Ecojustice: Reframing Climate Justice As Racial Justice

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Abstract

Climate change poses a considerable threat to the young generation. While the youths from Africa are less responsible for air pollution, prominent projections indicate that they are likely to be the most disadvantaged by the results of global warming, such as deluge, drought, and heat waves. Unlike those in China and countries in the Global North with the capacity to adapt to anticipated warming, Africa's young generation is more susceptible as it lacks the capacity to cope with the socio-economic challenges that climate change brings, including food price hikes, heat stress, and water shortages. Thus, although it has been nearly two decades since the adoption of the 1992 UN Framework Convention on Climate Change, a disproportionate percentage of countries in the Global North are yet to fully comply with the provisions of the instrument that aims to cap rising greenhouse emissions (GHGs). The article argues that racial injustice is perpetrated by the highest emitters of GHGs since Africa, which is noted as the least emitter, will be hit the most by climate change. It is against this backdrop that the article considers the prospects and challenges of Africa's youths filing an application with the Committee on Elimination of All Forms of Racial Discrimination to hold the highest emitting states accountable for the serious harm that their actions might have on the youths' livelihoods.

Keywords: climate; litigation; rights; Africa; mitigation; youths

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Introduction

For nearly a decade, youths have been active in the climate change landscape seeking to use different strategies to draw attention to the impact of rising greenhouse emissions. One of these strategies is the use of lawsuits, often termed "climate litigation" (Nkrumah 2021a,1). In their ambitious efforts to forestall high emissions, 21 youths from the United States (US) filed a legal action alleging that the continued promotion of fossil fuel by the US Government breaches their legal rights to life, liberty, and health.[1] Five years later, in *La Rose et al v Her Majesty the Queen*, 15 young Canadians drawn from seven provinces also approached the local court arguing that the Federal Government's contribution to global warming infringes on their rights to the security of the person, life, and liberty, especially as the young generation is disproportionately affected by the impact of climate emergency.[2] In the first youth-led climate case in East Asia, a group of 19 youth activists filed a suit against the South Korean Government alleging that in comparison to the average global climate target, the State's emission target was low and thereby infringed on their basic rights.[3] The golden thread running through all these legal actions is that countries in the Global North and China have been slow and or lack the political appetite to adopt radical action towards mitigation (Jourdan and Wertin 2020, 1245; Chalifour et al. 2021,1).

In contrast, Africa only accounts for a 4 per cent share of global greenhouse gas emissions (GGEs), yet it is already experiencing intense drought, storms, weed and pest invasions, increased fire threats, and heatwaves over much of the continent (Ayompe et al. 2020, 1). Thus, given that many of the inhabitants of Africa are Black Africans, one may claim that the continued rising emissions by Asian and Western countries symbolise an indifference of the respective governments to the plight of the vulnerable African population (Magrath 2010, 891; Rashad 2020, 546; Nkrumah 2021b, 1). One may argue that the rising emissions from Asia (the majority being Asians) and the Global North (the majority being Whites) are an overt illustration of climate injustice perpetrated by more industrialised populations against a less-resourced African group. This contrast has been branded as a racial injustice. Given that 2050 has been projected as the year that the full impact of climate change will be felt by vulnerable populations, it is obvious that youths will be the ones to bear the brunt of heatwaves and droughts (Nkrumah 2020b, 3−4).

Against this backdrop, an important question that remains unanswered is: "What interventions could be taken by youths to cap emissions or mitigate the effect of climate change?" The response to this discursive question is structured into three sections, excluding the present introduction. The next section serves as a background to the article, and it discusses the possible impact of climate change on Africa's young generation if urgent steps are not taken. Section three interrogates whether the youths

1 *Juliana v United States* [2016] 217 F Supp 3d 1224.
2 T-1750-19 (Canadian Federal Court).
3 *Do-Hyun Kim et al v South Korea*, Gretham Research Institute.

are entitled to environmental conservation, or whether this entitlement is implicitly or explicitly codified in international human rights law (IHRL). Section four begins with a conceptual discussion on climate injustice and whether this notion could be construed as a racial injustice. The section progresses with an overview of the Committee on Elimination of All Forms of Racial Discrimination (CERD) and what interventions, if any, could be made in this regard. The last section serves as a conclusion and makes recommendations for future research toward improving Africa's mitigation and adaptation strategies.

Background: Africa's Youth and Climate Change

Global climate change or human-caused global warming has already had evident effects on the environment (Báez et al. 2020, 319). These include trees flowering sooner, more intense heat waves, ice on lakes, and rivers drying up (Tabari 2021, 1). In sub-Saharan Africa, drier weather already interferes with the livelihood of the local population (Nhamo et al. 2019, 76). The warmer temperature and diminished rainfall continue to jeopardise the food production of many countries, most acutely, Zimbabwe, Malawi, and Zambia (Earth Observatory 2019). More disturbingly, Lake Chad (which borders the Sahara Desert and spans Cameroon, Chad, Niger, and Nigeria) has over the last six decades contracted by 90 per cent, limiting its water supply for irrigation and human consumption (UNEP 2018). This shrinkage, which is a result of climate change and extended drought, will not only lead to the loss of invaluable biodiversity but also compromise the sustenance of humanity (UNEP 2018).

It is important to underscore that unlike their (grand) parents or guardians, Africa's youths are more likely to be susceptible to the effects of global warming as they witness the ramification of current rising emissions (Nkrumah 2021b, 1). To be exact, by 2050, an African born in 2000 is more likely to be living on a planet with 8.4−11.3 billion people, with an atmospheric concentration of CO_2 between 463 and 623 parts per million by volume (Nkrumah 2020b, 3−4). This projection implies that in addition to an increase of 1 to 4 billion in the global population, intense drought will lead to poor crop harvests, insufficient food in the local market, food scarcity leading to price hikes, conflicts between neighbouring states over control of water bodies, and forced migration in search of food and water (Nkrumah 2021c, 14). Inevitably, the continent's youths are more susceptible to the effect of climate change, particularly in light of its immediate and projected long-term impacts. Their vulnerability may further be exacerbated by their limited capacity to prepare for and adapt to the looming climatic effect (Nkrumah 2020b, 2).

Keeping that in mind, if emissions continue at the current pace, the youths are more likely to face general hardships like climate-induced displacement, food price hikes, and water shortages. While those in the Sahel are bound to suffer the ramifications of famine, a shortened growing season, fires, heatwaves, and storms, those living in the coastal regions might be forced to migrate due to increased floods and erosion (Gizaw and Gan 2017, 665; Defrance et al. 2020, 1). Youths residing in small island states such

as Lamu, Mauritius, Sao Tome, and Principe may have to relocate as their homes may be flooded and become unsafe for habitation (Ourbak and Magnan 2018, 2206). This glimpse somewhat indicates that climate change threatens the future of the continent's young generation more than their agemates in Asia or Europe (Coulibaly et al. 2020, 349).

Consequently, there is an urgency for young people to explore climate litigation as an avenue to nudge high-emission states to cut down on their GHGs and provide the necessary resources for Africa's youths to brace for this looming threat. This approach, as briefly highlighted above, is being utilised by a growing number of young people across the globe to prod their governments to act on the climate crisis (Nkrumah 2021b, 7). Nonetheless, it appears all these cases involve young citizens holding their respective governments accountable for high emissions, which begs the question: Could youths in Africa hold a third state accountable on grounds of climate injustice?

As discussed elsewhere, although Africa's emissions have been comparatively low, there is an ongoing mobilisation by the youths seeking to cajole African governments to cap their emissions, particularly by shifting dependence on fossil fuel to more use of renewable energy (Nkrumah 2020b,1; 2021a, 2). It is with this in mind that the article proposes that Africa's youths use existing international human rights mechanisms to equally persuade high-emitting Asian and European states to mitigate emissions (Quirico 2017, 31; Nkrumah 2021b, 7). The international legal regime is proposed as it is a preferred platform that could give Africa's youths capacity to directly engage with the concerned states since they are geographically located beyond the African continent and not parties to African but rather international human rights (Glazebrook and Opoku 2018, 83; Toussaint et al. 2020, 745).

The US is rejoining the Paris Agreement, and this serves as an opportune time to invoke the provisions of the instrument to push the newly elected Democratic Government to shift from fossil fuel to renewable energy sources (Briggs 2021). If not urgently mitigated, the impact of changing climate will increase in scope and severity, thereby exacerbating the African youths' already fragile socio-economic conditions (Abegunde 2019, 6). Resorting to authoritative international bodies will not only prod unwilling states to make the uncomfortable adjustment by halting fossil fuel exploration but also draw attention to their operations and empower activists to name and shame the concerned states (Quirico 2018, 203). The litigation is not simply aimed at creating adversarial relationships between young Africans and high-emission states, but to re-evaluate the risks that the former stand to suffer from the inaction of the latter. It will also show the decisions that high-emission states ought to make regarding the comprehensive interventions to avert further degradation (Balmer 2020, 220).

Climate Justice Under International Instruments

The overarching document governing global climate change is the *1992 UN Framework Convention on Climate Change* (UNFCCC, A/RES/48/189) (UNGA 1994). It is the

primary instrument. With 197 state parties (UNCC 2021), Article 3(2)(5) of the Convention seeks to entreat state parties to adopt feasible measures to cut down greenhouse gases (GHGs). Ironically, nearly two decades after the adoption of the UNFCCC, there has been little movement in this regard (Nkrumah 2020a; 2021b).

Unlike the high-emitting US, Asian and European states, Africa is the most vulnerable continent to climate shocks due to its: (i) underdevelopment; (ii) lower gross domestic product per capita; (iii) less developed infrastructure; (iv) drought-prone landscape and (v) insufficient health facilities to treat a cascade of heat-related illnesses, including hyperthermia, heatstroke, heat exhaustion, and heat cramps (Ademola et al. 2017, 190; Crick et al. 2017, 2−3; Filhoa 2018, 29; Hoogendoorn and Fitchett 2018, 749−750). It is against this backdrop that the article seeks to understand how international instruments and institutions could be used to trigger political commitment from high-emission states towards reducing greenhouse emissions. Thus, considering that climate change effects are generally more severe in Africa than in Asian and European states which are high emitters, what obligations does the IHRL impose on the latter to cap their emissions? This question does not only beg legal scrutiny but extends to a claim of (il)legitimate exercise of external sovereignty that cannot be easily abandoned. At the theoretical level, the most distinctive feature of sovereignty is the total right and power of a state over its internal affairs (Krasner 2001, 230). Without undue interference from external bodies or states, citizens or their elected representatives may decide to govern their affairs (Whitehead 1997, 122). Suffice to note that in taking such a decision, the elected officials ought to be guided by the provisions of international treaties to which they are parties (Benvenisti and Downs 2009, 60).

Accordingly, as authoritative structures, China's National People's Congress or the US Congress may unanimously vote to burn far more fossil fuel on their soil without outside interference (Henkin 1995, 34; Altman 2020, 491). Nevertheless, this sovereignty only exists internally and does not extend to countries that did not participate in the election of parliamentarians or representatives who perform this legislative function (Ayoob 2002, 82). In effect, the extension of their GHGs to the territories of third states (in this case Africa) and contributing to those states' atmospheric depletion may be construed as an extension of their sovereignty and usurping the internal sovereignty of African states (Guiraudon and Lahav 2000, 165). Therefore, the Asian-Western countries abrogate to themselves the unconstitutional right to regulate the natural environment of the African continent. At the practical level, these high-emission states have imposed *de facto* environmental costs and damage in the form of excessive heat waves, drought, and flooding on vulnerable African youths (Yang et al. 2020, 319). As a result, the insufficient commitment of the Asian and Western states to halt fossil fuel exploration not only breaches the internal sovereignty of African states but also has an impact on youths who did not (in)directly engage in excessive emissions.

Even so, the right to a healthy environment is not one of the most upheld in the corridors of IHRL (Boyd 2012, 20). To be exact, only two regional instruments specifically refer

to environmental protection, Article 11 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*[4] and Article 24 of the *African Charter on Human and Peoples' Rights*.[5] Consequently, some regional human rights bodies, particularly the African Commission on Human and Peoples' Rights (ACHPR) and the European Court of Human Rights (ECHR) have occasionally adopted an evolutive interpretation of IHRL to give effect to the right to a healthy environment.[6] In these instances, these (quasi)judicial bodies tied pollution to substantive rights such as the rights to life, health, and water as the rationale behind a safe environment (Quirico 2017, 31).

By situating environmental protection at the intersection of these three rights, regional and (inter)national human rights bodies are given the leverage to draw from three sources of law: civil/political, socio/economic, and group rights (Mayer 2020, 234). To fulfil these protected rights, an expansive regime of IHRL imposes obligations on states to adopt measures to give effect to these rights while regulating the conduct of private actors from causing environmental harm (Toussaint and Blanco 2020, 378). In other words, states have a primary obligation to ensure that their operations, including facilities, do not emit enormous amounts of gasses that might endanger the lives and health of groups or individuals within the instrument's coverage (Glazebrook et al. 2018, 84; Mayer 2020, 232). As a result, the next paragraphs briefly discuss how young Africans' right to a healthy environment is entrenched in IHRL.

Civil/political Rights

One of the relevant instruments that seek to safeguard the right to life, environment, and human health is the *International Covenant on Civil and Political Rights* (ICCPR, 16 December 1966, United Nations, Treaty Series, vol. 999, 171; Burson et al. 2018, 388). Drafted to enforce the provisions of the *Universal Declaration of Human Rights* (UDHR 217 A(III) of 10 December 1948), the ICCPR places both negative and positive duties on state parties (Joseph 2019, 355). Within the realm of the former, the state ought to take appropriate measures to promote and protect the welfare of its citizens, particularly in terms of rights to life, dignity, and security. On the other hand, negative duties oblige the state and non-state actors to refrain from all acts that will impinge on the enjoyment of rights by citizens. Thus, negative duty in the arena of environmental issues could be likened to climate injustice.

Climate injustice may be understood as a human action that hinders the present and future generations access to clean air and enjoyment of other essential rights set out in a plethora of (inter)national human rights instruments. In the ICCPR, one could perceive

4 16 November 1999, A-52.

5 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

6 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (SERAC* case*)* [2001] AHRLR 60 (ACHPR 2001), para 67; *Fadeyeva v Russia* [2005] 55723/00, para 89; *Oneryildiz v Turkey* [2004] 48939/99, para 132.

climate injustice as interference with intersectional rights such as indigenous people's rights, respect for privacy, freedom of residence, movement, religion, expression, and liberty (ICCPR, arts 9, 11, 17, 18, 19). In essence, state parties ought to refrain from activities that might threaten people's rights listed in the document (Qureshi 2018, 296).

All the same, considering that a disproportionate percentage of atmospheric degradation is caused by non-state actors, Article 4 of the ICCPR implicitly imposes an obligation on state parties to protect citizens from the excesses of third parties that pose a threat to the survival of citizens (Quirico 2018, 203; Balmer 2020, 220). In so doing, the instrument obliges states to undertake measures that limit the actions of corporations or private individuals from causing enormous damage to the natural environment and infringing on human rights (Ganguly et al. 2018, 844). It was against this backdrop that the European Court held that environmental hazard does not need to escalate to the point of death before a state becomes complicit, as depletion itself interferes with one's right to privacy and quality of life in a home.[7] In this context, the state is obliged to exercise discretion in GHG by (non)state actors or ensure that facilities do not emit excessive levels of gasses that endanger the existence of the broader communities (Ganguly et al. 2018, 845).

More importantly, Article 2(2) of the ICCPR imposes positive duties on the state to adopt "laws or other measures as may be necessary" to forestall pollution that threatens people's lives and health. This obligation transcends the government's own departments' share of pollution to private entities. In the realm of climate change, it encompasses the following:

(i) setting up minimum standards of procedural safeguards in the use of fossil fuels;

(ii) ensuring compliance with minimum standards needed to protect vulnerable populations from hazardous emissions;

(iii) instituting measures to investigate excessive pollution;

(iv) imposing sufficient fines to deter air pollution; and

(v) establishing an independent judicial body to provide remedies for victims of environmental depletion (Fadeyi and Maresova 2020, 13; Hsu et al. 2017, 420).

Item v includes payment of adequate compensation to affected communities if third parties (subject to their jurisdiction) fail to comply with the procedural requirements needed to limit pollution (Kubatko and Kubatko 2019, 1508; Yue et al. 2019, 4285). This interpretation is aligned with the Dutch Supreme Court's ruling which found that a government has an urgent obligation to significantly cut down emissions per its human rights obligations.[8] In linking climate change to human insecurity, the Court found that members of the European Union have a positive obligation to take

7 *Lopez Ostra v Spain* [1994] 16798/90, para 51.

9 *Urgenda Foundation v the Netherlands* (*Urgenda* case) [2015] HAZA C/09/456689.

steps to avert rising emissions (*Urgenda* case, para. 5). It was emphatic when it upheld the applicant's claim that climate change infringes on Article 2 (right to life) and Article 8 (respect for family life and privacy) of the European Convention on Human Rights.[9] In turning down the appeal of the Dutch Government that cutting emissions is dependent on the commitment of other large emitters, the Hague Court of Appeal reiterated that states could be held either collectively or individually responsible (*Netherlands v Urgenda* Foundation, GHDHA 2018, 2610, para 30). It concluded that such collective accountability ought to begin with whether each state has individually taken the necessary measures to reduce its domestic emissions (*State of the Netherlands v Urgenda* Foundation, paras 60−2).

Social/Economic Rights

The *International Covenant on Economic, Social, and Cultural Rights* (ICESCR, 5 March 2009, A/RES/63/117) also contains important provisions which seek to protect people from the adverse effects of pollution. Akin to the ICCPR, Articles 11 and 12 of the ICESCR impose positive and negative duties on state parties to recognise people's right to the highest attainable standard of physical and mental health and access to water, food, and housing. In tying these rights to environmental depletion, the Committee on Economic, Social and Cultural Rights (CESCR) specifically avows that a state's duty to respect and protect the right to water transcends illegally reducing water volumes to forestalling third-party contamination of water bodies.[10] By entreating states to ensure that present and future generations have sufficient access to freshwater sources, it called on member states to, individually and in partnership with others, take steps to progressively protect the environment from depletion.[11]

On that account, the African Commission on Human and People's Rights held that the Nigerian Government was complicit in allowing Shell to drill oil with complete disregard for the environment of the Ogoni people (*SERAC* case, para 58). It reiterated that the resultant pollution violated the people's right to life, health, and food as outlined in the *African Charter on Human and Peoples' Rights* (*SERAC case*, paras 63−8). A year later, the Inter-American Commission on Human Rights (IACHR, 24 April 1997, OEA/Ser.L/V/II.96 Doc. 10 rev. 1, Chp IX, para 16) adopted similar reasoning when it handed down a decision that authorisation by the Ecuador's Government of mining operations resulted in pollution which gravely impacts the life and health of local communities. The golden thread running through this pattern of jurisprudence is that as duty-bearers, states are obliged to forestall life-threatening injuries and casualties that may result from pollution, including those of non-state actors (Listiningrum 2019, 121).

4 November 1950, ETS 5.

10 CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, para 8)

11 CESCR. General Comment No. 15, para 16.

Group Rights

Finally, Africans hold group rights by being a collective (Jewsiewicki and Mudimbe, 1993, 4). Within this collective, there are single units of youths who are entitled to individual rights of non-discrimination on racial grounds (Greenhow 2011,143). Racism may be simplified as the power relations between two groups, often overvaluation of one race over the other (Hoyt 2012, 225; Shiao and Woody 2021, 495). While during the fifteenth to sixteenth centuries (at the helm of the Transatlantic Slave Trade), people of African descent were derogatorily referred to as "Negroes", in contemporary times a more appropriate term "Blacks" has emerged (Rodney 1966, 432; Michalski and Nattinger, 1997, 314; Alexander et al. 2019, 6). In his paper on the system of racial categories, Bashi (1998, 962) identifies four main racial identities: Blacks, White, Asian, and Hispanic. Of these four categories, Blacks are most vulnerable to climate change due to the underdevelopment of the African continent, where a majority of this racial group resides (Nkrumah 2020b, 217). It is for this reason that climate injustice is framed as a racial injustice since the African continent emits fewer greenhouse gasses, yet it will be heavily impacted by the rising emissions from the continents of other racial groups (Whites, Asians, and Hispanics) (Magrath 2010, 891; Rashad 2020, 546).

A considerable number of UN treaties oblige states to refrain from actions that perpetuate racism based on an individual's membership in a particular group (UDHR, art 7; ICERD, art 2; ICCPR, art 4; ICESCR, art 2(2)). Indeed, the international geography of racial inequality has not been static but has transformed over the decades (Fossett 1986, 421). In contrast to twentieth-century racism where Blacks were perceived as less human, contemporary racism revolves around multiple layers, with institutionalised racism being one of the most striking (Ross 1990, 1).

As an illustration, it has been set out in Article 2(1)(a) of the Paris Agreement that to avert international disaster, the global average temperature ought to be kept between 1.5°C and 2°C above pre-industrial levels (UNTC 2015). Nevertheless, the high humidity in sub-Saharan Africa indicates that this threshold is a death trap for the continent as it will trigger heat waves that will erode a considerable portion of small island states and cause the deaths of large numbers of Black youths (Buis 2019). Limiting warming to 1.5°C would have reduced the number of people exposed to extreme heat waves to approximately 420 million (Buis 2019). With warming above 1.5°C, twice as many megacities and densely populated towns are more likely to become hotter (Buis, 2019).

Despite this unpleasant benchmark, it is still observed that the insufficient strategies to address emissions will propel global warming to 4.1°C−4.8°C above pre-industrial by the end of the century (CAT 2020). For example, whereas the US witnessed a 13 per cent decrease in its emissions in 2020 (as a result of the COVID-19 lockdown and associated restrictions), it is projected that the carbon emissions will soar before the end of 2021 as the US Government channels funds into fossil fuels as a component of the pandemic recovery stimulus (Harvey 2021; Tollefson 2021). To be more exact, the

Government's provision of subsidies to fossil fuel companies may be seen as negating the aspirations of the UNFCCC, which seeks to limit dependence on this resource (Erickson et al. 2017, 1; Achakulwisut et al. 2021, 3). In commenting on the subject, Shahzad et al. (2021, 3) bemoan that "the United States' environmental policy has been conducive to encouraging the use of fossil fuels". A cursory glance at this form of apathy may be said to have its roots in pre-existing lines of racism. Whereas those in the African region (majority Blacks) may be plunged into food scarcity and price hikes, Asian and Western Governments may have the means to provide financial relief for smallholders and commercial farmers which could contribute towards sustaining yields and subsidising food prices (Jongman, 2018, 2; Aryal et al. 2020, 5062). Thus, while high emitters will simply be uncomfortable with increased budgets for basic inflation, climate change will worsen the already dire socio-economic conditions of Africa's young population. This projection illuminates the deepening marginalisation of the latter group by the former, which somewhat lends itself to prevailing racial discrimination and violation of the extraterritorial obligation of Asian-Western countries.

To a great extent, since the adoption of the 1945 UN Charter, the notion of extraterritorial obligation has become more nuanced and evolved to become an important element of IHRL (McCorquodale and Simons 2007, 600). Although a growing number of actors in the human rights circles continue to question the rationale of this notion, IHRL acknowledges the equal rights of *all* humans and the duties of states to refrain from actions that violate the rights of *any* person (ICESCR, art 2(2); ICCPR, art 4; UDHR, art 7; Heupel 2018, 522; Ferstman 2020, 462; Middleton 2018, 82; Beiter 2017, 9). Particularly, a natural reading of Article 1(3) of the UN Charter provides a legal foundation for a state's transnational (human rights) obligations when it affirms that member states of the UN must work towards "international cooperation" in advancing basic rights for all. According to this provision, states are obliged to adopt cordial foreign policies and partner with others through actions that will enhance respect for the freedoms of those beyond their boundaries (Henkin 1995, 34). This provision is underscored by Article 56 of the Charter which entreats states to take action "individually" and "jointly" to universally safeguard the rights of all people (Lauren 1983, 18). The import of this provision may be translated as imposing a wider obligation on states to cooperate with the UN in promoting human rights beyond its territory (Mansson 2007, 220).

By extension, Article 56 reinforces Article 1(2) of the UN Charter's principle of "equal rights" of all populations, within and beyond a state's jurisdiction. In complementing this principle, the authors of subsequent human rights norms explicitly referred to extraterritorial obligation (Makum 2018, 48). One of these instruments is of specific relevance to the question of extraterritorial duties. At the risk of stating the obvious, Articles 14 of the ICESCR and 2(1) of the ICCPR respectively highlight that states must safeguard the rights of everyone in "other territories under its jurisdiction" and territories "subject to its jurisdiction". In expanding on the content of the last provision,

the UN Human Rights Committee underscored that a state party to the treaty must safeguard the rights of all individuals "even if not situated within the territory of the state party".[12]

In the bargain, the International Court of Justice (ICJ) underscores that the obligation to avert extraterritorial harm forms part of IHRL and states ought to exercise due diligence or consider the extent to which their domestic activities have an impact on those beyond their borders.[13] For this reason, in instances where this obligation is omitted from a particular regional or international treaty, some commentators (civil society, policymakers, and scholars) and (quasi)judicial bodies have interpreted these treaties to give effect to extraterritorial obligation (Heupel 2018, 528; Kanalan 2018, 43).[14] Having discussed the norms which implicitly codify climate justice, the next question is: which international institution is well-positioned to apply these provisions and why? In response to this question, the next section examines the prospect and challenges of climate adjudication and (non)compliance by states.

Litigation: Greening the Courtroom

Following the identification of global warming as a global hazard in the late 1980s, its regulation has mainly occurred through negotiation among states (Andonova et al. 2017, 254.). While this approach may be seen as safeguarding the territorial integrity of sovereign states, it perpetuates climate injustice as atmospheric depletion extends to and impinges on human activities in other countries (Sachs 2008, 351). In light of this challenge, could supranational governance play a role in capping emissions?

This was one of the concerns expressed by the International Union for Conservation of Nature (IUCN 2016) when it requested an advisory opinion from the ICJ on the extraterritorial obligations of states to reduce GHGs and pursue sustainable development.[15] Ironically, even though the request did not generate any response from the Court, it has sparked a renewed scholarly interest in international adjudication as a panacea for mitigating emissions (Jacobs 2005, 115; Vinuales 2008, 233; Bodansky 2017, 690). While the state's compliance with decisions handed down by monitoring bodies is not always guaranteed, the adjudicatory approach (to climate change) has evolved to become an important arena for holding states accountable (Sandoval et al. 2020, 75−76).

12 UN Human Rights Committee (HRC). 2003. *Concluding Observations: Israel*, 21 August, CCPR/CO/78/ISR.

13 International Court of Justice (1996) Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, (ICJ Reports 1996, para 27).

14 *Bankovic v Belgium* [2021] 52207/99, para. 59; *Skeini v Great Britain* [2011] 55721/07, para. 131−32.

15 IUCN. *Request for an Advisory Opinion of the International Court of Justice on the Principles of Sustainable Development in View of the Needs of Future Generations*, WCC-2016-Res-079-EN (Sept. 10)

Climate adjudication may be depicted as an evolving, yet expansive body of legal claims alleging the (imminent) impacts of atmospheric degradation (Bodansky 2017, 704; Weaver and Kysar 2017, 298; Barritt and Sediti 2019, 203). With an increasing number of cases, this body of litigation encompasses those with direct reference to climate change and those with global warming serving as an incidental or secondary component (Ugochukwu 2018, 91). The latter often revolves around the impact of mining activities, contentions over permits granted for extractive industries or false green advertising (Ganguly et al. 2018, 844). For illustrative purposes, on 8 March 2017, a South African court handed down a judgment on *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (*Earthlife* case).[16] In essence, the ruling underscores the importance of conducting an atmospheric depletion assessment before authorising the construction of a coal-fired power plant (*Earthlife* case, para 117). Also, after witnessing deadly fires in 2017, six youths approached the ECHR seeking an order to compel 47 states to cease further extraction of fossil fuels (Watts 2020). The US has equally witnessed a plethora of lawsuits where young people have approached federal and local courts seeking an order to bind the Government to conserve the environment and safeguard the life and health of present and future generations (Setzer et al. 2020, 78). Regardless of the distinction, climate (related) litigation is often tailored to receive injunctive relief in the hopes of influencing the content of environmental policies, or public policy in general. It also has the merit of exerting grassroots pressure on private entities or states to mitigate or provide reparations for harm suffered by the local population.

Still, unlike domestic adjudication which has garnered momentum in the recent past, there have been fewer cases at the international level alleging a breach of the UNFCCC or sustainable development. Three such petitions include a 2005 petition submitted by the Inuit Circumpolar Council (representing 150 000 people across Canada, Russia, Alaska, and Greenland) to the IACHR alleging that the refusal of the US Government to cut down its emissions had resulted in threats to their livelihoods, property, land, health, and lives (CIEL 2015). The group requested relief for human rights infringements in light of the rising emissions caused by the US (Gordon 2007, 55; Szpak 2020, 1575). Whereas the petitioners had anticipated that a favourable ruling would set a precedent for future climate litigation against the respondent, the IACHR dismissed the application as it lacks the jurisdiction to adjudicate on the matter (Szpak 2020, 1575). Its lack of jurisdiction is due to the fact that the US is not a party to the American Convention on Human Rights, the instrument that established the IACHR. The second is a 2006 petition presented to the World Heritage Committee (WHC 2007) by a group of NGOs alleging the devastating effect of climate change on heritage sites.[17] The third is a recently adjudicated Permanent Court of Arbitration case where foreign investors

16 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 65662/16) ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017).

17 World Heritage Committee. 2007. *Issues Related to the State of Conservation of World Heritage Properties: The Impacts of Climate Change on World Heritage Properties* (UNESCO Doc WHC 07/31.COM/7.1, 23 May).

involved in clean energy were pressing for reparation for the revocation of their economic benefits.[18]

In all three cases, the *Inuit* case could have been a vital blueprint for extraterritorial climate litigation if the respondent state (the US) had been a party to the regional human rights instrument, particularly as it is directly linked to human rights violations.

While all the above international bodies appear to be competent in adjudicating climate matters, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) appears to be well-placed to deal with issues relating to racial and climate injustice.[19] Other favourable factors include,

- its overarching position as the main racially adjudicatory body of the UN;
- the members' legal expertise;
- jurisdiction to address a complex/polycentric issue like climate change; and
- its specialised oversight duty for settling all disputes concerning racial injustice (Thornberry 2005, 246; Tamada 2021, 1).

Unlike the soaring national climate litigations, appealing for the intervention of an international body like CERD has the merit of circumventing local politics that is often fraught with disputes between the executive and judiciary on the principles of separation of powers (Tamada 2021, 2). Nevertheless, despite its prominence in the UN architecture, the Committee remains partially unknown to a disproportionate percentage of human rights activists, NGOs, and the general public (Charters and Erueti 2005, 258; Tamada 2021, 1). Perhaps the reason for this may be linked to the fact that all documents relating to communications and considerations of cases are held in closed-door deliberations. The silver lining, nonetheless, is that the Committee increases the visibility of its final decisions by informing broad actors in the UN structures, regional and national human rights institutions, and relevant civil society organisations about the outcomes and interventions to be made (Thornberry 2005: 46; Tamada 2021: 1).

To mobilise international support, the Committee reproduces the full texts of its findings and remedial action of the state in an annex to its annual reports. The reports also contain key information on follow-up actions. To enhance the enforcement of its decisions, other human rights bodies within the UN architecture are informed about the decisions, with the recommendation that UN special agencies play an instrumental role in enforcing them. As indicated in its 2005 Rule, the Committee observes that following its final decision on any communication, it may designate one or more special rapporteurs to closely observe the remedial actions taken by the state(s) to comply with its decisions (CERD 2005). It further asserts that, in situations where the delegated expert(s) observe(s) that the action taken by the state is inadequate, they may request

18 *The PV Investors v Spain* [2012] 2012−14.

19 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

the Committee to make additional recommendations or draw the attention of necessary UN special bodies, including the Security Council, to intervene.

Yet, given their record of ignoring decisions from international tribunals, there is a looming concern about whether a human rights body like CERD could order influential states like China and the US to cut down on their emissions.[20] This, however, does not negate the fact that an international adjudicatory opinion on climate change will have a considerable impact (Szpak 2020, 1575). To be exact, a CERD decision could have a chain of diffuse impact, both directly and indirectly, on concerned state parties. At the UN level, a ruling by the 18 apolitical CERD experts could:

(i) enhance international diplomacy by endorsing or shaping global environmental consciousness;

(ii) clarify procedures surrounding international adjudication, inter alia, the implication of the doctrinal problem of common but differentiated duties and capabilities;

(iii) give more teeth to the UNFCCC by imposing a cost on high emitters for being credibly accused of openly violating IHRL.

In the regional and domestic arena, the decision may inform national and regional climate adjudication in the following ways:

(i) filling gaps in human rights instruments;

(ii) providing legal guidance or evaluative standards upon which judges may adjudicate on GHGs;

(iii) serving as an incentive for countries to formulate more ambitious nationally determined contributions (NDCs) in the future; and

(iv) serving as a benchmark on customary obligations of states from which domestic courts could draw to hold governments accountable for climate inactions.

The CERD was established by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD 1965). With 182 state parties, ICERD is the first human rights treaty adopted to safeguard vulnerable groups from paradigmatic (skin) colour discrimination. Given that in the 1960s (when ICERD was drafted) racism was mainly based on colonialism and apartheid, it is natural that the instrument could not necessarily envisage environmental injustice in the list of factors on which racial subjugation could be based. As the monitoring body of ICERD, CERD is well-positioned to grasp and orient manifestations of differential vulnerability or unfair distribution of threats triggered by high emissions. The Committee has over the last 50 years served as a node for the protection of minority and vulnerable groups in the global community.

20 *Philippines v China* [2013] PCA 2013−19; *Nicaragua v the US* [1986); *Mexico v the US* [2004].

By being the monitoring body of the first binding human rights instrument, CERD becomes the first group of expert mechanisms established to enhance the state's compliance with its (internal and external) human rights obligations. Although the Committee's 18 members are drawn from a list of experts submitted by state parties, the body may be considered autonomous and impartial on three grounds:

(i) experts are excluded from cases involving their home countries;

(ii) members come from different legal systems and geographic locations; and

(iii) recommendations are made based on consensus.

In terms of operationalisation, Article 11(4) of ICERD mandates the body to verify the operationalisation of the instrument and "any matter referred to it". It is this flexibility of the body's rules of procedure that has enabled it to evolve and adapt to emerging issues that were ordinarily perceived to be beyond its scope (Thornberry 2005, 243).

Indeed, the art of customary rules of interpretation is outlined in the established boundaries of Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, which affirms that the purpose, context, and ordinary meaning of legal terms ought to be applied in good faith.[21] This clause is fundamental as the essence of human rights treaties is to safeguard the rights of individuals. For this reason, the CERD (2009) has through its general comments adopted an activist and creative interpretation of the ICERD to ensure that the instrument expands and stays relevant. For instance, Article 1 of the instrument simply defines "racial discrimination" as any preference, restriction, exclusion, or distinction on the grounds of "race, colour, descent, or national or ethnic origin".

The ICERD, in essence, does not directly speak to climate injustice, but only *racial* injustice. In overcoming this limitation, the CERD (2015) has expanded the import of this provision and redefined discrimination based on descent as using pollution to subject members of a particular community to dehumanising conditions based on their inherited status. It was against this backdrop that the CERD, during its 71st session, mooted that environmental depletion constitutes one of the criteria requiring urgent institutional action or an early warning signal. Put differently, it floodlighted climate change as a priority and advocated that urgent consideration be given to "hazardous activities that reflect a pattern of racial discrimination with substantial harm to specific groups" (OHCHR 2007).

That being the case, while Africa's youths may invoke ICCPR and ICESCR in submitting their complaint to the Committee, they do not need to take this route as the Committee has already codified and/or acknowledges climate injustice (directed at an ethnic group) as constituting racial discrimination. Put simply, climate injustice calls for a simple application of Article 1 of ICERD, without an evolutive reading of the

21 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

instrument. This form of interpretation might not only reinforce the legitimacy of the claim presented by the applicants but also provide clear contexts for the communication as it is drawn from an observation made by the CERD. While many in the global North may criticise this petition as inconsistent with established norms of treaty interpretation, it still opens a significant window for the Committee to apply the Covenant to environmental hazards that disproportionately affect young people by virtue of their descent, nationality, and race. This phenomenon of discrimination on multiple grounds may be paraphrased as "multiple racial discrimination". With this in mind, submitting a group communication alleging climate injustice as a racial injustice to an autonomous monitoring body like the CERD will serve as a radical approach towards prodding compliance from the US Government (and perhaps other high-emission countries).

The CERD performs an important function of receiving and examining individual or group communications alleging specific infringement on the rights entrenched in the treaty. Due to the vast number of state parties to the ICERD, the Committee's decision has a global appeal and transcends the parties listed in the communication (OHCHR 2020). Individual or group communication provides an avenue for the Committee to assess the abuse and hand down a decision that constitutes authoritative guidance to state practice on the steps to be taken to comply with the provisions of ICERD. Though this decision is not binding, it carries an important moral weight and could be used in "naming and shaming" high emitters.

There are, however, two hurdles. First, as prescribed under Article 14 of the ICERD, before submitting such a written petition, the applicant ought to have exhausted all available domestic remedies. This setback, however, has a silver lining. While the claw-back clause exists, it, however, does not compel Black youths to exhaust these remedies, as this communication will constitute some form of inter-state communication (Kende 2020, 128). The second limitation is that this form of complaint can only be filed against a state party that has submitted a formal declaration accepting the Committee's competence to perform this function. Fortunately, the top five emitting states China, US, India, Russia, and Japan are parties to the ICERD and have all made such a declaration (OHCHR 2020). This high number of target states making such a declaration correctly positions the CERD as the most suitable platform for this matter.

In submitting a petition to the Committee, the youths ought to make two key requests. First, emissions are to be limited to 1.5°C to reflect the realities of Africa's atmospheric pressure. Second, compensation ought to be reasonable. The objective of restitution should be tailored towards enhancing their capacity to withstand the damages suffered or that are yet to be experienced. It is important to highlight that the question of restitution has raged since 1991 when the issue of climate change gained prominence. Over the next decades, small African island states continued to unsuccessfully press for some form of restitution from high-emission states. Their claim somewhat seems to have materialised 24 years later with the inclusion of the *Warsaw International Mechanism for Loss and Damage* under Article 8(2) of the Paris Agreement. Be that as

it may, the Conference of Parties (COP) set this modest achievement back when it attached an appendix to the treaty agreeing that the mechanism "does not involve or provide a basis for any liability or compensation" (UNFCCC 2016, 51). Though disappointing, this mishap still presents a unique opportunity for CERD to adopt an evolutive interpretation of the UNFCCC in awarding reparations for vulnerable African youths.

In practice, when dealing with a matter that combines environmental injustice with race, the Committee is not obliged to limit itself solely to the instrument establishing it, but to draw from the general arsenal of IHRL. Under this condition, the CERD is mandated to take a series of remedial actions, including:

(i) requesting a submission of urgent information on the measures taken by the concerned state(s) to address the situation;

(ii) requesting UN specialised agencies to conduct fact-finding missions;

(iii) handing down a decision with an expression of reservations and relevant actions to be pursued (Thornberry 2005, 246).

For this reason, given that climate change has been one of the defining elements of young Africans' future, it is naturally fitting that the CERD considers the impact of emissions by Asian-Western states on African youths. If this approach is pursued, compensation in the form of financial transfer could help in the development of the infrastructure needed, such as safe drinking water, bridges, and irrigation systems.

Conclusion

Climate change represents one of the looming threats humanity will be confronted with if urgent steps are not taken to mitigate rising emissions. Since the year 2050 has been projected as the time when the full impact of climate change will be felt, young people are likely to be susceptible on two fronts. First, extreme weather events will likely trigger climate-induced crises that include forced migration, inequality, and resource scarcity. Second, they will have to confront substantial adaptation strategies that will call for a radical zero-carbon economy, restructuring the transport system and means of food production. Climate change will, over the next three decades, have more impact on young Africans than their compatriots in Asia and the global North, particularly in light of their lack of access to resources to cope with the extreme heat that global warming brings. This threat looms despite African youths being the least perpetrators of high GHGs emissions. On account of this, one may rightly say that the geography of climate bears striking resemblance to Hobbes' "state of nature", where the weak bear the burden of the strong (Moehler 2009, 297). This form of injustice is what has been transcribed as racial injustice in this article. However, since society has evolved and institutions established to safeguard less powerful regions from the powerful, the former

and its populations must utilise these institutions to protect themselves from the excesses of the latter.

It is in light of this hypothesis that the article surveys the prospect of CERD in safeguarding Africa's young generation in the face of climate injustice. It observes that the US, which is a leading emitter in the global North, has demonstrated greater resistance to local and international pressure to cap its emissions. For this reason, it is hoped that a decision by CERD will:

- appeal to the legal and moral compass of the US and other high emitters to limit their GHG;
- trigger a renewed debate on the lopsided effect of atmospheric depletion on Africa's youths population; and
- call for a re-evaluation of the 1.5°C benchmark as it disproportionately discriminates against Africans.

In sum, even if the communication submitted to the CERD fails to yield these results, it will serve as the first collective attempt by the youths on the African continent to hold Asian-Western states accountable for their high emission and its impacts on Africa's population.

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