Procedure) (Rule 99(c)).

125 Article 3, para 2(a), Optional Protocol (OP) to the ICESCR and art 7(h) Optional Protocol to the CRC on a communications procedure (OPIC).

126 Trail Smelter UNRIAA vol III (Sales No 1949.V.2) 1905 (1938, 1941).

Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[127] Based on the foregoing analysis, one would imagine that in so far as the issue of climate change links to the failure of the MNCs or states to prevent continuing activities underlying climate change and associated violations of rights, the prescription of time should not arise.

4.4 Personal jurisdiction (ratione personae)

Literally, *ratione personae* means because of his person or due to the person concerned. In some contexts, the jurisdiction of courts depends on whether the defendant resides within the territory of the court or whether the defendant is a citizen of the state to which the court belongs. In such cases, the court's jurisdiction is determined by the defendant's domicile. In international law, *ratione personae* expresses the rule of law that only a state that is a party to the international treaty can participate in the international dispute resolution process.[128] If a court does not have personal jurisdiction over a defendant, then the court cannot bind the defendant to an obligation or adjudication.[129]

This resonates in the *Okpabi* case. Apart from the claimants' argument that the UK is the appropriate venue to sue as per Brussels Regulation,[130] the claimants/appellants' case against the RDS in the UK is that it owed them a common-law duty of care because, as pleaded, it exercised substantial control over material aspects of SPDC's operations in Nigeria, through measures including the promulgation and imposition of mandatory health, safety and environmental policies, standards and manuals which allegedly failed to protect the appellants against the risk of foreseeable harm arising from SPDC's operations.[131] In determining the issue, the Court considered Article 4 of the recast Brussels Regulation which stipulated that a person domiciled in a member state could be sued in the courts of that member state irrespective of the person's nationality. The implication is that since RDS was registered in England, it could then be sued in England.

127 Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its 53rd session in 2001 in *Yearbook of the International Law Commission* (2001) vol. II, Part Two (ILC Draft Articles on State Responsibility).

128 Eboibi (n 101).

129 As above.

130 Recast Brussels Regulation (n 74).

131 *Okpabi* (n 81) para 7.

With respect to litigation against the activities of MNCs overseas, the above signifies that no legal impediment should constrain a non-national to pursue remedies against MNCs or the state for their extraterritorial activities that are averse to human rights. Such a challenge is possible on other grounds. For instance, it can happen because a parent MNC or a state has retained policies and measures inconsistent with its commitments under international human rights treaties and pillar instruments of climate change, urging a solution to the climate crisis. These entities can also be challenged for failing to prevent and breach their obligation to cooperate. Article 56 of the United Nations Charter urges the international community to cooperate in fulfilling human rights.[132] Besides, under the principle of state responsibility, it is not impossible to hold a state responsible for violating its obligations under a treaty or customary international law, such as obligations to cooperate or not to harm the environment.[133]

5 Conclusion

Direct litigation for a remedy against MNCs is non-existent before the treaty monitoring bodies of international human rights instruments. Whether litigation may be pursued to hold a parent MNC extraterritorially responsible for the activities of its subsidiary, which negatively contribute to climate change and human rights abroad, may raise key jurisdictional issues. Although based on environmental degradation and not specifically on climate change, the Supreme Court of the UK decision in *Okpabi v Shell*, regarding the jurisdiction of the court, offers indications as to how critical jurisdictional challenges can play out in extraterritorial litigation. As has been shown from the viewpoint of extraterritoriality, the analysis of the court judgement can help to animate and guide arguments on issues around territorial jurisdiction (*ratione loci*), subject matter jurisdiction (*ratione materiae*), temporal jurisdiction (*ratione temporis*), and personal jurisdiction (*ratione personae*), which may arise in claims against MNCs regarding human rights associated with climate change overseas. In the context of climate change and human rights violations, where the extraterritorial activities of MNC parent companies and subsidiaries or their states are in issue, *Okpabi v Shell* may become helpful in clarifying future jurisdictional questions that may be raised against claimants who are in pursuit of remedies outside the state where environmental wrongs are committed.

132 United Nations Charter a combined reading of arts 56 and 55 is arguably a basis for international co-operation in relation to human right.

133 C Wold, D Hunter & M Powers *Climate change and the law* (2009) 133.

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